
JOINT OPINION

THE ROUTES AVAILABLE TO ASYLUM-SEEKERS FROM UKRAINE AND THE IMPACT OF THE NATIONALITY AND BORDERS BILL

A. INTRODUCTION AND SUMMARY

1. On 24 February 2022, Russia launched a full-scale invasion of Ukraine. By 7 March 2022, the United Nations High Commissioner for Refugees (“UNHCR”) reported that more than 1.5 million people had fled from Ukraine.¹ According to current estimates, Russia’s invasion could force the displacement of some 4 million people.²
2. We are asked by the Good Law Project to advise on: (a) the routes by which individuals fleeing from Ukraine can claim asylum in the UK,³ and (b) the impact of the Nationality

¹ [“Ukraine Refugee Situation” UNHCR Operational Data Portal](#) (7 March 2022).

² [“Ukraine Refugee Situation” UNHCR Operational Data Portal](#) (7 March 2022).

³ In this Joint Opinion, we use the term “**asylum-seekers**” to mean all those who seek recognition as refugees, and “**refugees**” to mean all those who meet the definition in Article 1A(2) of the Convention Relating to the Status of Refugees 1951 as applied by the 1967 Protocol (the “**Refugee Convention**”), whether or not this has been formally recognised via a status determination process. As is now widely accepted, a person’s entitlement to the rights conferred by the Refugee Convention — and the corresponding obligations of Contracting States — does not depend on formal recognition. Rather, it arises by virtue of a person in fact meeting the Convention definition; thus, for the purposes of international law, status is declaratory. See, amongst many other sources: UNHCR, [Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees](#) at §28; Goodwin-Gill and McAdam, *The Refugee in International Law* (3rd ed, 2007) at p. 51; Hathaway, *The Rights of Refugees under International Law* (2nd ed, 2021) at pp. 178-180; *G v G* [2021] 2 WLR 705. In the present context, we consider that: (a) Persons fleeing from an armed conflict may well qualify as Convention refugees, but the mere fact of having fled from such a conflict does not itself suffice: Vanessa Holzer, “[The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence](#)” (UNHCR Division of International Protection, Legal and Protection Policy Research Series) (September 2012) at p 2; James C Hathaway and Michelle Foster, *The Law of Refugee Status* (CUP, 2014) at pp 174-181. Each individual claiming asylum must establish that under Article 1A(2) of the Refugee Convention, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”, she is outside her country of nationality or country of habitual residence and “is unable or, owing to such fear, is unwilling to avail [herself] of the protection of that country”. That definition might well cover a number of categories of Ukrainians, either currently or in the foreseeable future, including, but not limited to: (i) Ukrainians living under Russian occupation, who may risk being targeted by Russian forces because of their race or nationality, or because of their opposition to the invasion and occupation; (ii) those wishing to avoid forcible conscription into the armed forces of either side, if their objection to service is based on an unwillingness to be involved in war crimes or crimes against humanity: see, in relation to Ukrainian forces in the Donbas area prior to the February 2022 invasion, *PK and OS (basic rules of human conduct) Ukraine CG* [2020] UKUT 00314 (IAC), or if they risk torture or other prohibited ill-treatment as a result of their objection: *VB and Another (draft evaders and prison conditions) Ukraine CG* [2017] UKUT 00079 (IAC); and/or (iii) members of minority groups, such as Roma or LGBT+ people, who may be at risk from the Russian authorities (as well as the Ukrainian authorities). On 24 February 2022, UKVI withdrew its published country policy and information notes on Ukraine, which suggests that the Government is reassessing its policy on asylum claims by Ukrainians. (b) Individuals who do not ultimately fall within the refugee definition — for example, because they have been unable to establish that their well-founded fear of persecution is for one of the five Convention reasons — may well be eligible for Humanitarian Protection, a form of international protection provided where an individual is found not to be a refugee under the Refugee Convention but they are nevertheless at risk of serious harm, including torture or inhuman or degrading treatment or punishment, or serious and individual threat to civilian life or person by reason of indiscriminate violence in a situation of armed conflict. See UK Home Office, “[Humanitarian Protection](#)” (version 5.0, 7 March 2017); [Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need](#)

and Borders Bill (the “**Bill**”)⁴ on those individuals. The Bill is currently at Report Stage before the House of Lords.

3. As to (a), the routes by which individuals fleeing from Ukraine can claim asylum in the UK, although the Prime Minister has claimed that “[t]his country will continue to do what it has always done and receive those who are fleeing in fear of persecution”,⁵ the UK’s position is that all Ukrainians must “apply for visas under existing immigration routes”.⁶ However:
 - a. There is no existing immigration route by which Ukrainian nationals and residents fleeing persecution can arrive in the UK to seek asylum. There are no, and have never been any, refugee or humanitarian visas for which an application may be made from abroad.
 - b. The UK’s approach is “bespoke”,⁷ in the Home Secretary’s words, only in the sense that *immigration* routes have been altered or created. These essentially allow for family members abroad to join Ukrainians in the UK (as of 7 March 2022, 300 visas had been granted following 17,700 applications),⁸ or for Ukrainians abroad to be sponsored by those in the UK (a scheme yet to be set up). Ukrainians continue to require visas to enter the UK, and the bespoke immigration routes do not presently include a Visa Application Centre in Calais, apparently on the basis that doing so would create a “pull factor” for refugees.⁹ There is no existing or contemplated bespoke route for Ukrainians to claim asylum in the UK.

[international protection and the content of the protection granted](#), Art 15(c); *Elgafaji v Staatssecretaris van Justitie* (Case C-465/07) [2009] 1 WLR 2100; *QD (Iraq) v SSHD* [2011] 1 WLR 689. Importantly, eligibility for refugee status must be considered before eligibility of other forms of international protection: *H. N. v Minister for Justice, Equality and Law Reform, Ireland, Attorney General* (Case C-604/12), Court of Justice of the European Union (8 May 2014). (c) Whether an individual is ultimately to be granted refugee status or Humanitarian Protection, all individuals fleeing armed conflict are owed fundamental protections under the Refugee Convention on the basis of their status as asylum-seekers, or “presumptive refugees”. These include, among others, the protections afforded by Article 31 (immunity from penalisation) and Article 33 (the prohibition of *refoulement*): Professor Guy Goodwin-Gill, “Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection” (October 2001) at 2.6.

⁴ [Bill 141 2021-22](#), amended/HL Bill 82.

⁵ HC Deb 22 February 2022, [vol 709](#) (The Prime Minister (Boris Johnson)).

⁶ UK Home Office, “[Home Office action on Ukraine](#)” (25 February 2022).

⁷ See e.g. HC Deb 1 March 2022, [vol 709](#) (The Secretary of State for the Home Department (Priti Patel)).

⁸ As at 7 March 2022, the Home Office reported that it had issued 300 visas under the Ukraine Family Scheme (out of 17,700 applications, 8,900 of which had been sent to the Home Office). Lamiat Sabin, “[UK issues 300 visas under Ukraine Family Scheme after Home Office receives almost 9,000 applications](#)” *Independent* (7 March 2022).

⁹ Twitter (Matt Dathan, Home Affairs Editor of the Times) ([@matt_dathan](#)) (7 March 2022).

- c. In consequence, those attempting to reach the UK may have to resort to people-smugglers, will risk being “*pushed back*” if they cross on the Channel,¹⁰ may be at risk of prosecution in the UK, and will be liable to detention on arrival.¹¹ If they do manage to get to the UK, they will be ineligible to work, eligible for “*asylum support*” only if they are “*destitute*”, and at the tail-end of an unprecedented backlog in asylum claims.
- d. This contrasts with the position in the European Union. On 4 March 2022, and for the first time, the EU Council of Ministers adopted a Decision¹² under Article 5, Temporary Protection Directive,¹³ thereby allowing Ukrainian nationals and permanent residents the right to live, work, access healthcare, housing and education immediately in any of the 27 Member States for up to one year (with the possibility of extension), without the requirement to go through asylum procedures.¹⁴

4. As to (b), the impact of the Bill:

- a. If the Bill is enacted as envisaged by the Government,¹⁵ individuals fleeing from Ukraine to seek asylum in the UK, who will have inevitably transited through

¹⁰ See e.g. Justice and Home Affairs Select Committee (House of Lords), “[Uncorrected oral evidence: Oral evidence session with the Home Secretary](#)” (27 October 2021); Lizzie Dearden, “[Home Office vows to proceed with migrant pushbacks after boat tragedy — but won’t say if they’ve started](#)” *Independent* (26 November 2021).

¹¹ See e.g. Nadine White and May Bulman, “[Refugees trying to flee Ukraine targeted by people smugglers](#)” *The Independent* (3 March 2022).

¹² “[Council Implementing Decision \(EU\) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection](#)”.

¹³ “[Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing](#)”.

¹⁴ For further details see Jane McAdam, “[Europe triggers ‘temporary protection’ for Ukraine war refugees](#)” *The Interpreter (The Lowy Institute)* (4 March 2022).

¹⁵ Despite recent amendments in the House of Lords, this Joint Opinion proceeds on the basis of the Bill being enacted as envisaged by the Government. A summary of those amendments is as follows: On 28 February 2022, the House of Lords voted to, *inter alia*, (a) include a statutory requirement that all policies and decisions arising from the Bill must comply with the Refugee Convention (218 in favour and 140 against); (b) remove Clause 11 (Differential treatment of refugees), which would allow refugees to be divided into two “groups” based on how they arrive in the UK (204 in favour and 126 against); and (c) enable asylum-seekers to take up employment if a decision on their asylum application has not been made within six months (112 in favour and 89 against). HL Deb 28 February 2022, [vol 819](#). In addition, on 2 March 2022, the House of Lords voted to, *inter alia*: (a) remove Clause 15 (Asylum claims by persons with connection to safe third State: inadmissibility), which would create a power to declare an asylum claim inadmissible if it was made by a person with a connection to a safe third country (221 in favour and 172 against); (b) remove Clause 28 (Removal of asylum-seeker to safe country), which would provide for a system of offshore processing (208 in favour and 155 against); (c) included a new Clause (Immigration Rules: entry to seek asylum and join family) to allow people, such as unaccompanied children, in Europe who have a close family member in the UK to enter the country to seek asylum (178 in favour and 130 against); and (d) amend Clause 39 to ensure that arrival (*cf.* entry) without valid entry clearance is not a criminal offence (101 in favour and 96 against). HL Deb 2 March 2022, [vol 819](#). For a summary of all amendments, see UK Parliament, “[Lords asks government to think again on Nationality and Borders Bill](#)” (3 March 2022).

one or more other countries before arriving (in the absence of direct flights): will continue to risk being “*pushed-back*” if they cross on the Channel; will be criminalised for the mere act of arrival in the UK (and face imprisonment of up to twelve months or four years);¹⁶ will risk having their claim declared inadmissible; will risk being removed to remote states for off-shore processing; and will risk being designated a “*Group 2 refugee*” and denied their rights under the Convention Relating to the Status of Refugees 1951 as applied by the 1967 Protocol (the “**Refugee Convention**”).

- b. The Bill, being promoted by the Government at a time when the UNHCR has stated that Europe faces “*the fastest growing refugee crisis ... since the second world war*”,¹⁷ flagrantly violates the UK’s obligations under international refugee law, international human rights law, and is inconsistent with the common law.
- c. This is, variously, the view of the UNHCR,¹⁸ the Joint Committee on Human Rights (the “**JCHR**”),¹⁹ the House of Lords Constitution Committee, former Supreme Court justices²⁰ and a former Master of the Rolls,²¹ Members of the House of Lords and House of Commons, the Bingham Centre for the Rule of Law,²² Amnesty International,²³ Freedom from Torture,²⁴ Refugee Action,²⁵

¹⁶ The former on summary conviction and the latter on conviction on indictment.

¹⁷ Peter Beaumont, “[Ukraine has fastest-growing refugee crisis since second world war, says UN](#)” *The Guardian* (6 March 2022).

¹⁸ “[UNHCR Observations on the Nationality and Borders Bill 141, 2021-2022](#)” (October 2021); “[UNHCR Observations on the Nationality and Borders Bill, as amended](#)” (January 2022).

¹⁹ Joint Committee on Human Rights, “[Ninth Report – Legislative Scrutiny: National and Borders Bill \(Part 3\) – Immigration offences and enforcement](#)” (24 November 2021); Joint Committee on Human Rights, “[Twelfth Report – Legislative Scrutiny: National and Borders Bill \(Parts 1, 2 and 4\) – Asylum, Home Office Decision-Making, Age Assessments, and Deprivation of Citizenship Orders](#)” (19 January 2022).

²⁰ Simon Brown (Lord Brown of Eaton-under-Heywood), “[Nationality and Borders Bill violates Britain’s obligations to refugees](#)”, *The Times* (28 February 2022); See also [Letter to the Prime Minister](#) dated 25 February 2022, signed by: Rt Hon David Davis MP (Secretary of Exiting the European Union 2016-2018, Shadow Home Secretary 2003-2008); Rt Hon the Lord Blunkett (Home Secretary, 2001-2004); Rt Hon Dominic Grieve QC (Attorney General, 2010-2014); Rt Hon the Lord Kerr of Kinlochard GCMG (Head of the Diplomatic Service, 1997-2002); Rt Hon the Lord Walker of Gestingthorpe (Justice of the Supreme Court, 2009-2013).

²¹ See e.g. HL Deb 28 February 2022, [vol 819](#) (Lord Etherton, Lord Brown and Lord Kerr).

²² Ronan Cormacain (Bingham Centre for the Rule of Law), “[Nationality and Borders Bill: A Rule of Law Analysis of Clauses 9 and 11](#)” (26 January 2022); Ronan Cormacain (Bingham Centre for the Rule of Law), “[Nationality and Borders Bill: A Rule of Law Analysis of Clauses 29 and 39](#)” (1 February 2022).

²³ See e.g. Amnesty International UK, “[Nationality & Borders Bill: the truth behind the claims](#)” (3 November 2021).

²⁴ See e.g. “[Nationality and Borders Bill – Joint Opinion](#)” (commissioned by Freedom from Torture) (7 October 2021), co-authored by two of the authors of this Joint Opinion; Freedom from Torture, “[Written evidence from Freedom from Torture \(NBB0041\)](#)” (17 September 2021).

²⁵ See e.g. Refugee Action, “[All punishment, no protection: Why the anti-refugee Bill should be scrapped](#)” (November 2021); “[Public Bill Committee – Nationality and Borders Bill \(fourth sitting\)](#)” (23 September 2021) (Mariam Kemple-Hardy, Head of Campaigns, Refugee Action).

and the Refugee Council,²⁶ amongst others.

- d. Many of the Bill’s provisions, and all of its key clauses, fall well beyond any acceptable interpretation of the Refugee Convention under Articles 31-32 of the 1969 Vienna Convention on the Law of Treaties (the “**Vienna Convention**”), which themselves codify customary international law. Many of the Bill’s provisions seek to overrule decades of jurisprudence under the Refugee Convention, as declared at the highest judicial levels, where the Courts of course applied the approach set out in Articles 31-32 of the Vienna Convention²⁷ to the Refugee Convention.
- e. The Bill is, unquestionably, “*the single biggest legal assault on international refugee law ever seen in the UK*”.²⁸

B. (HOW) CAN INDIVIDUALS FLEEING FROM UKRAINE CLAIM ASYLUM IN THE UK?

Timeline of the UK’s approach

5. As at 8 March 2022, the UK has maintained its position that all Ukrainian nationals must obtain a valid visa before travelling to the UK — while limited immigration concessions have been made and new immigration schemes proposed, the need to obtain a visa to reach the UK remains, and there are no legal routes for Ukrainians outside the UK’s jurisdiction to claim asylum.
6. The UK’s approach to the reception of individuals fleeing from Ukraine has developed as follows:
 - a. 17 February 2022: The Home Office published guidance entitled “*Support for family members of British nationals in Ukraine, and Ukrainian nationals in Ukraine and the UK*” (the “**Guidance**”).²⁹ The Guidance sets out the ways in which Ukrainian nationals in Ukraine can apply for existing visas under the

²⁶ See e.g. Refugee Council, “[Briefing: Nationality and Borders Bill 2021-22 – Committee Stage \(House of Lords\)](#)”.

²⁷ Article 31(1) of the [Vienna Convention on the Law of Treaties](#) provides that: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

²⁸ “[Nationality and Borders Bill – Joint Opinion](#)” (commissioned by Freedom from Torture) (7 October 2021).

²⁹ UK Home Office, “[Guidance: Support for family members of British nationals in Ukraine, and Ukrainian nationals in Ukraine and the UK](#)” (17 February 2022).

Immigration Rules, in addition to a number of temporary concessions for Ukrainian nationals already in the UK.

- b. 24 February 2022: The Home Office published updated Guidance “*to reflect concessions for Ukrainian nationals currently in the UK*”.³⁰
- c. 25 February 2022: The Home Office published further updated Guidance to provide updated information on Visa Application Centres (“VACs”) (*i.e.* the provision of surge staff) and Family Migration Visas. The Home Office also published guidance entitled “*Concessions to the Immigration Rules for Ukrainian nationals on family routes*” (the “**Concessions Guidance**”),³¹ which provides for: (a) certain Ukrainian nationals to apply for permission to stay under a family route when the Immigration Rules would not usually permit this (because of the requirement to return to Ukraine in order to make an out of country application); and (b) “*document flexibility*” for individuals applying for entry clearance or permission under a family route (to account for situations in which individuals are now unable to provide the full range of documents otherwise required).
- d. 26 February 2022: In response to concerns regarding the lack of routes available to those without British family members, the Minister for Future Borders and Immigration emphasised (in a since-deleted tweet) that “*there are a number of routes, not least our seasonal worker scheme ... which Ukrainians can qualify for, alongside the family route for those with relatives here*”.³²
- e. 27 February 2022: The Guidance was updated to provide revised information on family visas, now stating that “[*t*]here may be cases where some people do not meet the eligibility criteria, for example the English language requirement or minimum income requirement” and that, “[*g*]iven the current circumstances,

³⁰ UK Home Office, “*Guidance: Support for family members of British nationals in Ukraine, and Ukrainian nationals in Ukraine and the UK*” (24 February 2022). Note that this version of the Guidance is not available under the UK Government Web Archive.

³¹ UK Home Office, “*Concessions to the Immigration Rules for Ukrainian nationals on family routes*” (version 1.0, 25 February 2022).

³² “[Kevin Foster MP: Anger over minister’s work visas for refugees comment](#)” *BBC News* (26 February 2022).

*if somebody does not meet these requirements, UKVI will consider an alternative grant of leave to come to the UK.”*³³

- f. In addition, the Prime Minister announced that “*any person settled in the UK [i.e. not necessarily a British citizen] will be able to bring their Ukrainian immediate family members to join them here*”.³⁴
- g. 28 February 2022: In response to a private notice question as to “*whether [the Government] will remove all visa restrictions for refugees coming from Ukraine*”, Lord Sharpe stated that “*a visa waiver is not the solution to the challenges faced by Ukrainians. Visas are an important security tool. In addition, there are now no direct travel routes from Ukraine to the UK. The safest route for people to leave Ukraine is via neighbouring countries to the west.*”³⁵
- h. In addition, the Home Secretary announced a “*bespoke humanitarian route*” which she asserted would allow an additional 100,000 Ukrainians to enter the UK. It later emerged that no such measure was currently in place and that this did not go beyond the easing of rules for a limited pool of family members of British nationals and other persons settled in the UK.³⁶
- i. 1 March 2022: The Home Secretary announced that: (a) the English language requirement and salary threshold had been removed; and (b) the family migration route would be expanded to include “*parents, grandparents, adult offspring, siblings, and their immediate family members*” (under a new “**Ukraine Family Scheme**”).³⁷ In relation to the latter, those joining family in the UK will be granted leave for an initial period of 12 months, and will be able to work and to access public funds.³⁸ (Further details at §§11-14 below.)
- j. The Home Secretary also announced a new “*humanitarian sponsorship pathway*”, which will be available “*to Ukrainians who may not have family ties*

³³ UK Home Office, “[Guidance: Support for family members of British nationals in Ukraine, and Ukrainian nationals in Ukraine and the UK](#)” (27 February 2022) (our emphasis).

³⁴ “[Press release: PM announces further humanitarian aid to Ukraine](#)” (27 February 2022).

³⁵ HL Deb 28 February 2022, [vol 819](#) (Lord Sharpe).

³⁶ May Bulman and Samuel Lovett, “[UK accused of being ‘heartless’ after offer to take in Ukrainian refugees ‘falls well short of what is needed’](#)” *The Independent* (1 March 2022).

³⁷ HC Deb 1 March 2022, [vol 709](#) (The Secretary of State for the Home Department (Priti Patel)).

³⁸ HL Deb 2 March 2022, [vol 819](#) (Lord Sharpe).

with the UK, but who are able to match with individuals, charities, businesses and community groups".³⁹ Under this pathway, individuals will be granted leave for an initial period of 12 months, and will be able to work and have access to public services. (Further details at §§18-19 below.)

- k. The Home Secretary reaffirmed the need for Ukrainian nationals to obtain a visa before coming to the UK and reiterated that “[f]amily members of British nationals resident in Ukraine who need a UK visa can apply through the temporary location in Lviv [see updates below], or through [VACs] in Poland, Moldova, Romania, and Hungary”.⁴⁰
- l. 2 March 2022: Lord Sharpe explained that “*emergency changes*” to the Immigration Rules in order to create the Ukraine Family Scheme would be made on 15 March 2022, but that the Government was “*introducing a concession to the existing rules to enable families to apply via a bespoke application process no later than Friday 4 March*”.⁴¹ Towards this, the Guidance was updated to reflect the announcement by the Home Secretary and states that “[e]xtended family members can apply to the Ukraine Family Scheme from Friday (4 March 2022)”.⁴²
- m. 4 March 2022: The Home Office published guidance entitled “*Apply for a Ukraine Family Scheme visa*” (the “**Ukraine Family Scheme Visa Guidance**”)⁴³ and “*Ukraine Scheme*” (version 1.0) (the “**Ukraine Scheme Guidance**”). (Further details at §§11-14 below.)
- n. 6 March 2022: The Guidance and Ukraine Family Scheme Visa Guidance were updated to provide that “[t]he temporary VAC in Lviv is no longer operating”.⁴⁴

³⁹ HC Deb 1 March 2022, [vol 709](#) (The Secretary of State for the Home Department (Priti Patel)). See also UK Home Office, “[Further support for Ukrainians fleeing Russia invasion](#)” (1 March 2022).

⁴⁰ HC Deb 1 March 2022, [vol 709](#) (The Secretary of State for the Home Department (Priti Patel)).

⁴¹ HL Deb 2 March 2022, [vol 819](#) (Lord Sharpe).

⁴² UK Home Office, “*Guidance: Support for family members of British nationals in Ukraine, and Ukrainian nationals in Ukraine and the UK*” (2 March 2022) (our emphasis). Note that this version of the Guidance is not available under the UK Government Web Archive.

⁴³ UK Home Office, “*Guidance: Apply for a Ukraine Family Scheme visa*” (4 March 2022).

⁴⁴ UK Home Office, “[Guidance: Support for family members of British nationals in Ukraine, and Ukrainian nationals in Ukraine and the UK](#)” (6 March 2022); and UK Home Office, “[Guidance: Apply for a Ukraine Family Scheme visa](#)” (6 March 2022).

- o. 7 March 2022: The Ukraine Scheme Guidance was updated in relation to the “*Ordinary residence in Ukraine*” and “*Qualifying applicants*” sections.⁴⁵
 - p. 8 March 2022: The Ukraine Family Scheme Visa Guidance was updated to provide for an expanded definition of “*Extended family members*”.⁴⁶ (See details at §12.b below.)
7. Set out below is a brief overview of the categories of visas available to individuals fleeing Ukraine.⁴⁷ This Joint Opinion does not address the recent concessions available to Ukrainians who are already in the UK.⁴⁸

What current options are available to individuals fleeing Ukraine?

8. We first outline the current (non-asylum) visa options available to Ukrainians and the (absence of) options available to those who are not eligible, do not and/or otherwise cannot apply for any such visas (at §§10-19 below). Secondly, we summarise the implications for any individual who arrives (or attempts to arrive) in the UK for the purposes of seeking asylum (at §§22-34 below).
9. It perhaps bears repetition that there is no visa category for an individual who wishes to travel to the UK for the purpose of claiming asylum. Nor is it possible for an individual to claim asylum in the UK from abroad.⁴⁹ The only way for an individual coming from a country on the Home Office’s “*visa national list*”,⁵⁰ such as Ukraine, lawfully to travel to the UK is by obtaining a valid visa.

⁴⁵ UK Home Office, “[Ukraine Scheme](#)” (version 2.0) (7 March 2022).

⁴⁶ UK Home Office, “[Guidance: Apply for a Ukraine Family Scheme visa](#)” (8 March 2022).

⁴⁷ See also Katherine Soroya and Alex Piletska, “[Can Ukrainians take refuge in the UK? Visa concessions and asylum policy](#)” *Free Movement* (4 March 2022).

⁴⁸ For a summary of these concessions, see Katherine Soroya and Alex Piletska, “[Can Ukrainians take refuge in the UK? Visa concessions and asylum policy](#)” *Free Movement* (4 March 2022); Melanie Gower (House of Commons Library), “[Research Briefing: Ukraine: UK immigration concessions](#)” (4 March 2022) at pp 15-16.

⁴⁹ UK Home Office, “[Policy on applications from abroad](#)” (20 September 2011).

⁵⁰ UK Home Office, “[Immigration Rules Appendix Visitor: Visa National List](#)”.

Family members of British nationals or other persons settled in the UK

Family Migration Visa

10. Home Office policy towards Ukrainians and their UK-based family members is fast developing. As at 8 March 2022, the situation in respect of family visas was set out on the Home Office website as follows.⁵¹

Ukraine Family Scheme

11. As set out above, changes to the Immigration Rules to create the Ukraine Family Scheme will not be made until 15 March 2022. In the meantime, the Government has introduced a concession to the existing rules to enable extended families to apply via this “*bespoke application process*”,⁵² and published the Ukraine Family Scheme Visa Guidance and the Ukraine Scheme Guidance.⁵³
12. Following the publication of the Ukraine Family Scheme Visa Guidance on 4 March 2022, as updated on 6 March 2022 and 8 March 2022, and the Ukraine Scheme Guidance on 4 March 2022, as updated on 7 March 2022, the position is as follows:⁵⁴
 - a. Eligibility requires that the applicant: (i) is applying to join or accompany a “*UK-based family member*”; (ii) is Ukrainian or the immediate family member of a Ukrainian national who is applying to the Scheme; and (iii) has been residing in Ukraine prior to 1 January 2022 (“*including those who have now left Ukraine*”).
 - b. “*UK-based family members*” must be:
 - i. a British national; someone settled in the UK (*e.g.* they have indefinite leave to remain, settled status or proof of permanent residence); someone who has pre-settled status and started living in the UK before

⁵¹ UK Home Office, “[Guidance: Support for family members of British nationals in Ukraine, and Ukrainian nationals in Ukraine and the UK](#)” (6 March 2022); UK Home Office, “[Apply for a Ukraine Family Scheme visa](#)” (6 March 2022); UK Home Office, “[Ukraine Scheme](#)” (version 2.0) (7 March 2022).

⁵² HL Deb 2 March 2022, [vol 819](#) (Lord Sharpe).

⁵³ UK Home Office, “[Guidance: Apply for a Ukraine Family Scheme visa](#)” (8 March 2022); UK Home Office, “[Ukraine Scheme](#)” (version 2.0) (7 March 2022).

⁵⁴ UK Home Office, “[Guidance: Apply for a Ukraine Family Scheme visa](#)” (8 March 2022); UK Home Office, “[Ukraine Scheme](#)” (version 2.0) (7 March 2022).

1 January 2021; or someone with refugee status or humanitarian protection in the UK,⁵⁵ and

ii. an “*immediate family member*”, “*extended family member*” or “*immediate family member of an extended family member*”:

1. An “*immediate family member*” is defined as a: spouse or partner; unmarried partner (*i.e.* living with the applicant in a relationship for two years); minor child; parent (if the applicant is a minor); or fiancé(e) or proposed civil partner;

2. An “*extended family member*” is defined as a: parent of an applicant over 18; child over 18; grandparent; grandchild or grandchild of a partner; brother or sister; aunt or uncle; niece or nephew; cousin; mother-in-law or father-in-law; grandparent-in-law; or brother-in-law or sister-in-law;

3. An “*immediate family member of an extended family member*” is defined as a: spouse or civil partner of an extended family member; child under 18 of an extended family member; parent of a child under 18 who is an extended family member; or fiancé(e) or proposed civil partner of an extended family member.

c. Family members not falling within the above “*will be considered where there are exceptional circumstances.*”

d. If eligible to apply, all applicants must complete an online application form, and book and attend an appointment at any VAC throughout Europe for the purposes of having their photograph and fingerprints taken. All applications “*will be subject to security checks*”. Applicants can apply through VACs in countries including Hungary, Moldova, Poland, Romania, Belgium and France.⁵⁶ The

⁵⁵ UK Home Office, “[Guidance: Apply for a Ukraine Family Scheme visa](#)” (8 March 2022).

⁵⁶ UK Home Office, “[Guidance: Apply for a Ukraine Family Scheme visa](#)” (8 March 2022). In relation to France, the Home Secretary has stated that the Home Office will be setting up a “*bespoke VAC en route to Calais but away from the port because we have to prevent a surge taking place*”: HC Deb 7 March 2022, [vol 710](#) (The Secretary of State for the Home Department (Priti Patel)). As at 7 March 2022, the Home Office had not provided further details regarding where or when it would do so. Ukrainians currently in France are advised to travel to the Paris or Brussels VACs in order to make an application. May

Home Office has not opened a VAC in Calais, despite reports that significant numbers of Ukrainians have arrived there seeking to travel to the UK. This was reported to be because of “*fears*” on the part of the Home Office that doing so would “*create a ‘pull factor’*” for refugees.⁵⁷ On 8 March 2022, it was reported that a VAC would be opened in Lille, around 100km from Calais, on a date yet to be announced.⁵⁸

- e. Applicants will be required to provide “*a copy of an official document that confirms your relationship to your UK-based family member*” and their passports. However, in line with the Concessions Guidance, applicants who are unable to do so will be required to explain why.
- f. UKVI will “*prioritise*” applications and “*aim to make a decision as quickly as possible*”.⁵⁹

13. A Ukraine Family Scheme visa will enable individuals “*to live, work and study in the UK and access public funds*” for a period of three years.⁶⁰

14. Those already in the UK with family members abroad are informed that “[*g*]uidance on how to apply from inside the UK will be available soon”.⁶¹

All other individuals in Ukraine

Normal visa routes

15. Individuals who are not eligible to apply under the above family routes are advised to apply for another visa under the Immigration Rules. These include the “*normal*” visas to visit, study or work in the UK.

Bulman, “[Ukrainian refugees face ‘chaos’ trying to apply to UK family visa scheme](#)” *Independent* (7 March 2022). See also Mark Easton, “[Ukrainians on way to UK hit paperwork dead-end in Calais](#)” *BBC News* (7 March 2022); Twitter ([@SkyNews](#)) (7 March 2022).

⁵⁷ Twitter (Matt Dathan, Home Affairs Editor of the Times) ([@matt_dathan](#)) (7 March 2022).

⁵⁸ Twitter (Matt Dathan, Home Affairs Editor of the Times) ([@matt_dathan](#)) (8 March 2022).

⁵⁹ It is unclear in practice what timescales this involves. As at 7 March 2022, and as noted at §3(b) above, only 300 visas had been granted following 17,700 applications.

⁶⁰ UK Home Office, “[Guidance: Apply for a Ukraine Family Scheme visa](#)” (8 March 2022).

⁶¹ UK Home Office, “[Guidance: UK visa support for Ukrainian nationals](#)” (8 March 2022).

16. Key categories that have been suggested by Government Ministers⁶² include:
- a. Seasonal Worker Visa: This visa would enable individuals to come to the UK to work in “*edible horticulture*” for up to 6 months (*i.e.* picking fruit and vegetables).⁶³ As a result of deadlines, the alternative lines of work listed under this visa — namely, “*pork butchery*”, “*poultry work*”, and “*driv[ing] heavy goods vehicles to transport food*” — are no longer available.⁶⁴ Eligibility requires that the individual has both: a certificate of sponsorship reference number from a UK sponsor; and sufficient money to support herself in the UK (typically at least £1,270) (unless exempt). An individual coming to the UK on a Seasonal Worker Visa cannot take a permanent job, is not eligible for public funds, and cannot bring family members.
 - b. Standard Visitor Visa: This visa would enable individuals to come to the UK “*for tourism, business, study (courses up to 6 months) and other permitted activities*” for up to 6 months (with extensions available in certain limited circumstances), after which they must intend to leave the UK.⁶⁵ Eligibility requires that the individual is able to support herself during the trip and to pay for the return or onward journey (or has funding from someone else), and is able to show that she will not live in the UK for long periods of time (*i.e.* “*through frequent or successive visits*”). An individual coming to the UK on a Standard Visitor Visa cannot undertake (paid or unpaid) work, is not eligible for public funds, and cannot marry or register a civil partnership.
17. For those who “*need to travel to the UK urgently for compassionate reasons*”, the Guidance advises these individuals to “*apply for a visa in the usual way*” and include “*clear compelling or compassionate reasons*” in the application.⁶⁶

⁶² See e.g. “[Kevin Foster MP: Anger over minister’s work visas for refugees comment](#)” *BBC News* (26 February 2022).

⁶³ UK Home Office, “[Temporary Work – Seasonal Worker Visa](#)”.

⁶⁴ The deadlines and date restrictions are as follows: “*pork butchery*” (application closed 31 December 2021); “*poultry work*” (application closed 15 November 2021, with work permitted until 31 December 2021); and “*driv[ing] heavy goods vehicles*” (application closed 1 December 2021, with work permitted until 28 February 2022).

⁶⁵ UK Home Office, “[Visit the UK as a Standard Visitor](#)”.

⁶⁶ UK Home Office, “[Guidance: Support for family members of British nationals in Ukraine, and Ukrainian nationals in Ukraine and the UK](#)” (6 March 2022).

Local Sponsorship Scheme

18. In addition, the Government has announced “plans” to set up a “Local Sponsorship Scheme for Ukraine”, according to which “sponsors, such as communities, private sponsors or local authorities [will be able] to bring those forced to flee Ukraine to the UK”.⁶⁷ This is said to be for Ukrainians with “no ties” to the UK.⁶⁸ It is said that there will be no formal limit on the numbers who may benefit from this and that “[t]hose who come under this scheme will also be granted leave for an initial period of 12 months and able to work and access public services”,⁶⁹ although it also appears to be envisaged that “the sponsor would provide housing and integration support”.⁷⁰
19. As at the time of writing, the Government has stated that further details on the Scheme, including how to apply, would be “published soon”.⁷¹
20. While news reports over the weekend of 5 – 6 March 2022 suggested that a further scheme, in addition to the two described above, might be established,⁷² the Prime Minister’s deputy official spokesperson later confirmed that the Government did not have plans to create additional humanitarian visa routes.⁷³

Practicalities

21. A person applying for a visa to the UK is required to: fill out an online application form and obtain a reference number; book an appointment at a VAC (in, *inter alia*, Hungary, Moldova, Poland, Romania, Belgium or France);⁷⁴ and attend the VAC appointment in order to provide their biometric data (*i.e.* digital photograph and fingerprints), and (if this has not been done before the appointment) to upload copies of their passport and any other necessary documents.⁷⁵

⁶⁷ UK Home Office, “[News story: Further support for Ukrainians fleeing Russia invasion](#)” (1 March 2022).

⁶⁸ UK Home Office, “[News story: Further support for Ukrainians fleeing Russia invasion](#)” (1 March 2022).

⁶⁹ UK Home Office, “[Guidance: UK visa support for Ukrainian nationals](#)” (6 March 2022).

⁷⁰ UK Home Office, “[News story: Further support for Ukrainians fleeing Russia invasion](#)” (1 March 2022).

⁷¹ UK Home Office, “[Guidance: UK visa support for Ukrainian nationals](#)” (6 March 2022); and see Melanie Gower (House of Commons Library), “[Research Briefing: Ukraine: UK immigration concessions](#)” (4 March 2022) at pp 13-14 (highlighting a number of the practical details about the scheme that are yet to be confirmed).

⁷² Harry Cole, “[UK HOPE: Priti Patel to relax rules to allow ALL Ukrainian refugees fleeing Putin’s invasion to come to Britain](#)” *The Sun* (6 March 2022).

⁷³ “[Ukraine-Russia latest news: Mayor ‘shot dead by Russians’ - as Ukraine ‘retakes’ town and airport in sign of difficulty for Putin](#)” *Sky News* (7 March 2022); Twitter ([@SkyNews](#)) (7 March 2022).

⁷⁴ See n.56 above in relation to the current situation in France.

⁷⁵ UK Home Office, “[Guidance: Apply for a Ukraine Family Scheme visa](#)” (8 March 2022); UK Home Office, “[Ukraine Scheme](#)” (version 2.0) (7 March 2022).

What happens if an individual fleeing Ukraine cannot obtain a visa?

Carriers' liability

22. An individual from Ukraine without a valid visa cannot lawfully travel to the UK, because Ukraine remains on the Home Office's "*visa national list*".⁷⁶ A further *de facto* impediment to such individuals even attempting to do so arises as a result of the carriers' liability regime. This regime, which is set out under Part 2 of the Immigration and Asylum Act 1999 (the "**1999 Act**"), empowers the Secretary of State to impose fines upon ship and aircraft owners⁷⁷ if a person requiring leave to enter the UK arrives and fails to produce (a) a valid "*immigration document*" (which satisfactorily establishes his/her identity and nationality or citizenship) and (b) a visa of the required kind.⁷⁸ The practical effect of this regime is that individuals fleeing Ukraine without immigration documents or without a visa for the UK are very unlikely to be able to board any flight, train, and ferry to the UK.⁷⁹

Arriving in the UK without a valid visa

23. If an individual fleeing the conflict finds a route to the UK without a valid visa, she will find herself in the same position as all other individuals who have sought protection in this country.

Inadmissibility of asylum application

24. The asylum applications of individuals fleeing Ukraine will be liable to an initial inadmissibility decision, with the result that these applications will not be substantively considered, at least until a minimum period of six months has lapsed.
25. The current inadmissibility regime is set out in Chapter 11 of the Immigration Rules and the Home Office guidance, "*Inadmissibility: Safe third country cases*" (version 5.0, 31 December 2020) (the "**Inadmissibility Guidance**").⁸⁰ Under this regime:

⁷⁶ UK Home Office, "[Immigration Rules Appendix Visitor: Visa National List](#)".

⁷⁷ Under section 40(7) of the IAA 1999, the Secretary of State may by order apply these provisions to passengers arriving by train.

⁷⁸ Section 40, IAA 1999. See also UK Home Office, "[Charging Procedures: A Guide for Carriers: S40 The Immigration and Asylum Act 1999 \(as amended\)](#)" (February 2022).

⁷⁹ See e.g. Lizzie Dearden, "[Transport operators face £2,000 fines for bringing Ukrainians without visas to UK](#)" *Independent* (7 March 2022).

⁸⁰ UK Home Office, "[Inadmissibility: Safe third country cases](#)" (version 5.0, 31 December 2020).

- a. An asylum application “*may be treated as inadmissible and not substantively considered*” if, among other things, the applicant has claimed asylum in a “*safe third country*”; could have done so; or has a connection to a safe third country “*such that it would be reasonable for them to go there to obtain protection*” (Immigration Rules, para 345A).
- b. A “*safe third country*” is defined as one in which the person will not be subjected to persecution contrary to the Refugee Convention or to further removal to a place where they would risk persecution or ill-treatment contrary to Article 3 of the ECHR, and in which “*the possibility exists to request refugee status and, if found to be a refugee, to receive protection in accordance with the Refugee Convention*”. This is likely to cover most countries through which an asylum-seeker from Ukraine would pass *en route* to the UK (Immigration Rules, para 345B).
- c. The Home Office will make an initial decision about whether a case appears to meet the criteria for inadmissibility and will then issue the applicant with a “*notice of intent*”, informing them that enquiries are to be made to determine whether their claim is inadmissible (Inadmissibility Guidance, pp. 11, 13).
- d. Having made these enquiries, the Home Office will make a further decision about whether the case still meets the criteria for inadmissibility (Inadmissibility Guidance, p. 14).
- e. Where an application is treated as inadmissible, the Home Office “*will attempt to remove the applicant to the safe third country in which they were present or to which they have a connection, or to any other safe third country which may agree to their entry*” (that is to say, once a claim is ruled inadmissible, the Home Office may try to remove the person to any safe country, not just the one which the person has been in or to which they have a connection) (Immigration Rules, para 345C).
- f. The Home Office will not make a formal inadmissibility decision unless and until an agreement has been reached with a “*safe*” third country to admit the person and process their claim (Inadmissibility Guidance, pp. 14-15).

- g. If an application is treated as inadmissible, but either (i) “*removal to a safe third country within a reasonable period of time is unlikely*”, or (ii) “*upon consideration of a claimant’s particular circumstances the Secretary of State determines that removal to a safe third country is inappropriate*”, she will admit the claim for consideration in the UK (Immigration Rules, para 345D).
- h. In relation to (i), if no “*safe*” third country agreement is in place after six months, the Home Office will admit the claim for consideration unless “*removal is still a reasonable prospect and there are clear mitigating factors to justify the extension*” (Inadmissibility Guidance, pp. 15, 17).
26. While unaccompanied children are exempted from the inadmissibility regime, families with children are not.⁸¹
27. In practice, the operation of the inadmissibility regime is entirely contingent on the UK’s ability to negotiate return agreements with potential “*safe*” third countries. While efforts to do so have often been unsuccessful, the UK returned 11 individuals to Denmark, Germany, Ireland, Italy, Slovenia, Spain, Sweden, and Switzerland on the basis of inadmissibility grounds in 2021.⁸²
28. For most applicants who are subject to an initial inadmissibility decision, the greatest detriment lies in the consequent delay in considering their applications, which is compounded by the general underlying delays in the UK’s asylum system.

Liability to detention

29. A Ukrainian seeking asylum in the UK without having obtained a valid visa will be liable to detention on the same legal basis as all other persons “*subject to UK immigration control*” (*i.e.* persons who require leave to enter or remain).⁸³ In summary, there is a

⁸¹ UK Home Office, “[Inadmissibility: Safe third country cases](#)” (version 5.0, 31 December 2020) at p 7.

⁸² UK Home Office, “[National Statistics: How many people do we grant asylum or protection to?](#)” (24 February 2022). 9,622 asylum applicants were identified for consideration on inadmissibility grounds in 2021. 64 individuals were served with inadmissibility decisions, meaning that the UK would not admit the asylum claim for consideration. 3,142 individuals were subsequently admitted into the UK asylum process for substantive consideration of their asylum claim.

⁸³ Statutory bases for detention include, inter alia: paragraph 16(1), (1A) or (2) of Schedule 2 to the Immigration Act 1971 (detention by immigration officers of persons liable to examination or removal); and section 62 of the Nationality, Immigration and Asylum Act 2002 (detention by Secretary of State of persons liable to examination or removal).

power to detain an individual: (a) pending a decision as to whether to grant leave to enter or remain; (b) pending a decision as to whether to remove; and (c) pending removal.

30. Under current Government policy, immigration detention should only be used sparingly and as a last resort. There is a presumption in favour of release and, wherever possible, alternatives to detention must be used.⁸⁴ Despite this, 24,497 people entered immigration detention in 2021. According to the latest Home Office figures (published on 24 February 2022), 76% had been detained for seven days or fewer, which was in part due to an increasing proportion of detainees being detained for short periods on arrival to the UK before being bailed, “*typically while their asylum (or other) application is considered.*”⁸⁵

Housing and financial support

31. A person seeking asylum in the UK is not entitled to work for the first year after she makes her claim. After that she may do so only with the permission of the Home Office, which is usually granted only if the asylum-seeker is not considered to be responsible for the delay in considering her case, and for purposes of employment in a post included on the Home Office’s “*shortage occupation list*” (Immigration Rules, paras 360-360B).
32. Asylum-seekers not permitted to work are also barred from mainstream benefits; instead, they are, if “*destitute*”, eligible for “*asylum support*”, a parallel benefits system administered by the Home Office under Part VI of the 1999 Act. By section 95 of the 1999 Act, a person is destitute if they do not have adequate accommodation or any means of obtaining it and/or are unable to meet their essential living needs; the test includes a person who is likely to become destitute within 14 days, *i.e.* who does not have sufficient income or savings to support and accommodate themselves for that period. People are expected to exhaust any existing savings and to sell any land, vehicles, and certain other goods (including, where possible, in their country of origin) before seeking support from the Home Office.⁸⁶ Accommodation under section 95 is provided on a no-choice basis

⁸⁴ UK Home Office, “*Immigration bail*” (version 11, 31 January 2022) at 7; UK Home Office, “[Detention: General instructions](#)” (version 2, 14 January 2022) at 6-7.

⁸⁵ Home Office, “[National statistics: Summary of latest statistics](#)” (24 February 2022).

⁸⁶ UK Home Office, “[Assessing destitution](#)” (version 4.0, 9 November 2021).

by private contractors operating on behalf of the Home Office, and the poor standard of such accommodation has frequently been criticised.⁸⁷

Waiting periods

33. If an asylum application is admitted for consideration, an individual fleeing Ukraine will then find themselves at the back of an unprecedented backlog, with a record number of people already awaiting decisions on their asylum applications.⁸⁸
34. According to the latest Home Office figures, 100,564 people in the UK were awaiting an initial decision on their asylum application at the end of 2021, with a further 4,360 awaiting further review.⁸⁹ Among these, some 61,864 individuals had been awaiting their decision for over 6 months. The backlog has almost trebled since mid-2019.

C. THE IMPACT OF THE NATIONALITY AND BORDERS BILL

35. Given our focus and scope, it is neither possible nor appropriate to comment on all aspects of the Bill. As set out at §4.b-c above, the Bill has been subject to sustained criticism elsewhere for its manifold legal deficiencies.⁹⁰
36. Instead, the remainder of this Joint Opinion seeks to sketch the manner in which the Bill would impact a Ukrainian, unable to obtain a visa and transiting third countries in the absence of direct flights *en route* to the UK, who seeks asylum here. Such an asylum claimant: (a) may be “*pushed back*” if she attempts to arrive via boat; (b) will be criminalised; (c) may well have her claim declared inadmissible; (d) may be removed for

⁸⁷ See e.g. Independent Chief Inspector of Borders and Immigration (David Neal), “[An inspection of contingency asylum accommodation: HMIP report on Penally Camp and Napier Barracks \(November 2020 - March 2021\)](#)” (July 2021); Diane Taylor, “[Home Office housing provider to make urgent repairs to asylum seeker flats](#)” *The Guardian* (11 January 2022).

⁸⁸ May Bulman, “[Fewer than 1% of asylum seekers Home Office wants to deport to EU actually deported after Brexit](#)” *Independent* (24 February 2022). See also “[Asylum applications in UK in 2021 at highest level since 2003, backlog of claims awaiting a decision at record high of over 100,000 people](#)” *Electronic Immigration Network* (24 February 2022).

⁸⁹ UK Home Office, “[Asylum and Resettlement – Asylum applications awaiting a decision](#)” (24 February 2022). See generally UK Home Office, “[Immigration statistics, year ending December 2021](#)” (24 February 2022).

⁹⁰ Freedom from Torture, Joint Opinion (7 October 2021); Joint Committee on Human Rights, “[Ninth Report – Legislative Scrutiny: National and Borders Bill \(Part 3\) – Immigration offences and enforcement](#)” (24 November 2021); Joint Committee on Human Rights, “[Twelfth Report – Legislative Scrutiny: National and Borders Bill \(Parts 1, 2 and 4\) – Asylum, Home Office Decision-Making, Age Assessments, and Deprivation of Citizenship Orders](#)” (19 January 2022); Bingham Centre for the Rule of Law, “[Nationality and Borders Bill: A Rule of Law Analysis of Clauses 9 and 11](#)” (26 January 2022); Bingham Centre for the Rule of Law, “[Nationality and Borders Bill: A Rule of Law Analysis of Clauses 29 and 39](#)” (1 February 2022); Migrant Voice and Amnesty International, “[Nationality and Borders Bill: House of Lords Report](#)” (28 February 2022); Refugee Council, “[Briefing: Nationality and Borders Bill 2021-22 – Committee Stage \(House of Lords\)](#)”.

off-shore processing; and (e) will be designated a “*Group 2 refugee*”, and provided with inferior treatment and protection.⁹¹

An asylum-seeker attempting to cross the Channel by boat can be “*pushed back*” (Clause 44 and Schedule 6)

37. The Bill empowers relevant officers to “*push back*” those boats to the coastal state(s) from which they embarked.
38. At present, the maritime enforcement powers under the Immigration Act 1971 (the “**1971 Act**”) provide that an officer may exercise certain enforcement powers in relation to ships in UK waters.⁹² In order to exercise those powers (under Part 1 of Schedule 4A of the 1971 Act):
- a. an officer must have reasonable grounds to suspect that an offence of assisting unlawful immigration to the UK (s.25), helping an asylum-seeker to enter the UK (s.25A), and/or assisting entry to the UK in breach of deportation or exclusion order (s.25B) is being or has been committed, or the ship is otherwise being used in connection with such an offence; and
 - b. the officer may only stop, board, and/or require the ship to be taken to a port in the UK and detained there.
39. Even though the Explanatory Notes to the Bill state that the current powers “*allow a ship to be required to be taken only to a port in the UK and detained there*” and “*do not allow for a ship to be taken elsewhere, only to a port in England and Wales*”,⁹³ the Secretary of State presently contends that these existing powers, and in particular the power to “*stop*” a ship, confers a power to “*push back*”. The issue is presently before the Courts.⁹⁴
40. However, the Bill seeks significantly to expand these powers. In particular, it will empower an officer to:

⁹¹ See also Colin Yeo, “[Imagine you are a Ukrainian refugee](#)” *Free Movement* (2 March 2022).

⁹² Section 28M, 1971 Act.

⁹³ [Nationality and Borders Bill Explanatory Notes](#) at §§471-472.

⁹⁴ *R (Freedom from Torture) v Secretary of State for the Home Department* (CO/4176/2021); *R ((1) Public and Commercial Services Union and (2) Care 4 Calais) v Secretary of State for the Home Department* (CO/4338/2021); and *R (Channel Rescue) v Secretary of State for the Home Department* (CO/4366/2021).

- a. exercise the powers in relation to any ship in “*UK waters, foreign waters or international waters*” (amendment underlined);⁹⁵
 - b. exercise the powers if the officer had reasonable grounds to suspect that an offence of knowingly entering the UK without leave or entry clearance (s. 24) was being or had been committed (in addition to the other offences set out above);⁹⁶ and
 - c. stop, board, “*require the ship to be taken to any place (on land or on water) in the [UK] or elsewhere and detained there*” and/or “*require the ship to leave [UK] waters*” (amendments underlined).⁹⁷
41. Thus, if an officer had reasonable grounds to suspect that individuals on board a boat were attempting to travel to the UK without a visa, the officer would be empowered to require that boat to leave UK waters using all “*such action as is reasonably necessary*”.⁹⁸
42. In addition, and noting current indications that the measures will be imposed without individual assessment of those on board,⁹⁹ we consider that this is incompatible with Article 33 of the Refugee Convention and Article 3 ECHR.¹⁰⁰

Criminalisation of arrival (Clause 39)

43. Under the Bill, an individual who is unable to obtain a visa and who subsequently arrives in the UK will have committed an offence. The Bill criminalises the very act of arriving in the UK to seek asylum, including by those who have come “*directly*” from their country of origin, even on the Government’s restrictive understanding of that term (see immediately below at §§51-52).¹⁰¹ As Lord Paddick recently observed in the House of Lords, the Bill:

⁹⁵ Paragraph 2 of Schedule 6 of the Bill.

⁹⁶ Paragraph 10 of Schedule 6 of the Bill.

⁹⁷ Paragraph 10 of Schedule 6 of the Bill.

⁹⁸ Paragraph 10 of Schedule 6 of the Bill (new Part A1(B1)(5)).

⁹⁹ See e.g. “[Channel: UK practices pushbacks as France, NGOs and the UN deem ‘turn-around’ tactics unsafe and unlawful](#)” *European Council on Refugees and Exiles* (17 September 2021); Rajeev Syal, “[Priti Patel to send boats carrying migrants to UK back across Channel](#)” *The Guardian* (9 September 2021).

¹⁰⁰ See e.g. “[UNHCR Observations on the Nationality and Borders Bill, as amended](#)” (January 2022) at p 19. **Note:** The Government’s current policy in respect of “*push-back*” operations is the subject of ongoing judicial review proceedings — including on the basis that it constitutes a practice or procedure which is contrary to the 1951 Refugee Convention — brought by three Claimant groups: Freedom from Torture; the Public Service and Commercial Union and Care 4 Calais; and Channel Rescue.

¹⁰¹ See Joint Committee on Human Rights, “[Ninth Report – Legislative Scrutiny: National and Borders Bill \(Part 3\) – Immigration offences and enforcement](#)” (24 November 2021) at pp 40-46; “[UNHCR Observations on the Nationality and](#)

*“potentially criminalises everyone who arrives in the UK to claim asylum even when they have flown directly to the UK. It effectively criminalises all asylum-seekers arriving in the UK unless they have been resettled through a government scheme—resettlement schemes that range from few and far between to non-existent.”*¹⁰²

44. The Bill does this by amending the 1971 Act — which already makes it an offence to knowingly enter the UK without leave — to create a new offence of unlawful arrival. Unlawful arrival means arrival without a valid entry clearance (*i.e.* without a valid visa).
45. The distinction between entry and arrival has always been recognised in UK law.¹⁰³ An individual may arrive at the UK border and present themselves to immigration control (including for the purpose of seeking asylum) but is not deemed to have entered the UK until such time as she has passed through immigration control and in effect crossed the border.¹⁰⁴ With the shift from entry to arrival, the Bill criminalises the individual who arrives without a visa and immediately presents themselves to border officials for the purposes of seeking asylum.
46. If convicted of this offence, an individual is liable to imprisonment of twelve months (on summary conviction) or four years (on conviction on indictment). There is no statutory defence.

Protection from penalisation and the re-writing of Article 31 Refugee Convention (Clause 36)

47. As Lord Sharpe confirmed to the House of Lords on 28 February 2022, *“there are now no direct travel routes from Ukraine to the UK”*.¹⁰⁵ As a result, any individual who arrives in the UK from Ukraine will necessarily have stopped in one or more countries in transit. If this Bill is enacted, any individual who does so, and who arrives in the UK without a visa, will be liable to penalisation on account of their unlawful arrival.

[Borders Bill, as amended](#)” (January 2022) at pp 16-18; and [“Nationality and Borders Bill – Joint Opinion](#)” (commissioned by Freedom from Torture) (7 October 2021) at pp 87-92.

¹⁰² HL Deb 2 March 2022, [vol 819](#) (Lord Paddick).

¹⁰³ Joint Committee on Human Rights, [“Ninth Report – Legislative Scrutiny: National and Borders Bill \(Part 3\) – Immigration offences and enforcement”](#) (24 November 2021) at 40-43.

¹⁰⁴ See section 11, 1971 Act; *Kapoor and Ors v R* [2012] 1 WLR 3569 at §23.

¹⁰⁵ HL Deb 28 February 2022, [vol 819](#) (Lord Sharpe).

48. The obligation not to penalise refugees is set out in Article 31(1) of the Refugee Convention. This obligation is central to the refugee protection regime as a needs-based, rather than an authorisation-based, scheme. It was included in response to the lessons from the 1930s, where refugees seeking sanctuary were denied admission to states because they lacked pre-authorisation to do so, and subsequently lost their lives.¹⁰⁶ In recognition of the fact that persons fleeing persecution are often unable to observe the administrative and legal formalities associated with movement between States,¹⁰⁷ Article 31(1) provides that States “*shall not impose penalties, on account of their illegal entry or presence*”, on individuals who enter or are present without authorisation so long as those individuals: (a) “[*came*] directly from a territory where their life or freedom was threatened”, (b) “*present[ed] themselves without delay to the authorities*”, and (c) “*show good cause for their illegal entry or presence*”.
49. The term “*penalties*” extends beyond criminal sanctions and includes administrative disadvantages, such as applying procedural bars to applying for asylum, or treating claims as inadmissible.¹⁰⁸
50. As to the phrase “*coming directly*”, Simon Brown LJ held over two decades ago in the Divisional Court, drawing upon the *travaux préparatoires*, the views of UNHCR, and the writings of academics and commentators, that “*some element of choice is indeed open to refugees as to where they may properly claim asylum [and] that [a]ny merely short term stopover en route to such intended sanctuary cannot forfeit the protection of [Article 31]*”: *R (Adimi) v Uxbridge Magistrates Court & Anor* [2001] QB 667 per Simon Brown LJ at §18 (our emphasis). This approach was affirmed by Lord Bingham in the House of Lords in *R v Asfaw* [2008] 1 AC 1061 at §22. It has been consistently applied by our courts since.¹⁰⁹

¹⁰⁶ See e.g. Freedom from Torture, *Joint Opinion*, para 4.2.

¹⁰⁷ See e.g. Draft Report of the *Ad hoc* Committee on Statelessness and Related Problems; Proposed Draft Convention relating to the Status of Refugees ([UN doc. E/AC.32.L.38](#), 15 February 1950), Annex I (draft Article 26) and Annex II (comments. p 57).

¹⁰⁸ Guy Goodwin-Gill and Jane McAdam, *The Refugee International Law* (CUP, 2021) at p. 266; Cathryn Costello, “[Article 31 of the 1951 Convention relating to the Status of Refugees](#)” (UNCHR Legal and Protection Policy Research Series, July 2007) at pp 37-38; James C Hathaway, *The Rights of Refugees under International Law* (CUP, 2021) at pp 515-518.

¹⁰⁹ See e.g. *R v MMH* [2008] EWCA Crim 3117 per Keene LJ at §14; *R v Kamalanathan* [2010] EWCA Crim 1335 per Thomas LJ at §5; *R v Jaddi* [2012] EWCA Crim 2565 per Hughes LJ at §19; *R v AM* [2010] EWCA Crim 2400 per Leveson LJ at §§8-9; *R v Mateta and Ors* [2013] EWCA Crim 1372 per Thomas LJ at §§16, 21; *R v Ordu* [2017] EWCA Crim 4 per Edis J at §§6, 28.

51. The Bill seeks to reinterpret Article 31(1) in a manner inconsistent with this settled and authoritatively declared meaning.¹¹⁰ Under the Bill, an individual will be deemed not to have come to the UK “*directly*” — and thus not to be entitled to immunity from penalisation — if they have “*stopped*” in another country between leaving the country where they faced persecution and arriving in the UK, and could reasonably be expected to have “*sought*” protection in that country.
52. The animating concern of this re-writing, and indeed of much of the Bill, is the idea that (as the Home Secretary put it) “[p]eople should be claiming asylum in the first safe country they reach, and not using the UK as a destination of choice”.¹¹¹ Thus, the Government explains in its recent policy factsheet (published the day following Russia’s invasion of Ukraine):

“Some people seeking asylum in the UK have travelled through safe countries such as European countries ...

This means that many people arriving in the UK to claim asylum have already had the opportunity to avail themselves of protection in manifestly safe countries with well-functioning asylum systems. People should claim asylum in the first safe country they reach, rather than making dangerous and unnecessary journeys to the UK to claim asylum here.”¹¹²

53. There is no basis whatsoever for this approach in international law.
- a. As UNHCR (among others) has consistently observed, the “*first safe country*” concept “*is not found in the Refugee Convention and there is no such*

¹¹⁰ See Joint Committee on Human Rights, “[Twelfth Report – Legislative Scrutiny: National and Borders Bill \(Parts 1, 2 and 4\) – Asylum, Home Office Decision-Making, Age Assessments, and Deprivation of Citizenship Orders](#)” (19 January 2022) at pp 24-27; “[UNHCR Observations on the Nationality and Borders Bill, as amended](#)” (January 2022) at pp 9-11, 37-38; “[Nationality and Borders Bill – Joint Opinion](#)” (commissioned by Freedom from Torture) (7 October 2021) at pp 21-25; Ronan Cormacain (Bingham Centre for the Rule of Law), “[Nationality and Borders Bill: A Rule of Law Analysis of Clauses 29 and 39](#)” (1 February 2022) at pp 8-9; HL Deb (28 February 2022). Vol. 819, Lord Kerr (noting that “*the Government ... assert that it is our right to interpret the Convention in this new way, differently from the way that it has been interpreted up to now by our courts, differently from the way that the UNHCR, the custodian of the convention, interprets it in its authoritative judgment on our Bill, and differently from the way in which 146 signatory states interpret it*”).

¹¹¹ HC Deb 19 July 2021, [vol 699](#) (The Secretary of State for the Home Department (Priti Patel)).

¹¹² “[Nationality and Borders Bill: inadmissibility for those travelling through or with a connection to safe third country countries](#)” (25 February 2022) (our emphasis).

requirement under international law”.¹¹³ It is, as Lord Kerr recently noted, “*a Home Office invention*.”¹¹⁴

- b. Moreover, such an approach would fundamentally undermine the principles of “*international co-operation*” on which the international refugee regime is based, as identified in the Preamble to the Refugee Convention. On the Home Office approach, countries contiguous to Ukraine would be required to host all Ukrainian refugees. But responsibility for receiving refugees was always intended to be shared. UNHCR has consistently stated that the Home Office’s approach “*would undermine the global humanitarian and co-operative principles on which refugee protection is founded*.”¹¹⁵ These principles were re-affirmed by the UN General Assembly – and indeed the UK – in the Global Compact on Refugees in 2018.¹¹⁶

54. The Home Secretary’s approach is inconsistent with the requirement, under the Vienna Convention, to interpret Article 31 “*in good faith in accordance with the ordinary meaning to be given to the terms in the context and in the light of*” its humanitarian aims.¹¹⁷ As Gregor Noll has explained:

“the ‘object and purpose’ of the 1951 Convention would not sit well with the penalisation of those who might hypothetically find protection in a transit country geographically closer to the country of origin. Such penalisation would lead to a concentration of reception burdens in that transit State, and thereby promote the ‘tensions’ which the Preamble exhorts States to prevent. An interpretation of the criterion of ‘coming directly’ in its context and in the light of the 1951 Convention’s object and purpose therefore leads to the following result. The benefit of Art. 31, para. 1 must be accorded to any refugee, with the exception of

¹¹³ “[UNHCR Observations on the Nationality and Borders Bill, as amended](#)” (January 2022) at p 2. See also UNHCR, “[Summary Conclusions on the Concept of ‘Effective Protection’ in the context of Secondary Movements of Refugees and Asylum-Seekers](#)” (Lisbon Expert Roundtable, 9 and 10 December 2002), February 2003 at §11.

¹¹⁴ HL Deb 28 February 2022, [vol 819](#) (Lord Kerr).

¹¹⁵ UNHCR, “[Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom](#)” (May 2021) at §4.5.21; “[UNHCR Observations on the Nationality and Borders Bill, as amended](#)” (January 2022) at §§7-8.

¹¹⁶ “[The Global Compact on Refugees](#)” (December 2018) at §§4-5.

¹¹⁷ Article 31(1) of the Vienna Convention on the Law of Treaties; *R v Asfaw* [2008] UKHL 31 per Lord Bingham at §11.

*those who have been accorded refugee status and lawful residence in a transit State to which they can safely return.”*¹¹⁸

55. Even on an originalist approach, the settled meaning of “*coming directly*”, which confers an “*element of choice*” as to where to claim asylum, is supported by the *travaux préparatoires* — which confirm that “[t]he drafters only intended that immunity from penalty should not apply to refugees who found asylum, or who were settled, temporarily or permanently, in another country”.¹¹⁹
56. Thus Lord Brown, former Supreme Court justice, recently explained, Clause 36 “*seeks to override well-established case law most directly*”, and specifically, to overcome the effect of *Adimi* (§50 above) as “*approved explicitly on the critical questions—of coming here without delay and so forth*” by the House of Lords in *Asfaw* (§50 above).
57. Lord Etherton, former Master of the Rolls, recently observed that Ukraine “*is the paradigm example of why this whole approach of the Government’s will not work in relation to ‘directly’.*”¹²⁰ It is not possible for any Ukrainian to come “*directly*” on the Government’s interpretation, with the consequence that a Ukrainian asylum seeker will be deprived of the fundamental right of non-penalisation if the Bill is enacted according to the Government’s wishes.

An asylum-seeker can have her claim declared inadmissible (Clause 15)

58. Under the Bill, an individual who has arrived in the UK from Ukraine, having necessarily stopped in one or more countries *en route*, will be liable to having their asylum claim declared inadmissible (and therefore not substantively considered) for that reason alone.
59. An overview of the current inadmissibility regime is set out at §25 above.¹²¹ While the Bill replicates key aspects of the existing regime by inserting new sections 80B and 80C

¹¹⁸ Gregor Noll, “Article 31 (Refugees Unlawfully in the Country of Refuge)” in A Zimmermann (ed), *The 1951 Convention Relating to the Status of the Refugees and its 1967 Protocol: A Commentary* (OUP 2011) at 1257.

¹¹⁹ UNHCR, “[Summary Conclusions: Article 31 of the 1951 Convention](#)” (June 2003) at §10(c) (our emphasis). See also [Statement of Mr Colemar \(France\), 13th Conference of the Plenipotentiaries](#) (22 November 1951); Guy S Goodwin-Gill, ‘Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection’ in Erika Feller, Volker Türk, Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (CUP 2003) and James C Hathaway. *The Rights of Refugees under International Law* (CUP 2021) at 497-498.

¹²⁰ HL Deb 28 February 2022, [vol 819](#) (Lord Etherton).

¹²¹ See “[Nationality and Borders Bill – Joint Opinion](#)” (commissioned by Freedom from Torture) (7 October 2021) at pp 7-9 for a more detailed overview.

into the Nationality, Immigration and Asylum Act 2002 (the “**2002 Act**”), it contains a number of notable amendments. Of particular note in the present context, the Bill:

- a. authorises the Secretary of State to declare an asylum application inadmissible in any case where an applicant “*has a connection to a safe third State*” (the definition of “*safe third State*” being materially identical to that set out at §25.b above);¹²²
- b. in relation to the requisite “*connection*” to a “*safe third State*”, specifically includes a situation where the individual’s protection claim in a third State has been refused;¹²³
- c. omits (at least on its face¹²⁴) the current requirement for an inadmissibility decision to be retracted if removal to a safe country is likely to be impossible within a reasonable period of time;¹²⁵ and
- d. fails to clarify the circumstances in which the Secretary of State would consider an asylum claim which met the criteria for being declared inadmissible: proposed section 80B(1) of the 2002 Act permits, but does not require, the Secretary of State to treat a case meeting the relevant criteria as inadmissible, which leaves unclear when that discretion to consider the application would be exercised at all, while proposed section 80B(7) of the 2002 Act provides that a case declared inadmissible may nonetheless be considered in such circumstances “*as may be provided for in the immigration rules*” or in “exceptional circumstances”.¹²⁶

60. Again, while the Government has said that unaccompanied children will be exempted from the inadmissibility regime, families with children apparently will not (although neither point appears on the face of the Bill).¹²⁷

¹²² Clause 15 of the Bill (new section 80B(1) of the 2002 Act).

¹²³ Clause 15 of the Bill (new section 80C) of the 2002 Act).

¹²⁴ Baroness Williams sought to offer reassurance that “*we [...] will not operate, the inadmissibility system in a way that puts someone in indefinite limbo*”, but declined to commit the government to a six-month time limit, as in the current rules: HL Deb 2 March 2022, [vol 819](#) (The Minister of State at the Home Office (Baroness Williams)).

¹²⁵ See e.g. “[UNHCR Observations on the Nationality and Borders Bill, as amended](#)” (January 2022) at pp 14-16.

¹²⁶ See “[Nationality and Borders Bill – Joint Opinion](#)” (commissioned by Freedom from Torture) (7 October 2021) at §12 for a detailed overview of the changes to the inadmissibility regime.

¹²⁷ “[Nationality and Borders Bill: children factsheet](#)” (25 February 2022).

61. Leaving aside the issue of practical deliverability, the revised inadmissibility provisions, in Lord Etherton’s words, “*are quite plainly contrary to the Refugee Convention and a breach of the UK’s obligations under it.*”¹²⁸ As Lord Etherton further explained, the definition of “*safe third State*” set out under the new section 80B(4) “*is really another way of stating the ‘coming directly from the country of persecution’ requirement.*”¹²⁹ For all of the reasons set out at §§48-57 above, such attempts to operationalise the Government’s “*first safe country*” concept are contrary to Article 31(1) of the Refugee Convention (the implications of a declaration of inadmissibility clearly constituting a form of penalisation). Again, as Lord Etherton put it, these provisions represent “*a rewriting of the Convention and not a legitimate interpretation of it.*”¹³⁰
62. We also note that:
- a. There is an absence of adequate safeguards against returning individuals to countries in which they will be denied rights owed to them under the Refugee Convention and/or the European Convention on Human Rights.¹³¹
 - b. A connection can be made with a state that a person has never been to, and a person can be removed to a completely different state. UNHCR has described this as “*a significant and highly problematic departure from international practice and UK case law.*”¹³² No indication appears to have been given by the Government of the circumstances in which it might be considered appropriate to remove a person to a state to which they have never been and/or to which they did not pass through *en route* to the UK.
 - c. Even if the amended regime ultimately requires that an inadmissibility decision be retracted if removal to a safe country is likely to be impossible within six months, as Lord Rosser has said: “*With the huge backlog and delay currently in the system, it is impossible to understand how adding another six months to the asylum process will help an already dysfunctional system.*”¹³³

¹²⁸ HL Deb 2 March 2022, [vol 819](#) (Lord Etherton).

¹²⁹ HL Deb 2 March 2022, [vol 819](#) (Lord Etherton).

¹³⁰ HL Deb 2 March 2022, [vol 819](#) (Lord Etherton).

¹³¹ See e.g. “[UNHCR Observations on the Nationality and Borders Bill, as amended](#)” (January 2022) at pp 9-12; “[Nationality and Borders Bill – Joint Opinion](#)” (commissioned by Freedom from Torture) (7 October 2021) at pp 18-21.

¹³² “[UNHCR Observations on the Nationality and Borders Bill, as amended](#)” (January 2022) at p 11.

¹³³ HL Deb 2 March 2022, [vol 819](#) (Lord Rosser).

An asylum-seeker can be removed to an off-shore processing facility (Clause 28 and Schedule 3)

63. Any individual who has fled from Ukraine and subsequently sought asylum in the UK, whether or not they initially arrived with a valid visa, will be at risk of being removed to offshore processing while their claim for asylum is pending.
64. While the proposal for such processing is set out at a high level of generality in the Bill, the recently published policy factsheet highlights its purpose: “*to make it easier to remove someone with a pending asylum claim*” and to “*deter unwanted behaviours such as irregular migration and clandestine entry to the UK.*”¹³⁴
65. The Bill proposes to do this by amending the 2002 Act to create an exception to the (*prima facie*¹³⁵) absolute bar on removing an asylum-seeker while their claim is “*pending*” in order to permit removal to a country which meets a set of criteria which are similar, but not identical, to those for a “*safe third State*” (see §25 above).
66. The Bill leaves out more than it includes. It does not specify: where the Secretary of State would contemplate sending individuals for processing; whether all or only some individuals would be processed offshore and if so, what the criteria for selection would be; who would do the processing and where any right of review or appeal would lie; what conditions or safeguards the UK would require as part of any offshore processing agreement; or where asylum-seekers recognised as refugees under offshore processing arrangements would be (re)settled.¹³⁶ As Lord Kerr observed in response to a letter sent by the Minister of State at the Home Office on the second day of Report Stage (2 March 2022):

*“[the Minister] cannot tell us with which countries she is negotiating with, what exactly she is negotiating for or what exemptions would be provided ... She has answered none of the questions ... [regarding] how legal assistance on British immigration law is to be provided to these people, in these unknown countries, who are going through a process about which we have been told nothing.”*¹³⁷

¹³⁴ “[Nationality and Borders Bill: overseas asylum processing](#)” (25 February 2022).

¹³⁵ Exceptions do exist elsewhere under the current system – in particular, in relation to removal to states listed in or under Schedule 3 to the 2004 Act.

¹³⁶ See e.g. HL Deb 2 March 2022, [vol 819](#) (Baroness Lister, Lord Etherton, Lord Rosser and Lord Kerr).

¹³⁷ HL Deb 2 March 2022, [vol 819](#) (Lord Kerr).

67. The Government has recently confirmed that “[u]naccompanied asylum seeking children will not have their claims processed overseas.” Again, however, this does not apply in relation to children seeking asylum with their family members. When recently pressed on this issue by the House of Lords, the Minister of State at the Home Office simply stated: “*I have gone as far as I am willing to go by confirming that unaccompanied asylum-seeking children would not be subject to offshoring*”.¹³⁸
68. Recent reports have suggested that Rwanda, Ghana, Albania, the Isle of Man and/or Ascension Island are among the countries or territories under consideration as possible venues for offshore processing, although the governments of a number of these have strongly denied any intention of agreeing to host such arrangements.¹³⁹ At present, no arrangements are known to have been reached with these or any other countries or territories. The apparent model for this idea is the Australian system of offshoring asylum-seekers to Nauru or Papua New Guinea. Concern has been expressed from many quarters at both the human suffering visited on those held in such offshore processing centres and the financial costs of the system.¹⁴⁰
69. If such arrangements are agreed as the Government envisages in the Bill, they would see asylum-seekers from Ukraine, including families with children, sent to camps in other countries or territories, including possibly remote islands.
70. As Lord Etherton has stated: “*Offshoring while an asylum-seeker is having their claim assessed is wrong in principle, oppressive in practice and, critically, lacking sufficient safeguards under the Bill.*”¹⁴¹ In relation to the lack of safeguards, numerous issues have been identified in relation to the implementation of offshore processing arrangements. While the nature and extent of the legal violations will necessarily depend on the specific regime imposed, these include, *inter alia*, potential breaches of the UK’s obligations

¹³⁸ HL Deb 2 March 2022, [vol 819](#) (The Minister of State at the Home Office (Baroness Williams)) (our emphasis).

¹³⁹ See e.g. Charles Hymas, “[Ghana dismisses reports it could host processing centre for Channel migrants](#)” *The Telegraph* (18 January 2022); Matthew Weaver and Rajeev Syal, “[Albania angrily denies it would process asylum-seekers for UK](#)” *The Guardian* (18 November 2021); Alain Tolhurst, “[Gibraltar And Isle Of Man Reject “Inhumane And Ridiculous” Plans To Host UK Asylum Processing Centres](#)” *Politics Home* (18 March 2021)

¹⁴⁰ See e.g. HL Deb 8 February 2022, [vol 818](#) (Lord Kirkhope, the Lord Bishop of Durham, Lord Paddick, Lord Kerr, Lord Rosser and Lord Etheron). See also Amnesty International, “[This is Breaking People: Human rights violations at Australia’s asylum-seeker processing centre on Manus Island, Papua New Guinea](#)” (2013); Amnesty International, “[Australia: Appalling abuse, neglect of refugees on Nauru](#)” (2 August 2016); Senate Standing Committee on Legal and Constitutional Affairs (Australia), “[Serious allegations of abuse, self-harm and neglect of asylum-seekers in relation to the Nauru Regional Processing Centre, and any like allegations in relation to the Manus Regional Processing Centre](#)” (21 April 2017); “[The Nauru Files](#)” (comprising 2,000 leaked incident reports from Australia’s off-shore detention camp in Nauru).

¹⁴¹ HL Deb 2 March 2022, [vol 819](#) (Lord Etherton).

under Articles 2, 3, 8 and/or 14 ECHR and/or Articles 3, 31 and/or 33 of the Refugee Convention.¹⁴²

An asylum-seeker will be designated a “Group 2 refugee” and deprived of her full Convention rights (Clause 11)

71. If the Bill were in force today, any asylum claimant coming to the UK from Ukraine without a visa and having stopped in another country in transit, could only ever be designated as a “Group 2 refugee”.
72. The Bill divides refugees — that is, people whose asylum claims have been accepted — into two “Groups” based upon their mode of arrival.
73. “Group 1” refugees are those who (i) have come to the UK directly from the country where they were at risk (such as Ukraine) — on the basis of the Government’s erroneous reinterpretation of the phrase “coming directly”, (ii) have presented themselves to the authorities without delay and (iii) where this applies, can show good cause for their unlawful entry or presence;¹⁴³ all other refugees are “Group 2” refugees.
74. Under the Bill, authorisation is given to treat refugees from Ukraine (as with all other “Group 2” refugees) differently from those who have arrived in the UK without having stopped in another country. The forms of such discrimination are not limited by the Bill, but expressly include: the length of any period of limited leave to enter or remain which is given; the requirements that they must meet in order to be given indefinite leave to remain; whether they may have recourse to public funds; and whether leave to enter or remain may be given to members of their family.
75. This involves the most extraordinary and flagrant re-writing of the Refugee Convention. The Refugee Convention does not permit the creation of two classes of refugees, still less on the basis of their mode of arrival, and even less so on the basis of a legally impermissible understanding of what “coming directly” in Article 31 involves. The central concern of the Refugee Convention is what a person is fleeing from, not how they

¹⁴² See Joint Committee on Human Rights, “[Twelfth Report – Legislative Scrutiny: National and Borders Bill \(Parts 1, 2 and 4\) – Asylum, Home Office Decision-Making, Age Assessments, and Deprivation of Citizenship Orders](#)” (19 January 2022) at pp 36-37; “[UNHCR Observations on the Nationality and Borders Bill, as amended](#)” (January 2022) at pp 11-16, 62-64; and “[Nationality and Borders Bill – Joint Opinion](#)” (commissioned by Freedom from Torture) (7 October 2021) at pp 44-58.

¹⁴³ Clause 11(2)-(3) of the Bill.

arrived in a host country. Clause 11 “*is a plain breach of the Convention—as plain as could be*”.¹⁴⁴

76. As UNHCR has confirmed,¹⁴⁵ the creation by the Bill of two classes of refugees is inconsistent with the Refugee Convention.

a. It involves breaches of a number of provisions of the Refugee Convention, in particular Article 23 (right to “*public relief and assistance*” on the same terms as host-country nationals); Article 32 (non-expulsion of refugees lawfully in the territory, save on grounds of national security and public order); and Article 34 (duty on states “*as far as possible [to] facilitate the assimilation and naturalisation of refugees*”).

b. It rests on the legally unfounded idea that there is a requirement or an expectation that an asylum-seeker should apply in the first safe country they reach.¹⁴⁶ The underpinning rationale for Clause 11 — namely, the idea that “*people should claim asylum in the first safe country they arrive in*”¹⁴⁷ — is, as earlier noted, “*a Home Office invention.*”¹⁴⁸ It is apt to undermine the principles of international co-operation on which the international refugee regime is based: see above at §53.b.

77. We also consider that it is strongly arguable that the proposed discrimination would be inconsistent with Article 14 ECHR read with Article 8 ECHR, for reasons set out in more detail in the Joint Opinion of 7 October 2021 commissioned by Freedom from Torture, with which we agree.¹⁴⁹ In summary, in our view:

i. The limited length and restrictive conditions of leave to remain would fall within the ambit of Article 8 ECHR, because they would have a profound impact on the enjoyment of a refugee’s private life in the UK, including their personal development and their ability to establish and develop relationships with others.

¹⁴⁴ HL Deb 28 February 2022, [vol. 819](#) (Lord Etherton).

¹⁴⁵ See e.g. UNHCR, “[UNHCR Observations on the Nationality and Borders Bill, as amended](#)” (January 2022) at 12-13.

¹⁴⁶ See e.g. “[UNHCR Observations on the Nationality and Borders Bill, as amended](#)” (January 2022) at pp 2-3.

¹⁴⁷ See e.g. [Nationality and Borders Bill Explanatory Notes](#) at §§21, 23 and 145.

¹⁴⁸ HL Deb 28 February 2022, [vol 819](#) (Lord Kerr).

¹⁴⁹ “[Nationality and Borders Bill – Joint Opinion](#)” (commissioned by Freedom from Torture) (7 October 2021) at 79-84; two of the co-authors of that Joint Opinion are co-authors of this Joint Opinion.

- ii. “*Group 2*” refugees would be treated less favourably than “*Group 1*” refugees in that regard.
- iii. Being a refugee who arrived in the UK unlawfully would amount to an “*other status*” for purposes of Article 14 ECHR.
- iv. There would be no objective justification for the inferior treatment, as it would be difficult to justify a regime which indirectly penalised unauthorised arrivals in a manner which would be proscribed under the Refugee Convention if that penalty were imposed directly.

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