# Nationality and Borders Bill 2021: Second Reading Briefing

## Freedom from Torture, July 2021

### Background

The Nationality and Borders Bill was laid before parliament on 6th July 2021, following a six-week consultation on the draft proposals within the New Plan for Immigration. As at 14th July 2021, the Government has not published a response to the consultation, or any equality impact assessment of the draft legislation.

The proposals within the bill constitute the greatest threat to the UK's asylum system in a generation. Taken together they will limit access to protection in the UK, criminalise people seeking safety, increase the risk of *refoulement* to persecution, hold refugees in a prolonged limbo without deciding their application, curtail the rights of refugees both before and following recognition of status, isolate refugees in harmful 'camps' in the UK and offshore, condemn refugees to poverty and insecurity and cripple the asylum system with delays, inefficiencies and errors. For this reason, we consider this piece of legislation to be **an anti-refugee bill**: it will do nothing to enhance the protection the UK offers to refugees or to reduce the risks associated with irregular movement. In fact, by criminalising and excluding refugees, this bill will increase the vulnerability and exploitation of those who will continue – in the absence of any other option - to move irregularly to seek protection.

On 28th July 2021 we will celebrate the 70th anniversary of the Refugee Convention. This bill is a betrayal of the letter and spirit of the Convention, which was drafted in the wake of the holocaust, to ensure that the impossibility of pre-authorised travel would be no barrier to seeking and accessing protection from persecution. Many of the proposals in the bill contravene international refugee and human rights law, threaten to undermine the global system of refugee protection and erode the UK's reputation as a leader in the protection of refugees. If this bill is passed, every year thousands of refugees will be denied the opportunity to secure protection, and to recover from persecution because the UK has reneged on its commitment to assess or recognise the protection needs of those who arrive on its shores. This is **unfair, inhumane and unlawful**.

### Key themes

#### 1. Proposals in the bill contravene international refugee and human rights law

As noted in an authoritative legal opinion[1] commissioned by Freedom from Torture, the measures proposed signify **a departure from the basic rationale of the 1951 Refugee Convention[2]** and, specifically, the Article 31 protection against penalisation and Article 33 prohibition of *refoulement*. We provide further detail in the sections below, on the specific likely breaches of international refugee and human rights law.

In its ambition to create a two-tier system, with access to the asylum procedure, to secure legal status and to the associated rights and entitlements determined by the refugee's method of entry, and preferential treatment for resettled refugees, these measures constitute an attempt to return to the 'authorisation-based' approach to protection that the Refugee Convention sought to replace. The premise that underlies the Government's proposed approach – that a refugee is required to claim asylum in the first safe country they reach – is simply inconsistent with the intentions of the drafters of the Refugee Convention and with international law. Indeed, the non-penalisation of those arriving irregularly is central to the intent of the Refugee Convention.

The proposal, under Clause 34, to define Article 31 of the Refugee Convention within primary legislation is an attempt to present these proposals as lawful, when they are not. Article 31 was never intended to be used to differentiate between groups of refugees for the purposes of processing their claim for protection. To be effective, the protection of Article 31 **must** be extended to **all asylum-seekers** including those who have travelled irregularly and through other safe countries. An individual's rights under the Convention – and the corresponding obligations

[1] If interested in seeing the full legal opinion, please contact Sile Reynolds (contact details at the end of the briefing)
[2] 1951 Convention relating to the Status of Refugees and its 1967 Protocol (collectively, the "Refugee Convention")

of Contracting States – flow from **the simple fact of meeting the Convention definition**, and are not dependent on a formal recognition process, and certainly not one that favours those who have travelled with prior authorisation.

**But why does it matter that these proposals breach international law?**

The Refugee Convention is the only international agreement governing the treatment of people fleeing persecution and crossing borders in order to do so. If the UK abandons its commitment to this Convention, why should other signatories not do the same? Without the Convention we have only moral duty to enforce the principle of non-*refoulement* and protect refugees from return to torture and persecution. This moral duty is in crisis, with governments around the world, including the UK, abdicating responsibility for the assessment and protection of people fleeing persecution. In terms of the number of asylum applications per head of population, the UK ranks low on the charts (51,000 sought asylum or were resettled in 2019), but its influence regionally and globally is significant. Departure from the Convention could have a domino effect on access to protection that would be devastating. Should France (150,000 asylum applications in 2019), Greece (77,000 in 2019), Turkey (currently hosts 4,000,000 refugees) or Iran (hosts close to 1,000,000 refugees) follow suit, then we would be looking at a return to the situation of the 1930s where closed borders and visa requirements left refugees to suffer and die.

## 2. The proposed reforms will not achieve the Government's stated objectives

The proposals within the bill effectively weaponise the asylum system in order to deter and disincentivise spontaneous arrivals and late or repeated claims for protection. **This approach will not deliver the Government's stated objectives** and will only undermine efforts to make the asylum system fair and compassionate.

The proposals **do nothing to 'break the business model' of smugglers**, which is driven by the need for safety and the absence of alternative routes to protection. However, the proposals will drive those who continue to arrive irregularly away from the safety of an asylum determination system and into the hands of those who would exploit them further upon arrival in the UK.

These measures are particularly cruel in a context where there is **inadequate provision for alternative routes** to arriving in the UK to claim asylum: people from almost all refugee-producing States require visas to come to the UK but there is no system of refugee visas in UK immigration law. The extraterritorialisation of UK border controls, including through carrier sanctions and visa restrictions, has contributed to the demand for smugglers and made journeys more dangerous. There is no indication that the Government is considering a resettlement programme or humanitarian visa regime on a scale that would come close to counterbalancing these measures.

**These measures will not increase the fairness of the system to protect those most in need of asylum**, but instead will disproportionately impact on the most traumatised and marginalised. The 'fast track' and 'one stop' measures are based on an assumption that late claims are, by their nature, unmeritorious and abusive. However, there are many reasons why traumatised people may delay disclosure, rely initially on fabricated accounts or present inconsistent or incoherent testimony. It is clinically recognised that an experience of torture or trauma, particularly where that engages feelings of shame – such as with sexual violence - will lead to avoidance behaviours and interfere with the person's ability to disclose. Traumatised individuals need time to process past events and to establish a sufficient level of trust and confidence to reveal the painful and shaming details of their experiences. These are precisely **the vulnerable individuals who will be punished and denied protection** by these measures.

## 3. The proposed reforms will actually weaken and undermine the UK's asylum system

Bearing in mind the evidence which shows that these kinds of proposals do not have a deterrent effect, it is important to think about the numbers of people this will impact and the effect on the asylum infrastructure in the UK. Estimates suggest that up to 21,600 people would potentially have their asylum claim deemed as inadmissible each year under the proposals within this bill. In the absence of readmission agreements, these measures will do nothing to ease the pressure on the asylum system but will instead generate additional work for an under-resourced department, will leave vulnerable people in limbo for an additional six months and will **inflate the asylum backlog further**.

Estimates also suggest that up to 9,200 people would be subject to the differential treatment proposed for Group 2 refugees, and their temporary protection status would need to be reviewed at regular intervals – anything from every 6 months to 2.5 years. The administrative burden associated with this process would be great and will only build even more delay and inefficiency into the asylum system.

Costs associated with increased backlogs, inflated administration, wasteful accommodation contracts, border security, imprisonment, unlawful detention and diplomatic arrangements to facilitate offshore processing will fall to the taxpayer. While the voluntary sector, the NHS and the social care and welfare systems will pick up the pieces of the lives broken by prolonged uncertainty, isolation and the fear of return to torture and persecution.

### 4. Reform is needed but there is another way

We want the UK to be a place of hope and sanctuary for people fleeing persecution and torture and that means holding on to the principles of protection and international solidarity that guided the drafting of the Refugee Convention 70 years ago. The UK delegation helped to build a future which guaranteed safety, stability and hope to people fleeing the horrors of war and persecution. These measures put that future under threat.

There is another way. Reform must happen, but the Government should apply the following principles:

- **Enhance the ability of people fleeing war and persecution to seek protection in Britain**. People seeking asylum should feel safe when they arrive, and have their refugee applications considered quickly, fairly and efficiently, no matter how they got here.
- **Put in place a fairer, faster and more independent system to decide on people's claims for protection.** People claiming asylum should receive quality legal advice, humane treatment and fast, accurate decisions.
- **Ensure that people can live in safety and dignity while waiting for their** claim to be decided. They should have a safe and dignified home within a local community, enough food and essentials, and the right to work.
- **Support refugees to build new futures in Britain as part of their community.** Policies should support people to realise their full potential and empower them to make a positive contribution to their communities.
- **Respect the dignity, liberty and humanity of those found not to be in need of protection.** People refused asylum should not be detained and be treated in a safe, dignified and humane way at all times.
- **Champion global solidarity and responsibility sharing** – the UK should play a role in providing sustainable solutions to forced migration, including through the resettlement of at least 10,000 refugees per year.

## Key specific proposals

### Clause 10: Differential treatment of refugees (temporary protection status)

***Clause 10 provides for a differentiated approach to the treatment of refugees based on Article 31(1) of the Refugee Convention and the interpretation set out in Clause 34 of the bill. It introduces the concept of 'Group 1' and 'Group 2' refugees. A refugee is a Group 1 refugee if they have come to the UK directly from a country or territory where their life or freedom was threatened and they have presented themselves without delay to the authorities. If these are not met then a person will be a Group 2 refugee.***

Clause 10 provides an overarching framework that will allow for the provisions on temporary protection status, as described in the New Plan for Immigration, to be implemented. Importantly, it does not base the distinction between Group 1 and Group 2 refugees on the categories of 'regular' or 'irregular' arrival but instead makes a distinction between those who are protected by Article 31 of the Refugee Convention and those who are not. This clause must then be read alongside clause 34 which narrows the protection available under Article 31. This means that many refugees who, under international law should benefit from Article 31 protection from penalty, will find themselves in Group 2, and will be **denied the rights and protections under the Convention**.

Under Clause 10 a Group 2 refugee will be granted temporary protection status with limited leave remain (up to 30 months), no automatic path to settlement limited family reunion rights and, possibly, no recourse to public funds.

These measures will create a parallel and substantial community of refugees with nothing to distinguish them, in terms of fear of persecution, from those who have been resettled and granted indefinite leave to remain.[3] This community will be **denied their right to safety and stability**, and forced to live in the shadows, without access to the welfare safety net, separated from family members and in fear of forced return to persecution or death. By actively constraining the assimilation and naturalisation of refugees, this clause is also **inconsistent with the UK's duty under Article 34 of the Refugee Convention**.

Attaching an NRPF condition to temporary protection status is **contrary to Article 23 of the Refugee Convention** which instructs Contracting States to *'accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.*' This proposal could result in up to 3,100 more people per year living in poverty and driven into debt and exploitation. The denial of security and the threat of impoverishment is likely to drive more people into conditions of **forced labour, trafficking and abuse**. This is particularly unfair considering the forced nature of refugee displacement, the long period of economic inactivity endured while waiting for an asylum decision and the disabling trauma resulting from the persecution and the delayed access to appropriate support and rehabilitation.

Repeated grants of limited leave could be so harmful as to constitute **a breach of Article 3 ECHR** (freedom from torture, inhuman and degrading treatment). For a torture survivor, this would have such a harmful impact, including by denying them full access to healthcare and the stability required to rehabilitate, that it would almost certainly constitute inhuman and degrading treatment and be **contrary to Article 14 UN Convention Against Torture** (right to rehabilitation).

Between 1999 and 2008, the Australian government operated a system of Temporary Protection Visas (TPVs), similar to that proposed under clause 10, as a way of deterring irregular arrivals. In 2000, the first full year after TPVs were introduced, there were 2,939 arrivals. In 2001 arrivals rose to more than 5,000. TPVs did not 'break the business model' of smuggling to Australia and did not stop deaths at sea. Many of the women and children who drowned in October 2001 were the family members of TPV holders. Ultimately, the policy was futile, as 90% of TPV holders were granted permanent protection. It was also found, by the Australian Human Rights Commission, to contravene Australia's obligations under the UN Convention on the Rights of the Child.

## Clause 14: Inadmissibility

***Clause 14 allows for an asylum claim to be considered inadmissible if the applicant has travelled through, or has a connection to, a safe third country where they could have claimed asylum. The Government will also seek to remove people seeking asylum to a safe country that agrees to receive them, even if they have no connection to it. If a return agreement cannot be secured within 'a reasonable timeframe' (six months), the asylum claim will be determined in the UK.***

This clause puts on a statutory footing, changes that were made to the Immigration Rules in December 2020. In the first three months of 2021, 1,503 'notices of intent' were issued to people seeking asylum to inform them that their claim was being considered for an inadmissibility decision. This constitutes almost one third of all adults who applied for asylum since the new inadmissibility rules were brought in. Not one of these has so far resulted in transfer to another country. The Government has, however, recently announced the signing of a readmission agreement with Albania, currently one of the top five countries of origin of people seeking asylum in the UK.

The amendments introduced under Clause 14, defining a 'safe third State' and a 'connection' to a safe third State raise a very real risk of a breach of international law, despite the repeated but vague statements that implementation would be 'in accordance with the Refugee Convention'. There is no reference in either Clause 14 of the bill, the Inadmissibility Guidance, or the Immigration Rules to a requirement for the decision-maker to consider whether removing an asylum-seeker to a third country carries a real risk of indirect *refoulement*. Neither is it stipulated that there is a requirement to consider the adequacy of the refugee status determination procedures in a potential 'safe third country'. In defining a 'connection' to a safe third State, no standard is set for

[3] in the year ending September 2019, 62% of asylum claims were made by those who entered the UK without authorisation, including those who entered by small boat, lorry, or without visas. https://migrationobservatory.ox.ac.uk/resources/briefings/migration-to-the-uk-asylum/

how to interpret a 'reasonable' expectation that someone could have made an asylum claim in that State, which could conceivably be a country in which the claimant has never set foot.

While 'safe third country' arrangements are not unlawful *per se* as a matter of international refugee and human rights law, the absence of adequate safeguards against onward *refoulement* will result in **breaches of the UK's obligations under Article 33 of the Refugee Convention** (non-*refoulement*). The prohibition on *refoulement* is entirely without effect unless it is extended **to all refugees, including those whose status has not yet been formally recognised**. The **prohibition also extends to "onward" or "indirect" *refoulement***: that is, removal to a territory from which there is a real risk that they will be expelled to their country of origin. These proposals are also likely to create a risk of a breach of **Article 2** (right to life), **Article 3 and Article 4** (prohibition of slavery and forced labour) **of the ECHR**.

Treating the claims of asylum-seekers who have entered the UK unlawfully as *prima facie* inadmissible is also a "penalty" for the purposes of **Article 31 of the Refugee Convention** and, therefore, a breach of that article. Under the Dublin system, family unity, the best interest of the child and the time spent on the territory of the State all limited the extent to which irregular entry could be used to justify transfer. Some level of individualised assessment would be required as a safeguard in any safe third country arrangement.

## Definition of Article 31 of the Refugee Convention

***Clause 34 sets out the Government's interpretation of Article 31(1) of the Refugee Convention, outlining the circumstances in which refugees who have entered a country illegally, or are present in a country illegally, are immune from penalties. The clause amends the existing exception that applies to those who have not come 'directly from a territory where their life or freedom was threatened' so that it only applies to individuals who can demonstrate that they could not reasonably have been expected to have sought protection under the Refugee Convention (as opposed to demonstrating that they could not reasonably have been expected to be given protection) in the country they stopped in.***

The criteria for the application of Article 31 have necessarily been broadly interpreted in international and domestic caselaw. The UK's Supreme Court has affirmed that all provisions of the Convention should be given "a generous and purposive interpretation, bearing in mind [the Convention's] humanitarian objects and the broad aims reflected in its preamble".[4] Importantly, our courts have established that some element of choice is open to refugees as to where they may properly claim asylum.[5]

The "coming directly" requirement within Article 31 was never meant to preclude passage through a safe, intermediate country. Article 31 was intended by the drafters simply to operate as a "show good cause" protection against penalisation – an active need for protection constituting good cause. The critical question is not whether a person could - or even should - have sought asylum elsewhere, as **there is no requirement in international refugee law to seek protection in the first safe country.** Instead, the question is whether they **had already found secure asylum** (whether temporarily or permanently) such that there is no protection-related reason for their irregular onward movement. The shift of emphasis in this clause from a reasonable likelihood of a grant of protection to a reasonable expectation of seeking protection is critical in seeking to weaken the protection offered by Article 31.

In clause 34, the Government is seeking to unilaterally narrow the protection afforded by Article 31, in order to legitimise the suite of measures contained within the bill that have as their foundation, the principle that it is right and lawful to penalise refugees based on their unlawful entry. This is a fundamental departure from the letter and spirit of the Refugee Convention to which our Government has pledged its continued commitment. If the UK can take such an unprincipled approach to what are universally agreed human rights standards, then what prevents other countries following suit?

[4] *R (ST (Eritrea)) v Secretary of State for the Home Department* [2012] 2 AC 135, para 30.
[5] *R v Uxbridge Magistrates Court, ex parte Adimi* [1999] Imm AR 560.

## Clause 37: Illegal entry and similar offences

***Clause 37 expands the existing offence of illegal entry so that it encompasses arrival in the UK without valid entry clearance. It also increases the maximum penalty for those entering without leave or arriving without a valid entry clearance from 6 months to 4 years***

Asylum seekers are not deemed to have "entered" the UK (and so opened themselves up to prosecution) until they disembark on UK territory. If they then disembark at a port, they do not "enter" until they have passed through immigration control. At the point at which they claim asylum, they are admitted to the UK while their claim is processed and they have not, therefore, entered the UK illegally. By criminalising "arrival", the Government would remove the protection given by the narrow definition of "entry" to people who have bypassed immigration procedures in order to claim asylum. This would also have the effect of making it easier to convict those who steer the boats that bring them to the UK.

As it is not possible to apply for entry clearance for the purpose of claiming asylum in the UK, and yet an asylum seeker must be physically in the UK in order to make a claim, the effect of this clause is to criminalise the act of seeking asylum in the UK.

The bill does not define what is meant by 'arrival' so it is not yet clear how this clause will interact with the proposals under clause 41 and schedule 5 to enhance maritime enforcement powers. Clause 41 includes powers to require migrant vessels to leave UK waters and to allow forcible disembarkation subject to agreement by receiving states. These proposals expand the current maritime enforcement powers to allow for the diversion of migrant vessels in international waters away from UK shores and towards another location or country, and not necessarily the one from which they disembarked, to facilitate the investigation of any offences committed. These are wide-reaching powers with significant implications for access to protection and the risk of *refoulement*, particularly in light of the proposal under Clause 12 to exclude the UK territorial seas from being considered a place of claim.

## Clauses 16-23: One stop process and fast track claims and appeals

***Clause 16 provides for an evidence notice to be issued to a claimant requiring them to provide evidence in support of their claim before a specified date. If they fail to do so, the provision of evidence will be deemed 'late' and the claimant will be required to provide a statement setting out their reasons for providing that evidence 'late'. The consequences for not complying with the evidence notice without good reason are that a decision-maker may give minimal weight to that evidence.***

***Clause 17 creates a principle that if a person making an asylum or a human rights claim provides evidence late, or fails to act in good faith, this conduct shall be taken into account as damaging the claimant's credibility.***

***Clause 18 provides for a priority removal notice (PRN) to be served to anyone who is liable for removal or deportation. The subject of a PRN will be required to provide a statement, information and/or evidence within the time specified ('the PRN cut-off date') or their reasons for providing evidence after the date.***

***Clause 20 creates a principle that evidence that is not provided in compliance with the priority removal notice (PRN) may be damaging to a claimant's credibility.***

***Clause 21 creates an expedited appeal route for appellants where they have been served with a PRN and made a claim or provided reasons or evidence after the PRN cut-off date. Their right of appeal will be to the Upper Tribunal instead of the First-tier Tribunal where certified by the Secretary of State.***

***Clause 23 creates the principle that a decision-maker must have regard to the principle that evidence raised by the claimant late is given minimal weight, unless there are good reasons why the evidence was provided late.***

The proposals to 'fast track' claims and appeals under Clauses 16-23 would, depending on the manner in which they are implemented, inhibit access to justice, risk inherent unfairness contrary to the common law and violate the procedural requirements of Articles 2, 3, 4, 8 and of Article 13 ECHR. Most importantly, they may give rise to a significant risk of *refoulement*.

There are ample mechanisms built in to the procedure to reduce the burden of handling repeat claims for asylum so any additional mechanisms must be balanced against the obligation not to refoule refugees. This obligation compels the government to consider any fresh claims up until the moment of return. The ECHR also obliges the Government to give 'anxious scrutiny' to any claims made under Article 3. The Government cannot propose to restrict access to the asylum process in the name of efficiency without breaching these obligations.

There are many reasons why it may not be possible for someone to present all relevant information in support of their claim at the earliest opportunity. These include failings within the process, such as a poor quality interview or difficulty accessing quality legal advice. The applicant may be too traumatised to recall coherently the events that led to flight, particularly if they are a survivor of torture, sexual violence or trafficking.

These proposals penalise the most vulnerable and those who have been failed by the system, by seeking to reduce the weight that is given to any evidence that is submitted after the applicant has been through the one-stop process. This could include independent expert medical evidence – such as a medico-legal report - that often proves determinative in asylum appeals involving our clients.

The proportion of asylum appeals allowed in the year to March 2021 was 47% and has been steadily increasing over the last decade (up from 29% in 2010). This means that the asylum appeal is a vital safeguard – particularly for the most vulnerable - as the Government often gets the decision wrong first time.

## Clause 11: Accommodation for asylum-seekers (reception centres)

***Clause 11 allows for the use of certain types of accommodation to house certain cohorts of asylum seekers and refused asylum seekers, including the use of 'accommodation centres'. The clause allows the Secretary of State to increase the time period someone can spend in an accommodation centre (previously limited to 6 months).***

The Secretary of State already has the power, and has been exercising the power, to accommodate asylum seekers differently according to the stage of their claim and compliance with conditions. This clause appears to make the use of accommodation centres the norm for those who arrive without prior authorisation, with little or no consideration of other relevant factors, such as vulnerability.

People seeking asylum are an inherently more vulnerable population, with a high prevalence of trauma symptoms (including post-traumatic stress disorder [PTSD], anxiety and depression). It is impossible to manage serious mental health conditions, like PTSD, in institutional accommodation. No reference is made within the clause to the consideration of vulnerability, the risk of harm or the policy concessions relating to claimants receiving therapeutic treatment at Freedom from Torture or the Helen Bamber Foundation, to accommodate such claimants in specific locations or types of housing.

The use of barracks during Covid has shown us how isolation from communities, placement in a male-only facility with large dormitories, very limited, or no perceived, privacy and substantially reduced access to specialist services all amplify the residents' sense of being **isolated, discriminated against, and punished**. This feeling of victimisation and associated trauma is exacerbated by the increased likelihood of far-right harassment.

Rather than expanding the use of harmful institutional accommodation, the government should be making a full commitment to housing people seeking asylum in communities and urgently addressing the long-standing structural issues in the management and monitoring of contracted provision.

## Clause 29: Change to the standard for testing the "well-founded fear of persecution"

***Clause 29 requires applicants to prove the factual basis underlying their claim and the basis for their fear to the higher legal test of 'a balance of probabilities'. The second part of the test concerning whether the applicant's fear of future persecution is well-founded will remain at the current legal standard of 'reasonable degree of likelihood'.***

Raising the standard of proof to '*a balance of probabilities'* will significantly increase the number of refugees wrongly sent back to face death or torture and, as such, risks **contravening Article 33 of the 1951 Convention**.

The current legal standard of '*reasonable degree of likelihood*' is a test grounded in an understanding of the nature of persecution for a Convention-based reason, the reality of an asylum seeker's experience of flight and the serious implications of setting evidentiary expectations too high. Our Proving Torture research demonstrated how hard it already is, even to this relatively low standard of proof, for survivors of torture to prove their claim.

The decision maker often has to make an assessment of the claim on the basis of fragmented, incomplete and confused information. This is complicated by the need to assess the plausibility of accounts given by people who are bewildered, frightened and desperate. Mental health problems arising from trauma and a very genuine fear of persecution can seriously affect consistency and coherence, and the ability to recall and present facts.

The Home Office has fostered a culture of disbelief which has encouraged its decision makers to deny protection to too many refugees on the grounds that they must be lying. This proposal **elevates the culture of disbelief to a statutory footing** which will raise the bar for anyone, genuine or otherwise, seeking protection in the UK.

## Clause 26: Removal of asylum seeker to safe country (offshore processing)

***Clause 26 includes provision for the removal of asylum seekers from the UK while their claim is pending, and creates a new rebuttable presumption that certain specified countries are compliant with their obligations under the ECHR.***

The proposal under Clause 26, read with Schedule 3, to allow for the removal of asylum seekers from the UK while a claim is pending (to facilitate the offshore processing of asylum claims) is yet another wide-reaching power, with little detail provided to clarify where claimants may be sent, what might be the selection criteria for eligibility to be processed offshore, who would do the processing and what legal regime would apply, what conditions or safeguards might apply, and what would happen to those recognised as refugees through an offshore process.

Depending on how the Government intends to implement this proposal, there may be a significant risk of a breach of international law. Asylum-seekers cannot lawfully be removed for offshore processing if doing so would result in a real risk of breach of their rights under Article 2, 3 or 4 ECHR, including through inhuman or degrading treatment during the status determination procedure and the risk of return to torture, persecution or death. To prevent a violation of Article 3 ECHR and Article 33 of the Refugee Convention, procedural safeguards would need to be in place to ensure there was no risk of *refoulement*.

This is not the first time the UK Government has contemplated arrangements of this kind: in 2003, a UK proposal for the creation of offshore "transit processing centres" for asylum-seekers arriving in the EU was ultimately abandoned due to widespread opposition, including from the House of Lords Select Committee on the European Union. The UK is clearly taking a lead from the example of Australia, which has been sending people who come by boat to Nauru and Manus Island, Papua New Guinea since 2001. It stopped sending people in 2008, but began doing this again in 2012. The suffering inflicted on those processed offshore has been enormous, with overwhelming evidence of abuse, including sexual abuse, mental health trauma and death resulting from suicide and neglect. This system costs Australia more than $1 billion a year with hugely expensive processing contracts for private providers and fees to the host government.

UNHCR's position on this is clear that "asylum-seekers and refugees should ordinarily be processed in the country of the State where they arrive", as "[t]he primary responsibility to provide protection rests with the State where asylum is sought."

## Clause 24: Accelerated detained appeals

***Clause 24 imposes a duty on the Tribunal Procedure Rules Committee to make rules for an accelerated timeframe for certain appeals made from detention.***

This is, effectively, an attempt to reinstate the Detained Fast Track (DFT) and insulate it from the kind of legal challenge that result in the suspension of DFT in 2015.[6] In that case, it was found that the truncated timescales, coupled with detention, put appellants at a serious disadvantage. Survivors of torture and trauma were particularly

[6] *Detention Action v First Tier Tribunal (IAC), Upper Tribunal (IAC) and the Lord Chancellor* [2015] EWHC 1689 (Admin)

disadvantaged due to the time required to instruct for and produce medical evidence. We do not see how the Government will overcome these challenges, nor what safeguards they will put in place to prevent unlawful operation. When considered alongside the accelerated one-stop process that will almost certainly worsen the quality of asylum decision-making, this proposal will only result in further judicial reviews when claims are wrongly, and unlawfully, refused in detention.

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