

JOINT OPINION

1. We have been asked to prepare an opinion on the Illegal Migration Bill (“**the Bill**”), for use by Freedom from Torture (“**FFT**”). The opinion addresses the Bill in the form that it was brought from the Commons to the Lords¹.
2. In summary, we consider that key aspects of the Bill are incompatible with the UK’s international obligations under 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 Convention Against Torture (“**CAT**”), the European Convention Against Trafficking (“**ECAT**”), the 1954 Convention relating to the Status of Stateless Persons (the “**1954 Statelessness Convention**”), the 1961 Convention on the Reduction of Statelessness (the “**1961 Statelessness Convention**”), 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. It thus violates both international law and the separation of powers. If the Bill were to enter into force in its current form it would, for all practical purposes, effectively extinguish the right to seek asylum in the UK.
3. The structure of the opinion is as follows:
 - 3.1. Section 1: Executive Summary (paragraphs 4 to 36)
 - 3.2. Section 2: The proposed regime for “illegal” arrivals/entrants
 - 3.2.1. Section 2A: Overview (paragraphs 37 to 38)
 - 3.2.2. Section 2B: Scope of the regime (paragraphs 39 to 42)
 - 3.2.3. Section 2C: Provisions about removal (paragraphs 43 to 114)

¹ And clause references are to HL Bill 133

- 3.2.4. Section 2D: Provisions about leave, citizenship etc. (paragraphs 115 to 128)
- 3.2.5. Section 2E: Provisions about modern slavery (paragraphs 129 to 152)
- 3.3. Section 3: Expansion of the inadmissibility regime (paragraphs 153 to 159)
- 3.4. Section 4: Expansion of the power of detention (paragraphs 160 to 177)
- 3.5. Section 5: Other provisions relating to modern slavery (paragraphs 178 to 188)
- 3.6. Section 6: Treatment of children (including unaccompanied minors) (paragraphs 189 to 191)

1 EXECUTIVE SUMMARY

1A The proposed regime for “illegal” arrivals

1A.1 Provisions about removal

- 4. The international system of refugee protection is predicated on State 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:
 - 4.1. 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.
 - 4.2. 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.
- 5. 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.

6. 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, because they will not have authorisation to do so. 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.
7. The Bill reverses the basic rationale of the Refugee Convention, which 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 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, and forced to sail back to Europe, where more than 250 were killed by the Nazis.³
8. The Bill creates serious risks of removal contrary to the ECHR and the international prohibition on *refoulement* to torture/ill-treatment (including under CAT):
 - 8.1. The Bill sets an extremely low threshold for a country to be treated as generally safe for removal:
 - 8.1.1. 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")).
 - 8.1.2. 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.

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>)

- 8.1.3. 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.
- 8.2. The Bill makes it extremely difficult to mount individual challenges to removal to the countries treated as generally safe:
- 8.2.1. 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)).
- 8.2.2. 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.
- 8.2.3. Only claims falling within the extremely restrictive and likely inadequate “suspensive claim” regime (summarised below) will suspend removal. Notably, new amendments (cl 52) preclude the domestic courts, outside the suspensive claim regime, from granting any 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.
- 8.2.4. 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.
- 8.3. The Bill breaches Art. 31 of the Refugee Convention: The entire regime (removals, together with bars on leave to enter/remain and citizenship and the removal of modern slavery protections) penalises unlawful arrivals.

- 8.4. 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.
- 8.5. In any event, the Bill fails to comply with Art. 31. The carve-out in cl 2(4) is far narrower than that which 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 that taken only recently under the NBA 2022.
9. 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.
10. 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:
- 10.1. 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;⁴ or (ii) the Secretary of State had made an error of fact.
- 10.2. 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 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)

⁴ Clause 38 gives examples of what would and would not constitute “*serious and irreversible harm*”. The requirement of imminence gives rise to obvious risks of breaches of Articles 2, 3 and 4 ECHR.

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 (a) contrary to established case law, and (b) 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.

11. 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, CAT, and customary international law. They also:

11.1. directly contravene the UK’s obligations under Arts. 2 and 3 (and 4) ECHR, which require that individuals with a credible claim that removal would be contrary to those Articles have access to a suspensive remedy;⁵

11.2. contravene Art 16(1) of both the Refugee Convention and 1954 Statelessness Convention, which guarantee that refugees and stateless persons should have unimpeded access to the courts, that no restrictions should be imposed on them by reason of their refugee status or status as stateless persons, so that refugees and stateless persons should be able to access such general remedies as exist in the State; and

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

⁵ 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. 2/3/4-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*”).

1A.2 Provisions about leave, citizenship etc

12. The provisions regarding leave and citizenship (cl 29-36) breach Art. 31 of the Refugee Convention, for the reasons summarised above.
13. The provisions also breach Art. 34, which requires contracting states “*as far as possible [to] facilitate the assimilation and naturalisation of refugees*”, and the equivalent obligation in respect of stateless persons contained in Art. 32 of the 1954 Statelessness Convention. 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 places them in a state of limbo and imposes 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 Arts. 34/32. The narrowing of the carve-out is also likely to lead to breaches of Art. 4 of the 1961 Statelessness Convention.
14. The provisions also create serious risks of breaches of Art. 8 ECHR and/or Art. 14 CAT. 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. Further, the bar risks leading to breaches of Art. 14 CAT, which requires States Parties to ensure in their legal systems that victims of torture obtain “*the means for as full rehabilitation as possible*”.

1A.3 Provisions about modern slavery

15. The Bill breaches Arts. 10 and 13 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.⁶ This essentially allows potential victims of trafficking to

⁶ 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”.

be stripped of support and then removed like any other arrival (cl 21-28). The Secretary of State relies on the “*public order*” exemption to justify removal, but this is wrong as a matter of international law:

- 15.1. 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 interim. In fact, Art. 10 was expressly designed to avoid potential victims being removed before they could be conclusively identified as victims.
- 15.2. 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, contrary the Secretary of State’s suggestion 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.
16. 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.*”
17. 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.

1B Expansion of the inadmissibility regime

18. 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.
19. 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.
20. 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 nationals⁷ are likely not to be considered, exposing individuals to *refoulement*.
21. 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.

1C Expansion of powers of detention

22. The Bill expands the powers of detention available to the Secretary of State and seeks to diminish and override the historic role of the courts to guard against unlawful illegal executive detention.
23. 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.

⁷ 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).

24. 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.
25. Clause 10(11) disapplies, for those detained under the Bill’s new powers, existing limitations on the detention of pregnant women. Clause 10(2) expands the locations where individuals may be detained, which is particularly likely to impact vulnerable individuals, and to lead to violations of the ECHR.
26. 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*.
27. 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.

1D Additional provisions relating to modern slavery

28. 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 all 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*”.
29. 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.
30. 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 justify curtailing 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.
31. 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 should in our view be informed by: (i) whether a person is a confirmed victim of trafficking – as this may impact 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.

1E Treatment of children (including unaccompanied minors)

32. Recent amendments have removed proposed powers by which the Secretary of State could remove “*relevant family members*” of individuals caught by the regime, which would have breached the CRC (in particular Arts. 2 and 3). Nevertheless, concerns remain about the impact of the Bill on children.
33. 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 3(4) provides that those regulations may confer a discretion on the Secretary of State.
34. 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.
35. 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.
36. 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.

2 THE PROPOSED REGIME FOR “ILLEGAL” ARRIVALS

2A Overview

37. The Bill imposes a range of punitive consequences on those who arrive in the UK without leave and seek international protection. It precludes them from seeking asylum in the UK; requires the Secretary of State to make arrangements for their removal; severely limits their ability to resist removal, even where it would be prohibited by international law; and bars them from future entitlements to leave to enter, leave to remain, and citizenship. We call this the Bill’s “**core regime**”.
38. The following sub-sections summarise the scope of the Bill’s core regime (section 2B); its provisions about removal and the multiple ways in which they breach or risk breaching international law and undermining the rule of law more generally (section 2C); the bars it places on leave and citizenship and the further legal issues these raise (section 2D); and the protections it removes from victims of modern slavery (section 2E).

2B Scope of the core regime

39. The Bill’s core regime applies to those who arrive in or enter the UK on or after 7 March 2023 without the permission they require, or who obtained that permission via deception “*by any person*”: see cl 2(2)-(3), (6) and (10) (removal) and cl 29(3) and 30(1)-(4) (leave and citizenship). It appears to apply irrespective of whether the person concerned was coerced, controlled or deceived in their journey (for example by traffickers); and irrespective of whether they participated in, or were even aware of, any deception practised on UK authorities. It also applies irrespective of whether the person’s route to the UK was a safe or a dangerous one.
40. The carve-outs from the regime are extremely narrow:
- 40.1. The regime does not apply to those who “*[came] directly from a country in which [their] life and liberty were threatened by reason of their race, religion, nationality, membership of a particular social group or political opinion*”: cl 2(4). This exception might appear to give effect to the UK’s duty under Art. 31 of the Refugee Convention not to penalise refugees for their unlawful entry or presence. It does not, for two reasons. First, Art. 31 is intended to protect individuals from penalty, not to permit State Parties to deny rights owed to refugees under the

Refugee Convention, nor to fail to implement their obligations in good faith (see paragraphs 75-88 below). Second, it is far narrower than what Art. 31 requires, in particular because it wrongly treats those who merely “*passed through*” a relevant country as not having “*come directly*” to the UK: see paragraphs 75 to 88 below.

40.2. The Secretary of State is not required to make arrangements for the removal of unaccompanied children until they turn eighteen: cl 2(11)(a), cl 3(1) and (5)-(6). However, she retains a power to do so; their asylum and human rights claims remain inadmissible; and the duty to make arrangements for removal arises the moment they turn eighteen: cl 3(2)-(3) and 5(1)(b).

40.3. Some victims of modern slavery are exempted where they are assisting the UK authorities to investigate trafficking offences: cl 2(11)(d). The parameters of this exception are strict: see section 2E below.

41. The Secretary of State has the power to make regulations exempting further classes of people from the core regime (cl 2(11)(b) and cl 3(7)), but to the best of our knowledge there has been no indication of whether or how this power might be used.

42. In practice, the core regime will catch the overwhelming majority of asylum-seekers arriving in the UK. This is (in short) because it is not possible to obtain permission to come to the UK simply to seek asylum; for the vast majority of people, no “safe and legal” route to doing so exists (and hence there is no “queue” those who arrive irregularly are “jumping”).⁸ Further, those who are granted permission for another purpose (e.g. study or tourism) and then seek asylum on arrival are liable to be treated as having engaged in deception.⁹

⁸ It is for this reason that Art. 31 – which also recognises that there is no obligation on refugees to seek asylum in the first country they reach – was adopted: see further paragraphs 84-88 below.

⁹ A more detailed explanation can be found in the UNHCR’s ‘Legal observations on the Illegal Migration Bill’, 11 April 2023, available at <https://www.unhcr.org/uk/641c7cfea.pdf>.

2C Provisions about removal

2C.1 Key features

Duty to make arrangements for removal

43. The Bill places a duty on the Secretary of State to “*make arrangements for the removal*” of a person to whom the core regime applies (cl 2(1)), and to ensure that these arrangements are made “*as soon as reasonably practicable*” (cl 5(1)).
44. The duty appears to apply indefinitely, no matter how long a person has been in the UK – including where they have stayed because the Government recognises that removing them would be unlawful. Combined with the barriers to leave discussed in section 2D, this means those caught by the core regime face a life of permanent uncertainty.

Expansion of potential destination countries

45. The Bill’s starting-point is that those caught by its core regime must be removed either to their country of origin; to the country from which they embarked for the UK; or to any country to which there is “*reason to believe [they] will be admitted*”: cl 5(3). We will refer to the latter two options as removal to “**third states**”.
46. The specific options differ depending on whether a person is a national of one of the countries on a new list which the Bill inserts as s. 80AA of the NBA 2022 (“**80AA countries**”). This list includes not only all EU member states but also Albania, Iceland, Norway and Switzerland. Nationals of 80AA countries may be removed to their country of origin subject to very limited exceptions: see section 3 below. Nationals of other countries who make an asylum or human rights claim may not be returned to their country of origin: cl 5(8)-(9). The unexpected consequence is to prevent the Secretary of State from removing those whose claims she considers to be unfounded to the country most likely to accept their return. This leaves the Bill’s regime very highly reliant on the Government’s ability to make removal arrangements with third states.
47. Nationals of any country may be returned to a third state listed in the Bill’s Schedule 1: cl 5(6)-(9) (“**Scheduled states**”). The list of Scheduled states is much longer than the list of 80AA countries. It includes a number of states which are not signatories to the Refugee Convention (India, Kosovo, Mauritius, Mongolia); a number of states from which the UK has historically recognised significant numbers of refugee claims (for example Sierra

Leone,¹⁰ Nigeria¹¹ and Albania¹²); and a number of states identified as safe only for men (for example Ghana, Liberia and Nigeria).

48. As discussed in section 2C.2 below, the Bill gives the Secretary of State the power to add new countries to Schedule 1 where she considers them to meet a very low threshold of general safety (cl 6(1)); and contains no requirements for keeping Scheduled states on the list, meaning they will be treated as presumptively safe indefinitely unless Parliament or the Secretary of State intervenes.

Removal of right to seek asylum and dismantling of other safeguards against removal

49. The Secretary of State's duty to make arrangements for removal applies even where a person has made a protection or human rights claim: cl 4(1). Indeed, those caught by the Bill's core regime are entirely prevented from claiming asylum in the UK: cl 4(2).¹³ Any claim that return to their country of origin would be contrary to the ECHR must also be declared inadmissible: cl 4(2) and (5).
50. In addition, asylum or human rights claims from any national of an 80AA country – whether or not they are caught by the Bill's core regime – must also be treated as inadmissible under a radically expanded version of the old EU-based inadmissibility regime (see section 3 below).
51. Claims that removal to a third state would breach the ECHR are still permitted, but a refusal can only be challenged by way of judicial review: cl 40(3)-(5). Still more significantly, new cl 52 prohibits the domestic courts from granting any interim remedy that “*prevents or delays, or has the effect of preventing or delaying*”, a person's removal from the UK pursuant to a decision made under the Bill. New cl 53 also limits the circumstances in which removal will be halted in response to interim measures ordered by the ECtHR. The result is that any claim not falling within the “*suspensive claim*”

¹⁰ Home Office data (available at <https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets>) suggest that, between 2011 and 2021, over 250 nationals of Sierra Leone were granted some form of protection in the UK, with an average final grant rate of over 50%.

¹¹ The same data suggest that, over the same decade, over 2,100 Nigerian nationals were granted some form of protection, with an average final grant rate of around 32% (and substantially higher over the past four years).

¹² The same data suggest, over the same decade, 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).

¹³ A claim declared inadmissible cannot be considered under the Immigration Rules: cl 4(3). The Immigration Rules are the only mechanism for having an asylum claim considered and determined in the UK.

regime described below will need to be pursued from abroad, in the hope of obtaining an order for return to the UK.

52. The Bill provides for only two types of claim to suspend or prevent removal to a Scheduled state: “*serious harm suspensive claims*” and “*factual suspensive claims*” (see paragraph 102 onwards). For present purposes, we note that:

52.1. In general, a person will have eight days to make a suspensive claim before they are at risk of removal: cl 7(2)(b), 41(7) and 42(7). Extensions of time are permitted only where there are “*compelling reasons*”: cl 45.

52.2. There are other procedural hurdles: claims will not be considered unless they contain specific types of information and are made in the manner prescribed by regulations: cl 41(5) and 42(5).

52.3. Ultimately:

52.3.1. Serious harm claims can only succeed where a person would face “*a real, imminent and foreseeable risk of serious and irreversible harm*” before the end of the “*relevant period*” – being the time it would take for a human rights claim to be finally determined in the UK: cl 38(3), (9).

52.3.2. Factual claims can only succeed where the Secretary of State was mistaken in concluding that the person fell within the scope of the core regime: cl 42.

52.4. The timescales for initial decisions on both types of claim are extremely tight: cl 41(2) and (7), cl 42(7).

52.5. The scope for appealing a negative decision is very limited: there is a seven-day deadline (cl 48); appeals must go directly to the Upper Tribunal (cl 43); if the claim has been certified, permission to appeal is required (with a high threshold set and no further right of appeal or judicial review) (cl 44 and cl 49); there are strict limits on evidence not placed before the Secretary of State within the initial 8-day claim period (cl 47); and appeal decisions must usually be made within 23 days (cl 48).

- 52.6. Even where a suspensive claim succeeds, a person can be removed at any time if “it appears to the Secretary of State that there has been a change of circumstances”: cl 46(3)-(4).

2C.2 Legal issues arising from provisions about removal

Overview

53. In our view, the Bill’s provisions about removal:
- 53.1. curtail, to the point of effectively extinguishing, the right to seek asylum in the UK;
 - 53.2. create very serious risks, bordering on certainty, that individuals will be removed contrary to the UK’s non-*refoulement* obligations;
 - 53.3. are intrinsically inconsistent with the obligations flowing from Art. 3 ECHR as articulated by the Grand Chamber of the ECtHR;
 - 53.4. run contrary to the UK’s obligation under Art. 31 of the Refugee Convention not to penalise refugees on the basis of their unlawful entry or presence; and
 - 53.5. authorise the removal of asylum-seekers to third countries even where the UK knows their asylum claims will not be considered (fairly and efficiently or indeed at all), and/or that their rights under the Refugee Convention will not be respected – something which would breach the UK’s obligation to implement and perform its treaty obligations in good faith (*pacta sunt servanda*).
54. These provisions also:
- 54.1. give rise to serious risks of procedural unfairness within the suspensive claim regime, thereby compounding the risks of *refoulement* contrary to international law; and
 - 54.2. contain a number of “Henry VIII” clauses, which confer on the Secretary of State powers to amend primary legislation.

Effective extinguishment of right to seek asylum

55. The Bill's core regime is likely to catch the overwhelming majority of asylum-seekers who arrive in the UK and will completely preclude those affected from seeking refugee status here. The net result is to curtail, to the point of effectively extinguishing, the right to seek asylum in the UK.
56. The international system of refugee protection, with the Refugee Convention at its core, is predicated on States Parties ensuring that those who arrive on their shores seeking asylum have their claims considered fairly and efficiently.¹⁴ While they are not prohibited from making arrangements with third states to help achieve this – as EU Member States have done via the Dublin Conventions – the Bill goes far beyond this, for two main reasons. The Bill is therefore contrary to the Refugee Convention, in that it fails to secure access to the procedures which form the gateway to respect for all other Convention rights.
57. **First**, the Bill does not limit removals to circumstances where the third state has agreed to consider and determine asylum claims in accordance with the Refugee Convention. This is not a requirement for a state to be included in the Schedule of countries to which removal will generally be permitted; and there is no mechanism for an individual to resist removal on the basis that their claim will not be considered (fairly and efficiently, or indeed at all) in the destination country, or that the country will not respect their rights under the Refugee Convention generally.¹⁵
58. **Second**, the Bill does not restore access to the UK asylum system for those who cannot lawfully be removed (within a reasonable time or indeed at all). No matter how long a person remains here, the Secretary of State is precluded from considering their claim.

¹⁴ See e.g. UNHCR, Guidance note on bilateral and/or multilateral transfer arrangements of asylum-seekers (May 2013): “The Michigan Guidelines on Protection Elsewhere: Colloquium on challenges in international refugee law” (2007) 28 *Michigan Journal of International Law* 207, Guideline 4 (indeed this is the fundamental underpinning of the Guidelines as a whole).

¹⁵ The criteria in s 77 of the NIAA 2022 (inserted by Sch 4 NBA) for a country to which an asylum-seeker whose claim is outstanding can in principle be removed do not include an express requirement that the destination country be one where there is the possibility of seeking and being granted asylum. However, (i) the requirements of s 77 remain more stringent than those proposed by the Bill; and (ii) there is an additional layer of protection under the NBA 2022, as only those whose claims are declared inadmissible are presently exposed to removal under s 77, and the inadmissibility regime requires a connection to a safe third state (which must be one where refugee status could reasonably have been obtained: s 80B(4)) and refers only to removal to such a state (s 80B(6)).

This is not the case at present: the inadmissibility regime established by the NBA 2022 provides routes for claims to be returned to the system in appropriate cases.¹⁶

59. In other words, the Bill does not establish a regime for meeting the UK’s obligations under the Refugee Convention via third-country processing. Instead, it completely blocks access to asylum procedures in the UK, without any proper guarantee that proper procedures will be made accessible elsewhere. This is a fundamental and unprecedented renunciation of the UK’s commitment to international refugee protection.

Refoulement, and/or removal contrary to the ECHR

60. Removal is prohibited under international human rights and refugee law where:

60.1. It would amount to *refoulement* contrary to Art. 33 of the Refugee Convention.¹⁷

The prohibition on *refoulement* protects asylum-seekers as well as recognised refugees.¹⁸ It will be breached not only where a person faces a real risk of persecution in the country to which they are returned, but where they are sent to a third state from which there is a real risk¹⁹ of “*onward*” or “*indirect*” *refoulement*.²⁰ This can happen, for example, where the destination country is not

¹⁶ See s. 80B(7) NIAA 2002 (inserted by s. 16 NBA 2022), which enables otherwise inadmissible claims to be considered if the Secretary of State considers there are “*exceptional circumstances*” or “*in such other cases as may be provided for in the immigration rules*”. These include cases where the Secretary of State considers that “*removal to a safe third country within a reasonable period of time is unlikely*”: para 345D.

¹⁷ Art. 33(1) of the Refugee Convention provides that “*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.*” The principle of *non-refoulement* applies to all refugees unless they fall within the narrow exceptions identified in Art. 33(2).

¹⁸ This is because refugee status is declaratory: a person is a refugee as soon as they meet the definition in Art. 1A(2), not simply when a government ultimately recognises this: see e.g. *ST (Eritrea) v Secretary of State for the Home Department* [2012] 2 AC 135, [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, *The Refugee in International Law* (3rd ed, 2007), p 248; Hathaway, *The Rights of Refugees under International Law* (2nd ed, 2021) p 342; Costello, “Art. 31 of the 1951 Convention relating to the Status of Refugees” (UNCHR Legal and Protection Policy Research Series, July 2007), pp 14-16. Any other approach would deprive Art. 33(1) of its content, as Contracting States could avoid allegations of breach by *refouling* individuals without considering whether they were refugees or not: see UNHCR, “Note on International Protection” (1993), para 11; Goodwin-Gill and McAdam, pp 232-233 (citing numerous conclusions of UNHCR Executive Committee and UNGA Res. 52/103 (12 December 1997) para 5).

¹⁹ 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*”).

²⁰ 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. The prohibition on

a signatory to the Refugee Convention or where its asylum system is so inadequate that a good claim for refugee protection risks going unrecognised.²¹

60.2. It would expose the individual to a risk of torture or cruel, inhuman or degrading treatment or punishment. Again, this is so whether the risk arises directly or indirectly. The prohibition flows not only from the UK's obligations under the ECHR (see immediately below) but also from its obligations under Art. 7 of the International Covenant on Civil and Political Rights ("ICCPR")²² and the UN Convention Against Torture.²³

60.3. It would result in a real risk of treatment contrary to Arts. 2, 3 and/or 4 ECHR.²⁴ Again this includes cases where, though there is no such risk in the destination country, a person may be expelled to another country where such a risk does arise.²⁵ As a result the Grand Chamber has held that Contracting States, before sending an asylum-seeker to a third state, must "*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*"²⁶ by conducting "*a thorough examination of the relevant conditions in the third country concerned and, in particular, the accessibility and reliability of its asylum system.*"²⁷ This assessment must be carried out of the authorities' own motion; must be up to date; must consider the safeguards the

indirect *refoulement* has been expressly recognised by the UK courts, including the House of Lords: 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.

²¹ See e.g. Goodwin-Gill and McAdam, p 393; 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), [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), [2.1]; "Guidance note on bilateral and/or multilateral transfer arrangements of asylum-seekers" (May 2013), [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"); Hathaway, p 374; Michigan Guidelines on Protection Elsewhere, Guideline 4.

²² See e.g. UN Human Rights Committee in its General Comment No. 20 (1992) on Art. 7 ICCPR, [8]-[9].

²³ Art. 3. See also UN Committee Against Torture, General Comment No. 1, 2 February 2017.

²⁴ 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), [111]-[116]; *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, [286].

²⁵ 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), [129]; *TI v UK* [2000] INLR 211. *FG v Sweden* (App. No. 43611/11, 23 March 2016), [117].

²⁶ *Ilias and Ahmed v Hungary* (App. No. 47287/16, 21 November 2019), [134].

²⁷ *Id.*, [139].

system affords “*in practice*”; and must involve the authorities seeking out “*all relevant generally available information*” rather than merely assuming compliance with Convention standards.²⁸ If the asylum system is inadequate, the person should not be removed.²⁹

- 60.4. It would result in a real risk of a flagrant breach of Art. 5 or 6 ECHR.³⁰ This might arise where, for example, there is a real risk of a person being subjected to indefinite or arbitrary detention in the destination country.
61. As we have explained, those caught by the Bill’s core regime may be removed to Scheduled states in accordance with the provisions summarised in section 2C.1. In our view, these provisions give rise to very serious risks of removal contrary to the international obligations summarised above. This is for two key reasons.
62. **First**, the Bill sets a very low threshold for countries to be treated as generally safe for removal.
63. There are no legal criteria for including a country in the initial list of Scheduled states; nor (to the best of our knowledge) will there be any formal scrutiny process apart from debates on the passage of the Bill. As noted at paragraph 47 above, the initial list includes multiple states from which the UK receives refugees and some which are not even a signatories to the Refugee Convention. If the Bill is passed in its current form, these states will be assumed to be safe for third-state removals unless individuals can prove otherwise using the highly restricted processes summarised at paragraph 52 above (and further discussed at paragraphs 102-111 below).
64. This will be despite there having been no formal, independent assessment of critical questions like whether the country respects the principle of non-*refoulement*; whether it respects the prohibition on removal to torture or ill-treatment; and whether it enables people to request refugee status and, if found to be a refugee, protects them in accordance with the Refugee Convention. Indeed, if the Bill is passed in its current form the initial Scheduled states will be treated as generally safe even where it is clear beyond doubt that one or more of these requirements is not met.

²⁸ *Id.*, [141].

²⁹ *Id.*, [134].

³⁰ See e.g. *Othman (Abu Qatada) v UK* (2012) 55 EHRR 1, [261]; *USA v Giese* [2015] EWHC 2733, [62].

65. Requirements like these have informed the legal criteria for ‘safe countries’ or ‘safe third countries’ in UK law for many years.³¹ General minimum standards for removals to a third state are a vital safeguard for people who, through no fault of their own, would struggle to bring a properly prepared individual challenge.³² For the reasons discussed in section 2D, this group is likely to grow significantly if the Bill passes – meaning that abandoning this safeguard is more dangerous than ever.
66. The danger is only increased by the absence of any legal criteria for keeping Scheduled states on the list. Countries will remain there indefinitely – no matter how the evidential picture changes – unless Parliament or the Secretary of State decides as a matter of pure discretion to intervene, with no formal monitoring or oversight.
67. Furthermore, the Bill includes a ‘Henry VIII’ clause which allows the Secretary of State to add to the list of Scheduled states – a list enshrined in primary legislation – simply by making regulations. We discuss the serious concerns raised by clauses like this at paragraphs 112 to 114 below. At this stage, we note that the Secretary of State can add a Scheduled state if she is satisfied of just two things: (i) that in that country there is in general no “*serious risk of persecution*”; and (ii) that removal to that country will not in general contravene the UK’s obligations under the ECHR: cl 6(1). Even these criteria are not enforceable as such: it is enough that the Secretary of State is satisfied that they are met, and judicial oversight would be limited accordingly. All this means the Secretary of State could add a Scheduled state even if, to take just a few examples:
- 67.1. there was no possibility, or no realistic possibility, of seeking refugee protection there – for example because the country was not a signatory to the Refugee

³¹ See e.g. Sch 3 to the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (presumptions of safety, defined by reference to whether a country is one “*from which a person will not be sent to another State in contravention of their Convention rights*” and “*from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention*”); previous para 345B of the Immigration Rules (defining a “*safe third country*” as, inter alia, one where “*the principle of non-refoulement will be respected in the country in accordance with the Refugee Convention*”, where “*the prohibition of removal in violation of the right to freedom from torture and cruel, inhuman or degrading treatment... is respected*”, and where “*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*”; s. 80B(4) of the NIAA 2002 (as inserted by the NBA 2022, defining a “*safe third State*” as, inter alia, one “*from which a person will not be sent to another State otherwise than in accordance with the Refugee Convention*” or “*in contravention of their rights under Art. 3 [ECHR]*”, and where “*a person may apply to be recognised as a refugee and (if so recognised) receive protection in accordance with the Refugee Convention in that State*”). Although the criteria set out in s77 NIAA 2002 (as inserted by the NBA 2022) are less demanding, these are in practice conditioned by s 80B: see fn 15 above.

³² For example, 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”: Hathaway, p 327.

Convention, had no functioning asylum system, or had not agreed to process the claims of asylum-seekers from the UK;

- 67.2. there was a serious general risk of people being subjected to onward *refoulement*;
 - 67.3. there was a serious risk that those recognised as refugees would be denied their rights under the Refugee Convention – for example by not being allowed to work or access the social security system.
68. Again, once a state is added to Schedule 1 there are no legal requirements for keeping it there, even if the facts change dramatically.
69. These factors alone give rise to a very serious risk of indirect *refoulement*.
70. **Second**, having set a very low threshold for countries to be treated as generally safe, the Bill makes it harder than ever to mount individual challenges to removal.
71. The Bill substantially dismantles existing individual protections by establishing a system where human rights claims will not be treated as suspensive, and where there is no right of appeal against refusal: see paragraph 51 above. Appellate scrutiny of asylum claims has existed for at least 30 years, and human rights claims for over 20 years. This means that:
- 71.1. Only the Secretary of State will ever consider the merits of these claims. Any challenge must then be by way of judicial review, and can succeed only if a technical legal error is identified – not simply because the Secretary of State’s decision was wrong. Judicial review is more complex and technical than a statutory appeal, and is almost impossible without legal representation.
 - 71.2. Indeed, the Secretary of State will not even look at these claims before removing the person to face whatever risks they fear – no matter how serious or well-founded.
 - 71.3. Although removal could be challenged by way of judicial review, the courts would (as noted above) be prohibited from granting interim relief (cl 52) – even if a person established a strong *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. Interim measures granted by the ECtHR would only be suspensive if a Minister decided they should be (cl 53).

72. In general, an individual could protect themselves only by making one of the two extraordinarily narrow kinds of claim summarised at paragraph 52 above to suspend removal. The huge risks of procedural unfairness and breaches of Articles 2, 3 and 4 ECHR in requiring individuals to make and the Upper Tribunal to determine these claims are discussed at paragraphs 102-111 below.
73. Taken together, these two sets of factors generate a serious risk that the Bill will result in removal contrary to the Refugee Convention, the principle of non-*refoulement* (including under CAT) and the ECHR. They also render the Bill inconsistent with the obligations identified by the ECtHR Grand Chamber as flowing from Art. 3 ECHR (summarised at paragraph 60.3 above) – as the Bill does not require a thorough and proactive examination of the accessibility and reliability of the asylum system in a Scheduled state before an individual is removed there.³³ To the contrary – it envisages removal even where there is no such system at all.
74. For completeness we would add that the prohibition on interim relief in new cl 52 undermines, in a highly unusual and deeply concerning way, the courts’ constitutional role as a check on the lawfulness of executive action. It also amounts to a violation of Art 16 of both the Refugee Convention and 1954 Statelessness Convention, which guarantee that refugees and stateless persons should have unimpeded access to the courts, that no restrictions should be imposed on them by reason of their refugee status or status as stateless persons, so that refugees and stateless persons should be able to access such general remedies as exist in the State.³⁴

Breach of Art. 31 of the Refugee Convention

75. Art. 31(1) of the Refugee Convention provides that Contracting States “*shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly*

³³ In *AAA (Syria) v SSHD* [2022] EWHC 3230 (Admin), the Court held that these obligations had been complied with because the Secretary of State had published a detailed assessment of why Rwanda met the criteria in what was then para 345B of the Immigration Rules: see [59]-[60]. Again, the Bill would not require any equivalent assessment: there would be no formal requirements for including a state on the initial list of Scheduled states; the criteria for adding new states (see paragraph 66) would set the bar lower than the law requires; and there would be no formal mechanism for reviewing whether country conditions had changed once a State had been included.

³⁴ Hathaway, *The Rights of Refugees under International Law* (2nd ed. 2021) p 798-799; UNHCR Legal Observations on the Illegal Migration Bill, 2 May 2023, para 79.

from where their life or freedom was threatened in the sense of Art. 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.”

76. In agreeing this clause Contracting States, including the UK, recognised that refugees often have to flee persecution without papers, and often need to enter other countries without permission to claim asylum. This was “perhaps the most important innovation of the Refugee Convention”³⁵ – its basic rationale was to replace previous authorisation-based regimes of the 1930s with a needs-based or definition-based model. 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, and forced to sail back to Europe, where more than 250 were killed by the Nazis.³⁶
77. Although Article 31 refers to ‘refugees’ it is widely recognised – including by the UK courts – as protecting all asylum-seekers.³⁷
78. The Bill’s provisions about removal, as summarised in sections 2B and 2C.1 above, penalise asylum-seekers on account of their illegal entry or presence.
79. The link to unlawful entry is clear and express. As to penalties, and consistent with the broad and generous interpretation Art. 31 requires,³⁸ the term encompasses not only criminal sanctions but also administrative disadvantages or disbenefits. For example:
 - 79.1. Leading academic commentators consider that measures such as “*procedural bars to applying for asylum*”³⁹ or “*treating claims as inadmissible*”⁴⁰ may constitute “*penalties*”, and that the term encompasses any “*loss, disability or disadvantage*” (including, for example, “*the assignment of refugees... to*

³⁵ Hathaway, *The Rights of Refugees under International Law* (2nd ed. 2021) p 485.

³⁶ “The Jewish Refugees the US turned away” *BBC* (10 May 2017) (<https://www.bbc.co.uk/news/av/magazine-39857056>)

³⁷ See e.g. *R v Uxbridge Magistrates Court, ex parte Adimi* [1999] Imm AR 560, 677 (“That Art. 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”). This reflects the declaratory nature of refugee status.

³⁸ 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, [30]. See also Goodwin-Gill, “Art. 31 of the 1951 Convention relating to the Status of Refugees: Non-penalisation, Detention and Protection” (October 2001), [9].

³⁹ Goodwin-Gill, p 266.

⁴⁰ Costello, p 37.

abbreviated procedures” or “the punitive denial of social or economic benefits”).⁴¹

- 79.2. 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 Art. 31(1).
- 79.3. The legislation enacted by a number of Contracting States to give effect to Art. 31 expressly or impliedly goes beyond criminal penalties.⁴²
80. The penalties to which those caught by this part of the Bill’s core regime will be exposed, in our view, include the duty to make arrangements for their removal; the automatic inadmissibility of their asylum claims; the resulting delay in their access to the refugee process; the limitations on suspensive challenges to removal; and the possibility of return to Scheduled states which do not meet the usual minimum criteria for a safe third country, including because they will not process asylum claims fairly and effectively (or indeed at all) and because they do not respect minimum human rights standards.⁴³ Disentitlement to the protections otherwise given to victims of modern slavery, discussed in section 2E below, is another example. That these measures amount to penalties is, in our view, made even clearer by cl 1(1), which provides that “*[t]he purpose of this Act is to prevent and deter unlawful migration.*”
81. The Secretary of State appears implicitly to accept that the regime imposes penalties for the purposes of Art. 31, as cl 2(4) of the Bill presents as an attempt to exempt those within the scope of Art. 31 from the operation of the core regime. That is no answer because the purpose of Art. 31 is protective; it was not drafted as a means of permitting States to deny refugees the rights granted by the Convention, nor permit States to fail to implement their Convention obligations in good faith, as the UNHCR has made clear.
82. In any event, the Bill interprets Art. 31 too narrowly. Clause 2(4) refers to those “*coming directly from a country in which [their] life and liberty were threatened by reason of their*

⁴¹ Hathaway, pp 515, 518.

⁴² See the examples given by Costello, p 33.

⁴³ The position is different from that considered in *AAA (Syria) v SSHD* [2022] EWHC 3230 (Admin), where the inadmissibility of the claimants’ asylum claims and their removal to Rwanda were held not to constitute penalties on the basis that there was a third-country processing agreement with Rwanda, which the Court found to have met the ‘safe third country’ criteria contained in para 345B of the Immigration Rules: [124]-[125]. As noted above, the Bill would require inadmissibility and allow removal even where neither was the case. We note also that decision of the Divisional Court is under appeal on this point.

race, religion, nationality, membership of a particular social group or political opinion.”

This not sufficient to comply with Art. 31 for two main reasons.

83. **First**, the clause requires that a person’s “*life and liberty*” have been threatened for one or more of the reasons identified. Art. 31(1) refers to “*life or freedom*”; the phrase mirrors that in Art. 33(1) (the prohibition on *refoulement*) and is widely understood as encompassing any risk that would amount to persecution under Art. 1A(2). The difference in wording means that, under cl 2(4), it would not be enough for a person to have come from or via a country where they faced a real risk of persecution unless that persecution involved a threat to life. This is the case even where the person came straight to the UK from their country of origin, without passing through any third countries at all. The result is that many people who should be protected from penalisation under Art. 31(1) will be exposed to the Bill’s core regime despite cl 2(4).
84. **Second**, cl 2(5) provides that a person is not to be taken to have “*come directly*” to the UK if they “*passed through or stopped in another country outside the UK where their life and liberty were not so threatened.*” This is an extraordinarily narrow definition of “*coming directly*” which is fundamentally at odds with Art. 31(1), and how it has been interpreted by senior courts, including the Appellate Committee of the House of Lords, in the UK.
85. It is firmly established that the “*coming directly*” requirement does not exclude from the protection of Art. 31 those who pass through, or even stay temporarily in, a ‘safe’ intermediate country.⁴⁴ Only those who have already found secure asylum (whether temporarily or permanently), such that there is no protection-related reason for their unlawful onward movement, can be penalised for it.⁴⁵ Thus, the domestic courts have recognised that the Refugee Convention affords individuals “*some element of choice*” as to where they claim asylum.⁴⁶ As Simon Brown LJ said in *Adimi*:

⁴⁴ See e.g. Goodwin-Gill and McAdam, pp 264-265, 3.3.5 (noting that this was expressly envisaged by the drafters of Art. 31); Goodwin-Gill, “Art. 31”, [103]-[104].

⁴⁵ 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, “Art. 31”, [17]-[25]; Hathaway, pp 497-500.

⁴⁶ 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: e.g. UNHCR Executive Committee Conclusion No.15 (1979); UNHCR’s

“[A]ny merely short term stopover en route to such an intended sanctuary cannot forfeit the protection of [Art. 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 not the refugee sought or found there protection de jure or de facto from the persecution they were fleeing.”⁴⁷

86. Far from enabling an individualised assessment of these factors to determine whether a person is protected against penalisation by Art. 31, cl 2(4) excludes even those who passed briefly through a country where there was no possibility of seeking asylum, or where they faced destitution or other serious harm not amounting to a persecutory risk to “*life and liberty*”.
87. By raising the bar for the ‘coming directly’ requirement so significantly, the Bill guarantees that refugees who should be protected against penalisation will instead be exposed to it, in direct contravention of the UK’s obligations under the Refugee Convention.
88. It is worth noting that the approach the Bill takes to Art. 31 is even narrower than the one Parliament has only recently adopted in the NBA 2022. The NBA 2022 provides that a person is not to be taken to have come directly to the UK for the purposes of Art. 31(1) if they “*stopped in another country outside the UK*” (without any reference to ‘passing through’) – and allows them to bring themselves back within Art. 31 if they “*can show that they could not reasonably be expected to have sought protection under the Refugee Convention in that country*”: s. 37(1). In light of the principles summarised at paragraph 85 above we consider s. 37 to be inconsistent with international law – but it is notable that even on the view of Art. 31 that Parliament adopted in 2022, the scope of the Bill is excessively narrow.

written evidence to the Home Affairs Committee’s inquiry into Channel crossings, September 2020 [5]; Goodwin-Gill and McAdam, p 392.

⁴⁷ Page 678. 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. *Mateta* [2013] EWCA Crim 1372, where it was accepted by all parties before the Court of Appeal that Art. 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.

Risk of removal otherwise contrary to the Refugee Convention

89. Under the Refugee Convention, there are a number of rights to which refugees are entitled when they are subject to the state's jurisdiction (most notably, the protection against *refoulement* discussed above), and when they are present in the territory, even before they have been formally recognised as such.⁴⁸ The rights which inhere on the basis of presence in the territory include:
- 89.1. the right to the enjoyment of their Convention rights without discrimination (Art. 3);
 - 89.2. 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*" (Art. 4);
 - 89.3. 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 (Art. 13); and
 - 89.4. the right to "*the same treatment as is accorded to nationals with respect to elementary education*" (Art. 22(1)).
90. In addition, those who are "*lawfully present*" in a Contracting State are entitled to:
- 90.1. 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 (Art. 18);
 - 90.2. freedom of movement, including the right to choose their place of residence (Art. 26); and
 - 90.3. protection against expulsion save on grounds of national security or public order (Art. 32).

⁴⁸ 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), [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.

91. Finally, those “*lawfully staying*” have additional rights – for example work rights under Art. 17 and rights to public assistance under Art. 23. The UK courts have expressly recognised the importance of these rights to those who are recognised as refugees.⁴⁹
92. In our view, removing asylum-seekers to third states where it is (or ought to be) known that these rights will not be respected and protected would amount to a failure to implement the UK’s obligations under the Refugee Convention in good faith.
93. The duty to implement treaty obligations in good faith is reflected in Art. 26 of the Vienna Convention on the Law of Treaties.⁵⁰ 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.*”⁵¹ 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 a treaty*” – including where a state seeks “*to do indirectly what it is not permitted to do directly*”.⁵² The UNHCR,⁵³ other experts,⁵⁴ academic commentators,⁵⁵ and the High Court of Australia⁵⁶ have all

⁴⁹ See eg.. *Saad v Secretary of State for the Home Department* [2001] EWCA Civ 2008, [72]; *Fornah v Secretary of State for the Home Department* [2007] 1 AC 412, [121].

⁵⁰ The principle has also been recognised generally by the International Court of Justice: see e.g. *Nuclear Tests (Australia v France)*, ICJ Rep (1974) 253, 268, [46].

⁵¹ *Saad v Secretary of State for the Home Department* [2001] EWCA Civ 2008, [11].

⁵² Goodwin-Gill and McAdam, p 387.

⁵³ UNHCR Executive Committee Conclusion No. 85, [aa] (“[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”). “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).

⁵⁴ 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 preceded 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*”).

⁵⁵ See e.g. Goodwin-Gill and McAdam, p 387-390 (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*”); Hathaway, pp 825-830. 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.

⁵⁶ *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.*” See also the extensive discussion in

taken the view that if asylum-seekers are to be lawfully transferred to a third state it must be on the basis that their rights under the Refugee Convention will be secured.

94. The Bill envisages the removal of refugees to Scheduled states irrespective of whether those states will respect their rights under the Refugee Convention, and in fact even where it is abundantly clear that they will not. In particular, as noted above:

94.1. There is no requirement that, to be placed or to remain on Schedule 1, a state be one which can generally be expected to comply with the Refugee Convention (or even with the bare prohibition on *refoulement*).

94.2. There is no requirement that a Scheduled state be one to which removal would not generally breach the UK's obligations under the Refugee Convention (only that removal would not in general breach its obligations under the ECHR). There is no legal justification for prioritising the UK's obligations under the ECHR over its obligations under the Refugee Convention in this very obvious way.

94.3. There is no legal avenue for an individual to challenge their removal to a Scheduled state on the express basis that this would contravene the UK's obligations under the Refugee Convention, or that their Convention rights would not be respected and protected there.

95. As a result, the Bill, in our view, is very likely to lead to individuals being removed to states which the UK knows or ought to know will not respect their rights under the Refugee Convention – during the status determination process, and even if they are found to be refugees. This would breach the UK's own obligations under the Convention.

Breach of the right to an effective remedy

96. Article 13 ECHR provides that “*Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority.*” This means that, where an individual claims that a decision has breached or will breach their Convention rights, they must be able to bring an “effective” challenge.⁵⁷ Precisely what

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

⁵⁷ Although Art. 13 is not a right scheduled to the Human Rights Act 1998, the courts have treated it as basic to the purpose of the statute itself: see *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153, [14] and [56]-[57].

this requires will vary depending on the circumstances, but the following principles are of particular relevance.

97. **First**, where a person claims that removing them to another country would expose them to a real risk of breaches of Art. 2 or 3 ECHR,⁵⁸ they must have access to a remedy which is automatically suspensive.⁵⁹ As explained above, the suspensive claims regime applies only to a subset of Art. 3 cases: in particular, it is limited to “*imminent*” risks arising within the “*relevant period*” (defined by reference to the determination of a human rights claim in the UK), irrespective of whether a person has actually made such a claim, and irrespective of how effectively they would be able to participate in the determination of that claim from the destination country. As a result, in our view the Bill will result in breaches of Art. 13 in any arguable Art. 3 case which falls outside the suspensive claims regime.⁶⁰
98. Automatic suspensive effect is not a hard-edged requirement in the context of a claim that expulsion will breach Art. 8 ECHR. However, in such cases Art. 13 requires that Contracting States “*make available to the individual concerned the effective possibility of challenging the deportation.... order and of having the relevant issues examined with sufficient procedural safeguards and thoroughness by an appropriate domestic forum.*”⁶¹
99. **Second**, a remedy is liable to be ineffective where the individual concerned is not in practice able to make use of it to substantiate their complaint: for example, because they cannot access legal assistance or interpreters.⁶² The Supreme Court specifically considered the effectiveness of “out-of-country” appeals against removal in *Kiarie & Byndloss v Secretary of State for the Home Department* [2017] 1 WLR 2380. It held, by reference to both Art. 13 and the procedural requirements of Art. 8, that certifying the appellants’ challenges to their deportation – which had the effect of limiting them to an

⁵⁸ We consider that the same approach would be taken to a breach of Article 4.

⁵⁹ See *MSS v Belgium and Greece* [GC] (App. No. 30696/09, 21 January 2011), [293]; *M v Bulgaria* (App. No. 41416/08, 26 July 2011), [129]-[131]; *Jamaa v Italy* [GC] (App. No. 27765/09, 23 February 2012), [198]-[200]; *De Souza Ribeiro v France* [GC] (App. No. 22689/07, 13 December 2012), [82]; *AM v Netherlands* (App. No. 29094/09, 5 July 2016), [62]-[63], [66]-[67]; *Allanazarova v Russia* (App. No. 4721/15, 14 February 2017) [97]-[99].

⁶⁰ The ECtHR has in the past found that judicial review in the UK is an effective remedy against removal in breach of Arts 2 or 3 ECHR: see *Soering v UK* (1989) 11 EHRR 439 and *Vilvarajah v UK* (App. No. 13163/87, ECHR 1991). However, these decisions were made in contexts where judicial review was treated as automatically suspending removal and where the challenge could be brought from within the UK.

⁶¹ *De Souza Ribeiro v France* [GC] (App. No. 22689/07, 13 December 2012), [83].

⁶² See e.g. *MSS v Belgium and Greece* [GC] (App. No. 30696/09, 21 January 2011), [301]

“*out-of-country*” appeal – was unlawful given the obstacles they were likely to face in preparing and presenting their cases. The Bill goes far beyond the existing “*out of country*” appeals regime: its effect would be that all human rights claims, save those made within the narrow suspensive claims regime, would need to be pursued from abroad unless a Minister chose to give effect to interim measures ordered by the ECtHR. In our view, the Bill’s provisions are almost bound to result in repeated violations of Art. 13 in individual cases – even outside the context of Art. 3.

100. For completeness we note that the ECtHR has held that factors such as “*the strong pressure of immigration*” or “*the need... to combat illegal immigration*” cannot justify exempting immigrants from the usual procedural safeguards against arbitrary expulsion.⁶³

101. As a result, the Bill, in our view, is very likely to lead to individuals being removed to states which the UK knows or ought to know will not respect their rights under the Refugee Convention – during the status determination process, and even if they are found to be refugees. This would breach the UK’s own obligations under the Convention.

Risk of denying access to justice and procedural unfairness within the suspensive claims regime

102. As noted at paragraph 52 above, the Bill allows for two types of suspensive claim, a serious harm suspensive claim and a factual suspensive claim.

103. A **serious harm suspensive claim** is defined as “*a claim by a person (“P”) who has been given a third country removal notice that the serious harm condition is met in relation to P*” (cl 38(2)). The “*serious harm condition*” is in turn defined as follows: “*that P would, before the end of the relevant period, face a real, imminent and foreseeable risk of serious and irreversible harm if removed from the United Kingdom under this Act to the country or territory specified in the third country removal notice*” (cl 38(3)). As to this definition:

103.1. The “*relevant period*” is, in summary, the total period that it would take for a human rights claim in relation to the person’s removal to be finally determined: see cl 38(9) (and note cl 40(3)-(5) in respect of human rights claims by such persons). The requirement that the risk of serious and irreversible harm relate to

⁶³ *De Souza Ribeiro v France* [GC] (App. No. 22689/07, 13 December 2012), [97].

the relevant period appears to be premised on assumptions that (i) any person making a serious harm suspensive claim will also make a human rights claim; and (ii) a successful human rights claim will result in a person being able to leave the country or territory to which they had been removed, and travel to the UK or some other safe place. However, (i) in practice many individuals may not make a human rights claim, especially if they lack legal representation; and (ii) there is no mechanism which could ensure that a person whose human rights claim succeeded would be able to leave the country or territory to which they had been removed. As a result, even if the suspensive claims regime were capable of operating fairly, it would still be likely to result in removals which exposed some people to a real risk of unlawful harm (and indeed even of “*serious and irreversible harm*”) in the destination country.

103.2. The requirement that the risk of “*serious and irreversible harm*” be “*imminent and foreseeable*”, as well as “*real*”, was added to the original Bill by way of amendment. As to imminence and foreseeability:

103.2.1. It is unclear whether the requirement that the risk be “*imminent*” is intended to add anything of substance to the requirement that the risk must be of harm “*before the end of the relevant period*”. If it is so intended, this would imply that a person could be removed notwithstanding that to do so would place them at real risk of serious and irreversible harm before any human rights claim would be finally determined. This would pose an obvious risk of breach of Arts. 2, 3 and 4 ECHR. If, however, the time period by reference to which the risk is to be assessed is simply the “*relevant period*”, then the requirement that the risk be “*imminent*” serves only to obfuscate and confuse.

103.2.2. It is doubtful that the requirement that the risk be “*foreseeable*” adds anything in practice, since it is hard to see how a person could show that they would face a real risk of serious and irreversible harm unless the risk in question was foreseeable.

103.3. Clause 38(4) provides a non-exhaustive list of examples of types of harm which would constitute “*serious and irreversible harm*”. The list consists of death, certain forms of persecution, torture or inhuman or degrading treatment or

punishment (or onward removal to a country/territory in which the relevant individual would face a real, imminent and foreseeable risk of any of the foregoing).

103.4. Clause 38(5) provides that “*serious and irreversible harm*” does not include (i) certain forms of persecution; and (ii) harm resulting from the standard of healthcare available in the relevant country/territory being lower than that available in the UK. Clauses 38(6)-(7) provide that “*any pain or distress resulting from a medical treatment that is available to P in the United Kingdom not being available to P in the relevant country or territory*” is “*unlikely*” to constitute “*serious and irreversible harm*”.

103.5. Clause 39 would empower the Secretary of State to amend what is currently cl 38 “*to make provision about the meaning of ‘serious and irreversible harm’*”.

104. A **factual suspensive claim** is defined as “*a claim by a person who has been given a removal notice that the Secretary of State or an immigration officer made a mistake of fact in deciding that the person met the removal conditions*” (cl 37(3)). “*Removal conditions*” are defined by reference to the conditions specified in cl 2.

105. Clauses 41 and 42 make provision in respect of **procedures for the making and determination of suspensive claims**. The key points are as follows:

105.1. The claim must be made within the period of 8 days beginning with the day on which the person is given the removal notice: cl 41(1), 41(7), 42(1) and 42(7). We discuss the risks arising from the timescales imposed by the Bill at paragraph 109 below.

105.2. The claim must be made in a manner and form prescribed (by regulations) by the Secretary of State, and contain such information as she prescribes: cl 41(5)(b)-(c) and 42(5)(b)-(c).

105.3. The claim must also contain “*compelling evidence*” that the factual basis of the claim is made out, i.e. that there would be a relevant risk of serious and irreversible harm (in the context of a serious harm suspensive claim) or that a relevant mistake of fact had been made (in the context of a factual suspensive claim): cl 41(5)(a) and 42(5)(a).

- 105.4. The Secretary of State must determine the claim within 4 days (cl 41(2), 41(7), 42(2), 42(7)), unless she exercises a power to extend the period by notice to the person concerned (cl 41(6), 42(6)).
- 105.5. When considering a suspensive claim, the Secretary of State must take into account certain prescribed factors, including any failure by the claimant to provide evidence which they could reasonably have been expected to provide: cl 41(4), 42(4).
- 105.6. If the Secretary of State rejects a suspensive claim, she may certify that the claim is “*clearly unfounded*”: cl 41(3) and 42(3).
106. The Bill provides for an **avenue of appeal to the Upper Tribunal** against the rejection of a suspensive claim.⁶⁴ The key points are as follows:
- 106.1. If the claim has not been certified as “*clearly unfounded*”, there is a right of appeal (cl 43(2)). The notice of appeal must contain “*compelling evidence*” that the factual basis of the claim is made out (cl 43(3)).
- 106.2. If the claim has been certified as clearly unfounded, the claimant cannot appeal unless they first apply for and obtain permission to appeal from the Upper Tribunal (cl 44(2)). The Upper Tribunal may only grant permission to appeal if it considers that there is compelling evidence (i) that the factual basis of the claim is made out (cl 44(3)(a) and 44(4)); and (ii) in the context of a serious harm suspensive claim, the risk of serious harm is not only real, imminent and foreseeable, but also “*obvious*” (cl 44(3)(b)). This sets the test for permission to appeal higher than that for success on the appeal itself. An application for permission to appeal is to be determined on the papers, unless “*the Upper Tribunal considers that an oral hearing is necessary to secure that justice is done in a particular case*” (cl 44(5)).
- 106.3. An appeal or application for permission to appeal must be submitted within 7 working days of notice of the Secretary of State’s decision (cl 48(1)(a),

⁶⁴ CI 51 provides for an avenue of appeal to the Special Immigration Appeals Commission (rather than the Upper Tribunal) in cases where the Secretary of State issues a certificate on prescribed grounds, e.g. in relation to national security.

48(2)(a)).⁶⁵ The Upper Tribunal is required to determine an application for permission to appeal within 7 working days, and an appeal within 23 working days (cl 48(1)(b), 48(2)(b)).

106.4. An appellant or applicant for permission to appeal has limited scope to rely on any “*new matter*”, i.e. a matter of which they did not provide details to the Secretary of State prior to the deadline for submission of their suspensive claim (cl 47(4)). The Upper Tribunal is prohibited from considering any new matter unless the Secretary of State provides consent⁶⁶ or the Tribunal determines that there were “*compelling reasons*” for the person not to have provided details of the matter prior to the deadline for submission of their suspensive claim (cl 47(3), 47(5)).

107. The provisions outlined above contain many tight deadlines, as identified above. Despite this the Bill provides only limited scope for **extensions of time**:

107.1. If a suspensive claim is made out of time, the Secretary of State must consider whether there were “*compelling reasons*” for the claimant not to make the claim within time (cl 45(2)). If the Secretary of State decides that there were no such compelling reasons, the claimant may apply to the Upper Tribunal for a declaration to the contrary (cl 45(4)). Such an application must (i) contain “*compelling evidence*” that there were “*compelling reasons*” for the claimant not to make the claim within time (cl 45(5)(a)); (ii) be made within 7 working days of notice of the Secretary of State’s decision (cl 48(3)(a)); and (iii) be determined by the Upper Tribunal on the papers, within 7 working days of the application being made (cl 45(5)(b), 48(3)(b)). The Secretary of State is only required to consider the substance of the claim if she or the Upper Tribunal decides that there were “*compelling reasons*” why the claimant did not present it in time (cl 45(3) and 45(6)).

107.2. Clause 48(4) stipulates that Tribunal Procedure Rules must enable the Upper Tribunal to extend the time limits for presentation and/or determination of (i)

⁶⁵ An appeal following a grant of permission to appeal must be submitted within 7 working days of notice of permission being granted.

⁶⁶ The Secretary of State is only permitted to provide consent if she considers that there were “*compelling reasons*” for the individual not to have provided details of the matter prior to the deadline for submission of their suspensive claim (cl 47(6)).

appeals; (ii) applications for permission to appeal; and (iii) applications for declarations that there were “*compelling reasons*” why a suspensive claim was not made within time. However, the Upper Tribunal is only to have power to extend such time limits “*if it is satisfied that it is the only way to secure that justice is done in a particular case*” (cl 48(4)(a)). We discuss this safeguard at paragraph 110.4.3 below.⁶⁷

108. As to **challenges to decisions of the Upper Tribunal**:

- 108.1. In respect of a decision of the Upper Tribunal to allow or dismiss an appeal against a refusal of a suspensive claim, there is an avenue of appeal to the Court of Appeal (subject to the need to obtain permission): see cl 43(7) and s.13 of the Tribunals, Courts and Enforcement Act 2007 (“**TCEA 2007**”).
- 108.2. There is no right of appeal against a decision of the Upper Tribunal in respect of an application for permission to appeal or for a declaration that there were “*compelling reasons*” why a suspensive claim was not made within time (cl 44(7), 45(7)). The same applies to a decision of the Upper Tribunal as to whether there were “*compelling reasons*” why details of a particular matter were not provided to the Secretary of State before the deadline for submission of a suspensive claim (cl 47(8)).
- 108.3. Clause 49 seeks to exclude claims for judicial review of decisions of the Upper Tribunal on such applications, subject to very narrow exceptions.⁶⁸ It provides:

“(1) Subsections (2) and (3) apply in relation to a decision by the Upper Tribunal—

- (a) to grant or refuse permission to appeal in response to an application under section 44(2) (permission to appeal: claims certified as clearly unfounded),*
- (b) to grant or refuse an application for a declaration under section 45(4) (out of time claims), or*
- (c) to make or not make a determination under section 47(5)(b) (new matters).*

(2) The decision is final, and not liable to be questioned or set aside in any other court.

⁶⁷ The Bill also provides that Tribunal Procedure Rules must enable the Upper Tribunal to extend certain time limits by up to 3 working days where a “*new matter*” is raised (cl 48(4)(b)). Any such extension would in practice primarily be for the benefit of the Secretary of State, to enable them to consider and deal with the new matter.

⁶⁸ CI 51 provides for an equivalent ouster in the context of certain decisions by the Special Immigration Appeals Commission.

- (3) *In particular—*
- (a) *the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision;*
 - (b) *the supervisory jurisdiction does not extend to, and no application or petition for judicial review may be made or brought in relation to, the decision.*
- (4) *Subsections (2) and (3) do not apply so far as the decision involves or gives rise to any question as to whether—*
- (a) *the Upper Tribunal has or had a valid application before it under section 44(2) or 45(4),*
 - (b) *the Upper Tribunal is or was properly constituted for the purpose of dealing with the application, or, in the case of a decision mentioned in subsection (1)(c), for the purpose of making the decision, or*
 - (c) *the Upper Tribunal is acting or has acted—*
 - (i) *in bad faith, or*
 - (ii) *in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice.*
- (5) *In this section—*
- “decision” includes any purported decision;*
 - “the supervisory jurisdiction” means the supervisory jurisdiction of—*
 - (a) *the High Court, in England and Wales or Northern Ireland,*
 - or*
 - (b) *the Court of Session, in Scotland.”*

109. The requirement on an individual to produce “*compelling evidence*” that the factual basis of their claim is made out, at the stage of initial submission of the claim and on any appeal, is contrary to the jurisprudence of the European Court of Human Rights. See (e.g.) *Saadi v Italy* (37201/06, 28 February 2008) at [129], where the Court made clear that under the ECHR the burden on the applicant is only to produce sufficient evidence to show a *prima facie* case that removal would expose them to a relevant risk, and the onus is then on the government to dispel any doubts about the position. See also *Karanakaran v SSHD* [2000] 3 All ER 449 at 477, where the Court of Appeal emphasised the importance of considering all evidence (of varying degrees of cogency) when making an assessment of future risk.

110. Further, the provisions summarised above simultaneously (i) require the Secretary of State and the Upper Tribunal to take decisions under great time pressure, such that errors are likely to be made in many cases; and (ii) severely restrict, and very frequently prevent, individuals from mounting effective challenges to such decisions. In our view, the regime envisaged by the Bill is likely to result in procedural unfairness and individuals being denied access to justice in many cases. This is for the following reasons:

- 110.1. The deadline to submit a suspensive claim is very tight, especially when it is borne in mind that 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. Under the Bill, a person has just 8 days in which to (i) do 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 (or indeed anyone to tell them what the prescribed manner and form of application is).
- 110.2. The unfairness occasioned by the 8-day deadline for submission of a suspensive claim is not ameliorated by the possibility of submitting an out of time claim. The threshold for consideration of a claim made out of time is high – there must have been “*compelling reasons*” for not making the claim by the deadline (see paragraph 107 above), meaning an extension could not be granted even where there was a good or very good reason (as would, for example, be sufficient under the expanded ‘one-stop’ procedures recently introduced by the NBA 2022⁶⁹). Moreover, if a person does not submit a suspensive claim by the deadline, they are liable to be removed immediately – that is, before they have an opportunity to finish assembling and to submit their ‘late’ claim (cf cl 7(2)-(3)).
- 110.3. The unfairness associated with the 8-day deadline is accentuated by the restrictions on the admissibility of further evidence on appeal. In any event, even if further evidence is admitted, the timescales for appeals are tight. As explained above, the Secretary of State is expected to determine a suspensive claim within 4 days, and any appeal must be lodged within 7 working days thereafter. An

⁶⁹ See e.g. s. 19(4), s. 22(4), s. 26(2).

individual therefore has less than a fortnight to gather any additional evidence for their appeal. In practice, this is likely to be insufficient in many cases.

110.4. The Upper Tribunal's power to extend timescales "*if it is satisfied that it is the only way to secure that justice is done in a particular case*" is not an adequate safeguard against unfairness, for similar reasons to those articulated by the Court of Appeal in *R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber)* [2015] 1 WLR 5341 at [42]-[45]. In particular:

110.4.1. A key reason for seeking an extension of time would often be to enable factual inquiries to be made and evidence assembled (e.g. as to why a person would be at real, imminent and foreseeable risk of serious and irreversible harm, or to rebut an allegation that they had obtained leave to enter by deception). However, until such inquiries have been completed, it may not be possible to say whether they are likely to be fruitful, and it may therefore be difficult to persuade the Tribunal that the high threshold for extending time is met.

110.4.2. In practice, any application for an extension of time may well need to be made at the outset of the hearing listed to determine the appeal. This places an appellant in an invidious position since (i) in order to explain why an extension of time is required, they will need to identify the evidential gaps in their case, i.e. the gaps which they wish to have time to try to fill by obtaining further evidence; but (ii) if the application for an extension of time is refused, the appellant will then need to persuade the judge that the appeal should be allowed notwithstanding the gaps. In the words of Lord Dyson MR in *Detention Action* at [43], this is "*unfair and unjust*".

110.4.3. The expectation must be that the prescribed time limits will usually be applied.

110.5. When determining an application for a declaration that there were compelling reasons why a suspensive claim was not made within time, the Upper Tribunal has no power to hold an oral hearing. This is so even if the Upper Tribunal considers that an oral hearing would be necessary to secure that justice is done in

the case at hand. See cl 45(5)(b) (and contrast cl 44(5), which provides that, exceptionally, the Upper Tribunal may hold an oral hearing in respect of an application for permission to appeal, if the Tribunal considers this “*necessary to secure that justice is done in a particular case*”). The inability to convene an oral hearing poses a particularly high risk of injustice in cases where an applicant is unrepresented and unable to express themselves clearly in writing: for such individuals, an oral hearing would be critical in order to enable them to explain (and evidence) why they did not make their claim within time or raise a matter at an earlier stage. Moreover, as the Court of Appeal has recognised, an oral hearing with oral advocacy, lies at the heart of our legal system.⁷⁰

110.6. Where the Secretary of State has certified a claim as clearly unfounded, the Upper Tribunal can only grant permission to appeal if it considers that there is compelling evidence that (i) the factual basis of the claim is made out (cl 44(3)(a) and 44(4)); and (ii) in the context of a serious harm suspensive claim, the risk of serious harm is obvious (cl 44(3)(b)). If that high threshold is not met, the Upper Tribunal is obliged to refuse permission to appeal even if it considers that (i) the appeal would have a real prospect of success; and thus (ii) the Secretary of State had been wrong to certify the claim as clearly unfounded. Two particular points bear emphasis in relation to the test for permission to appeal:

110.6.1. When determining an appeal, the Upper Tribunal is simply required to determine whether the factual basis of the claim is made out (see cl 43(6)); the Upper Tribunal is not required to determine whether the evidence in support of the claim is compelling, or whether any risk is obvious. It makes no sense to set the bar for permission to appeal higher than the bar for allowing an appeal itself.

110.6.2. There is a risk that many claims will be certified as clearly unfounded because the claimant had insufficient time to assemble a strong application; it is therefore of particular concern that there should be

⁷⁰ *Sengupta v Holmes* [2002] EWCA Civ 1104 at para 38 (Laws LJ): “*That judges ... change their minds under the influence of oral argument is not an arcane feature of the system; it is at the centre of it.*”; para 47 (Keene LJ): “*oral argument ... is a fundamental part of our system of justice and it is a process which as a matter of common experience can be markedly more effective than written argument.*”

such a high hurdle to obtain permission to appeal following certification.

110.7. Clause 49 at least *prima facie* precludes any challenge to a decision of the Upper Tribunal, except on very narrow grounds. Indeed, cl 49 purports to preclude a challenge on the basis that the Tribunal had acted in breach of the principles of natural justice, unless the breach can be characterised as “*fundamental*” (whatever that may mean).

110.8. Clause 50 amends the definition of who is a “*judge of the Upper Tribunal*” in s.5(1) TCEA 2007, so that it includes any judge of the First-tier Tribunal. That in turn would include, e.g., Employment Judges (see s.4(1) TCEA 2007). The Bill therefore provides for a framework in which appeals could be determined by individuals who have no expertise in immigration law.

111. The procedural unfairness associated with the regime is likely to have serious practical consequences. In particular, if individuals are denied a fair opportunity to assemble cogent claims, and/or a fair opportunity to challenge adverse decisions, this is in practice likely to result in people with meritorious claims being removed, notwithstanding that this will expose them to a risk of serious and irreversible harm and in potential contravention of the UK’s international obligations as outlined above.

Specific concerns regarding ‘Henry VIII’ clauses

112. The Bill includes several provisions which would empower the Secretary of State to amend primary legislation, i.e. so-called ‘Henry VIII’ clauses. The principled objections to Henry VIII powers are well-known: see e.g. Lord Judge’s lecture “*Ceding Power to the Executive; the Resurrection of Henry VIII*”.⁷¹

113. The Henry VIII clauses in the Bill include powers (i) to amend the Schedule which lists the countries or territories to which a person may be removed (cl 6); (ii) to amend the definition of “*serious and irreversible harm*” for the purposes of serious harm suspensive claims (cl 39); and (iii) to amend the list of ‘safe states’, i.e. states whose nationals’ asylum claims must be declared inadmissible unless exceptional circumstances apply (cl 57).

⁷¹ Available at https://www.regulation.org.uk/library/2016_Henry_VIII_powers-Lord_Judge.pdf

114. These powers are of concern since (i) they would give the Secretary of State wide powers to make changes to primary legislation in ways which could have serious implications for individuals; and (ii) statutory instruments are in practice subject to a much lower degree of legislative scrutiny than Bills (see Lowe & Potter, *Understanding Legislation: A Practical Guide to Statutory Interpretation* (2018), [1.23]-[1.27] and *R (Public Law Project) v Lord Chancellor* [2016] AC 1531 at [22] per Lord Neuberger).⁷²

2D Provisions about leave, citizenship etc.

2D.1 Key features

115. As well as being exposed to removal, those caught by the Bill's core regime face a general and permanent bar on being granted leave to enter or remain in the UK, and on obtaining UK citizenship: cl 29-36.

116. The bar on leave to enter and remain has limited exceptions allowing for (presumptively temporary) periods of leave for unaccompanied children and some victims of modern slavery: cl 29(3), new s. 8AA(2)(a). There is also a carve-out where:

116.1. a person has been removed under the Bill's core regime and the Secretary of State considers that refusing limited leave to enter or entry clearance would contravene the ECHR (only) or there are "*other exceptional circumstances*";

116.2. the Secretary of State considers that refusing limited leave to remain would contravene the ECHR or the UK's obligations under "*any other international agreement*", or that there are "*other exceptional circumstances*";

116.3. the Secretary of State considers that refusing indefinite leave to remain would contravene the ECHR (only).

117. There is no general exception for those whose removal from the UK the Secretary of State or the courts have been unable to effect or have recognised as unlawful.⁷³ This is

⁷² Lord Judge calculated that only around 0.01% of statutory instruments are rejected: see the lecture cited above.

⁷³ The Explanatory Notes to the Bill suggest that a person who successfully challenges their removal "by way of judicial review on ECHR grounds" will be "allowed to return to the UK and be granted limited leave to enter and limited leave to remain". This is consistent with the exceptions in relation to a grant of entry clearance, but neither the Bill nor the Explanatory Notes speaks to the position of those who cannot be removed for other reasons, such as the unavailability of sufficient agreements with third countries or the Secretary of State recognising (without intervention from the courts) that removal to an otherwise available third country would be unlawful or inappropriate.

significant because, as noted above, the Bill prevents the removal of those caught by its core regime to their country of origin unless they are nationals of 80AA states; as a result, absent large-scale removal agreements, the Bill will result in large numbers of people being stuck in the UK without any form of leave, forced to rely on public funds because the Secretary of State cannot remove them or grant them leave to enable them to support themselves.

118. The bar on citizenship is similarly broad and permanent: cl 30-31. It applies even to children caught by the Bill's core regime: see e.g. cl 31(1)(a), 31(2)(a)(i). Again, there is an exception where the Secretary of State considers that a grant of citizenship is necessary to comply with the ECHR (though not with any other international obligations): cl 35.

2D.2 Legal issues arising from the bars on leave and citizenship

Overview

119. In our view, the Bill's provisions about leave and citizenship:

- 119.1. run contrary to the UK's obligation under Art. 31 of the Refugee Convention not to penalise refugees on the basis of their unlawful entry or presence;
- 119.2. are inconsistent with the UK's obligation under Art. 34 of the Refugee Convention and Art. 32 of the 1954 Statelessness Convention to facilitate the assimilation and naturalisation of refugees and stateless persons respectively; and
- 119.3. are likely to result in repeated breaches of Art. 8 ECHR and/or Art. 14 CAT in individual cases.

Breach of Art. 31 of the Refugee Convention

120. The duty of non-penalisation under Art. 31 of the Refugee Convention is described in paragraphs 75-88 above. For the same reasons given at paragraphs 79-80, permanent bars to leave to enter/remain and to citizenship, in our view, are inconsistent with the Refugee Convention because their effect is to deny access to Convention rights, and in any event constitute penalties imposed by the Bill on account of the unlawful entry of those caught by its core regime. For the reasons given at paragraphs 82-88, the carve-out contained in cl 2(4) is too narrow to protect all those who should be covered by Art. 31.

121. It may be possible for an individual asylum-seeker to request a grant of limited leave to remain (only) on the basis that this was necessary in order to comply with the UK's obligations under Art. 31 (pursuant to cl 29(3) – see paragraph 116 above). However:
- 121.1. This option would only realistically be available to those able to secure legal representation. It is not clear whether legal aid would be available for an application of this kind, rendering the prospect still more remote.
- 121.2. If the Secretary of State took the view that a grant of leave was not required to ensure compliance with Art. 31, the only remedy would be judicial review. Again, this would only be realistically available with legal representation.
122. As a result, the Bill's provisions on leave and citizenship are inconsistent with the Refugee Convention and likely to lead to breaches of Art. 31.

Breach of Art. 34 of the Refugee Convention

123. Article 34 of the Refugee Convention provides *inter alia* that “*Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees.*” Article 32 of the 1954 Statelessness Convention is in materially identical terms. This is a duty of means rather than 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.*”⁷⁴ Naturalisation as a citizen is the endpoint of the scheme of the Refugee Convention, which allocates rights according to the refugee's level of attachment to the host state. As the 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.”⁷⁵
124. This is precisely the kind of system the Bill establishes. It envisages that asylum-seekers who would meet the refugee definition if their claims were considered, and cannot practicably and lawfully be removed from the UK, will be kept in a precarious state almost indefinitely and will never be granted citizenship unless international law

⁷⁴ Hathaway, pp 1215-1216.

⁷⁵ UNHCR Observations on the New Plan (4 May 2021), [11].

definitively requires it in their individual case.⁷⁶ Far from seeking to help refugees meet the usual requirements for citizenship, the Bill places a permanent and (for most) insuperable barrier in their way. This contravenes Art. 34 of the Refugee Convention and Art. 32 of the 1954 Statelessness Convention.

125. In addition, Article 4(1) of the 1961 Statelessness Convention requires Contracting States to “grant [their] nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality of one of his parents at the time of the person’s birth was that of that State” Contracting States may only refuse an application for naturalisation made pursuant to Art. 4(1) for failure to comply with the types of condition envisaged in Art. 4(2) (which, for example, permits a requirement that an application be made before the person reaches a certain age). Because the carve-out in cl 35 is limited to situations where the refusal of citizenship would breach the ECHR, Art. 4 will be breached in any case which falls within the scope of Art. 4(1) and in which the refusal is based on the applicability of the Bill’s core regime.

Breach of Art. 8 ECHR and/or Art. 14 CAT

126. It is well established that leaving an individual without status for a prolonged period of time is likely, at a certain point, to breach their rights under Art. 8 ECHR.⁷⁷ As noted at paragraph 117 above, unless a sufficient number of third-country removal arrangements could be concluded in short order, the Bill is likely to leave a large number of people in precisely this kind of limbo.

127. As also noted above, the Bill does make provision for a grant of leave where the Secretary of State considers this necessary to comply with the ECHR. Again, however, in reality this is likely to require an express application from the person concerned – such that breaches of Art. 8 will be avoided only for those fortunate enough to have timely access to legal representation. The near-inevitable result will be ongoing breaches of Art. 8 in large numbers of individual cases.

128. In addition, Art. 14(1) CAT requires States Parties to ensure in their legal systems that victims of torture “obtain redress and have an enforceable right to fair and adequate

⁷⁶ For example, in the unusual case where denial of citizenship engaged Art. 8 ECHR and where the denial was found to breach Art. 8 because it was “arbitrary”: see e.g. *Genovese v Malta* (2011) 58 EHRR 25.

⁷⁷ See e.g. *RA (Iraq) v SSHD* [2019] 4 WLR 132.

compensation, including the means for as full rehabilitation as possible.” The qualification “*as full ... as possible*” does not relate to the availability of the State’s resources, but reflects the reality that the “*pervasive effect of torture*” may prevent victims from ever fully recovering their dignity, health and self-sufficiency.⁷⁸ The obligation applies to all victims of cruel, inhuman or degrading treatment.⁷⁹ Securing the “*means*” for rehabilitation – including medical, physical, psychological and/or social rehabilitation⁸⁰ – may in certain cases require a grant of leave to enter or remain in the UK, given that rehabilitation aims to restore the victim’s “*full inclusion and participation in society*”, with “*a high priority*” being placed “*on the need to create a context of confidence and trust*”.⁸¹ Compliance with Art. 14 may technically be possible under the carve-out for leave to enter or remain in “*exceptional circumstances*” or limited leave to remain where the Secretary of State considers that refusal would contravene the UK’s obligations under other international agreements. However, the practical reality is that only victims of torture who obtain timely legal representation are likely to be able to avail themselves of these avenues, whereas access to rehabilitation “*should not depend on the victim pursuing judicial remedies.*”⁸² Moreover the bar on granting ILR to those caught by the core regime is not subject to an exception by reference to Art. 14 CAT.

2E Provisions about modern slavery

2E.1 Key features

129. Where potential or confirmed victims of modern slavery are caught by the Bill’s core regime, they are denied key protections to which they would otherwise be entitled (as set out below). In effect this puts them in the same position as those currently disqualified from modern slavery protection under s. 63 of the NBA 2022 on the basis that they are a “*threat to public order*” or have made their claim in bad faith. We recall that the Bill’s core regime applies irrespective of whether a person was coerced, controlled or deceived in their journey to the UK, for example by traffickers: see paragraph 39 above.

⁷⁸ UN Committee Against Torture, *General Comment No 3 on the Implementation of Article 14 by States Parties* (2012), CAT/C/GC/3 (General Comment 3), para 12; Nowak, Birk and Monina, *The UN Convention Against Torture: A Commentary* (2nd Ed, OUP 2019) (“Nowak et al”), p 411.

⁷⁹ *Ibid.*, para 1

⁸⁰ See e.g. Nowak et al., p 411.

⁸¹ General Comment 3, paras 11, 13.

⁸² General Comment 3, para 15.

130. **First**, under the NBA 2022, where a person has received a positive ‘reasonable grounds’ decision they may not be removed from the UK for thirty days or until they receive a ‘conclusive grounds’ decision, whichever is later: s. 61. Those caught by the Bill’s core regime are excluded from this protection: cl 21(1)-(2). There are very narrow exceptions:

130.1. Where the Secretary of State is satisfied that the person is cooperating with a public authority in connection with an investigation or criminal proceedings relating to their exploitation; that it is necessary for them to be in the UK to provide that cooperation; and that the public interest in this occurring is not outweighed by any significant risk of serious harm to the public: cl 21(3)-(4). By new amendments, the Secretary of State is required to assume that the person’s presence in the UK is not necessary unless there are “*compelling reasons*” for taking this view: cl 21(5)-(6).

130.2. For the parents/children of a person who comes within this first exception: cl 21(7).

131. **Second**, under the Modern Slavery Act 2015 a person who has received a positive reasonable grounds decision is entitled, during their “*recovery period*” (of a minimum of thirty days – see above), to the assistance and support necessary to help them recover from exploitation: s. 50A. Potential victims of trafficking caught by the Bill’s core regime are disentitled to this assistance: cl 22.

132. **Third**, under the NBA 2022, where a person receives a positive conclusive grounds decision the Secretary of State must generally⁸³ grant limited leave to remain in the UK if she considers this necessary for the purpose of assisting the person in their recovery from exploitation; enabling them to seek compensation; or enabling them to cooperate with a public authority in connection with an investigation or criminal proceedings: s. 65. The provisions discussed in section 2D mean that those caught by the Bill’s core regime are automatically ineligible for this form of leave (as for all others), subject to the exceptions identified. The Bill also gives the Secretary of State a broad power to revoke grants of leave previously made under s. 65 where a person has since been caught by the core regime: cl 21(8)-(9).

⁸³ Unless the person is a threat to public order or has claimed to be a victim of modern slavery in bad faith: s. 65(6)-(7).

133. The overall result is that potential victims of trafficking will be denied support and removed from the UK on the same basis as other “illegal” entrants (and subject to the same extremely limited safeguards – see section 2C). By implication, this will occur:

133.1. in the case of potential victims, without the Secretary of State ever making a conclusive grounds decision as to whether they are a victim of modern slavery;⁸⁴ and

133.2. in the case of confirmed victims, irrespective of that fact.

134. The Bill provides for these sections to be suspended after two years: cl 25(1). The Secretary of State has the power to change this date via regulations, or to revive sections which have already been suspended for rolling 12-month periods: cl 25(3)-(9).⁸⁵ This effectively gives the Secretary of State significant control over how long this primary legislation remains in force, with limited legislative and no judicial oversight.

2E.2 Legal issues arising from provisions about modern slavery

Overview

135. In our view, the provisions of the core regime which relate to modern slavery:

135.1. breach the UK’s obligations under Art. 10 ECAT, and risk breaching Art. 13 ECAT, by allowing potential victims of trafficking to be removed before the identification process is complete and by depriving them of the support and assistance to which they are entitled in the interim;

135.2. are likely to result in breaches of the UK’s obligations under Art. 4 ECHR and Art. 16 ECAT by removing victims and thereby exposing them to the risk of re-trafficking; and

135.3. are likely to result in breaches of the UK’s “operational” or “protective” duty, and/or its “investigative” duty, under Art. 4 ECHR.

⁸⁴ The Secretary of State’s current guidance for caseworkers makes it clear that, when a person is “disqualified” under s. 63 NBA 2022, “where a Conclusive Grounds decision has not yet been made, a Conclusive Grounds decision will not be made”: *Modern Slavery: Statutory Guidance for England and Wales*, v 3.1, p 166.

⁸⁵ Regulations providing for “revival” must be approved via the affirmative resolution procedure unless the Secretary of State considers there is an “urgent need” to bypass this process (in which case she can obtain a 28-day reprieve before an affirmative resolution is required): cl 26.

Breach of Arts. 10 and 13 ECAT

136. Article 10 of ECAT, a cornerstone of the UK's international obligations to victims of modern slavery, requires States Parties to:

136.1. *“Ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process... has been completed.”*

The words *“removed from its territory”* refer *“both to removal to the country of origin and [to] removal to a third country.”*⁸⁶

136.2. *“Ensure that the person receives the assistance provided for in Art. 12, paragraphs 1 and 2.”* This includes, *“as may be necessary to assist victims in their physical, psychological and social recovery”*: appropriate and secure accommodation; psychological and material assistance; access to emergency medical treatment; translation/interpretation services; counselling and information; representation; and access to education for children: Art. 12(1)-(2). These are the forms of support usually provided under s. 50A of the Modern Slavery Act.

137. Article 13 ECAT further requires States Parties to *“provide in [their] internal law a recovery and reflection period of at least 30 days, where there are reasonable grounds to believe that the person concerned is a victim [of trafficking].”* During this period, States Parties must:

137.1. *“Authorise the persons concerned to stay in their territory”*, such that *“it shall not be possible to enforce any expulsion order”* against them: Art. 13(1).

137.2. Provide them with the types of assistance set out in Art. 12(1)-(2): Art. 13(2).

138. Article 13 goes beyond Art. 10 in that it requires observance of the recovery and reflection period even if the identification process is rapidly completed.

139. States Parties are not bound to observe the recovery and reflection period *“if grounds of public order prevent it or if it is found that victim status is being claimed improperly”*: Art. 13(3). The Secretary of State contends that this *“public order”* exemption authorises

⁸⁶ ECAT Explanatory Report, [133].

the exclusions summarised above, on the basis that “*it is in the interests of the protection of public order ... to prevent persons from evading immigration controls in this country, to reduce or remove incentives for unsafe practices or irregular entry, and to reduce the pressure on public services caused in particular by illegal entry into the UK.*”⁸⁷

140. In our view this is incorrect, for two key reasons.

141. **First**, the “*public order*” exemption relates only to Art. 13. There is no equivalent exemption in or for Art. 10, which – as the Court of Appeal has put it – “*provides for an interim period between a ‘reasonable grounds’ decision and the end of the ‘identification process’ [during which] the potential victim (1) ‘shall not be removed’ and (2) must receive the assistance specified in paragraphs 1 and 2 of Art. 12*”: *R (EOG) v SSHD* [2023] QB 351, [7].

142. Potential victims of trafficking cannot be excluded from these protections (or from the identification process more generally) on public order grounds, and certainly not on the grounds of unlawful entry or presence. Indeed, one of the express purposes of Art. 10 is to ensure that victims who are illegally in the territory of a State Party are not removed before, and are protected and supported until, the identification process is complete. As the Explanatory Report to ECAT says (emphasis added):

“131. Even though the identification process is not completed, as soon as competent authorities consider that there are reasonable grounds to believe that the person is a victim, they will not remove the person from the territory of the receiving State. Identifying a trafficking victim is a process which takes time. [...] Many victims, however, are illegally present in the country where they are being exploited. Paragraph 2 [of Art. 10] seeks to avoid their being immediately removed from the country before they can be identified as victims. Chapter III of the Convention secures various rights to people who are victims of trafficking in human beings. Those rights would be purely theoretical and illusory if such people were removed from the country before identification as victims was possible.”

143. As a result, the Bill breaches Art. 10 ECAT by permitting – indeed mandating (cl 2) – the attempted removal of potential victims before a conclusive grounds decision is made; and by depriving them of the support and protection to which they are entitled in the interim.

⁸⁷ Explanatory Notes to the Bill, [135]; see also [119].

144. **Second**, the “*public order*” exemption in Art. 13 cannot properly be invoked in the wide, blanket fashion the Bill envisages – one which applies it not only to all unlawful arrivals, but to their close family members irrespective of how they arrived.

145. As the Explanatory Report to ECAT makes clear, Art. 13 “*is intended to apply to victims of trafficking in human beings who are illegally present in a Party’s territory*”, who are all the more vulnerable due to the risk of removal: [172] (emphasis added). As a result, Art. 13(1) is described as introducing “*a recovery and reflection period for illegally present victims during which they are not to be removed*”: [173].⁸⁸ As a result, illegal presence alone – and still less being a family member of someone unlawfully present – cannot constitute “*grounds of public order*” capable of “*preventing*” the observance of this period. This would be incompatible with the protections Art. 13 is intended to provide. As a result, and notwithstanding the invocation of public order, the Bill’s provisions breach Art. 13 as well as Art. 10.

146. We note for completeness that the carve-out for potential victims who are co-operating with the authorities (see paragraph 130 above) does not avoid the breaches identified: the Explanatory Report to ECAT explains in terms that observance of the recovery and reflection period is “*not conditional on [potential victims] co-operating with the investigative or prosecution authorities*”: [175]. This is at least in part because the drafters recognised that a rest and recovery period may be necessary before victims came to be in a sufficiently stable position as to be able to co-operate with the authorities (as expressly recognised in Art. 13(1), which refers to a period “*sufficient for the person concerned to... take an informed decision on cooperating with the competent authorities*”). We consider the significance of this further below.

Risk of removal in breach of Art. 4 ECHR and Art. 16 ECAT

147. Article 4 ECHR provides that “*no one shall be held in slavery or servitude*”. As a right of first importance under the ECHR, it also has a preventive component, which includes (relevantly) the duty not to remove an individual to another state where there are substantial grounds for believing that they would face a real risk of being subject to trafficking: see paragraph 60.3 above.

⁸⁸ See also [178].

148. Article 16 ECAT provides, *inter alia*, that where a State Party returns a victim of trafficking to another state, “*such return shall be with due regard for the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim, and shall preferably be voluntary.*”
149. We have discussed in section 2C.2 above how the Bill’s core regime gives rise to a serious risk of removal in breach of Arts. 2, 3 and 4 ECHR. For the same reasons, we consider it likely to give rise to returns in breach of Art. 16 – in particular because they will be effected without “*due regard*” for the rights or safety of victims of trafficking. This is most likely to occur in cases where a victim is unable to access the representation required to obtain urgent injunctive relief against removal to a third state on the basis of a breach of their Convention rights – because, as explained above, the Secretary of State intends to remove them without giving any claim falling short of a “*serious harm*” suspensive claim even the most cursory scrutiny.

Risk of other breaches of Art. 4 ECHR

150. Another important preventive duty arising under Art. 4 ECHR is the “operational” or “protection” duty, which requires Contracting States to take reasonable steps to protect potential or confirmed victims of trafficking.⁸⁹ This duty is engaged where there is a “*credible suspicion*” that a person faces a real, present and continuing risk of being trafficked or re-trafficked.⁹⁰ One of the most important ways Contracting States discharge this duty is via the support and assistance provided to potential victims during the recovery and reflection period.⁹¹ In our view, removing this support from those caught by the Bill’s core regime risks resulting in large-scale breaches of the operational duty in individual cases.
151. Finally, Art. 4 ECHR also encompasses the “investigative” duty – engaged at the same point – to conduct an effective investigation capable of leading to the identification and prosecution of traffickers.⁹² As noted above, the Bill envisages removal even during the recovery and reflection period save where a person is already cooperating with the

⁸⁹ See *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, [286]; *Chowdury v Greece*, Application No. 21884/15, 30 March 2017, [88]; *R (TDT (Vietnam)) v SSHD* [2018] 1 WLR 4922, [17].

⁹⁰ See e.g. *TDT*, [44]-[45]; *Batayav v SSHD* [2003] EWCA Civ 1489, [37]-[38].

⁹¹ As recognised by the ECtHR in *VCL and AN v UK* (App. Nos. 77587/12 and 74603/12, 16 February 2021), [152]-[153].

⁹² *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, [288].

authorities and the Secretary of State considers there are “*compelling circumstances*” requiring that they be in the UK to do so. In our view this is likely to result in breaches of the investigative duty because it risks the removal of individuals:

151.1. Who are not yet cooperating with the authorities, but might have chosen to do so had they been afforded a recovery and reflection period without threat of removal. As noted above, Art. 13(1) expressly recognises that one of the purposes of this period is to facilitate an informed decision about such cooperation.

151.2. Whose presence in the UK is required for an effective investigation, where the Secretary of State considers that the need falls short of “*compelling circumstances*”.

152. As a result, these provisions are liable to thwart the UK’s ability to identify and prosecute traffickers.

3 EXPANSION OF THE INADMISSIBILITY REGIME

3A Key features

153. Clause 57 seeks to expand the automatic inadmissibility regime for asylum applicants generally, i.e. not only in respect of those who meet the four conditions set out at cl 2.⁹³

154. Under the present rules, the Secretary of State must declare an asylum claim made by a national of an EU member State inadmissible (s. 80A of the Nationality, Immigration and Asylum Act 2002 (“**NIAA 2002**”). This means that the claim cannot be considered under the Immigration Rules, unless “*there are exceptional circumstances as a result of which the Secretary of State considers that the claim ought to be considered*” (s. 80A(4) NIAA 2002) (“**the Exceptional Circumstances Carve-Out**”).

155. Clause 57 would expand the inadmissibility regime as follows:

155.1. The list of so-called ‘safe countries’ for these purposes (the “**Safe List**”; to be inserted at s. 80AA(1) NIAA 2002) would be expanded to include the non-EU

⁹³ An asylum application or human rights claim made by a person who meets the four conditions under cl 2 will be declared inadmissible pursuant to cl 4(2).

EEA countries (Iceland, Liechtenstein and Norway), Switzerland and, most notably, Albania (cl 57(3)).

155.2. The Secretary of State would be empowered to add other countries to the Safe List, if satisfied that “(a) *there is in general in that State no serious risk of persecution of nationals of that State, and (b) removal to that State of nationals of that State will not in general contravene the United Kingdom's obligations under the Human Rights Convention*” (cl 57(2)-(3); s. 80AA(2)-(3) NIAA 2002). The generalised assessment for adding states to this Safe List (based on risks to nationals of that state in general), provides a lower threshold than the individualised assessment required in order to remove an individual to a safe third state at s. 80B(4) NIAA 2002 (based on risks to the Claimant).⁹⁴

155.3. The Secretary of State would also be required to declare inadmissible human rights claims made by nationals of states on the Safe List (in addition to asylum applications).⁹⁵ At present, the Secretary of State may certify as “*clearly unfounded*” a protection claim or human rights claim made by an individual who is entitled to reside in a list of countries set out at s. 94(4) NIAA 2002. The relevant individual is thereby prevented from bringing an appeal against a decision on that claim to the First-tier Tribunal under s. 82 NIAA 2002. Under cl 57, however, nationals of Safe List states would not have their human rights claims considered at all under the Immigration Rules, except in exceptional circumstances.

155.4. The amended version of s. 80A would retain the Exceptional Circumstances Carve-Out. As defined by s.80A(5) NIAA 2002, ‘exceptional circumstances’ for these purposes include:

⁹⁴ S. 80B(4) NIAA 2002 provides that “[A] State is a “safe third State” in relation to a claimant if— (a) the claimant's life and liberty are not threatened in that State by reason of their race, religion, nationality, membership of a particular social group or political opinion, (b) the State is one from which a person will not be sent to another State— (i) otherwise than in accordance with the Refugee Convention, or (ii) in contravention of their rights under Art. 3 of the Human Rights Convention (freedom from torture or inhuman or degrading treatment), and (c) a person may apply to be recognised as a refugee and (if so recognised) receive protection in accordance with the Refugee Convention, in that State.”

⁹⁵ ‘Human rights claim’ is defined at s. 113 NIAA 2002 as “a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Convention).”

- 155.4.1. When the State is a signatory to the Human Rights Convention and is derogating from any of its obligations under the Convention, in accordance with Art. 15 (s. 80A(5)(a)) (“**the ECHR Carve-Out**”). Art. 15 of the Convention provides that in times of war or other public emergencies, Contracting States may take measures derogating from their obligations under the Convention “*to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*” In such circumstances the state in question must inform the Secretary General of the Council of Europe of the measures taken and the reasons therefor;
- 155.4.2. When the State is an EU Member State and a procedure has been initiated in accordance with Art. 7 of the Treaty on European Union (“**TEU**”), by which the State may be warned or sanctioned in respect of the risk or existence of a serious breach of the values referred to in Art. 2 of the Treaty, namely “*respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*” (“**the TEU Carve-Out**”).

3B Legal issues

156. The designation of safe countries of origin is generally accepted as a legitimate procedural tool, which authorities may use to prioritise or accelerate the examination of asylum applications, so long as sufficient safeguards are in place.⁹⁶ However, the proposed provisions do not include sufficient safeguards and pose serious risks of *refoulement*, and other violations of the Refugee Convention.

⁹⁶ The historic presumption of safety in respect of EU member states derives from the development of a shared system of refugee and human rights law across the EU, published in English, which allowed courts and decision makers in the UK to monitor that minimum standards of safety were upheld in respective states. The procedures under Art. 7 TEU allowed member states and the relevant authorities to hold states to account if they were to derogate from such standards. S. 80A was inserted into NIAA 2002 by s.15(1) of the Nationality and Borders Act 2022, in order to replicate the presumption of safety in respect of EU members states under EU law, after the UK had left the EU, and s. 80A still refers to Art. 7 TEU.

157. In our view, the concerns are particularly acute in respect of Albania. UK Visas and Immigration’s ‘Country policy and information note’ on human trafficking in Albania of February 2023, for example, states that “*there remains a risk of re-trafficking and other harm for some victims on return, and is likely to be greater for females than males.*” Indeed, in the first half of 2022, 55 percent of adult asylum applications by Albanian nationals were successful at the initial Home Office decision, 90 percent of which were made by women.⁹⁷ The Country policy states that “*the onus is on the person claiming asylum to credibly evidence that they face a real risk of persecution or serious harm on return to Albania.*” Where asylum and human rights claims by Albanian nationals are automatically to be declared inadmissible, however, those individuals will not have the opportunity to provide such evidence.
158. In accordance with the ECHR Carve-Out, nationals of Albania may only rely on exceptional circumstances to avoid their claims being declared inadmissible if Albania were to derogate from its ECHR obligations in accordance with Art. 15 ECHR (i.e. in the context of war or another public emergency). The ECHR Carve-Out is too narrow, however, to capture the many well-founded claims which may be made in the event that state protections in Albania are unavailable to the individual or insufficient to protect them from the risk of persecution. The UK Visas and Immigration Country Policy noted above, for example, states that: “*The onus is on the person claiming asylum to explain and substantiate why the ‘layers’ of protection available – that is, by the state and/or NGOs, shelters, support and re-integration services – would be unavailable to them. Each case must be considered on its individual facts and merits.*” The expansion of the inadmissibility regime as proposed by cl 57 would not allow each case to be so considered, exposing potentially large numbers of individuals to *refoulement*.
159. The expansion of the inadmissibility regime to apply to human rights claims is also likely to lead to ECHR breaches. Unlike protection claims, human rights claims are often made based on the claimant’s connection to the UK (e.g. having a partner or children in the UK, or being dependent on a person in the UK).⁹⁸ As noted above, the proposed

⁹⁷ See The Migration Observatory, ‘*Albanian asylum seekers in the UK and EU: a look at recent data*’ (4 November 2022), which analysed Home Office immigration statistics, accessible at: <https://migrationobservatory.ox.ac.uk/resources/commentaries/albanian-asylum-seekers-in-the-uk-and-eu-a-look-at-recent-data/> (last accessed 11 April 2023).

⁹⁸ See e.g. *Maslov v Austria* (App. No. 638/03, 23 June 2008) at [96]-[97], [100]-[101]; and *Üner v the Netherlands* (App. No. 46410/99, 18 October 2006) at [62]-[64].

expansion of the inadmissibility regime applies generally, and not only to individuals targeted by the cl 2 conditions. Accordingly, the provisions would mean that a claim brought by a Norwegian national based on the right to private life, having lived in the UK for a lengthy period (e.g. on a Spouse Visa or a Skilled Worker Visa), would automatically be declared inadmissible. The individual's claim would not be considered under the Immigration Rules, and there would be no right of appeal (s. 80A(3) NIAA 2002). Such outcome does not accord with the stated purpose of the Bill (i.e. "*to prevent and deter unlawful migration*": cl 1(1)), and may expose individuals from Safe List states to discrimination on the basis of nationality.⁹⁹

4 EXPANSION OF THE POWERS OF DETENTION

4A Key features

4A.1 Detention of those within scope of removal regime

160. Under cl 10, the Secretary of State would be given new discretionary powers to detain individuals whom she suspects to be caught by the Bill's regime. In particular: cl 10(1)-(3) would amend Sch. 2, para. 16(2) of the 1971 Act, inserting a new para. 16(2C); and (ii) cl 10(5)-(10) would amend s. 62 NIAA 2002. Broadly, these provisions would confer on the Secretary of State the powers to detain individuals in circumstances in which:

160.1. the immigration officer suspects that the individual meets the four conditions set out under cl 2, pending a decision on whether those conditions are met;

160.2. if the immigration officer suspects that the Secretary of State has a duty to remove the individual under cl 2, pending a decision on whether the duty applies;

160.3. if the Secretary of State has a duty to remove the individual under cl 2, pending the individual's removal from the UK; or

160.4. the individual is an unaccompanied child, in respect of whom the Secretary of State does not have a duty to remove, but whom the Secretary of State may detain pending a decision to remove (under cl 3(2)) or a decision to grant leave to enter or remain. Pursuant to amendments to the Bill prior to it reaching the House of

⁹⁹ Contrary e.g. to Art. 1 of the International Convention on the Elimination of All Forms of Racial Discrimination, which prohibits discrimination on the basis of national origin.

Lords, the Secretary of State may only detain an unaccompanied child in accordance with regulations the Secretary of State may make under cl 10(2D)-(2G), which regulations may confer a discretion on the Secretary of State (see further Section 6 below on the treatment of children).

161. Amendments in the House of Commons also removed the previously proposed power to detain “*relevant family members*” of individuals suspected of meeting the cl 2 conditions.
162. The current powers to detain under Sch. 2, para. 16(2) to the 1971 Act and s. 62 NIAA 2002, may be exercised where the Secretary of State has “*reasonable grounds for suspecting*” that the person meets the relevant criteria. Cl 10 would appear to lower that threshold, such that the Secretary of State (or the case workers making the decision) may detain on the basis of subjective suspicion that the relevant conditions apply.
163. Protections for vulnerable individuals included in the current legislation are omitted from the new proposals:
 - 163.1. The proposed provisions do not include a carve-out in respect of unaccompanied children. Paras. 16(2A) and 18B of Sch. 2 to the 1971 Act (as amended by ss. 5(2) and 5(4) of the Immigration Act 2014), provide that unaccompanied children may not be detained for more than 24 hours (among other limitations), pending a decision as to whether an immigration officer will give directions in order to effect the child’s removal.¹⁰⁰ Such limitations do not apply in respect of the proposed powers to detain.
 - 163.2. Clause 10(11) also disapplies statutory limitations on the detention of pregnant women. In particular, s. 60 of the Immigration Act 2016 provides that, where the Secretary of State is satisfied that a woman is pregnant, the woman may not be detained under “*a relevant detention power*”, save where she is shortly to be removed or where exceptional circumstances justify the detention, and in those circumstances, may be detained for a maximum of 72 hours or seven weeks where personally authorised by a Minister of the Crown. Cl 10(11) amends the definition of the relevant detention powers (under s. 60(8)(c) of the 2016 Act) to exclude the powers conferred on the Secretary of State by virtue of cl 10.

¹⁰⁰ As reiterated by the proposed new para. 17A(3)(b) to Sch 2 to the 1971 Act (pursuant to cl 11(1)(b) of the Bill).

164. The Bill would also expand the locations in which an individual may be detained, with the potential particularly to impact vulnerable individuals. Cl 10(2) proposes to insert into Sch. 2, para. 16(2) of the 1971 Act: “(2I) A person (of any age) detained under subparagraph (2C) may be detained in any place that the Secretary of State considers appropriate” (emphasis added). These provisions confer upon the Secretary of State a much broader discretion as to the place in which a person may be detained, not confined to the limited list of places set out under the Immigration (Places of Detention) Direction 2021 and Short-term Holding Facility Rules 2018.

4A.2 Expansion of detention powers more widely

165. Clause 11 of the Bill would modify the Secretary of State’s detention powers under Sch. 2 to the 1971 Act generally, not only in respect of individuals caught by the Bill’s regime. In particular, cl 11 would amend Sch. 2 to provide that:

165.1. A person liable to be detained pursuant to any of the detention powers under paragraph 16 “*may be detained for such period as, in the opinion of the Secretary of State, is reasonably necessary to enable the examination or removal to be carried out, the decision to be made, or the directions to be given*” (emphasis added) (new paragraph 17A(1));

165.2. The powers to detain under subparas. (1) to (2), (2C), (3) and (4) of paragraph 16 (i.e. not only (2C)) which relates to the regime of the Bill) “*apply regardless of whether there is anything that for the time being prevents the examination or removal from being carried out, the decision from being made, or the directions from being given*” (new paragraph 17A(2)); and

165.3. While a person is detained under para. 16 generally, and “*the Secretary of State no longer considers that the examination or removal will be carried out, the decision will be made, or the directions will be given within a reasonable period of time*”, the person may be detained for “*such further period as, in the opinion of the Secretary of State, is reasonably necessary to enable such arrangements to be made for the person’s release as the Secretary of State considers to be appropriate*” (new paragraph 17A(4)-(5)).

166. Clause 12(4) is an ouster clause:

- 166.1. The clause seeks 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 (i.e. pursuant to the powers inserted into the 1971 Act and the 2002 Act, by way of cl 10(1)-(3) and (5)-(10) respectively).
- 166.2. The ouster also applies for the first 28 days after the Secretary of State has refused to grant immigration bail to a person detained under the same powers.
- 166.3. Clause 12(4) provides (by way of amendment to Sch. 10 to the Immigration Act 2016) that in respect of decisions to detain (under para. 16(2C) of Sch. 2 to the 1971 Act, or ss. 62(2A) or (2B) NIAA 2002) or a refusal to grant immigration bail (where the person is detained under the same powers):
- 166.3.1. the decision is final and is not liable to be questioned or set aside in any court;
 - 166.3.2. the relevant powers are not to be regarded as having been exceeded by reason of error made in reaching the decision; and
 - 166.3.3. the supervisory jurisdiction does not extend to, and no application or petition for judicial review may be made or brought in relation to the decision.
- 166.4. Exceptions to the outcomes set out in subparagraph 166.3 above apply:
- 166.4.1. in cases in which the decision involves or gives rise to any question as to whether the immigration officer or Secretary of State has acted in bad faith, or in a procedurally defective way amounting to a fundamental breach of the principles of natural justice; and
 - 166.4.2. in respect of applications for a writ of *habeas corpus*.

4B Legal issues

4B.1 Limiting the court's jurisdiction by way of the Hardial Singh principles

167. The proposed amendments represent a significant expansion of the Secretary of State's powers regarding the authorisation of immigration detention.

168. Paragraph 87 of the Explanatory Notes to the Bill states that cl 11 replaces “*in part*” the common law principles limiting the Secretary of State’s powers of detention, with a “*codified statutory version*” of certain of those principles. The Bill is in fact inconsistent with the relevant principles, known as the *Hardial Singh* principles,¹⁰¹ the authoritative formulation of which was set out by Lord Dyson at [22] of *R (Lumba) v SSHD* [2012] 1 AC 245:

“(i) *The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;*
(ii) *The deportee may only be detained for a period that is reasonable in all the circumstances;*
(iii) *If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention;*
(iv) *The Secretary of State should act with reasonable diligence and expedition to effect removal.*”

169. It has long been for the courts to decide what amounts to a reasonable period of detention under the second and third *Hardial Singh* principles (two principles which the Bill purports to codify) (*R (A) (Somalia) v SSHD* [2007] EWCA Civ 804; [2007] ACD 93 at [62] per Toulson LJ, and [71] per Keene LJ). Keene LJ noted in *R (A) (Somalia)* at [71] that this was the “*approach adopted in practice in the domestic cases*” including *Hardial Singh* itself, and that it would be a “*remarkable proposition that the courts should have only a limited role where the liberty of the individual is being curtailed by administrative detention.*” This should be understood in the context that the courts have long recognised the liberty of the individual as a “*fundamental constitutional principle*”,¹⁰² and that “*every detention is prima facie unlawful and that it is for a person directing imprisonment to justify his act.*”¹⁰³

¹⁰¹ Deriving from the judgment of Woolf J (as he then was) in *R v Governor of Durham Prison, Ex p Hardial Singh* [1984] 1 WLR 704, p. 706.

¹⁰² *R (Lumba) v SSHD* [2012] 1 AC 245 at [219] per Lord Collins, citing Sir Thomas Bingham MR (in *re S-C (Mental Patient: Habeas Corpus)* [1996] QB 599, 603).

¹⁰³ *Lumba* at [44] per Lord Dyson, citing *Allen v Wright* (1838) 8 C & P 522 and Lord Atkin's dissenting speech in *Liversidge v Anderson* [1942] AC 206, 245. See further Keene LJ at [71] of *R (A) (Somalia)*: “*Classically the courts of this country have intervened by means of habeas corpus and other remedies to ensure that the detention of a person is lawful, and where such detention is only lawful when it endures for a reasonable period, it must be for the court itself to determine whether such a reasonable period has been exceeded.*” Lord Bingham of Cornhill also stated in ‘Personal Freedom and the Dilemma of Democracies’ (2003) 52 ICLQ 841–858: “*Freedom from executive detention is arguably the most fundamental and probably the oldest, the most hard won and the most universally recognised of human rights*”. Lord Scarman also clarified in *Khawaja v SSHD* [1984] AC 74, at pp. 110–112 that no person within the jurisdiction can be deprived of his or her liberty without cause, irrespective of their immigration status or nationality.

170. As set out in the Explanatory Notes to the Bill at paragraph 88, cl 11 would overturn *R (A) (Somalia)*, in effect passing into law the “*remarkable proposition*” described by Keene LJ: it would fall to the Secretary of State alone to decide what amounts to a reasonable period of detention and lawful exercise of her powers of detention. This represents a fundamental break with the way in which the courts have applied the *Hardial Singh* principles as a limit on the executive’s powers of detention, and cannot properly be characterised as ‘codification’ of those principles. It is rather an attempt at a legislative overruling of basic common law principles in the anxious context of executive detention.
171. Further, under cl 11, in circumstances in which “*the Secretary of State no longer considers that the examination or removal will be carried out, the decision will be made, or the directions will be given within a reasonable period of time,*” the Secretary of State may detain an individual for “*such further period as, in the opinion of the Secretary of State, is reasonably necessary to enable such arrangements to be made for the person’s release as the Secretary of State considers to be appropriate.*” The proposed power to some extent reflects the Secretary of State’s existing power to detain an individual for a further “*grace period*” in order to make arrangements for their release once one or more of the *Hardial Singh* principles have been breached (see e.g. *R (AC) Algeria v SSHD* [2020] 1 WLR 2893 and the caselaw cited therein).
172. Importantly, however, it is at present for the courts to decide what further period of detention is reasonable. As set out by Irwin LJ in *R (AC) (Algeria)*, what amounts to a reasonable grace period must be “*judged on the facts of the case*”, and “*the Respondent should be expected to advance some evidence and make considered submissions as to what period would be appropriate and why*” ([38] – [44]). Cl 11 would do away with such judicial checks, leaving it to the Secretary of State alone to decide what further period of detention is reasonable, once the primary power to detain has been extinguished.
173. Clause 12(4) seeks to preclude (by way of an ouster clause) the judicial review of Relevant Detentions, though it preserves the right to bring applications for a writ of *habeas corpus*. This amounts to a further significant attack on the courts’ historical oversight over the lawfulness of administrative detention. There remains a significant doubt as to whether *habeas corpus* would provide an effective means of policing the lawfulness of detention decisions, where *habeas corpus* is primarily concerned with the

reasons or cause for which the detention was carried out,¹⁰⁴ and the Secretary of State would have *prima facie* authority to detain under the relevant powers introduced by the Bill. Further, most modern challenges to unlawful detention are brought by way of judicial review.

174. It may still be possible for individuals to bring a false imprisonment claim. Moreover, applications for *habeas corpus*, may still provide a route for the courts to assess the lawfulness of detentions carried out pursuant to the powers introduced by the Bill in accordance with the *Hardial Singh* principles (“**Relevant Detentions**”). *Hardial Singh* was itself a case of *habeas corpus*, and the principles which derive from that case apply both to judicial review and *habeas corpus* applications.¹⁰⁵
175. That being said, the *Hardial Singh* principles have been treated in two authoritative cases as more readily applicable to judicial review than to *habeas corpus* applications. In *R (Khadir) v SSHD* [2006] 1 AC 207, for example, Lord Brown stated at [33], “*To my mind the Hardial Singh line of cases says everything about the exercise of the power to detain (when properly it can be exercised and when it cannot); nothing about its existence.*” Further, in *Lumba* at [30], Lord Dyson accepted the submission that “*the Hardial Singh principles reflect the basic public law duties to act consistently with the statutory purpose (Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997, 1030B-D) and reasonably in the Wednesbury sense.*” Accordingly, the effectiveness of *habeas corpus* applications to review the lawfulness of Relevant Detentions in accordance with the *Hardial Singh* principles may be limited.

4B.2 Human rights considerations

176. The cl 10 amendments are likely to lead to breaches of the Human Rights Act 1998 in respect of family members, women and children, particularly if the locations for detention are not governed by a subsidiary regime. In particular, the detention of children

¹⁰⁴ See Farbey et al. ‘The Law of Habeas Corpus’ (3rd ed.), p. 21

¹⁰⁵ Ibid., p. 143: “[I]n the important case of *R (I) v SSHD* [2002] EWCA Civ 888; [2003] I.N.L.R. 196 [...] the applicant brought proceedings for both judicial review and *habeas corpus*. It was agreed by the parties that both challenges raised identical issues; nor was there any dispute that the *Hardial Singh* principles applied to both.”

in inappropriate accommodation (even aside from the question of the length of detention) can engage Arts. 3, 5 and 8 ECHR.¹⁰⁶

177. By way of example, in *Popov v France*, the Court noted at [91] that “*it is important to bear in mind that the child’s extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant,*” and at [100], that the length of detention of the children (in that case, 15 days), “*whilst not excessive per se, could be perceived by them as never-ending, bearing in mind that the facilities were ill-adapted to their accommodation and age.*” Notably, in that case, the detention centre in question had been authorised by the French authorities as one where families could be held (see [93]). Notwithstanding, the conditions of detention were found to have breached the child’s Art. (5)(1)(f) rights and the Art. 8 rights of the whole family. The Bill’s disapplication of existing limitations on the location for detention runs the risk of such rights readily being breached, particularly in relation to vulnerable individuals.

5 OTHER PROVISIONS RELATING TO MODERN SLAVERY

5A Key features

178. We have discussed in section 2E the ways in which the Bill excludes those caught by its core regime from the protections to which victims of modern slavery are usually entitled. The Bill also goes further than this, by expanding the scope of those excluded more generally.

179. Section 63 of the NBA 2022 empowers the Secretary of State, in her capacity as the “*competent authority*” under the National Referral Mechanism, to determine that a person is a “*threat to public order*” and is therefore disentitled to the protections identified at paragraphs 129-132 above (the prohibition against expulsion pending a conclusive grounds decision, the provision of support and assisting during this period, and the potential for a residence permit in case of a positive conclusive grounds decision). Section 63(3) sets out circumstances in which a person “*is*” a threat to public order; it presently includes not only where (for example) a person has been convicted of a terrorist offence or is reasonably suspected to have been involved in terrorism-related activity, but also where a person is a “*foreign criminal*” under s. 32 of the UK Borders Act 2007. The

¹⁰⁶ See e.g. *Rahimi v Greece* (App. No. 8687/08, 5 April 2011) at [85]–[86]; and *Popov v France* (App. No. 39472/07, 19 January 2012) at [91].

latter sets a low standard, including where a person has received a sentence of imprisonment of 12 months or more.

180. The Bill adds to the list in s. 63(3) (by cl 28):

180.1. Anyone who is “*liable to deportation*” from the UK, including under the Immigration Act 1971. A person will be liable to deportation under the 1971 Act if the Secretary of State “*deems [their] deportation to be conducive to the public good.*” This confers an extremely broad discretion, the exercise of which is governed by policy which the Secretary of State can change at any time.¹⁰⁷

180.2. Pursuant to new amendments, any person who is not a British citizen, has been convicted in the UK of an offence, and has been sentenced to a period of imprisonment.

181. These exclusions apply irrespective of whether a person has received a positive reasonable grounds or conclusive grounds decision, including if this happened before the Bill comes into force (cl 28(6)).

182. New amendments also make it clear that the Secretary of State must decide that a person is disentitled to modern slavery provisions if they fall within one of the relevant categories (cl 28(2)), unless there are “*compelling circumstances*” which mean she should not do so (cl 28(3)).

5B Legal issues

183. As we explained in sections 2E.2 and 4, Art. 10 ECAT prohibits States Parties from removing victims of trafficking until the identification process is complete and requires them to provide support and assistance under Art. 12 in the interim. Art. 13 ECAT provides in addition for a recovery and reflection period of at least 30 days’ duration. While States Parties are not obliged to observe the recovery and reflection period “*if grounds of public order prevent it*”, there is no equivalent exception under Art. 10.

184. The effect of cl 28 is to require the Secretary of State – save where she considers there to be “*compelling circumstances*” – to deprive potential victims of trafficking of support

¹⁰⁷ The current version is *Conducive deportation* (version 1.0, 25 November 2021).

and assistance, and (subject to any successful legal challenge) to remove them from the UK:

184.1. without ever making a conclusive grounds decision;

184.2. in deportation cases, (i) based purely on her assessment that deporting them would be “*conducive to the public good*”, (ii) irrespective of whether she ultimately decides to make a deportation order against them or not, and (iii) irrespective of when or how they arrived in the UK; and

184.3. in cases involving a sentence of imprisonment, irrespective of its length, the seriousness of the offence, the passage of time since it was committed, or the evidence of rehabilitation.

185. For the same reasons discussed in paragraphs 136-143 above, we consider this to be a clear breach of the UK’s obligations under Art. 10 ECAT.

186. We also consider it to give rise to a very serious risk of breaches of Art. 13, on the basis that there will almost certainly be cases where the Secretary of State considers that deportation would be “*conducive to the public good*”, or where an individual has committed an offence leading to imprisonment, but where in all the circumstances “*grounds of public order*” cannot properly be said to “*prevent*” the observance of the recovery and reflection period. In legal terms the two questions are different. A person who has at some point received a sentence of imprisonment, and even a person whose deportation is conducive to the public good, may not pose any threat at all to public order;¹⁰⁸ even if they do, that threat may be minimal or may arise only in the medium to long term and hence may not preclude the observation of the recovery and reflection period. By treating imprisonment or a “*conducive*” assessment as necessarily decisive of the public order question, subject only to a narrow “*compelling circumstances*” exception, the Bill gives rise to very serious risks that the UK will breach its obligations in individual cases.

187. Finally, and for completeness, we consider it difficult to see how the Secretary of State could lawfully determine whether a person’s deportation would be conducive to the

¹⁰⁸ For example, where this determination has been made on the basis of past behaviour and the risk of this behaviour being repeated is reliably assessed as very low.

public good before the end of the recovery and reflection period and the completion of the identification process. This is because:

187.1. Where a person is found to be victim of modern slavery, this is likely to bear directly on their responsibility for any apparently criminal conduct associated with their exploitation.¹⁰⁹ The public interest in their deportation cannot properly be assessed before the extent of this responsibility (if any) is known.

187.2. Again, one of the express purposes of the reflection and recovery period is to “allow victims to come to a decision ‘on cooperating with the competent authorities’ – that is, on “whether they will cooperate with the law enforcement authorities in a prosecution of the traffickers.”¹¹⁰ The public interest in securing this cooperation cannot properly be taken into account if the person is removed before they are able to make an informed decision.

187.3. There will also be a wider public interest in identifying, supporting and protecting victims of trafficking, which again cannot properly be taken into account if they are removed before the identification process is complete.

188. As a result, cl 28 of the Bill risks breaching domestic standards for lawful decision-making as well as violating the UK’s international obligations.

6 TREATMENT OF CHILDREN (INCLUDING UNACCOMPANIED MINORS)

189. Amendments to the Bill prior to it reaching the House of Lords, removed proposed powers by which the Secretary of State could remove “*relevant family members*” of individuals caught by the regime, which would have breached the Convention Rights of the Child (“**CRC**”) (in particular Arts. 2 and 3). Notwithstanding, the Bill’s treatment of children raises numerous concerns. Existing legislative provisions designed to protect the safety and welfare of children are expressly disapplied in the Bill. As discussed in Section 4 above, limitations on the location and period in which children may be detained are disapplied (cl 10). Clause 13 also 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

¹⁰⁹ See the statutory defence under s. 45 of the Modern Slavery Act.

¹¹⁰ Explanatory Report to ECAT, [174].

be removed or required to leave the UK, or where the Secretary of State proposes to detain the family in pre-departure accommodation.

190. As noted above, cl 3 empowers the Secretary of State to defer the removal of unaccompanied children until they reach the age of 18 (although the Secretary of State may still remove unaccompanied children: cl 3(2)). The context in which this power is conferred raises a number of concerns:

190.1. 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, and further may be circumvented by cl 3(3)(d), which provides that the child may be removed “*in such other circumstances as may be specified in regulations made by the Secretary of State*”, where cl 3(4) provides that those regulations may confer a discretion on the Secretary of State.

190.2. A child whose removal is deferred will begin to build a life and social ties in the UK, potentially over a period of many formative years. The child’s development and creation of such ties is subject to complete upheaval at any moment, when the Secretary of State may decide (before or after the child turns 18) to effect their removal. This is contrary to Art. 20(3) CRC, which provides that “[w]hen considering solutions” for the care and accommodation of a child, “*due regard shall be paid to the desirability of continuity in a child's upbringing.*”

190.3. There is nothing in the Bill which requires the Secretary of State, when deciding whether to defer or effect the removal of an unaccompanied child and at what stage, to take into account the best interests of the child as a primary consideration (Art. 3 CRC).

191. Finally, the Bill does not provide sufficient guarantees to ensure that the Secretary of State will comply with Art. 20(1) CRC, which provides that “[a] child temporarily or

permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State” (emphasis added). Cl 15 empowers the Secretary of State to provide or arrange for the provision of accommodation for unaccompanied migrant children. The clause does not, however, impose on the Secretary of State duties 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).¹¹¹ Far from “*special protection and assistance*”, therefore, it is not clear whether the Secretary of State would be required to provide to unaccompanied children the standard of protection and assistance to be given to looked after children generally in the UK.

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LEIGH DAY

6 June 2023

¹¹¹ These include duties to safeguard and promote the child’s welfare, including by promoting his or her educational achievement, and appointing at least one person to achieve these outcomes, as well as ascertaining the wishes and feelings of the child or other relevant person insofar as possible in relation to any decision which needs to be made, and giving due consideration to the child’s age, understanding religious persuasion, racial origin and cultural and linguistic background.