Joint Committee on Human Rights

Legislative scrutiny: Government Bill 262 of Session 2022-23
(entitled Illegal Migration Bill)

April 2023

1. This Bill is unusual in design and totalitarian in nature. Its single stated purpose runs throughout. That purpose is undoubtedly authoritarian in nature. What makes it unusual, however, is the degree to which it constitutes an entire and single system dedicated to its stated purpose. This has implications for understanding any of its provisions because, even more than is usual, it is not possible to read any provision in isolation.

2. In this submission, we draw connections between various provisions; and we use the word "totalitarian" to remind the reader of the entire system in which sits any particular provision under consideration.

3. We have provided answer to each of the Committee's questions. However, our answers cannot be read as comprehensive responses concerning the human rights implications of this Bill; and, at various points, we make specific reference to our expectation that others may elaborate on considerations concerning children, modern slavery, legal aid, and detention (particularly of children and pregnant women).

4. Our conclusion is that this Bill is entirely unsalvageable, should never have been introduced and ought to be rejected in its entirety.

(1) What routes will be available to those who wish to seek asylum in the UK if this Bill is enacted, and would they be sufficient to fulfil the UK's international obligations under the UN Refugee Convention?

5. As explained under separate subheadings below:

    5.1. There are no such routes.

    5.2. Even if there were, these could not be sufficient to fulfil Refugee Convention obligations.

    Absence of routes for people to seek asylum:

6. There is no visa available to travel to the UK for the purpose of seeking asylum. Visas are required to travel from all countries from which any significant number

of people seek asylum here.[1] Immigration rules provide that any visa applied for or obtained for the purpose of seeking asylum (or any other purpose not permitted by the rules) may be refused or cancelled.[2] However, a claim for asylum in the UK must be made from within the UK.[3]

7. Ministers nonetheless claim so-called 'safe and legal routes' exist. However, with the exception of schemes for Ukrainian nationals and certain Afghan nationals formerly employed by UK Government, what they refer to are not any route by which a person may seek asylum in the UK; and while some (not all) of the routes to which they refer are for refugees, what is provided is highly restricted (particularly according to country of nationality).[4] Further explanation is provided in the Appendix.

That visa or other sanctioned routes could not in itself be sufficient to fulfil Refugee Convention obligations:

8. The Refugee Convention applies regardless of how a refugee arrives on the territory. It expressly excludes penalties imposed upon refugees for arriving by a route that is not sanctioned in advance by law or practice of that territory.[5] Moreover, as UNHCR has made clear, it is destructive of the Convention for any country to seek to make provision of asylum dependent upon whether refugees arrive by formally sanctioned routes.[6] This would give licence and encouragement for other countries to do likewise. Ultimately, that would fatally undermine the Convention. It would not licence, but would encourage countries bordering conflict, tyranny and persecution to neglect or abandon their responsibilities by starkly exacerbating the disproportionate responsibility already and long carried by these countries.[7]

9. The implications for any ambition to entirely end refugees' reliance upon making dangerous journeys and upon dangerous people must be faced. But the choice is not simply between removing all such reliance or doing nothing.

10. If the Government wishes to enable refugees with e.g. particular connection to the UK to travel safely for the purpose of seeking asylum, it can do much to achieve that. It would have to recognise that a refugee might not be able to travel directly or safely from their country of origin – from many countries there are no direct routes; it may not be safe to travel on a passport through an airport; it may not be safe to obtain a passport; it may not be safe to wait to complete a

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[1] Immigration Rules, paragraph 24 and Appendix Visitor: Visa national list

[2] Immigration Rules, paragraph 30C, paragraph 9.13.1 and paragraph 9.20.2

[3] Home Office policy on applications from abroad, 20 September 2011; and Nationality and Borders Act 2022, section 14(1) and (2)

[4] We note the express non-discrimination obligation in Article 3, Refugee Convention to apply it "*to refugees without discrimination as to race, religion or* ***country of origin***" (emphasis added)

[5] Article 31, Refugee Convention

[6] Including in oral evidence to the Committee and by its public statement of 7 March 2023

[7] UNHCR's most recent analysis is that as of mid-2022, "*69 per cent of refugees and other people in need of international protection lived in countries neighbouring their countries of origin*" and "*Low- and middle-income countries host 74 per cent of the world's refugees and other people in need of international protection. The least developed countries provide asylum to 22 per cent of the total.*"

visa application process. It may not be possible or safe to do some of these things in another country. Moreover, people smugglers may control the only means to escape the refugee's country; and this may determine far more of the journey to safety than merely getting out of the country. The more the Government did to make a 'safe and legal route' accessible from anywhere the refugee may be, at any stage along a journey, the more refugees would be enabled to reduce reliance on people smugglers.

11. Equally, if the Government were to engage in meaningful regional responsibility-sharing – e.g. participating in arrangements to receive refugees who claim asylum in the EU – the more this would reduce refugees' reliance on people smugglers and dangerous journeys.[8]

(2) Clause 1(5) provides that section 3 of the Human Rights Act does not apply in relation to provisions made by or by virtue of this Act. Section 3 HRA requires courts and public authorities to read legislation in a way which is compatible with Convention rights, so far as it is possible to do so. What are the implications of the disapplication of section 3 HRA?

12. Clause 1(5) is effectively an attempt to shield the Bill from the possibility of human rights compliance. It is an extraordinary measure. We deplore its inclusion in this Bill; and the precedent that would be set if it is enacted.

13. The Bill is plainly not human rights compliant. While we are implacably opposed to clause 1(5), its removal would be extremely unlikely to enable a human rights compliant reading of the Bill. The Bill in significant part excludes courts and is stark in stipulating what is permitted and required of the Home Secretary. In significant part its provisions are formulated to require non-compliance with human rights – such as those to require expulsion, to require certain claims not to be considered and to bar rights to be registered as a British citizen.

14. Clause 1(5) sets a very dangerous precedent. Parliamentarians may justifiably tire of 'thin end of the wedge' arguments; and our alarm at the wider implications of clause 1(5) should not detract from immediate concern at the very serious damage the Bill (including clause 1(5)) will do to the human rights of people targeted by it, as discussed throughout this submission. However, once a government is permitted by Parliament to start switching operative parts of the Human Rights Act 1998 (HRA) on and off for targeted circumstances or groups of people, principled objection to doing so ever more widely, even to the point of rendering the HRA meaningless, is lost. Disapplying section 3 of the HRA in this Bill has already been used as a model for another piece of legislation, the recently published Victims and Prisoners Bill, which (if enacted) will mean certain people imprisoned by the state will have laws determining their release excluded from human rights interpretation.

[8] Amnesty does not consider that the Dublin Regulations provide an effective or just system for allocating asylum responsibilities, but the notion of shared regional responsibility through a system that recognised family and other connections that a refugee may have and allocated responsibility on a proportionate basis is in principle one that we have promoted. Real responsibility-sharing includes sharing responsibility for hosting people seeking asylum, determining asylum claims, hosting people determined to be refugees and taking such fair and humane action as may be necessary or permitted in respect of people determined not to be refugees.

(3) Clause 2 of the Bill places a duty on the Secretary of State to make arrangements as soon as reasonably practicable to remove any person who enters the UK irregularly, and has not come directly from a territory where their life and liberty was threatened (which includes anyone who has passed through or stopped in another safe country). Is this approach compliant with the UK's obligations under the UN Refugee Convention? What proportion of asylum seekers currently stop in or pass through a safe third country and would therefore be subject to removal from the UK without any assessment of their claim?

15. This requirement is not compliant and intended to be not compliant (see response to Question 1).

16. Many refugees who seek asylum in the UK do not come from countries, from which any direct flights to the UK exist, e.g. Afghans, Eritreans or Syrians. However, it is not safe or practical for many refugees to fly direct even where direct flights exist (e.g. from Iran). That this is impractical is largely a creation of Government policy to refuse visas and require airlines to bar visa-less travel. That it is not safe is largely a feature of persecution and the risks to a refugee if attempting to take actions (summarised in answer to Question 1) necessary to undertake a direct flight, even if a visa were formally available.

17. Save for refugees *sur place*,[9] it is extremely difficult to envisage how any significant number of refugees could, in these circumstances, ever come to the UK to seek asylum save in a manner that would be caught by clause 2.

18. The effect of clause 2 is permanent. This is a general feature of the Bill, and a central aspect of its totalitarian nature. Once caught by clause 2, someone's expulsion is forever required. To cement this intent, clause 4 forever bars consideration of a protection or human rights claim (see response to Question 4) and clause 29 forever bars any grant of leave to enter or remain (see response to Question 14). Clause 4 and 29 (also clause 30), therefore, prevent the only possible escape from the four conditions in clause 2. That possible escape is a grant of leave to enter or remain which would mean the fourth condition (clause 2(6)) would no longer apply. But even if an exception in clause 29 is triggered, the person would remain under threat of expulsion (and required to be expelled) as soon as no longer having any such leave, including if it is cancelled or refused extension for the purpose of reinstating the expulsion requirement.

19. Ultimately, the permanent requirement to expel the person creates, for so long as the person is not or cannot be expelled, an indefinite limbo for that person. Many people to whom this limbo applies will be refugees, notwithstanding the refusal to ever consider their status. Their international status is to be simply ignored and the rights this status attracts in international law are to be made

[9] A refugee *sur place* is someone whose refugee status (being at risk of persecution) arises from events occurring while the person is outside their country. For example, an overseas student in the UK who becomes at risk as a result of a coup in their country.

indefinitely inaccessible – a repudiation of the Refugee Convention. Other people with legitimate human rights claims for protection or stay are caught by this same limbo. Given the nature of being without leave to enter or remain in the UK, while requiring such leave, this is a profound interference with Article 8 ECHR and may cause such deprivation; social exclusion; mental, physical and/or moral deterioration; and/or vulnerability to exploitation as to be or become degrading (Article 3 ECHR).[10]

(4) Clause 4 provides that any 'protection claims' (under the Refugee Convention or claims for humanitarian protection) and or 'human rights claims' (under section 6 HRA) made by persons who meets the conditions in clause 2 must be declared inadmissible. What are the human rights implications of clause 4?

20. Clause 4 follows 'naturally' upon clause 2. Since clause 2 requires the Home Secretary to expel the person, there is an inevitability about a provision to require the Home Secretary not to admit the person's protection or human rights claim. However, the scheme this creates is plainly incompatible with human rights for it is, and is intended, to shut out the possibility of identifying the true human rights implications of expelling the person or any real human rights obligations that would prohibit this.

(5) Clause 5 provides for the destinations to which individuals who are subject to the duty or power to be removed can be sent. Anyone who makes a protection or human rights claim can still be removed to a country on a list set out in the Schedule (which includes nations in Europe, Africa and Asia). If a protection or human rights claim is made by a national of an EU country, or Albania, Iceland, Liechtenstein, Norway and Switzerland, they can also be returned to their own country, unless the Secretary of State considers there are exceptional circumstances preventing it. What are the human rights implications of clause 5? Does the designation of states as safe for removal or return raise any additional human rights concerns?

21. Clause 5 is a limiting clause. It restricts the countries or territories to which a person may be expelled in fulfilment of the requirement in clause 2 or – while an unaccompanied child remains under 18 – in exercise of the power in clause 3(2).

22. However, this limiting effect is not truly an effort in human rights compliance. Given the nature, extent and consequence of clause 2, clause 5 can only be understood as giving appearance of human rights compliance by excluding some countries or territories as a destination for expulsion. The inclusion of the Republic of Rwanda in the Schedule is, of course, a 'natural' consequence of the arrangement Government has made with the government of that country. Notwithstanding the High Court judgment in December 2022,[11] we do not consider commitments formally expressed by the two governments to be reliable. We say this having regard to the recent and current record of the

[10] *R (Adam & Ors) v Secretary of State for the Home Department* [2005] UKHL 66
[11] *R (AAA & Ors) v Secretary of State for the Home Department* [2022] EWHC 3230 (Admin)

Rwandan government regarding respect for freedom of speech, refugee rights and human rights more broadly.[12]

23. There is a symmetry between:

    23.1. on one hand, the readiness of the UK Government to ignore recent and current human rights violations in which the Rwandan government is so heavily implicated, and its extreme intolerance of free speech (itself undermining reliance upon what it says in and in connection with the agreement between the two governments); and

    23.2. on the other, the readiness of the UK Government to disregard and violate its own human rights obligations by this Bill.

    This emphasises that the Home Secretary cannot be relied upon to ensure that inclusion of any country on this list properly reflects even a general presumption of safety for the purpose of expelling someone from the UK.

(6) Clause 8 provides the Secretary of State with the power to remove a person's family members as long as they meet certain conditions, including that they do not have leave to enter or remain in the UK, are not British or Irish citizens, and do not have the right of abode in the UK. What are the human rights implications of clause 8?

24. Clause 8, unlike clause 2, provides a power (not a requirement) to expel someone. However, like clause 2, the conditions for it pay no regard to the true circumstances of the person it catches.

25. Family member caught by clause 8 are not caught by clause 4. Their protection or human rights claims are not barred. However, the family member is caught by clause 29 in precisely the same way as the person to whom clauses 2 and 4 apply – i.e. the exclusion of leave to enter or remain applies equally. The "compelling circumstances" and necessity exceptions in clause 29 apply equally to both. The construction of the relevant statutory regime in this Bill, therefore, tends to exclusion of any protection or human rights claim the family member may make, even if on its face clause 29 formally provides scope to consider and give effect to these.

[12] We note the UK Government's recommendations in 2021 concerning the 37th Universal Periodic Review and Rwanda identified the need for "*transparent, credible and independent investigations into allegations of extrajudicial killings, deaths in custody, enforced disappearances and torture…*" and to "*protect and enable journalists to work freely, without fear of retribution, and ensure that state authorities comply with the Access to Information law.*" It also expressed concern for victims of human trafficking. More recently, the US and UN are among those who have raised serious concerns regarding Rwanda's implication in regional conflict. Our own annual assessment concerning Rwanda is here: https://www.amnesty.org/en/location/africa/east-africa-the-horn-and-great-lakes/rwanda/report-rwanda/

26. The underlying intention – let alone what can be expected to happen in practice – is strongly indicated by different uses of the words "must" and "may".[13] Clause 29(3), (4) and (5) purports to be primarily concerned with situations where a grant of leave is "necessary" in order to comply with international law, Yet, even where the grant is necessary, the provisions provide only power ("may") to fulfil the UK's obligation. The strong indication that is driven throughout the Bill (by its opening stated purpose in clause 1 and the interplay of its various clauses), including given to decision-makers, is to expel and exclude all who fall within the Bill's scope. Experience indicates this will seriously impede any family member attempting to show that expulsion would violate their human rights.

27. This may include family members who are born in the UK and lived nowhere else – but who are without leave and without citizenship (including where entitled to that citizenship). It may include family members who lawfully entered the UK but no longer have leave – even where leave is cancelled or refused extension for the purpose of bringing the family member within the scope of the Bill. It also includes family members estranged from the person to whom clause 2 applies, even where the estrangement results from domestic violence or other abuse.

(7) The duty to make arrangements to remove persons who arrive in the UK irregularly will apply to persons who arrived on or after 7 March 2023 (the date of the introduction of the Bill). Is the retrospective effect of the Bill compliant with the UK's human rights obligations?

28. We are gravely concerned that the retrospective effect will licence a failure or refusal to properly process any claim of someone who has arrived on or after this date; and at the possible implications even were a person's claim positively decided and leave granted. Someone would not, for so long as that leave remained extant, fall within the scope of clause 2(6). However, clause 2 would still capture the person if and when leave is cancelled or refused extension, even if done for the purposes of bringing the person within the Bill's scope. We raise these matters not because they are the extent of our concerns, but to draw attention to the extent of retrospective application.

29. Given what is being retrospectively applied is not human rights compliant, that retrospective application cannot be compliant.

(8) Do the powers to detain individuals contained in clause 11 comply with the UK's human rights obligations, including the Refugee Convention and the prohibition on arbitrary detention under Article 5 ECHR? Is this affected by the powers to detain applying even though the detained person's examination or removal is not possible "for the time being" (see clause 12(1)(b))?

30. We anticipate others will elaborate upon the Bill's impact on people liable to detention, including children and pregnant women. We draw attention,

[13] It is e.g. remarkable that the Bill should require ("must") the Secretary of State to exercising existing powers of expulsion and requires ("must") that she does not admit protection or human rights claims, but merely allows ("may") that she grants leave to enter or remain when that is necessary to fulfil international law.

however, to our response to Question 11 and the statutory duty concerning children's safety and welfare;[14] and the related international obligation concerning children's best interests.[15] Our further observations on detention are not the limit of our human rights concerns.

31. The use of immigration detention has long pursued an improper purpose of deterrence.[16] Article 5(1)(f) is clearly focused on preventing someone detained from entering without authorisation or taking steps to expel or extradite that person. This is not a general licence to use detention to deter other people from seeking to enter. The provision in clause 12(1)(b) is incompatible with Article 5 and a starker example of the deterrence motivation that underlies much use of immigration detention. That is emphasised by purpose stated in clause 1(1) and explained in clause 1(2)(c), albeit our assessment of the purpose and effect of the provision in clause 12(1)(b) is not dependent on these earlier provisions. Clause 12(1)(b) expressly seeks to render any inability to carry out the relevant examination or expulsion an irrelevant consideration. If the purpose of detention under such powers were truly restricted to the conditions in Article 5(1)(f), it is to say the least difficult to understand how that can be considered irrelevant.

(9) Clause 12 of the Bill would overturn the common law principle that, for the purposes of establishing whether immigration detention is lawful, it is for the court to decide whether there is a reasonable prospect of removal within a reasonable period. Instead, the Secretary of State would determine whether the period of detention is or is not reasonably necessary. Does this change adequately protect against arbitrary detention in breach of Article 5 ECHR?

32. For similar reasons given in response to Question 10, this change is incompatible with Article 5. Clause 12 removes from judicial determination, the central question to establishing lawfulness of the person's detention (assuming the person was lawfully within the scope of the detention power at all).

33. Given the nature of the Bill, including its totalitarian purpose, it is especially difficult to conceive how the exercise of the Home Secretary's powers would ever likely be done in a way constrained by what is truly reasonable. The Bill is not designed to achieve what is reasonable. It is specifically designed to do what is not reasonable, in significant part in the expectation that what is so unreasonably done to one person may deter someone else from coming to the UK. Overturning the common law principle, to which this question draws attention, is intended to render immune from effective judicial scrutiny the exercise of detention power that is unreasonable and intended to be so. While provisions that are to be introduced by clause 12 fall short of explicitly stating the purpose of deterrence, clause 1(1) and (2) is explicit. Clause 1(3) requires clause 12 (and all other provisions) to be read, so far as is possible, to give effect to that purpose. Without clause 1(5), it is unimaginable that this feature of clause 12 could be read to such an extreme. Clause 1(5) means it is necessary to consider what would otherwise and should remain unimaginable.

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[14] Borders, Citizenship and Immigration Act 2009, section 55

[15] 1989 UN Convention on the Rights of the Child (UNCRC), Article 3

[16] This was, in our assessment, a significant and improper feature of detained fast-tracking of asylum claims

(10) Clause 13 of the Bill would, for the first 28 days of detention, prevent the First-tier Tribunal granting immigration bail to a person subject to removal in accordance with clause 2. It also seeks to oust judicial review in connection with their detention for the same period, although habeas corpus applications could still be made. Are these changes compliant with the UK's human rights obligations, particularly Article 5 ECHR?

34. Article 5(4) entitles anyone detained to take proceedings by which a court or tribunal may speedily determine the lawfulness of their detention. Clause 13 would, for the first 28 days of detention, effectively prevent that. The clause only permits a writ of habeas corpus (or other prerogative remedy) or judicial review on grounds of bad faith or fundamental breach of natural justice. It expressly excludes judicial review on grounds of error – e.g. wrongly concluding the person falls within the scope of clause 2.

35. Accordingly, what is being attempted is to make 'lawful' both detention of someone for 28 days merely by reason of their falling within the primary scope of the Bill (being within clause 2); and detention of someone wrongly suspected of falling within that clause. Since the Bill's underlying purpose is not generally human rights compliant, the Bill cannot make such detention 'lawful' for the purposes of Article 5(4); and it certainly cannot do so in the case of a person wrongly treated as within its scope.

(11) To what extent do the provisions of the Bill relating to both unaccompanied and accompanied children comply with the UN Convention on the Rights of the Child and domestic human rights obligations. In particular, is clause 3(2), which gives the Secretary of State the power to remove an unaccompanied child from the UK in certain circumstances, compatible?

36. We anticipate others will elaborate upon the Bill's impact on children, but emphasise that it provides no evidence of any real or serious consideration, still less respect for, children's best interests[17] or the statutory duty imposed upon the Home Secretary under section 55 of the Borders, Citizenship and Immigration Act 2009. That duty requires her to make arrangements to ensure functions concerning immigration, asylum and nationality are discharged having regard to the need to safeguard and promote the welfare of children. Yet, the Home Secretary is here sponsoring a Bill to prevent functions being discharged in accordance with that duty.

37. Clause 3(2) is a limiting provision much like clause 5. It defers the statutory requirement to expel an unaccompanied child until adulthood. However, it goes no further than that. The child remains caught by the Bill (see clause 2(7)); and the provisions of clause 5 apply equally to the child (see clause 5(2)(b)). Clause 3(2) is not in isolation incompatible with human rights obligations. However, it enables what is incompatible because of the extent to which, notwithstanding the deferral of the expulsion requirement, the remainder of the Bill continues to have effect upon the child.

[17] UNCRC, Article 3

(12) The Bill disapplies various modern slavery provisions to those who enter or arrive in the UK irregularly in accordance with the four conditions set out in clause 2:

(a) Would the removal of potential victims of slavery or trafficking from the UK be compatible with the UK's obligations under Article 4 ECHR and the Council of Europe Convention Against Trafficking (ECAT)?

(b) Is the removal of support provisions for potential victims of slavery or trafficking currently available under the Modern Slavery Act 2015 and equivalent provisions in Scotland and Northern Ireland compatible with the UK's obligations under Article 4 ECHR and ECAT?

(c) Is the removal of the duty to grant limited leave to victims of slavery or trafficking who have received a positive conclusive grounds decision compatible with the UK's obligations under Article 4 ECHR and ECAT?

38. We anticipate others will elaborate upon the Bill's incompatibility with Article 4 and ECAT. We emphasise two matters.

39. First, there is the illusion that the Bill retains ability to investigate and prosecute slavery, human trafficking and other exploitation by disapplying specified provisions where a victim of exploitation is cooperating with related investigations or criminal proceedings: see clauses 21(3) to (5) and equivalent provisions in clauses 23 and 24. These merely defer the Bill's wider effect until the relevant authorities no longer have use for the victim (more particularly, until such the Home Secretary considers there to be no more use to be had from the victim). This is as much exploitative of the victim as ultimately of no value to the victim. It can be expected that victims made aware of this will be deterred from coming forward or continuing any cooperation.

40. Second, the Bill significantly enables human exploitation. It does so not merely by increasing the power of slavers, traffickers and other abusers over existing victims – though it certainly does this. It does so, far more widely, by creating the conditions for a large number of people in the UK, and on journeys to the UK, to be vulnerable to exploitation. The Bill intentionally creates a terror of the authorities, and of anyone who cannot be trusted not to report to them. It does this by requiring that the authorities (ultimately the Home Secretary) cannot assist someone or be sensitive to any circumstances requiring assistance (even protection from persecution or human exploitation). This is the result of requiring expulsion, excluding consideration of relevant claims and the construction of powers of detention and permanent exclusion of leave (even of British people's citizenship rights). People can be expected to avoid the authorities. If so, they can be expected to be made extremely vulnerable to exploitation, including slavery and trafficking. The Bill is therefore a charter for slavery and trafficking – the very antithesis of any commitment to Article 4 or ECAT.

(13) The Government justifies the disapplication of various modern slavery provisions on the basis that persons who meet the four conditions in clause 2 are a "threat to public order" and therefore the obligations arising under Article 13 of the Council of Europe Convention Against Trafficking (ECAT) do not apply. To what extent is this extension of the public order disqualification compatible with Article 4 and ECAT?

41. Clause 1(4)(b) has particular application to people liable for deportation. It identifies such persons as a threat to public order for the purpose of disapplying modern slavery and human trafficking protections. This purpose is given effect by clause 28.

42. The application of clause 28 to victims of slavery or human trafficking is in one sense more extensive and in another sense less extensive than the circumstances in which victims are caught by clauses 21, 23 or 24. The retrospective effect of clause 28 is more extensive. It applies to people who arrived or entered the UK before 7 March 2023. It is less extensive in that it only applies to victims who are liable for deportation under section 3(5) of the Immigration Act 1971.

43. Clauses 21, 23 and 24 include no express identification of victims to whom they apply as persons who are a threat to public order. That is hardly surprising. Any suggestion that an enslaved, trafficked or otherwise exploited person is by reason of their exploitation a threat to public order is expressly to identify victimhood with culpability (and justify removal of any protection to victims). That is destructive of ECAT. Nonetheless, the Explanatory Notes state that clauses 21 to 28 (not merely clause 28) extend the 'public order' disqualification provided by ECAT to all victims caught by these provisions.[18]

44. There are two alternative ways to read this. Each appear to be sleights of hand:

    44.1. The Bill may be read as treating all victims caught by it in a way that ECAT would only permit on public order grounds. That is impermissible under ECAT. On that reading, the Explanatory Notes seek to disguise what is being done by suggesting that all the victims fall within the public order grounds – even though the Bill makes no express suggestion.

    44.2. Alternatively, it is possible to read the Bill as removing any executive consideration of deportation powers – requiring expulsion (clause 2) and permanent exclusion (clause 29) – for an implied public order justification. Certainly, the Bill has given effect to a regime of even more severe effect than deportation, which previously has been the most stringent form of expulsion power (more so than administrative removal).[19] Clause 28, on that reading, may be designed to protect what has been done against any charge of obvious disproportionality by

[18] e.g. paragraphs 2e) and 117ff

[19] This is because a deportation order not merely requires a person to leave and authorises their expulsion, but unless and until revoked prohibits their return.

reason of comparison with a victim liable for deportation who arrived or entered on or before 6 March 2023.

45. Whatever may be the correct reading or motivation, the Bill is not consistent with ECAT. No victim is a threat to public order by virtue of being a victim, and it is not permissible to treat victims as disqualified from protections on this basis.

(14) Clause 29 of the Bill amends the Immigration Act 1971 to permanently prohibit any person who has ever met the four conditions in clause 2, or any of their family members who have met the conditions in clause 8, from being granted leave to enter or remain in the United Kingdom, entry clearance or an electronic travel authorisation (ETA). Exceptions are made in limited circumstances. When read with these exceptions, do you think the prohibition is compatible with the UK's human rights obligations, particularly under Article 8 ECHR?

46. Clause 29 is not compatible.

47. Our answers to Questions 3 and 6 briefly consider the impact of clause 29 upon people caught by clause 2 and family members (caught by clause 8). Clause 29 applies equally to both.

48. The difference for people caught by clause 2 is the bar on the claims by which they might otherwise hope to establish the "compelling circumstances" or necessity exceptions in clause 29. Accordingly, the impediments to any person caught directly by clause 2 are even more severe; and it is even less realistic that the exceptions can provide any serious prospect (let alone have any serious purpose) of securing human rights compliance.

(15) Clause 30(4) provides that, if a child was born in the United Kingdom on or after 7 March 2023 and either of its parents, whether before or after their birth, have ever met the four conditions in clause 2, then the child is an 'ineligible person' for the purposes of applying for British citizenship. Is this prohibition compatible with the UK's human rights obligations, particularly under Article 8 ECHR?

49. Clause 30(4) is not compatible. We have joined the Project for the Registration of Children as British Citizens (PRCBC) in a separate submission addressing the most extreme incompatibility of this provision, which arises from its arbitrary deprivation of the citizenship rights of British children.

50. As identified in response to Question 19 (below), we must emphasise that sole focus upon clause 30(4) is to miss an equally extreme incompatibility arising from clause 30(3).

(16) The Bill provides that in only very limited circumstances will legal proceedings relating to the removal of a person meeting the conditions in clause 2 or 8 have the effect of suspending that person's removal. The first circumstance is where they would face a 'real risk of serious and irreversible harm' in the destination country while awaiting the resolution of their legal

claim. The second is where the claimant alleges that a mistake of fact was made when deciding that they met the relevant conditions. Are these limited circumstances consistent with the UK's human rights obligations, including, in particular, the prohibition on refoulement?

51. These provisions are not consistent with human rights obligations and cannot be expected to even extend to respecting the prohibition of refoulement. Several features of suspensive claims, and the provisions relating to them, must be considered.

52. First is the underlying permanent requirement to expel someone and forever exclude them from leave to enter or remain. Accordingly, even where a suspensive claim (or appeal) is successful, this does not fundamentally alter the Bill's effect on the person. The provisions under the subheading 'legal proceedings' provide no express escape route for anyone caught by the Bill. If someone succeeds in preventing expulsion to a named destination, this merely requires the Home Secretary to continue casting around for another destination. This may continue indefinitely. One consequence may be to so degrade a person's moral integrity as to break even their will to resist expulsion to a place where they will suffer torture or other extreme abuse.

53. A successful 'factual suspensive claim' (or appeal) may provide an escape. This is not expressly recognised in the Bill, but demonstrating the Home Secretary has wrongly determined someone to be caught either by clause 2 or clause 8 should secure this. However, the Home Secretary may continue to treat the person as within the conditions set out in either clause while newly considering and/or deciding the facts. Ultimately, the answer must lie with the higher courts (or tribunals) to which an application for judicial review may be made seeking a declaration that the person is not someone to whom either clause applies.

54. Second, the only human rights consideration permitted is by the 'serious harm suspensive claim' (or appeal). This is limited to whether, within "the relevant period", the person would face a real risk of serious and irreversible harm. That period is the time it might take the Home Secretary (or court or tribunal on judicial review) to resolve whether the person's expulsion was contrary to human rights. The standard to be imposed is precisely the standard imposed by the Immigration Act 2014 in connection with deportation.[20] Deportation concerns expulsion of people which the Home Secretary or Parliament has determined is conducive to the public good, generally on account of conviction and imprisonment for criminal acts. The scheme under which this standard is applied to deportation is currently suspended[21] following the Supreme Court ruling in 2017 that there was not generally capacity to enable effective appeals following someone's expulsion.[22]

[20] Immigration Act 2014, section 17(3) inserted Nationality, Immigration and Asylum Act 2002, section 94B

[21] Home Office guidance on the use of section 94B certification (*ibid*) was withdrawn on 3 August 2017

[22] *R (Kiarie & Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42

55. The Bill would expand the application of a standard (failing which any suspension of expulsion is excluded) more than 6 years after that standard has continued, in its current more limited setting, to be incapable of lawful operation.

    55.1. The number of people affected would be hugely expanded. That must significantly increase the impediment to operating any such standard lawfully.

    55.2. It would expand the application of the standard to people who have only recently arrived. This is significant because people facing deportation, to whom the standard would currently apply (if in operation), are generally long resident in the UK, often with settled family and ties here. If it is not possible to create conditions necessary for effective appeals for people who generally have this degree of settled connection to the UK, including family support, it seems significantly less likely this can be done for people who have only just arrived in the UK (or have never been permitted to make any significant connection that might help them to conduct legal proceedings from overseas).

    55.3. It would also expend the standard's application to where the sole remedy available is judicial review and not an appeal. Judicial review is more generally constrained as to what the court can consider and how it will approach questions of fact on which to determine the lawfulness of a public authority's act or omission. It seems at least probable that if an effective appeal cannot be ensured, it is far less likely that judicial review can be an effective remedy.

56. These considerations must be considered cumulatively. What is provided for by the Bill is not human rights compliant, and there appears no serious intention that it should be. We remain unconvinced that what was intended by the Immigration Act 2014 was human rights compliant. It having been demonstrated, at the least, that there was no real or effective capacity to ensure human rights compliance in what was done by that Act, it is extraordinary, to put the matter very modestly, to now seek to hugely expand what was then done.

57. Third, there is an improper degree of control over the extremely limited appeal of a refusal of either type of suspensive claim. The Home Secretary may treat the claim as invalid for not containing "compelling evidence". She may prescribe other information it must contain or the form and way it must be made; and may treat the claim as invalid for not meeting these prescriptions. In either event, there is no claim made and no appeal possible. However, if she accepts there is "compelling evidence" and that the claim is validly made, she may seek to bar any appeal by certifying it to be "clearly unfounded" (notwithstanding the compelling evidence she required for there to be any claim made at all). The Home Secretary is permitted to seek to bar the Upper Tribunal (to which any permitted appeal may be made) from considering matters she decides are new. She may also seek to bar any claim or appeal if she says it was not made within time. These features must be considered with our response to Question 17.

(17) Subject to limited exceptions, a claim that removal should be suspended on either basis must be brought within 7 days following receipt of the removal notice. The Secretary of State must then make a decision 3 days following the claim. Appeals must be brought 6 working days following a decision and decided 22 working days following the notice of appeal. Are these time frames sufficient to meet the requirements of procedural fairness and protect claimants against being wrongly removed to face human rights violations?

58. The regime established by the Bill is designed to ensure relevant circumstances of the individual are not effectively considered. That is confirmed by the highly restricted timeframes and their wider context (see response to Question 16).

59. The timeframes provide clear example of this – particularly the treatment of out of time claims or appeals. If the Home Secretary treats a claim as invalid because it is made late or treats relevant material to be excluded as late, there is a highly restricted opportunity to seek a declaration from the Upper Tribunal to reverse this. An application must contain "compelling evidence" to show "compelling reasons" why the claim or material was not provided in time. What is most starkly absent from this stringent formulation is any consideration of the claim's underlying merits. However, compelling the evidence may be that the person would be seriously and irreversibly harmed or simply expelled where there was no power to do so, such consideration is to be ignored.

60. We anticipate others will elaborate upon the impact of these timeframes, including in relation to legal aid and the potential impact of this Bill upon that provision. We merely note that it remains unclear to us how the formulations within Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to limit immigration legal aid scope are to apply, if they are, to the circumstances of people caught by this Bill.

(18) Clause* [53] *of the Bill would give the Secretary of State a duty to make regulations specifying the maximum number of asylum seekers who could enter the UK via 'safe and legal routes'. The consequence of this cap being breached would be that the Secretary of State would have to lay a statement before Parliament explaining why the number who entered the UK exceeded the number specified in the regulations in a given year. Does such a 'soft' cap, in principle, comply with the UK's obligations under the UN Refugee Convention?

61. In itself, clause 53 is not incompatible with the Refugee Convention. As addressed in answer to Question 1, the relevant incompatibility arises from the Bill's treatment of anyone who seeks asylum by routes other than those to which clause 53 would relate (if these existed).

62. However, clause 53 nonetheless reveals the wider incompatibility underlying this Bill. Clause 1(1) provides a statement of the entire purpose of the Bill and clause 1(3) seeks to cement that by requiring everything in the Bill and every provision made under it to be read to achieve that purpose (unless it is not possible to do so).

63. But how is clause 53 intended to contribute to this purpose? The most that could be said for a provision concerning "safe and legal routes" is that these are opportunities to prevent "unlawful migration" by providing a sanctioned alternative. While that would not be sufficient to justify the Bill's treatment of people who do not or cannot come by any such route (see response to Question 1), any genuine commitment to creating and maintaining safe routes could legitimately be said to contribute to such a purpose. But clause 53 is not constructed to be such a genuine commitment. Its design is to constrain migration. It sets a maximum. It provides for parliamentary scrutiny of any excess of that maximum. Moreover, it leaves entirely for the Home Secretary to designate what is to be counted as a "safe and legal route". As explained in the Appendix, what Ministers currently refer to as such routes are – with the exception of the Ukraine visa schemes and the limited provision for Afghan interpreters (and other former locally employed staff) – either schemes that cannot be applied for and so provide no real alternative to someone who might otherwise be compelled to make an "unlawful migration" journey (resettlement); only apply to certain British nationals and in any event not via a scheme truly designed as a refugee protection route (the Hong Kong scheme); or are to be decimated by this Bill (refugee family reunion visas).

64. Clause 53 is plainly designed to constrain migration of refugees. It does not truly fulfil anything towards the purpose of clause 1(1), itself an illegitimate purpose. While it is not in itself incompatible, it does expose the falsity at the heart of what is presented as justification for this Bill. It emphasises the degree to which Government intends to absent itself from any real or effective sharing of the refugee responsibilities to which it is obligated and expects others to fulfil.

(19) Are there other human rights considerations arising from this Bill that you want to bring to the attention of the Committee?

65. We address some further considerations under subheadings below.

Clause 30(3):

66. As highlighted in response to Question 15, this provision is no less incompatible with human rights, particularly relating to children, than clause 30(4). This is more fully elaborated in the joint submission to which we refer. In short, both clause 30(3) and (4) – when read with clause 31(1)(a), (1)(b) and (2)(a)(i) – arbitrarily deprive British children of their citizenship rights.

Regulations on interim measures and "serious and irreversible harm":

67. Clauses 38 and 51 are described in the Explanatory Notes as placeholders.[23] Government amendments are yet to be tabled, so it is not possible to definitively assess the impact of the measures that will be included. Nonetheless, at least as currently drafted, these provisions are antagonistic to the rule of law and the role of an independent judiciary; and that antagonism is necessarily extended to the sphere of the European Court of Human Rights and respect for the

[23] Paragraphs 19, 173 and 216

Convention in relation to which that court holds the ultimate supervisory jurisdiction. That antagonism results from the attempt, as these clauses are drafted, to secure to the Home Secretary an immunity from, or authority over, the relevant court or tribunal.

The policy of deterrence:

68. As stated above, the Bill makes more explicit and emphatic a policy of deterrence. We draw attention to this policy because of its wider human rights implications. Clearly, a fair and efficient system that properly distinguishes between people with rights to stay and people without such rights, and acts with efficiency upon that distinction, though always treating every person with the human dignity that is their right, may be both human rights compliant and provide disincentive to people without any right to stay. Insofar as any system sought to deter in this fashion, there could be no objection to its deterrent aim.

69. However, where deterrence is elevated so that real and effective consideration of the circumstances and treatment of one person is diminished or excluded for the purpose of deterring another person, this is liable to not be human rights compliant. Human rights demand respect for the dignity of each person according to each person's circumstances. Sacrificing that dignity for an aim directed at someone else is essentially exploitative. Where the treatment that is intended to deter another person significantly interferes with someone's human rights, it is in the circumstances described here, at the very least, likely to be either illegitimate, disproportionate or both.

An assault upon human rights:

70. Less than a year on from the passing of the Nationality and Borders Act 2022, the Government has introduced the current Bill. That Act constitutes a profound assault upon and repudiation of the Refugee Convention.[24] Nonetheless, this Bill would render much of that Act redundant by extending the assault upon human rights obligations considerably further. Ministers may say their intention is not to create conflict over human rights and stir political and public hostility towards human rights for the ultimate purpose of withdrawing from the 1950 European Convention on Human Rights. However, it is entirely predictable that it will create that conflict and stir that hostility.

71. The Bill largely seeks to exclude judicial oversight by the UK's higher courts of a system of mass and arbitrary mandatory expulsion, permanent exclusion, and denial of individual consideration. It extends this even to people who are refugees with the right to asylum (including refugees with such close connection to the UK that would plainly indicate this to be the proper country of asylum by any reasonable or rational consideration); to people who are victims of slavery and human trafficking and entitled to protection; and to people who are British with entitlement to British citizenship. The Bill is designed to compel applications to the European Court of Human Rights by requiring that the Home

[24] Amnesty's assessment is shared by, among others, UNHCR; see *Updated Observations on the Nationality and Borders Bill*, as amended, 1 January 2022

Secretary (and her officials) not to respect people's human rights and preventing the UK's domestic courts from correcting this. It is equally designed to compel that court to not only receive many more applications from the UK, but to significantly increase both the number and proportion of applications on which it finds the UK to be in violation of its Convention obligations.

72. This must all be set against the parlous condition into which human rights respect has been driven in the UK, including by ministerial rhetoric and policy over recent years. Ministers have misrepresented the true circumstances of both the asylum and modern slavery systems of the UK;[25] and expressly and publicly demonised people whom those systems ought to protect.[26] Ministers have wrecked the asylum system – creating huge backlogs by failing and even refusing to process people's claims – at considerable expense to the taxpayer,[27] while persistently and vocally blaming the cost and carnage upon the shoulders of those who are most victims of this. The Bill represents a monstrous extension of the very same policy. Those sponsoring this Bill appear entirely careless that it can be expected to cause an expansion of less visible and possibly more dangerous routes to the UK and the spread of human exploitation across the UK fuelling organised crime and other plainly socially harmful impacts. It is difficult to avoid the conclusion that even such baleful consequences are intended to or would be used as merely more fuel with which to stir hostility towards people whom ministers have made scapegoat and towards human rights and every manifestation of respect towards human rights that will be required (even if it may be insufficient) to attempt to protect these same people.

APPENDIX – safe and legal routes

1. This Appendix explains our assessment that the various routes, which ministers refer to as 'safe and legal', do not provide routes for people to seek asylum.

2. There are some limited **resettlement schemes**. These are not schemes to which anyone can apply.[28] These schemes permit a third party (usually UNHCR) to select and put forward people for resettlement if the person or family meets criteria set by the Home Secretary. UNHCR will generally prioritise person or family it considers to be in an especially insecure or unsustainable condition in the place in which they are currently receiving asylum.

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[25] This includes misrepresenting relevant official data for which ministers have been publicly rebuked by the UK Statistics Authority. The Home Secretary has even grossly overstated the number of refugees globally in the same breath as falsely suggesting that all are "coming here": *Hansard* HC, 7 March 2023 : Col 152.

[26] The very title of this Bill is a feature of this, but the most incendiary example remains the Home Secretary's description of people arriving by boat across the Channel as an "invasion": *Hansard* HC, 31 October 2022 : Col 641

[27] We recall our warning to the Home Office in December 2020 of the likely consequences of its then new immigration rules on inadmissibility, since substituted by primary legislation via the Nationality and Borders Act 2022 and now to be made redundant by the inadmissibility provisions in this Bill. Our warning is here: https://www.amnesty.org.uk/resources/amnesty-uk-letter-immigration-minister-ministers-reply-regarding-immigration-rules

[28] As UNHCR made clear to the Committee in oral evidence

3. Ministers rightly identify **the Ukraine visa schemes** as providing routes to asylum for many Ukrainian refugees.[29] The scheme does not require any asylum claim or demonstration of risk of persecution. That is entirely consistent with the general circumstances in Ukraine as a result of Russia's war of aggression. Ministers also rightly identify the **scheme for Afghan interpreters** and other former locally employed staff.[30] Although this scheme has proved to be inaccessible on various occasions, it is formally constructed to benefit specific people fleeing persecution. Unlike, the Ukraine scheme it does require demonstration of risk of persecution. The thresholds concerning risk (imminence, likelihood, and severity) vary and are generally high, and may exclude people. Nonetheless, at least for anyone who can meet these thresholds and other demands of the scheme, this scheme provides for asylum.

4. Ministers, however, wrongly identify the **Hong Kong British Nationals (Overseas) scheme** as a scheme providing a route to asylum.[31] The scheme is of undoubted value to its British national beneficiaries. Like the Ukraine schemes, it does not require any asylum claim or demonstration of risk of persecution. Unlike the Ukraine schemes, it does not apply in circumstances where its beneficiaries can be assumed to be refugees. Moreover, unlike the Ukraine schemes, it discriminates between people from the relevant territory to which it applies on grounds that do not indicate particular or heightened risk of persecution. Those grounds are that the person must be a British national and must be able to satisfy the Home Secretary of possessing sufficient means to accommodate and support themselves and their family.

5. Ministers make dubious reference to **refugee family reunion visas**.[32] These are granted to people to join someone granted asylum (or humanitarian protection) in the UK following an asylum claim. This means all people for whom such visas can be available are dependent on a family member (generally a partner or parent) first reaching the UK and successfully claiming asylum – requiring them to make a journey for which there was no visa. Accordingly, were this Bill to pass, it would in due course largely shutdown the refugee family reunion visa scheme because it would, more quickly, largely shutdown the asylum system.

6. Accordingly, the route or routes by which anyone can seek asylum in the UK are ones that are not formally sanctioned by UK law or Home Office rules and policy. Given the considerable effort to prevent any journeys without such formal sanction, these routes are inevitably largely controlled by people smugglers or human traffickers, including organised crime.

[29] Immigration Rules Appendix Ukraine Scheme
[30] Immigration Rules Appendix Afghan Relocation and Assistance Policy (ARAP)
[31] Immigration Rules Appendix Hong Kong British National (Overseas)
[32] Immigration Rules, paragraphs 352Aff