Nationality and Borders Bill:

The following is an extract from the joint submission of Migrant Voice and Amnesty International UK to the Public Bill Committee on this Bill. It considers one of the primary objectives Ministers claim to be pursuing by this Bill. That objective is to ***"fulfil international obligations including under the 1951 Refugee Convention."***[1] *Regrettably, this is not an objective that Ministers have said they wish to pursue. Nonetheless, Ministers have suggested they are concerned about the principle of asylum being undermined. The Bill sets out, in various ways, to undermine the UK's international commitments and so, counter to the concerns Ministers' express, to undermine the principle of asylum.*

1. Whereas the Home Secretary has expressed concern at the idea that the principle of asylum may be undermined, there is nothing in this Bill that suggests any commitment to upholding it while much that does undermine it. The principle derives from Article 14 of the 1948 Universal Declaration of Human Rights, paragraph 1 of which states:

> "*Everyone has the right to seek and enjoy in other countries asylum from persecution.*"

2. The 1951 Refugee Convention gives effect to this right by both defining the status of refugee and the rights of refugees. It thereby identifies the nature and quality of asylum from persecution that every person is entitled to seek and enjoy. The responsibility to provide asylum falls upon the international community of nations and is a shared responsibility. As with all responsibilities that are shared, where some refuse or fail to fulfil their part others become increasingly unable or unwilling either to take up the slack or even fulfil their own share of the common duty. It is especially damaging that many nations – on whom relatively fewer or few demands fall even while being better placed to meet these by reason of their relative wealth and stability – choose not to play their full or fair part. There are nations whose contribution to providing asylum is far poorer than the UK. Nonetheless, the UK's contribution is very modest. It lags significantly behind its nearest comparable neighbours in Europe. It is even further behind, in terms of the number of refugees hosted, many far poorer and far less stable countries closer to conflict and sites of oppression.[2] It is, at this time, especially poignant that Ministers have called upon the neighbours of Afghanistan to keep their borders open to refugees – most of whom cannot and will not arrive by any pre-authorised or managed process – and for other nations to do more to help refugees.[3] Yet, at the same time, this Bill seeks to more firmly close the UK's borders to even the very small number of people who seek refuge here.

3. Regrettably, there are several ways by which this Bill undermines obligations under the 1951 Refugee Convention. Key provisions discussed here include Clauses 10, 26, 27-35, 37, 38 and 41.

4. Clause 10 is intrinsically contrary to that Convention. It creates categories of refugees and apportions differing standards of protection accordingly. There is no foundation for any such discrimination among refugees whether in the Convention or elsewhere in international human

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[1] An aim suggested at e.g. *Hansard* HC, Second Reading, 19 July 2021 : Col 711 *per* the Home Secretary in claiming to champion the "*principle of seeking refuge*".

[2] A comparison from UNHCR data with Bangladesh, France, Germany, Sudan, Sweden, Turkey and Uganda is available here: https://www.unhcr.org/refugee-statistics/download/?url=k2BW06

[3] The Home Secretary has written in *The Daily Mail* that it is necessary for other countries to do more. While she is right that other countries must do so, her call for this in the absence of any recognition that so many of the countries she is calling upon already do so much more than the UK, even with the emergency evacuations of recent weeks and the resettlement programme that is planned, is not compelling. The piece in *The Daily Mail* is here: https://www.dailymail.co.uk/news/article-9936489/PRITI-PATEL-proud-history-helping-need-countries-more.html

rights law or in general principle. The attempted justification for this relies on Article 31 of the Convention, a provision which by implication allows, at its highest and only in closely restricted circumstances, an administrative penalty upon a refugee who crosses a border without permission.[4] None of Clause 10 is consistent with this nor compatible with the Convention more generally. Nor are the 'legitimate interest' arguments presented in the Government's Human Rights Memorandum of any validity. These are not in any event relevant to any question of fulfilment of the UK's 1951 Refugee Convention obligations. However, in their own terms, they are fatally flawed:

a. Ministers assert a legitimate interest in discouraging people from seeking asylum in the UK rather than what they say is the first safe country in which the person has arrived.[5] The UK cannot have a legitimate interest in pursuing something contrary to what it is committed, under international human rights law, to uphold. The right to seek and enjoy asylum is not restricted to doing so in any particular country, whether a country into which a refugee first enters or any other. Any such restriction of the right would fundamentally undermine the shared responsibility at the heart of the Convention and the asylum duty it embodies.

b. Ministers also assert a legitimate interest in encouraging people seeking asylum to present themselves as soon as is practicable.[6] Insofar as it goes, that is a reasonable assertion. However, again, the UK can have no legitimate interest in pursuing this in a way that goes beyond the boundaries of the international human rights law to which it is signatory. Article 31 does not permit Clause 10; and nor does anything else to which the UK is bound under or related to the Convention. Moreover, Ministers can hardly claim to be encouraging people seeking asylum to present themselves as soon as is practicable. By this Bill they have set about constructing an array of measures whereby claiming asylum may place a person at immediate risk of being pushed back to another country (Clause 14), being left in limbo (Clause 14), being detained (Clause 24), being banished to a third country from where it is said the person's claim may be considered (Clause 26), being prosecuted (Clause 37) or otherwise adversely treated.

c. Ministers' final assertion is of a legitimate interest in promoting lawful methods of entry.[7] That too insofar as it goes is reasonable. What the UK has no legitimate interest in doing is, contrary to its international human rights law obligations, penalising people for exercising their right to seek asylum by entering without permission. That is especially so given the general absence of any visa for coming to the UK to seek asylum and general policy that asylum can only be claimed in this country by someone who is physically present.

5. Clauses 14, 26 & 41 in their separate ways are directed to shifting responsibility by the UK to other countries for some or all of the following – a person's asylum claim; that person while their claim is considered; and that person after their claim is determined (whether they are found to be a refugee or not). This is all contrary to the sharing of responsibility that is fundamental to the Convention. The vice of this shifting of responsibility is made especially stark given the following:

a. Clause 14, on its face, purports to shift responsibility on the basis of a person's 'connection' to another place. Curiously, the Bill is silent – as Ministers have been –

[4] This is more fully explained by UNHCR here: https://www.unhcr.org/uk/publications/legal/60950ed64/unhcr-observations-on-the-new-plan-for-immigration-uk.html

[5] The Bill's European Convention on Human Rights Memorandum, paragraph 12(a)

[6] The Bill's European Convention on Human Rights Memorandum, paragraph 12(b)

[7] The Bill's European Convention on Human Rights Memorandum, paragraph 12(c)

about the many people with connection to this country. The Bill does not recognise any connection of people arriving in the UK to seek asylum (such as having family, friends or associates here; or by reason of language, past contact with the UK or any historical connection). Nor does the Bill recognise these connections to the UK of people in other places. It is striking how in this Bill and in Ministers' underlying policy, any concept of 'connection' is all one way – i.e. to somewhere, anywhere but the UK.

b. The UK remains a relatively modest recipient of people seeking asylum and host to refugees. It has not experienced significant increases in asylum claims in recent years. It neither receives claims on the scale of its nearest comparable neighbours nor hosts the number of refugees that are hosted by those countries, still less the numbers hosted in countries such as Lebanon, Jordan, Pakistan, Uganda and others closer to conflict and political oppression. Even at times of operating relatively large resettlement schemes, the UK has long lagged far behind these various European and other countries.

6. Clause 26 and Schedule 3 are intended to enable a policy of shifting to countries – through which a person has never been, passed through or had any connection – the responsibility for the person during such time as that person's asylum claim may be considered and potentially thereafter. At the heart of this remains a fascination at the Home Office with the abysmal asylum policy pursued by Australia on Manus and Nauru islands. The cruelty and injustice of that policy is so manifest that mere contemplation of anything similar constitutes a strong repudiation of commitment to the Convention.

7. By Clauses 27 to 35 it is intended to legislate domestically for interpretations of the specific provisions of the Convention – specifically concerning whom is to receive that Convention's protection. We note the repeal of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (SI 2006/2525) that is provided for by Clause 27(4). That repeal is of regulations, which along with certain provisions in the immigration rules, were intended to give domestic effect to what is generally known as the Qualification Directive (Council Directive 2004/83/EC). Much of Clauses 27 to 35 adopt the same or very similar language to the Directive and the Regulations and rules by which it was to be given domestic effect. There is an important difference, however, between the Directive to which the UK was previously a signatory and the legislation proposed by the provisions in this Bill. The Directive was always expressly subject to underlying purposes intended to secure minimum standards across the EU that were in keeping with the Convention itself.[8] The Bill, as UK domestic law generally, contains nothing similar. Instead, it asserts a unilateral interpretation of an internationally agreed legal commitment.[9] It is, in principle, improper for the UK to do this and thereby encourage others to seek to set their own diminished interpretations of this Convention. However, the error in these clauses goes significantly further in relation to matters that are in any event not derived from the Directive:

a. Clause 29 sets out to amend the UK's existing and settled legal standard by which it is assessed whether a person is a refugee. Currently, the required approach is one of holistic assessment of all relevant material to evaluate whether a person is a refugee – i.e. meets the definition in Article 1(A)(2) of the Convention. The standard of proof for that evaluation is one of real or serious risk (or reasonable likelihood).[10] Clause 29 seeks to compartmentalise aspects of the evaluation and apply different standards of

[8] See the introductory text to the Directive, which makes this plain.

[9] UNHCR has expressed concerns about the underlying motivations in its response to the *New Plan for Immigration*, *op cit*; and in its response to the Bill, including in its short post-Second Reading statement, which highlighted the damaging proposal to amend the approach to the standard of proof by Clause 29.

[10] *R (Karanakaran)* [2000] EWCA Civ 11; *R (Sivakumaran)* [1988] 1 AC 958

proof to the separated parts. This is not merely adding complexity. It is intentionally raising the standard of proof as a means to exclude some people from the protection they seek, need and to which they are entitled. The injustice and absurdity of the result is perhaps most clearly highlighted by considering the impact of different standards of proof for the separated parts identified in Clause 29(2)(b) and Clause 29(4). The first of these requires a higher standard of proof to determine whether a person is indeed afraid that they will be persecuted. The latter of these applies to the current standard to determine whether the person will be persecuted. The result is that a person may establish that they will be persecuted but be unable to meet the new, higher standard to establish they are indeed afraid of this. If so, under this clause, their asylum claim would be refused.

b. Clause 34 is an attempt to provide legislative authority for a fundamental and unilateral rebuttal of the basic principle of shared responsibility under the Convention and the right of all persons to seek and enjoy asylum "in other countries". This clause is presented as a domestication of Article 31 of the Convention. It is emphatically rejected by UNHCR,[11] the international body responsible for that Convention, and expressly sets out to renege on the current embodiment of that article in UK domestic law.[12] Article 31 does not permit prosecution of refugees for having crossed one or more borders without permission to do so. It does not establish any 'first safe country' requirement, which requirement does not appear in or derive from the Convention or any other aspect of international human rights law. Such a requirement is contrary to that law and contrary to principle, particularly that of sharing responsibility and of recognition of the agency of refugees in exercising their right to seek and enjoy asylum. The motivations behind this clause and the surrounding rhetoric appear to be founded on a profoundly wrong belief that, in some way, excessive or unfair demands are placed on the UK's asylum system. The truth is that the UK receives relatively few people seeking asylum and setting out to criminalise most of the relatively few people who do seek asylum here is wholly incompatible with this country's international obligations and an entirely reckless signal to others concerning their own obligations.

c. Clause 35 seeks to enlarge on an existing error in UK law. It concerns Article 33(2) of the Convention, which in certain circumstances withholds from a refugee the protection against *refoulement* (i.e. being returned directly or indirectly to a place where the person is at risk of persecution). The basis for the article is a reasonable assessment that the refugee is a danger to the security of the country or, if having been convicted of a particularly serious crime, a danger to the community. The presumptions to be found in section 72 of the Nationality, Immigration and Asylum Act 2002 do not respect what are intended to be especially high standards for depriving a person of a right on which their very life may depend. Amending these presumptions to reduce the standards that are applied still further is manifestly disrespectful of the relevant international law and the lives of the people, whom it is intended to protect. The injustice and absurdity of what is being done (and what already exists) can be seen by a comparison of this clause and Clause 37. By the latter clause, a sentence of up to 4 years may be imposed upon a refugee for entering the UK without permission in order to seek asylum (notwithstanding that there is no visa available to any person for the purpose of coming to the UK to seek asylum). Clause 35, however, seeks to reduce the threshold for presuming a crime to be "*particularly serious*" from 2 years to 12 months. Thus, easily entrapping a refugee arbitrarily and wrongly prosecuted for doing no more than exercising her, his or their right to seek asylum in the UK by the only means available to do so.

[11] See UNHCR response to the *New Plan for Immigration, op cit*

[12] *R (Asfaw)* [2008] UKHL 31; *R (Adimi)* [2001] QB 667

8. Clauses 37 and 38 seek to punish people seeking asylum for doing so and to punish people for helping them. The justification for the former derives from the same misinterpretation of Article 31 that is found in Clause 34 and underpins Clause 10. The breadth of Clause 38 – which is to open to criminal prosecution any member of the public providing any assistance, including rescuing a person or boat in distress, that may enable someone to enter the UK to seek asylum – is not only anathema to the principles of the Convention. It is also plainly contrary to the laws of the sea, which would require the saving of life to be prioritised, and to basic humanity.[13]

9. Clause 41 and Schedule 5 is to open the possibility of push backs at sea to others' territorial waters or land territory. It includes powers to divert or take ships away from the UK and its territorial waters. This shifting of responsibility is, as discussed above, contrary to the principles of shared responsibility underpinning the Convention. It risks *refoulement*, which is contrary to the Convention, without consideration of that risk. Moreover, it is manifestly not in keeping with the urgency of the laws of the sea and of rescue at sea, which would ordinarily require any person rescued at sea to be brought to safety as quickly as possible rather than either pushed back into some other country's territorial waters or any haggling over responsibility between one country and another.[14]

[13] The 1982 UN Convention on the Laws of the Sea, the 1974 International Convention for the Safety of Life at Sea and the 1979 International Convention on Maritime Search and Rescue are each relevant. Their application in the context of irregular sea migration is elaborated upon by the UN High Commissioner for Human Rights in a May 2021 report, *Lethal Disregard*, which is available here: https://www.ohchr.org/Documents/Issues/Migration/OHCHR-thematic-report-SAR-protection-at-sea.pdf

[14] Paragraph 10 of Schedule 5