SUMMARY OF JOINT OPINION ON

THE ILLEGAL MIGRATION BILL 2023

INTRODUCTION

1. This is a high-level summary, prepared on instructions from Freedom from Torture, of our views on the compatibility of the Illegal Migration Bill ("**the Bill**") with international law and well-established principles of domestic law. It summarises a longer-form Joint Opinion.

2. In summary, we consider that key aspects of the Bill are incompatible with the UK's international obligations under (in particular) the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (the **"Refugee Convention"**), the European Convention on Human Rights (the **"ECHR"**, compliance with which the Government has notably been unable to certify), the European Convention Against Trafficking (the **"ECAT"**), and the Convention on the Rights of the Child (the "**CRC**"). The Bill also seeks to undermine long-established domestic safeguards against arbitrary detention and to significantly curtail the courts' constitutional role as an independent check on the lawfulness of executive action. If the Bill were to enter into force in its current form it would, for all practical purposes, effectively extinguish the right lawfully to seek asylum in the UK.

THE PROPOSED REGIME FOR "ILLEGAL" ARRIVALS

Provisions about removal

3. The international system of refugee protection is predicated on States Parties to the Refugee Convention ensuring that those who arrive seeking protection have their claims considered fairly and efficiently. States are not prevented from making arrangements with third countries to help achieve this, but the Bill does not do this:

3.1. It does not limit removals to cases where the third country has agreed to consider and determine asylum claims in accordance with the Refugee Convention.

3.2. It does not restore access to the UK asylum system for those who cannot lawfully be removed – no matter how long they stay, the Secretary of State is precluded from considering their claim.

4. In other words – the Bill does not establish a regime for meeting the UK's Refugee Convention obligations via third-country processing. Instead, it blocks access to asylum in the UK without any (still less any adequate) guarantee that it will be made accessible elsewhere. This amounts to a fundamental and unprecedented renunciation of the UK's commitment to international refugee protection.

5. In our view the Bill curtails, to the point of effectively extinguishing, the right to seek asylum in the UK. The Bill's regime will catch the vast majority of those who arrive in the UK to seek asylum. There is no such thing as an 'asylum-seeker visa', and those who arrive with another form of leave only to claim asylum are liable to be said to have obtained leave by deception.

6. The Bill creates serious risks of indirect *refoulement* and/or removal contrary to the ECHR and the international prohibition on *refoulement* to torture/ill-treatment:

6.1. The Bill sets an extremely low threshold for a country to be treated as generally safe for removal:

6.1.1. There is no process of scrutiny (save debate in Parliament) for including a country in the initial list of 'safe' Scheduled states. The list includes multiple states which are not signatories to the Refugee Convention and many from which the UK regularly receives refugees. Countries could be included even if it were abundantly clear that they would not meet the usual criteria for "safe third countries" (as set out in e.g. the Nationality and Borders Act 2022 (the "**NBA 2022**")).

6.1.2. The Secretary of State could add additional countries using a 'Henry VIII' clause, on the basis of criteria far more relaxed than the usual safe third country requirements (see cl 6(1)). This means that, for

example, a country could be added even if there were no possibility of seeking and obtaining refugee status there.

6.1.3. There are no legal criteria for keeping states in the Schedule, meaning they would be treated indefinitely as presumptively safe, with no legal or independent oversight.

6.2. The Bill makes it extremely difficult to mount individual challenges to removal to the countries treated as generally safe:

6.2.1. It envisages removing people before their human rights claims are even considered by the Secretary of State, let alone by a court or tribunal (cl 1(2)(h), 4(1)).

6.2.2. It removes the right of appeal against the refusal of a human rights claim (cl 40), which may be challenged only by way of judicial review.

6.2.3. Only claims falling within the extremely restrictive "suspensive claim" regime (summarised below) will suspend removal. Notably, new amendments (cl 52) preclude the domestic courts from granting <u>any</u> interim remedy that prevents or delays a person's removal from the UK in pursuance of a decision made under the Bill. This means that even if a person clearly established, in the context of a claim for judicial review, a *prima facie* case that removal would expose them to a real risk of serious harm falling outside the "suspensive claim" regime – such that it would be in breach of international law and s 6 of the Human Rights Act 1998 – the courts could do nothing to prevent this. We say more about this below.

6.2.4. Those who have already been removed may pursue claims for judicial review from abroad. However, many will not be able to do so effectively – and courts will not be able to grant interim relief on this basis. The possibility of a successful claim and a return to safety in the UK will for many be no more than hypothetical.

7. The Bill breaches Art. 31 of the Refugee Convention:

7.1. The entire regime (removals, together with bars on leave to enter/remain and citizenship and the removal of modern slavery protections) penalises unlawful arrivals.

7.2. Article 31 is a protective provision. It cannot be deployed to undermine rights granted by the Refugee Convention itself, including the right to have a refugee claim determined in the absence of a safe third country applying proper procedures and respecting minimum human rights standards, and the rights that flow from the recognition of refugee status. The Bill sets up a scheme that shirks, rather than shares responsibility, as the UNHCR has said.

7.3. Further, the carve-out in cl 2(4) is far narrower than what Art. 31 requires, in particular because it allows penalisation of those who have merely "*passed through*" a safe third country, and does so irrespective of whether they can show a good reason for not seeking asylum there. The approach to Art. 31 is even narrower than the one taken only recently under the NBA 2022.

8. The Bill creates a serious risk of a failure to implement Refugee Convention obligations in good faith by knowingly transferring asylum-seekers to countries which will not respect their rights under the Convention. The Bill allows removal to Scheduled states irrespective of whether, generally or in relation to the individual, they will respect the Refugee Convention, and indeed even if it is clear that they will not do so.

9. The suspensive claims regime is not an adequate safeguard for compliance with international obligations and is likely to lead to breach the minimum requirements of procedural fairness in many cases:

9.1. It leaves very limited scope for suspensive claims, confined to challenges on the basis that: (i) removal would expose a person to "*a real, imminent and foreseeable risk of serious and irreversible harm*" within the period that it would take for a human rights claim to be determined;[1] or (ii) the Secretary of State had made an error of fact.

9.2. There is a high risk of procedural unfairness within the suspensive claims regime. This is especially (but not only) because of very tight deadlines for submitting

[1] Clause 38 gives examples of what would and would not constitute *"serious and irreversible harm"*. The requirement of imminence is in particular in breach of international law.

claims and appeals. A person may never even have heard of the country to which the Secretary of State has given notice of an intention to remove them. Pursuant to the procedure provided under the Bill, a person has just 8 days in which to: (i) carry out research on the relevant country, in order to assess whether they would face a real, imminent and foreseeable risk of serious and irreversible harm if removed thereto; (ii) assemble "*compelling evidence*" that they would face such a risk, or that the Secretary of State had made a relevant mistake of fact; (iii) prepare and submit a claim in the prescribed manner and form. This is likely to be impossible for many individuals, including many persons who would have meritorious suspensive claims, especially if (as will often be the case) they are: (i) in detention; (ii) unable to access the internet; (iii) not proficient in English; (iv) illiterate; (v) traumatised and/or exhausted by their journey to the UK and/or events which prompted them to travel here; and/or (vi) without expert legal representation.

10. These concerns only underscore the deeply problematic limitations imposed by cl 52 on the grant of interim relief by domestic courts. As noted above, these create very significant risks that individuals will be removed in breach of the UK's non-*refoulement* obligations under the Refugee Convention, the ECHR and customary international law. They also:

    10.1. directly contravene the UK's obligations under Arts. 2 and 3 ECHR, which require that individuals with a credible claim that removal would be contrary to those Articles have access to a suspensive remedy;[2] and

    10.2. undermine, in a highly unusual and deeply concerning way, the courts' constitutional role as a check on the lawfulness of executive action.

Provisions about leave, citizenship etc

11. The provisions regarding leave and citizenship (cl 29-36) breach Art. 31 of the Refugee Convention, for the reasons summarised above.

[2] For the reasons given above, (i) the procedural barriers to making a *"serious harm suspensive claim"* are such that in practice this will not be an effective remedy for many, and (ii) there will be some Art. 2/3-based claims which do not qualify as a *"serious harm suspensive claim"* at all (e.g. where the relevant risk is real but cannot be shown to arise within the designated time period, or where the relevant risk is real but cannot be shown to be *"imminent"*).

12. The provisions also breach Art. 34, which requires contracting states "*as far as possible [to] facilitate the assimilation and naturalisation of refugees*." This is a duty of process not result, but the Bill clearly breaches the process obligation. Rather than making a good-faith effort to help refugees meet the requirements for citizenship, it would place them in a state of limbo and impose permanent and (for many) insuperable barriers in the way of leave and naturalisation. The carve-out for cases where refusal of citizenship would breach the ECHR in an individual case (i) has been narrowed by recent amendments, such that it no longer covers other situations where refusal would breach the UK's international legal obligations; and (ii) more importantly, cannot change the fact that the entire regime runs contrary to Art. 34.

13. The provisions also create serious risks of breaches of Art. 8 ECHR. UK courts have repeatedly recognised that leaving people in a state of immigration limbo will eventually breach Art. 8. The Bill has a carve-out allowing for a grant of leave where necessary to comply with the ECHR (cl 29(3)), but the reality is that in general only those who manage to access legal representation at the point where Art. 8 requires a grant of leave will avoid a breach of their rights.

Provisions about modern slavery

14. The Bill breaches Arts. 10 and 13 of the European Convention Against Trafficking (**"ECAT"**) by removing from those caught by the Bill's regime: (i) protection against removal between a positive reasonable grounds ("**RG"**) decision and a conclusive grounds ("**CG"**) decision, and (ii) the right to support and assistance during this period.[3] This essentially allows potential victims of trafficking to be stripped of support and then removed like any other arrival (cl 21-27). The Secretary of State relies on the "*public order*" exemption to justify removal, but this is wrong as a matter of international law:

    14.1. The exemption only applies to the duties in Art. 13 ECAT (which makes provision for a "*recovery and reflection*" period). The UK has independent obligations under Art. 10 not to remove a potential victim of trafficking until the identification process is complete and to provide support and assistance in the

[3] This is subject to an extremely narrow exception (further narrowed by recent amendments) for a subset of those cooperating with the authorities: cl 21(2)-(6). This misses the point that the recovery and reflection period provided for by Art. 13 ECAT is expressly intended to allow victims of trafficking to "take an informed decision on cooperating with the competent authorities".

interim. In fact, Art. 10 was expressly designed to avoid potential victims being removed before they could be conclusively identified as victims.

14.2. The "*public order*" exemption in Art. 13 does not in any event apply to measures seeking to deter unlawful entry/reduce pressure on public services, as the Secretary of State states in the Bill's Explanatory Notes. Article 13 was expressly intended to protect victims of trafficking who find themselves illegally in the country (as the Explanatory Report to ECAT confirms); if the "*public order*" exemption allowed them to be deprived of the benefits of the Article, it would be self-defeating.

15. The Bill creates serious risks of removal contrary to Art. 4. ECHR and consequently to Art. 16 ECAT, which requires that victims of trafficking be returned only with "*due regard for [their] rights, safety and dignity*."

16. It also risks breaching the UK's "protection" or "operational" duty under Art. 4 ECHR – to take steps to protect potential or confirmed victims from a real/present/continuing risk of re-trafficking – and its duty to conduct an investigation capable of leading to the identification and prosecution of traffickers. Provision of assistance and support during the recovery and reflection period, which is intended to help escape the influence of traffickers and enable an informed decision on cooperation with the authorities, is a key way in which the UK discharges these duties. Removing these protections without individualised assessment is liable to put victims at real and unjustified risk. Further, the narrowness of the exception for those cooperating with the authorities risks removing individuals who might otherwise have decided to assist with an investigation – thwarting the UK's ability to identify and prosecute traffickers.

EXPANSION OF THE INADMISSIBILITY REGIME

17. Clause 57 expands the inadmissibility provisions generally (i.e. not only in respect of individuals who meet the cl 2 conditions), in that: (i) non-EU EEA countries (Iceland, Liechtenstein and Norway), Switzerland and, most notably, Albania are added to a list of 'safe countries of origin'; (ii) the Secretary of State may add to this list relatively easily; and (iii) human rights claims as well as asylum claims made by individuals from listed countries must be declared inadmissible.

18. The mandatory inadmissibility regime with only an extremely narrow exceptional-circumstances carve-out gives rise to a serious risk that individuals will be exposed to *refoulement*. The exceptional circumstances carve-out is also potentially discriminatory on the basis on nationality, contrary to Art. 3 of the Refugee Convention.

19. Albania should not be added to the list of so-called 'safe states' to be inserted at s. 80AA of the Nationality, Immigration and Asylum Act (the "**NIAA 2002**"). A large number of well-founded asylum claims by Albanian nationals[4] are likely not to be considered, exposing individuals to *refoulement*.

20. It is inappropriate to require the Secretary of State to declare human rights claims inadmissible based on a person's country of origin, given that human rights claims are often brought on the basis of the individual's ties in the UK, rather than in relation to risks in their country of origin. The expansion of the inadmissibility regime to cover human rights claims is likely to lead to human rights breaches.

EXPANSION OF POWERS OF DETENTION

21. Clause 10 expands the Secretary of State's powers to detain individuals, including where she "*suspects*" individuals of meeting the four conditions under cl 2.

22. Recent amendments removed the previously proposed power to detain "*relevant family members*" of individuals suspected of meeting the cl 2 conditions. The Bill was also amended to provide that the new powers of detention may only be exercised in respect of an unaccompanied child in the circumstances specified in regulations made by the Secretary of State (cl 10(2): under the proposed new paragraph 16(2B) at Sch. 2 to the 1971 Act). Notably, cl 10(2) (by new paragraph 16(2F)) provides that regulations for these purposes may confer a discretion on the Secretary of State or an immigration officer. The Secretary of State may also, by regulations, specify time limits that apply in relation to the detention of an unaccompanied child in relation to removal.

23. Clause 10(11) disapplies, for those detained under the Bill's new powers, existing limitations on the detention of pregnant women. Clause 11(2) expands the locations where

[4] Home Office data suggests that, between 2011 and 2021, over 3,700 Albanian nationals were granted some form of protection, with an average final grant rate of around 45% in the years to 2019 (reducing thereafter as it became more common to seek to certify them).

individuals may be detained, which is particularly likely to impact vulnerable individuals, and to lead to violations of the ECHR.

24. Clause 11 modifies the Secretary of State's powers of detention generally (i.e. not only in respect of individuals caught by the Bill's regime), such that it would fall to the Secretary of State to determine what amounts to a reasonable period of detention (and a reasonable further grace period of detention pending release). This is incompatible with the way in which the courts have applied the *Hardial Singh* principles, as the primary limit on the executive's powers of administrative detention, and dramatically limits the vital oversight function the courts have exercised for the last four decades via *Hardial Singh*.

25. Clause 12(4) provides an ouster clause which seeks to limit the supervisory role of the courts in respect of the Secretary of State's powers of detention, e.g. by seeking to prevent a person from challenging their detention by way of judicial review during the first 28 days of detention, where they have been detained as part of the Bill's regime. Certain exceptions would apply, including where there is a question that the Secretary of State has acted in bad faith, and in respect of applications for a writ of *habeas corpus*. There remains a significant doubt, however, as to whether *habeas corpus* would provide an effective means of policing the lawfulness of detention decisions, where the Secretary of State would have *prima facie* authority to detain under the relevant powers introduced by the Bill.

ADDITIONAL PROVISIONS RELATING TO MODERN SLAVERY

26. The Bill expands the existing use of the "*public order*" exemption under Art. 13 ECAT (as contained in s. 63 of the NBA 2022) to exclude from basic protections (as identified above) all potential victims of trafficking who are "*liable to deportation*" (cl 28). Recent amendments go still further, excluding <u>all</u> non-nationals who have been sentenced to a period of imprisonment (whether or not this renders them liable to deportation) and specifying that exclusion is mandatory save in *"compelling circumstances"*.

27. This is incompatible with Art. 10 ECAT. As noted above, the UK has a duty not to remove potential victims until the identification process is complete (with no "*public order*" exemption). The Bill envisages those who have been sentenced to imprisonment or are considered liable to deportation being removable even before a CG decision is made, which would be an obvious breach of Art. 10.

28. Clause 28 also risks breaching Art. 13 ECAT. A person may be liable to deportation under the Immigration Act 1971 ("**1971 Act**") where the Secretary of State considers that deportation would be "*conducive to the public good*" – a very broad, discretionary threshold. Not every case where deportation would be conducive to the public good will be one where (as required by Art. 13) "*grounds of public order prevent*" the observance of the person's recovery and reflection period. Similarly, grounds of public order will certainly not prevent the observance of the recovery and reflection period in every case where a person has been sentenced to a period of imprisonment. The proposed *"compelling circumstances"* exception is far too narrow to avoid breaches of ECAT in such cases.

29. There are also legitimate concerns as to how the Secretary of State could, as a matter of domestic law, lawfully decide whether a person's deportation was "*conducive to the public good*" without having afforded them a recovery and reflection period (one purpose of which is for them to decide if they are willing to cooperate with the authorities to help prosecute their traffickers) and made a CG decision. The public interest analysis must in our view be informed by: (i) whether a person is a confirmed victim of trafficking – as this impacts on their responsibility for any offences with which they have been charged, as well as on whether the wider public interest in identifying, supporting and protecting victims of trafficking is engaged; and (ii) the extent of any public interest in having the person present in the UK to assist the authorities – something they can only make an informed decision about if given the recovery and reflection period.

TREATMENT OF CHILDREN (INCLUDING UNACCOMPANIED MINORS)

30. Recent amendments have removed proposed powers by which the Secretary of State could remove "*relevant family members*" of individuals caught by the regime, which provisions would have breached the CRC (in particular Arts. 2 and 3). Nevertheless, concerns remain about the impact of the Bill on children.

31. Clause 3(3) – inserted by recent amendments – provides that the power to remove unaccompanied children may only be exercised in specific circumstances. These include where the person is to be removed for the purposes of reunion with a parent; removal to a safe country listed under s. 80AA(1) of the NIAA 2002; where the child has not made a protection or human rights claim and is to be moved to a country where he/she is a national or citizen, has obtained a passport or identity document, or a country or territory

from which he or she embarked for the UK. These limitations are insufficient. Further, (cl 3(3)(d)) provides the child may be removed "*in such other circumstances as may be specified in regulations made by the Secretary of State"*, where cl 4(4) provides that those regulations may confer a discretion on the Secretary of State.

32. The Secretary of State's power to defer the removal of unaccompanied children (cl 3) is problematic. This leaves the child in limbo, at risk of an upheaval of the life and connections they may build in the UK, contrary to the need for continuity in the child's upbringing under Art. 20 CRC.

33. Clause 13 disapplies the duty under s. 54A Borders, Citizenship and Immigration Act 2009 that the Secretary of State consult the Independent Family Returns Panel on how best to safeguard and promote the welfare of children who are to be removed or required to leave the UK, or where the Secretary of State proposes to detain the family in pre-departure accommodation.

34. Finally, cl 15 empowers the Secretary of State to provide or arrange for the provision of accommodation for unaccompanied migrant children, but does not transfer to the Secretary of State obligations similar to those imposed on local authorities in relation to looked after children in their care (see e.g. s. 22 of the Children Act 1989), and may therefore contravene the requirement that children deprived of their family environment be provided with "*special protection and assistance*", under Art. 20(1) CRC.

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