



## Illegal Migration Bill 2023: Second Reading Briefing

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March 2023

### Background

As the [UN Refugee Agency](#) has stated, by effectively banning anyone who arrives outside the normal immigration laws from making an asylum claim in the UK the proposals in this [Bill](#) extinguish what is left of the UK's asylum system. By similarly denying victims of trafficking access to support or protection from removal under the National Referral Mechanism ("NRM")<sup>1</sup>, this Bill undoes years of progressive reform to offer safety to victims of modern slavery.

Much of the Bill contravenes international refugee and human rights law, threatens to undermine the global system of refugee protection and erodes the UK's reputation as a leader in refugee protection. The Secretary of State recognises, by a statement under section 19(1)(b) of the Human Rights Act 1998 ("HRA"), that the provisions within are likely to be incompatible with the human rights convention. This statement and the disapplication of section 3 HRA foreshadow a likely, and possibly intentional, conflict between the Government and the European Court of Human Rights.

In departing significantly from the basic rationale of the 1951 Refugee Convention<sup>2</sup> and specifically the Article 31 protection against penalisation and Article 33 prohibition of refoulement, the Government ignores the universal appeal, in solidarity with Jewish communities following the Holocaust, to 'never again' allow the persecution of our fellow humans. It also risks creating a precedent to be followed by countries around the world, many of whom bear a far greater responsibility for meeting the global protection need.

This combination of a disregard for human rights norms, the many placeholder clauses which confer extensive powers on the Secretary of State to make regulations, and the pace at which this Bill is making its way through parliament, effectively places these reforms beyond scrutiny for human rights compliance. Such an authoritarian approach to legislating should be cause for concern.

In deliberately punishing those who arrive without prior authorisation, the vast majority of whom would be accepted as refugees were their claims considered in the UK, we consider this Bill to be yet more anti-refugee legislation. By denying refugees and survivors of trafficking the opportunity to regularise their status, it will deny them and their family members any chance of rebuilding their lives in safety. Excluded and yet unremovable, this population will become even more vulnerable to exploitation and abuse in the UK. Those that follow behind them in pursuit of sanctuary in the UK will find even the existing minimal safe routes have been shut down by this Bill, driving them to risk their lives crossing the Channel. **This is unfair, inhumane and unlawful and we call on parliamentarians to reject this legislation.**

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<sup>1</sup> The NRM is the framework designed to identify and protect victims of trafficking and of modern slavery.

<sup>2</sup> 1951 Convention relating to the Status of Refugees and its 1967 Protocol (collectively, the "Refugee Convention")

## Key themes

### 1. This Bill effectively extinguishes the UK's asylum system

Under clause 2 the Bill places a duty on the Secretary of State to make arrangements 'as soon as reasonably practical' to remove any person who enters or arrives in the UK in breach of normal immigration laws, has entered or arrived on or after 7<sup>th</sup> March 2023, has travelled through a 'safe' third country, and requires leave to enter or remain but does not have it. The person must be removed either to their home country or to a 'safe' third country for consideration of any asylum claims. The duty does not apply to unaccompanied children while they remain children, although the Bill does give the Secretary of State the power to make arrangements for the removal of unaccompanied children. An exception exists for some victims of modern slavery and regulations may be made to exclude further groups.

The breadth of this category of persons subject to the duty is astonishing and goes much beyond the reach of current inadmissibility laws. Under this clause anyone arriving in the UK without leave to enter or with leave that was obtained by means of deception will be subject to the duty. This could include victims of trafficking who have been brought here under the control of others. By targeting those who arrive with, for example, a tourist or spousal visa but then claim asylum, the Government is shutting down one of the last remaining safe routes to seek asylum in the UK. Only those with a 'sur place' asylum claim will fall outside the remit of this duty.

Under clause 4 any asylum or human rights claim (relating to the person's country of origin or citizenship) made by someone subject to the duty would be automatically and permanently inadmissible in the UK, with no right of appeal to the immigration tribunal and no exception for unaccompanied children. With no access to the asylum system to determine the risk of persecution faced by those subject to this duty, it is hard to understand how the Secretary of State will fulfil her commitment to uphold our obligations under the 1951 Refugee Convention, and specifically avoid a breach of Article 33 (non-refoulement) particularly in light of the provisions concerning removal.

Clause 5 specifies that a person subject to the duty may be removed to their country or nationality, embarkation or anywhere they may be admitted. There are two 'safeguards' that may prevent removal in very narrow circumstances: if a national of one of the countries listed in a new section 80AA to the 2002 Act (EEA countries + Albania - clause 50(3)) claims asylum, they can be removed to their own country or a third country, but not to their own country if the Home Secretary considers there are "exceptional circumstances" (to be defined) which prevent removal. Albania is included on this list, despite a 53% grant rate for asylum claims and the Home Office's own [Country Policy Information Notes](#) identifying risk of re-trafficking and the prevalence of blood feuds and domestic violence. This suggests there will be a real risk of refoulement of some Albanian asylum seekers leading to a breach of Article 33 of the Refugee Convention.

The second 'safeguard' ensures that removal to the country of origin will not be possible for anyone seeking asylum from a country not listed in section 80AA. However, for this group and for those benefiting from the first 'safeguard', it will still be open to the Secretary of State to remove these persons to a third country listed in the schedule to the Bill – including Rwanda.

It remains possible for a person to claim that removal to one of the 'safe' third countries would breach their human rights, but any refusal of this claim cannot be appealed to the immigration tribunal and would have to be judicially reviewed. It is also a non-suspensive challenge so the person could be

removed while waiting for determination of the claim and any judicial review, and would have to pursue their challenge remotely, with all the practical obstacles and protection risks that entails.

For cases where removal would present a risk of ‘serious and irreversible harm’ a further, and suspensive, challenge is available (clauses 37-48). The term ‘serious and irreversible harm’ mirrors the test applied by the European Court of Human Rights in relation to interim measures under Rule 39, such as that used to halt the Rwanda removal flight. The [Explanatory Memorandum](#) to the Bill states that “serious” indicates that the harm must meet a minimum level of severity, and “irreversible” means that the harm would have a permanent or very long-lasting effect. The detail of this definition is not yet clear, nor is the evidence required to demonstrate this test and the Bill gives the Secretary of State the power to define the term through regulations, which will not be subject to the same level of parliamentary scrutiny as primary legislation. Any suspensive claim would have to be made within 7 days of receiving the notice of removal and would need to be accompanied by ‘compelling evidence’ (clause 40(5)).

If the suspensive claim is not certified, any refusal can be appealed but only to the Upper Tribunal and in an expedited process (clause 47(1)). If it is certified (clauses 40 and 41), the person would have to first apply for permission to appeal to the Upper Tribunal (clause 43), the Tribunal’s decision on this application cannot be judicially reviewed. This kind of ouster clause is so dangerous, particularly where it concerns decisions of such gravity as this, because it insulates decisions of the Upper Tribunal from any kind of judicial oversight or correction by the higher courts. If successful in the Upper Tribunal, any suspensive claim would not result in the person being admitted to the UK asylum process and that person could, in time, find themselves back at the start of the process should their circumstances change.

The routes to legal challenge available to persons subject to this duty would, most likely, need to be undertaken from within detention, under time pressure, with no asylum interview on record, and limited if any access to expert documentation of torture. There is no explicit provision for access to legal advice for any of the routes to legal challenge under this Bill, and the [legal aid landscape](#) suggests most people will struggle to find a representative. It is difficult to see how a vulnerable and traumatised person will be able to engage with this process.

There is a risk, recognised by the Secretary of State in her Human Rights Memorandum to the Bill, that these clauses will breach Articles 2 (right to life), 3 (prohibition of torture), and 8 (right to private and family life) of the Human Rights Act, but she either dismisses this risk as proportionate and justified in the interests of national security and public safety or argues that the ‘safeguards’ in the Bill (relating to removal and to suspensive claims) will protect from violation of those rights. These ‘safeguards’ fall far short of the standard required to avoid the risk of direct and indirect refoulement or a breach of European Convention on Human Rights (“ECHR”) rights.

## **2. The Bill will condemn survivors of modern slavery to further exploitation**

Clauses 21 to 28 apply the public order disqualification in the Council of Europe Convention on Action against Trafficking in Human Beings (“ECAT”) to any victims of trafficking subject to the duty to remove. This means that the protections in modern slavery legislation barring removal during the minimum 30-day reflection and recovery period, requiring the Secretary of State to grant limited leave to remain in the UK in certain circumstances and in respect of the provision of support, do not apply to victims of trafficking who meet the criteria in clause 4. In other words, victims of trafficking can be removed at any time, will be ineligible for a grant of leave even if recognised as a confirmed victim of trafficking and will also be banned from claiming asylum.

Roughly three quarters of all [survivors of trafficking](#) are not British nationals and the majority will be in the country without leave to remain. Many will have been brought here by their traffickers by ‘irregular routes’ and when identified will generally either be referred into the NRM and/or will claim asylum. The trafficking experience of survivors, and risk of being re-trafficked if returned to their country of origin, can form part or all of the grounds for their claim. It is through these systems that survivors will be able to access any form of support, assistance and protection.

In 2022, 16,938 [potential victims of modern slavery](#) were referred to the NRM, the most common non-UK nationalities being Albanian, Vietnamese, Eritrean, Sudanese and Iranian. Of the 6,189 final (‘conclusive grounds’) decisions made that year, 87% were positive for adults and 92% for children. 93% of Helen Bamber Foundation clients who are survivors of trafficking are in both the asylum system and the NRM<sup>3</sup> and the majority have only been able to rebuild their lives in the UK because they were granted refugee status.

Victims with insecure immigration status already frequently [do not feel able to report their abuse](#) and exploitation to authorities, for fear of arrest, detention and removal. Preventing victims of trafficking from entering the NRM and having access to the asylum system is playing into the hands of traffickers, who will use this as a way to trap their victims or enable further exploitation.

### **3. The Bill will result in mass indefinite detention**

Clause 11 introduces new powers for the automatic and indefinite detention of all those who are, or seem to be, subject to the duty to remove. The power applies to everyone in this category, including children, families and pregnant women, and in the absence of existing safeguards (the duty to consult the Independent Family Returns Panel, and the time limit on pre-departure accommodation and the detention of pregnant women) which have been disapplied.

The period of detention allowed is that which is ‘reasonably necessary’ as determined by the Secretary of State. In what is a dramatic move away from the established common law principle that it is for the court to decide whether there is a reasonable or sufficient prospect of removal within a reasonable period of time, this provision appears to give the Secretary of State power to detain indefinitely and irrespective of any safeguards designed to prevent unlawful detention.

Contrary to international norms and in a brazen effort to avoid legal scrutiny of decisions to deprive someone of their liberty, there is no recourse to immigration bail or judicial review in the first 28 days of detention (clause 13). This is likely to result in many vulnerable people, including survivors of torture and trauma, being held in detention with no means of challenging the lawfulness of that decision. The Bill does not exclude the power of the court to grant the remedy of *habeas corpus*, which can lead to the release of a detainee, but this barely compensates for a regime that will give the Secretary of State almost total impunity to detain people.

Indefinite detention, with no route to challenge and minimal safeguards to protect the vulnerable is a betrayal of the commitments made following the [Shaw Review](#) into the welfare in detention of vulnerable persons.<sup>4</sup> Clinically, it is well understood that torture survivors are particularly vulnerable

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<sup>3</sup> Of the 83,236 people that arrived in the UK on small boats between 1 January 2018 and 31 December 2022, 7% (6,210 people) were referred to the NRM. Most of these individuals (5,897 or 95%) also had an asylum claim lodged. [Irregular migration to the UK, year ending December 2022 - GOV.UK \(www.gov.uk\)](#)

<sup>4</sup> [Shaw Review \(publishing.service.gov.uk\)](#)

to harm in detention. Faced with even a brief period in detention, many will experience re-traumatisation, including powerful intrusive recall of torture experiences and a deterioration of pre-existing trauma symptoms.

#### **4. The human impact of this Bill will be devastating**

Abdul<sup>5</sup> grew up in Afghanistan with his mother, father, brother and sister. His family faced retribution after his father, a civil servant, refused to facilitate the release of Taliban members from prison. Abdul's uncle was killed by the Taliban, Abdul himself was abducted and released, and his father was kidnapped – Abdul's father has not been seen or heard from since.

Still a child and alone, Abdul fled. His only route to safety was through smugglers. In trying to escape, Abdul was held hostage, subjected to torture and forced labour. To this day, he does not know where he was held. He arrived in the UK just after he turned 19, having travelled irregularly.

Abdul was recognised as a victim of trafficking and was granted asylum. His experiences continue to have a profound, negative impact on Abdul's mental health, and he has PTSD and depression.

This Bill would see Abdul denied protection, detained on arrival in the UK and, if and when possible, removed; he would be sent to an unknown country in spite of being a refugee and victim of trafficking. Currently, however, with nowhere to return people like Abdul, he would be stuck in limbo, living in uncertainty and unable to rebuild his life in safety. He had hoped one day to sponsor his younger sister under the UK's family reunion rules to bring her to safety, but will be denied that too.

The harmful impact of these provisions should not be underestimated. We know, from our work with survivors of torture, trafficking, trauma and persecution, that the prospect of detention, exclusion and removal to Rwanda inspires terror. There is no doubt that the regime of prolonged insecure status will cause unimaginable harm and deny tens of thousands of refugees the opportunity to rebuild their lives in the UK, in breach of Article 34 of the Refugee Convention (assimilation and naturalisation) and Article 14 of the Convention against Torture (rehabilitation).

We also know that this approach does not deter people from coming to the UK.

#### **5. The deterrent approach does not work**

The Illegal Migration Bill is a continuation of a series of increasingly punitive asylum policies and legislation – building on the [2021 Inadmissibility Rules](#), the [New Plan for Immigration](#), the [Nationality and Borders Act 2022](#), and the [Rwanda MEDP](#) - which seek to deter irregular arrivals to the UK. However, extensive [evidence](#) has shown that deterrence measures are ineffective, and the Government's own [statistics](#) show that the recent legislative changes have not reduced arrivals. Over 89,000 people arrived in the UK to claim asylum in 2022 - more than twice the number of applications in 2019 and the highest number for almost two decades. Over 45,000 people arrived by small boats in 2022 - 60% higher than in 2021.

Freedom from Torture's research, [Fleeing a Burning House: Why torture survivors seek protection in the UK](#), provides an evidence basis drawn from refugees' testimonies, exploring why torture survivors seek safety in the UK. Our research found that the government's deterrent approach will ultimately fail because it does not acknowledge the factors that push refugees to seek sanctuary in the UK. Critically, our research showed that our clients were prepared to undertake their frequently dangerous journeys to the UK for four principle reasons: to join family or community that could offer security and

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<sup>5</sup> Names & other identifying details changed for safeguarding reasons

support; because of familiarity with the UK's language, culture and institutions; in the hope of reaching a place where human rights are respected; and because there was a lack of safety in the countries they were passing through.

The proposals in this Bill will do nothing to “prevent and deter unlawful migration” especially by “unsafe and illegal routes” (clause 1(1)). These provisions will instead drive those who continue to arrive irregularly away from the safety of an asylum determination system or the National Referral Mechanism, and into the hands of those who would exploit them further.

The Australian government pursued a similar model of deterrence and rights limitation for irregular arrivals over decades, combining offshore processing, indefinite detention, temporary protection status and maritime interception. Offshore processing, in particular, proved to be an [‘abject policy failure’](#) and had no deterrent effect whatsoever. While the number of boats reaching Australia has fallen sharply since 2014, this can be attributed not to legislative efforts to restrict access to the procedure, but to a switch to stopping boats out at sea and forcing them to turn around.

## **6. The Bill relies on and sustains a toxic and inhumane rhetoric**

This legislation is the product of a political climate of increasingly normalised xenophobic rhetoric directed towards asylum seekers. The Home Secretary has played a central role in this demonisation, using terms such as “invasion,” when describing small boat arrivals, and misrepresenting the likely volume of displaced persons seeking to come to the UK.

The dangerous consequences of this hateful rhetoric were raised by Holocaust Survivor, Joan Salter MBE, in January this year when she told the Home Secretary that this language reminded her of the [“dehumanising language that was used to justify the murder of her family during the Holocaust.”](#) Jewish human rights advocates have [warned](#) that this language, and the Bill itself, disregard the lessons of Jewish experience. Following the Holocaust, the Refugee Convention was drafted to ensure that never again would those fleeing persecution perish because they could not reach safer shores.

Rather than moderating her language, the Home Secretary has continued to stoke a culture of fear concerning those arriving irregularly. This is a playbook, commonly deployed by authoritarian and populist regimes, to spur affective polarisation and reinforce political oppositions in order to deliver a political objective. Migrants arriving in breach of normal immigration laws are presented as a threat to the social order, are demonised and dehumanised, so that they can then be excluded from the protection of universal rights. In the process further cultural conflict is generated, encouraging distancing between political identities, discouraging compromise and undermining democratic institutions. This legislation, constituting an authoritarian power-grab, an avoidance of scrutiny, and a significant erosion of human rights, is an act of political and legislative barbarity that reflects and amplifies the rhetoric of hate to which the Secretary of State subscribes.

## **7. Our alternative vision**

The continued risk to life in the Channel is a serious problem and no-one wishes to see a continuation of the loss of life, but the phenomenon of small boats is a symptom of the mismanagement of the UK’s asylum system, the securitisation of the UK’s borders and a global increase in protection-related displacement caused by an escalation in conflict around the world.

We want the UK to be a place of hope and safety for people fleeing persecution and torture, and that means holding on to the principles of protection and international solidarity.

Reform must happen and rebuilding a fair, compassionate and competent asylum process in the UK is central to delivering a system that can manage the continued flow of people seeking safety. To achieve this **Parliamentarians should oppose this Bill and advocate the following principles:**

- **Enhance the ability of people fleeing war and persecution to seek protection in Britain.** People seeking asylum should feel safe when they arrive, and have their asylum claim considered quickly, fairly and efficiently, no matter how they got here.
- **Put in place a fairer, faster and more independent system to decide on people's claims for protection and to clear the current backlog.** People claiming asylum should receive quality legal advice, humane treatment and fast, accurate decisions.
- **Ensure that people can live in safety and dignity while waiting for their claim to be decided.** They should have a safe home in a local community, enough food and essentials, and the right to work.
- **Support refugees to build new futures in Britain.** Policies should support people to realise their full potential and empower them to make a positive contribution to their communities.
- **Respect the dignity, liberty and humanity of those found not to be in need of protection.** People refused asylum should not be detained and be treated in a safe, dignified and humane way.
- **Champion global solidarity and responsibility sharing.** The UK should play a role in providing sustainable solutions to forced migration, including through resettlement and family reunion.

## 8. Who we are

Freedom from Torture is the only human rights organisation dedicated to the rehabilitation of torture survivors who seek refuge in the UK. We do this by providing clinical, legal and welfare services to more than 1,000 torture survivors every year at our specialist centres across the UK.

René Cassin works to promote and protect universal rights drawing on Jewish experience and Jewish values. We achieve this by campaigning for change in defined human rights areas – through a combination of advocacy, policy analysis, public campaigning and education and building the capacity of activists to promote and protect human rights.

The Helen Bamber Foundation is a specialist clinical and human rights charity that works with survivors of trafficking, torture and other forms of extreme human cruelty. We provide a bespoke Model of Integrated Care for survivors which includes, among other things medico-legal services; therapeutic care; a counter-trafficking programme; housing, welfare and legal protection advice.

JustRight Scotland is a charity founded by human rights lawyers who use the law to defend and extend people's rights. We provide direct legal advice and representation to people seeking safety in Scotland, as well as to survivors of torture, trafficking and gender-based violence.

At Safe Passage International, we champion the rights of refugees and displaced people as they flee persecution, using the law to help them access a safe route to a place of safety. We work alongside refugees to campaign for change and build public support for safe passage for all.

For further information, please contact Sile Reynolds ([sreynolds@freedomfromtorture.org](mailto:sreynolds@freedomfromtorture.org)) and Matilda Bryce ([mbryce@freedomfromtorture.org](mailto:mbryce@freedomfromtorture.org))