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Evidence to Joint Committee on Human Rights
Human Rights of Asylum Seekers in the UK

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1. Dr Natalie Hodgson is an Assistant Professor in the School of Law at the University of Nottingham and Head of the Forced Migration Unit in the Human Rights Law Centre. Dr Hodgson's PhD thesis examined the legality of Australia's offshore detention of asylum seekers under international law.

Introduction

2. This submission addresses two of the questions asked by the Committee.
3. In relation to Question 1, this submission argues that denying asylum to refugees who do not use "safe and legal routes" is incompatible with the state's obligations under the *Convention Relating to the Status of Refugees* ('*Refugee Convention*'). Furthermore, this submission raises concerns about the state's insistence on refugees travelling to the UK through "safe and legal routes" while simultaneously failing to provide "safe and legal routes" to refugees. The state's actions in this respect have the potential to undermine the human right to seek asylum.
4. In relation to Question 3, this submission argues that the removal of refugees to third countries should be an exceptional practice used as part of a burden-sharing arrangement. Additionally, a number of criteria need to be met for the relocation of asylum seekers to third countries to be lawful. These include ensuring adequate status determination procedures in the third country, acceptable living conditions and appropriate support services for refugees transferred to the third country, and that the state must make individual determinations on whether an asylum seeker should be relocated to a third country.
5. This submission concludes by briefly exploring the consequences of failing to respect the human rights of refugees and asylum seekers. Australia received significant

opprobrium while operating offshore detention centres. The submission suggests that the UK's credibility when speaking about human rights issues and the UK's ability to hold other countries accountable for their human rights obligations is likely to be damaged if the UK is perceived to be ignoring its own human rights obligations in relation to asylum seekers and refugees.

Question 1: Is it compatible with the UK's human rights obligations to deny asylum to those who do not use what the Government calls "safe and legal routes"?

6. For multiple reasons, it is not compatible with the UK's human rights obligations to deny asylum to people who enter the UK irregularly.
7. First, a person becomes a refugee at the point in time when they satisfy the definition of a refugee.¹ Refugee status is declaratory; the state does not *decide* whether or not a person is a refugee, rather, the state *recognises* the fact that a person is a refugee.² Mode of arrival has no impact on refugee status.³ A person is a refugee regardless of whether they arrive irregularly or through "safe and legal routes".
8. Under the *Refugee Convention*, the UK is obligated to afford a number of rights to refugees, including protections against *refoulement*.⁴ Any policy which denies asylum to refugees because of their irregular entry and results in those refugees being returned to their country of origin would therefore breach the UK's obligations under the *Refugee Convention* and related instruments, regardless of whether or not the UK has formally recognised that person as a refugee at the time they are *refouled*.
9. Second, many refugees travel to the UK irregularly because of the lack of "safe and legal routes". As recent questioning by the Home Affairs Select Committee has demonstrated, there is a lack of "safe and legal routes" available for refugees to travel to the UK to seek asylum.⁵ Furthermore, even where "safe and legal routes" do exist, they do not appear to be working efficiently,⁶ meaning that refugees must choose between risking harm or death while they wait for a "safe and legal route" to the UK to become available, or travelling to the UK irregularly.
10. The *Refugee Convention* recognises that asylum seekers may be forced, because of their circumstances, to travel to and enter a territory irregularly in order to seek asylum. Article 31 states that:

The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without

authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

11. Article 31 provides that states must not impose a penalty on asylum seekers who have entered a territory irregularly. The term 'penalty' has been interpreted broadly to include disadvantageous treatment of asylum seekers because of their mode of arrival.⁷ Denying asylum to a refugee who did not use government-approved routes to seek asylum would amount to a 'penalty' and thus be incompatible with the *Refugee Convention*.
12. The fact that Article 31 refers to refugees 'coming directly from a territory where their life or freedom was threatened' does not mean that refugees have to claim asylum in the 'first safe country'. Expert consensus is that Article 31 does not require a person to seek international protection at the first opportunity.⁸ The drafters to the *Refugee Convention* recognised that asylum seekers might travel through multiple countries prior to seeking asylum. The reference to 'coming directly from a territory' was added to the *Convention* to address the rare situation where a refugee might enter a territory irregularly despite having already claimed, and been granted, asylum elsewhere.⁹ UK courts have affirmed that 'some element of choice is indeed open to refugees as to where they may properly claim asylum' and that travelling through countries 'en route to such intended sanctuary cannot forfeit the protection of [Article 31].'¹⁰
13. Third, as a state party to the *Refugee Convention*, the United Kingdom has an obligation to refrain from conduct that would defeat the object and purpose of the *Convention*.¹¹ More generally, under Article 14 of the *Universal Declaration on Human Rights*, '[e]veryone has the right to seek and to enjoy asylum from persecution.' The right to seek asylum entails an obligation on states 'not to frustrate the exercise of the right to seek asylum in such ways as to leave individuals at risk of persecution or other relevant harm.'¹²
14. In the absence of simultaneously increasing safe routes through which asylum seekers can travel to the UK, attempts to 'deter illegal entry into the United Kingdom'¹³ will effectively amount to an attempt to frustrate the right of people to seek asylum, undermining Article 14 of the *Universal Declaration* as well as the object and purpose of the *Refugee Convention*. Asylum seekers would not need to engage people smugglers and undertake risky journeys to the UK if safe routes were available and accessible to them.

Question 3. Is the policy of relocating asylum seekers to third countries consistent with the UK's human rights obligations?

15. The state where refugees claim asylum is the state that should bear responsibility for determining refugee status and granting asylum.¹⁴ The relocation of asylum seekers to third countries should be an exceptional practice. UNHCR has recognised that such a practice may be used 'as part of a burden-sharing arrangement to more fairly distribute responsibilities and enhance available protection space,'¹⁵ particularly where refugees have close ties with the third state they are relocated to.¹⁶
16. The practice of relocating refugees to states in the Global South who do not have the necessary resources and infrastructure to support the complex needs of this group is unlikely to represent a genuine 'burden-sharing arrangement' that 'more fairly distribute[s] responsibilities' among states, and thus is unlikely to be consistent with the UK's commitments under the *Refugee Convention*.
17. Additionally, a number of criteria need to be met for the relocation of asylum seekers to third countries to be lawful.
18. First, there needs to be an adequate refugee status determination procedure in place in the third country.¹⁷ This involves a fair and impartial procedure through which refugee status is determined, an avenue for review or appeals of negative decisions, and access to legal advice and a translator where necessary.¹⁸ The failure to ensure that such procedures are in place may amount to indirect *refoulement* if refugees are returned to their country of origin because inadequate status determination procedures failed to recognise a person's entitlement to protection.
19. Second, asylum seekers' living conditions must meet minimum human rights standards. This involves adequate accommodation, which is not overcrowded and where refugees are afforded sufficient personal space, the provision of culturally appropriate foods, basic non-food items and access to communication devices, and access to appropriate medical treatment for physical and psychological health issues.¹⁹ Relocation of asylum seekers to a country where living conditions do not meet these minimum standards may constitute *refoulement* if an asylum seeker is transferred into cruel, inhuman and degrading conditions. Additionally or alternatively, relocation of an asylum seeker to a country where living conditions do not meet these minimum standards may amount to constructive *refoulement* if the living conditions are so inadequate and oppressive that asylum seekers are effectively compelled to return to their country of origin.²⁰
20. Third, related to this point, the state must make individual determinations on whether an asylum seeker should be relocated to a third country. The failure to make individual decisions may amount to collective expulsion, in contravention of Article 4 of Protocol No 4 of the *European Convention on Human Rights*. Individual decisions would enable

the state to assess the particular vulnerabilities and risk profile of the asylum seeker, including whether the person is at risk of persecution in the third country (for example, if they identify as LGBTIQ and would be relocated to a country where such people are persecuted), whether they have physical or psychological medical needs that could not be adequately treated in the third country, and the special rights and needs of children.

Conclusion: What are the consequences of failing to respect the human rights of asylum seekers?

21. The Committee may want to consider how the deficiencies in the UK's approach towards asylum seekers might impact human rights more broadly. In particular, the UK's credibility when speaking about human rights issues and the UK's ability to hold other countries accountable for their human rights obligations is likely to be reduced if the UK is perceived to be ignoring its own human rights obligations in relation to asylum seekers.
22. During Australia's period of offshore processing of asylum seekers, it was noted that Australia's standing in the Asia-Pacific region had been damaged by Australia's policies. Giving evidence to the Australian Parliament, the President of the Australian Human Rights Commission, Professor Gillian Triggs stated:

... [O]ur closer neighbours from Indonesia, the Philippines, Vietnam and Malaysia say to me in all good faith that they have always seen Australia as a leader for human rights globally and in the region. Without wanting to attack us, they are genuinely puzzled about a country with such an outstanding human rights record—from the days of Doc Evatt in 1945 and the UN Charter and the Human Rights Declaration, all the way through to the 1990s when we were a major player in relation to the statute that created the International Criminal Court. We have been punching—if I can use that phrase—well above our weight in relation to creating this law and normative behaviour in relation to human rights. They are asking me why we are now adopting an exceptional approach to the prolonged detention of asylum seekers and refugees. Nobody really questions the right to hold children and their families for short periods of time for security, identity and health checks and so on. What they are puzzled by is why we should be complicit in treatment which is seen within the international community as cruel treatment and punishment.²¹

23. More recently, when Australia raised concerns about China's treatment of the Uyghur people in a speech to the United Nations Human Rights Council, a spokesperson for China replied that, 'If Australia does care about human rights, it should address its own human rights problems in the first place, namely, guarantee the rights of refugees, migrants and Indigenous people, close its offshore migrants detention centres, and take

serious measures to protect the safety of life and property of its people during the mega-blaze.¹²²

24. The UK's failure to give full effect to its human rights obligations under international refugee law risks damaging the UK's ability to speak out about human rights abuses in other jurisdictions. Perversely, this might mean that the UK is less able to exert influence in responding to the state policies and practices that cause people to leave their countries in search of safety.

¹ Article 1A(2) of the *Refugee Convention* defines a refugee as a person who has a 'well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.'

² UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (reissued February 2019) para 28.

³ See *Refugee Convention* art 31(1).

⁴ *Refugee Convention* art 33(1).

⁵ See House of Commons, Home Affairs Committee, 23 November 2022, Questions 423–428.

⁶ See Holly Bancroft and Andrew Woodcock, 'Just four Afghan refugees brought to the UK since fall of Kabul', *The Independent*, 1 December 2022 <<https://www.independent.co.uk/news/uk/home-news/afghan-refugees-acrs-arap-home-office-b2237159.html>>; May Bulman and Nicola Kelly, 'Revealed: UK has failed to resettle Afghans facing torture and death despite promise', *The Guardian*, 3 December 2022 <<https://www.theguardian.com/world/2022/dec/03/revealed-uk-has-failed-to-resettle-afghans-facing-torture-and-death-despite-promise>>.

⁷ Cathryn Costello and Yulia Ioffe, 'Non-penalization and Non-criminalization' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 917, 921.

⁸ *Ibid* 923.

⁹ *Ibid*. See further Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 'Summary Record of the Thirteenth Meeting' (10 July 1951) UN doc A/CONF.2/SR.13, 14–15 (Mr Colemar, France).

¹⁰ *Adimi (on the application of) v Uxbridge Magistrates Court & Anor* [1999] EWHC Admin 765, para 18.

¹¹ *Vienna Convention on the Law of Treaties* (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts 18, 26.

¹² Guy S Goodwin-Gill, 'The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement' (2011) 23(3) *International Journal of Refugee Law* 443, 445.

¹³ Explanatory note to the Nationality and Borders Act 2022, para 1.

¹⁴ UNHCR, *Maritime Interception Operations and the Processing of International Protection Claims: Legal Standards and Policy Considerations with Respect to Extraterritorial Processing* (Protection Policy Paper, November 2010) para 2.

¹⁵ *Ibid* para 3.

¹⁶ *Ibid* para 40.

¹⁷ *Ibid* para 18.

¹⁸ *Ibid* para 19.

¹⁹ See *ibid* paras 19–20.

²⁰ Penelope Mathew, 'Non-Refoulement' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021) 899, 913-915.

²¹ Evidence to Legal and Constitutional Affairs References Committee, Parliament of Australia, Canberra, 9 February 2016, 19 (Gillian Triggs).

²² Daniel Hurst, 'Australia criticises China over treatment of Uighurs and for eroding freedoms in Hong Kong', *The Guardian*, 15 September 2020 <<https://www.theguardian.com/australia-news/2020/sep/15/australia-criticises-china-over-treatment-of-uighurs-and-for-eroding-freedoms-in-hong-kong>>.