



**Evidence to Joint Committee on Human Rights
Legislative Scrutiny: Illegal Migration Bill**

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.

Overview

2. This submission addresses four of the questions asked by the Committee.
3. In relation to Question 3, this submission raises concerns that Clause 2 of the Bill is incompatible with the UK's obligation to fulfil its obligations under the Refugee Convention in good faith. The submission further argues that Article 31 of the Refugee Convention does not provide authority for the proposition that asylum seekers are required to claim asylum in the first safe country that they enter.
4. In relation to Question 4, this submission argues that a person is a refugee regardless of whether or not their asylum claim is inadmissible, and thus a finding of inadmissibility does not extinguish the UK's legal obligations toward that person. Additionally, this submission argues that the inadmissibility provisions of the Illegal Migration Bill have the potential to undermine the global system of refugee protection.
5. In relation to Question 5, this submission raises concerns about the inclusion of Albania on the list of countries that people can be returned to, given the substantial number of protection claims from Albania that have been recognised in previous years. Returning an individual to Albania without first considering their asylum claim could amount to a breach of the prohibition on *refoulement*. Furthermore, this submission notes the criticisms that have previously been made about the potential of removing asylum seekers to Rwanda.

6. In relation to Question 8, this submission notes that while immigration detention is not *prima facie* unlawful under international law, the regime for detention established in the Bill has the potential to become unlawful in situations where detention is not reasonable, necessary and/or proportionate. This submission further raises concerns about the possible detention of children.

Question 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 a 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?

7. Under Article 14 of the *Universal Declaration on Human Rights*, '[e]veryone has the right to seek and to enjoy asylum from persecution.'
8. The 1951 *Refugee Convention Relating to the Status of Refugees* ('*Refugee Convention*') and the 1967 *Protocol Relating to the Status of Refugees* ('*Refugee Protocol*') are the core international instruments that give effect to the right to seek asylum, by defining a 'refugee' and identifying the rights of refugees and obligations of states towards refugees.
9. As a state party to the *Refugee Convention* and *Refugee Protocol*, the UK has an obligation to perform its obligations under these instruments in good faith.¹ This includes an obligation '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.'²
10. Clause 2 of the Bill risks violating the UK's obligations to perform its obligations under the *Refugee Convention* in good faith. Asylum seekers are presumptive refugees – that is, as refugee status is declaratory (see para 14 below), an asylum seeker should be assumed to be a refugee until it is conclusively established that they are not a refugee. Clause 2 of the Bill places a duty on the Secretary of State to make arrangements as soon as reasonably practicable to remove a person who enters the UK irregularly. In doing so, the Bill prioritises

¹ *Vienna Convention on the Law of Treaties* art 26.

² 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.

border control and the punishment of people who irregularly enter the UK over any protection considerations. It is difficult to see how this could be a 'good faith' performance of the UK's obligations under the *Refugee Convention*.

11. Furthermore, the Bill seems premised on the notion that the *Refugee Convention* requires refugees to claim asylum in the first safe country they enter. This is incorrect.
12. Article 31 of the *Refugee Convention* provides 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.

13. 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 they pass through. Expert consensus is that Article 31 does not require a person to seek international protection at the first opportunity.³ 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.⁴ 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].'⁵ Therefore, Article 31 does not require an asylum seeker to claim asylum in the first safe country they reach.

Question 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)

³ 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, 923.

⁴ 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).

⁵ *Adimi (on the application of) v Uxbridge Magistrates Court & Anor* [1999] EWHC Admin 765, para 18.

made by persons who meets the conditions in clause 2 must be declared inadmissible. What are the human rights implications of clause 4?

14. A person becomes a refugee at the point in time when they satisfy the definition of a refugee.⁶ 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.⁷ Mode of arrival has no impact on refugee status. A person is a refugee regardless of whether they have passed through or stopped in another safe country on their way to the UK.
15. The UK owes obligations to refugees, regardless of whether or not the UK has formally recognised a person's refugee status. Most importantly, this includes protection from *refoulement*.⁸ Therefore, declaring a person's asylum claim to be 'inadmissible' does not alter the underlying fact that the individual may be a refugee and thus the UK is under an obligation not to expel or return that person to a situation where they would be at risk of serious harm.
16. Furthermore, it is the state where a person is claiming asylum that should bear the primary responsibility for determining that person's refugee status and granting asylum.⁹
17. The idea that people should seek asylum in the first safe country they reach has the potential to confine large numbers of asylum seekers to neighbouring countries which may struggle to deal with such large influxes of people. Applying this logic, Poland would be required to accommodate the 5.5 million refugees from Ukraine who have crossed into their border since the conflict with Russia began. The willingness of other European states to accommodate people fleeing Ukraine demonstrates how responsibility and burden sharing can be used to effectively respond to a situation of mass displacement.
18. If the UK were to begin finding that large numbers of asylum claims are 'inadmissible', the UK would effectively create a precedent for other states to do the same. In refusing to consider the

⁶ 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.'

⁷ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (reissued February 2019) para 28.

⁸ *Refugee Convention* art 33(1).

⁹ 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.

protection claims of asylum seekers, the UK risks undermining the global system of refugee protection.

Question 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?

19. As stated above, refugees are protected by the prohibition on *refoulement* regardless of whether or not their protection claim is 'inadmissible'.¹⁰
20. It is concerning that Albania has been added to the list of countries where people can be returned if they make an 'inadmissible' asylum claim. Statistics collected by the Migration Observatory at the University of Oxford indicate that, in 2021, 45% of adult Albanian asylum applications were successful at the initial Home Office decision. In the first six months of 2022, that figure rose to 55%.¹¹ Returning an individual to Albania without first considering their asylum claim could amount to a breach of the prohibition on *refoulement*.
21. Furthermore, the Government has listed 'Rwanda' in the Schedule as a country that a person may be sent to if they meet the inadmissibility criteria. UNHCR, among other commentators, has consistently expressed concerns about the legality and appropriateness of sending asylum seekers to Rwanda.¹²

¹⁰ *Refugee Convention* art 33(1).

¹¹ Peter William Walsh, 'Albanian asylum seekers in the UK and EU: A look at recent data', *The Migration Observatory at the University of Oxford*, <<https://migrationobservatory.ox.ac.uk/resources/commentaries/albanian-asylum-seekers-in-the-uk-and-eu-a-look-at-recent-data/>>.

¹² UNHCR, 'UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum Seekers under the UK-Rwanda arrangement' <<https://www.unhcr.org/en-au/publications/legal/62a317d34/unhcr-analysis-of-the-legality-and-appropriateness-of-the-transfer-of-asylum.html>>.

Question 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))?

22. International law permits the detention of asylum seekers for some purposes, including when they initially enter a territory to document entry, verify identity, and identify the basis for asylum seeker’s claims for protection.¹³ However, generally speaking, detention must be ‘reasonable, necessary and proportionate’.¹⁴ The decision to detain an individual must be made on a case-by-case basis, take into account less invasive means of achieving the same ends, and be subject to periodic re-evaluation and judicial review.¹⁵ There is a risk that the effect of the provisions in the Bill will give rise to a situation where people are detained for longer than is reasonable, necessary and/or proportionate, particularly if they are being detained in the absence of any clear avenues for removal.
23. Furthermore, under the *Convention on the Rights of the Child*, the detention of children should be a measure of last resort and children should only be detained for the shortest possible period of time.¹⁶ Recent research from Australia has demonstrated the significant psychological impact that immigration detention – even for short periods of time – can have on children.¹⁷ The fact that the Bill enables the detention of children is highly concerning.

¹³ *FJ et al v Australia (Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No 2233/2013)* (Human Rights Committee, CCPR/C/116/D/2233/2013, 22 March 2016) para 10.3; *MMM et al v Australia (Communication No 2136/2012, Views Adopted by the Committee at its 108th Session (8–26 July 2013))* (Human Rights Committee, CCPR/C/108/D/2136/2012, 28 October 2013) para 10.3.

¹⁴ *FJ et al v Australia* (above n 13) para 10.3; *MMM et al v Australia* (above n 13) para 10.3.

¹⁵ *FJ et al v Australia* (above n 13) para 10.3; *MMM et al v Australia* (above n 13) para 10.3.

¹⁶ *Convention on the Rights of the Child* art 37(b).

¹⁷ Shidan Tosif et al, ‘Health of Children who Experienced Australian Immigration Detention’ (2023) *Plos One*, doi: 10.1371/journal.pone.0282798. See further Shidan Tosif, Georgia Paxton and Hamish Graham, ‘We provided health care for children in immigration detention. This is what we found’, *The Conversation*, 30 March 2023 <<https://theconversation.com/we-provided-health-care-for-children-in-immigration-detention-this-is-what-we-found-201783>>.