

ILLEGAL MIGRATION BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

Summary of the Bill

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Illegal Migration Bill. It has been prepared by the Home Office. On introduction of the Bill in the House of Commons, the Home Secretary (the Rt Hon Suella Braverman KC MP) made a statement under section 19(1)(b) of the Human Rights Act 1998 (“HRA”) that she is unable to make a statement that, in her view, the provisions of the Bill are compatible with Convention rights, but the Government nevertheless wishes the House to proceed with the Bill.
2. The purpose of the Bill is to deter illegal entry into the United Kingdom; break the business model of the people smugglers and save lives; and promptly remove those with no legal right to remain in the UK.
3. The Bill includes the measures to:
 - a) Place a duty on the Secretary of State to make arrangements as soon as reasonably practical to remove any person who enters the UK illegally, and has not come directly from a territory where their life and liberty was threatened, either to their home country or to a safe third country for consideration of any asylum claims (any such claims would be permanently inadmissible in the UK as would any human rights claims relating to a person’s home country). The duty in clause 2(1) does not require the Secretary of State to make removal arrangements for unaccompanied children, although they may do so.
 - b) Confer powers to detain persons to whom the duty applies (and their family members), including pending their removal and whilst a determination is made as to whether they meet the four conditions/the duty applies. For the first 28 days of detention the First-tier Tribunal will not be able to grant bail and there will be no ability to challenge a decision to detain by way of judicial review. There will be no restriction on the ability to apply for a writ of habeas corpus (and the equivalent procedure in Scotland) during this 28-day period. Individuals will also be able to apply to the Secretary of State for bail under Schedule 10 to the Immigration Act 2016, although it will not be possible to challenge a decision to refuse bail by way of judicial review. There will be no restriction on an individual’s ability to access damages in respect of unlawful detention in the 28-day period.
 - c) Codify certain common law principles relating to immigration detention, but places emphasis on the Secretary of State’s opinion as to whether the time period of detention is reasonable, rather than leaving that determination to the court. This will apply across the totality of the statutory immigration detention powers.

- d) Provide for the accommodation of and other appropriate support for unaccompanied children by the Secretary of State or local authorities. Extend the public order disqualification provided for in the Council of Europe Convention on Action against Trafficking in Human Beings to exclude persons within the scheme from the protections afforded to potential victims of modern slavery, subject to limited exceptions.
 - e) Provide for a permanent bar on (i) lawful re-entry to the UK for those who have ever satisfied the conditions for the duty to make arrangements for removal and their family members; (ii) obtaining limited leave to remain and settlement to those who have ever satisfied the conditions for the duty to make arrangements to remove and their family members; and (iii) securing British citizenship through naturalisation or registration for those who have ever satisfied the conditions for the duty to make arrangements to remove, subject in each case to limited exceptions.
 - f) Make bespoke provision so that persons subject to removal to a safe third country will have a limited time in which to bring a claim based on a real risk of serious and irreversible harm arising from their removal to a specified third country or based on the Secretary of State having made a mistake of fact when determining that a person was subject to the duty to make arrangements for removal. A decision by the Secretary of State to refuse the claim may be appealed to the Upper Tribunal. There will be time limits for the consideration of such claims by the Home Office, for the lodging of any appeal and for its consideration by the Upper Tribunal. All other legal challenges to removal, whether on ECHR grounds or otherwise, would be non-suspensive and would therefore be considered by our domestic courts following a person's removal.
 - g) Extend section 80A of the Nationality, Immigration and Asylum Act 2002, which provides that asylum claims from EU nationals must generally be declared inadmissible to the UK's asylum system, to cover nationals from Albania, Iceland, Liechtenstein, Norway and Switzerland and other countries to be specified in regulations, and include rights-based claims as well as, as now, asylum claims.
 - h) Introduce a duty on the Secretary of State to determine the maximum number of persons to be admitted to the UK for settlement each year via safe and legal routes. The annual number will be determined following consultation with representatives of local authorities and others.
4. The Government considers that clauses of the Bill which are not mentioned in this memorandum do not give rise to any human rights issues. The Convention rights raised by provisions in the Bill are: right to life (Article 2); prohibition of inhuman or degrading treatment (Article 3); prohibition of slavery (Article 4); liberty and security of person (Article 5); fair trial (Article 6); private and family life (Article 8); right to an effective remedy (Article 13); and prohibition of discrimination (Article 14).

5. Clause 1(5) provides that: “*Section 3 of the Human Rights Act 1998 (interpretation of legislation) does not apply in relation to provision made by or by virtue of this Act.*”. This does not affect the Government’s assessment of compatibility of the Bill with the Convention rights as set out below.

Duty to make arrangements for removal

6. Clauses 2 to 10 deal with the duty to make arrangements for removal (the duty) in relation to those individuals who meet the conditions within clause 2. The relevant ECHR articles to the duty to make arrangements for removal (the duty) are 2, 3, 4, 6, 8, 13 and 14.
7. **Clause 2** sets out the four conditions, which if met, means that a person would be subject to the duty. The conditions are:
 - a) that the person (P) entered or arrived in the UK without the required permission;
 - b) P arrived or entered after 7 March 2023;
 - c) P did not come directly from a country where they had a fear that their life and liberty were threatened for reasons under the Refugee Convention;
 - d) P needs, but did not, have leave to enter or remain in the UK.

It is accepted that the conditions of the duty will *prima facie* interfere with P’s rights under Article 8, when exercised. However, the Government considers that the interference is justified under Article 8(2) for being in accordance with the law and necessary in a democratic society.

8. The conditions of the duty require that P will have breached immigration law by arriving or entering the UK without the necessary permission and as such, there is a clear rationale regarding the pursuit of the legitimate aim in protecting the UK’s borders, as well as public safety and preventing immigration crime.
9. The safeguards within the Bill, such as suspensive claims and judicial scrutiny will ensure that the application of the conditions of the duty are exercised properly, going no further than necessary to achieve the legitimate aim. Accordingly, the Government considers that the provisions in clause 2 are compatible with Article 8 ECHR.
10. **Clause 3** provides that the Secretary of State is not required to make arrangements for removal of unaccompanied children but may do so.
11. Clause 3 is likely to engage Article 8 where an unaccompanied child (UC) is not removed for potentially some years (until they turn 18) in which time, the UC may have built some considerable family and/or private life (although a majority of unaccompanied children who claimed asylum in 2022 are aged 16 or 17). However, the delay to removal itself will not cause interference with Article 8 rights and will be in accordance with the law, namely the duty under section 55 of the Borders, Citizenship and Immigration Act 2009 (best interests of the child) and section 17 of the Children Act 1989 (provision of services to children in need).

12. Article 14 rights (when taken together with Article 8) may also be engaged by both children and adults for the differential treatment that both experience under clause 3 on the basis of “age”. However, the Government considers that any age discrimination is limited since accompanied children will be removed with their parents and that it would not be a ground that would require very weighty reasons to justify the differences in treatment, and as such the Government considers that the difference in treatment is in pursuit of a legitimate aim and objectively justifiable.
13. **Clause 4** provides that the duty applies to a person (adult or child) regardless of whether they make an asylum claim, human rights claim, slavery or human trafficking claim or judicial review application. Clause 4(2) states that the Secretary of State must declare a human rights claim or asylum claim to be inadmissible. This means that P’s claim would not be admitted for consideration by the UK. To note, a human rights claim is defined in clause 4(5) as being a claim that removal to a person’s country of origin or from which the person has a passport would be unlawful under section 6 of the Human Rights Act 1998.
14. Clause 4 may engage Articles 2, 3, 4, 8 and 13.
15. Article 2 enshrines the right to life and includes a positive obligation to put in place a framework of laws, procedures and means of enforcement that will, to the greatest extent reasonably practicable, protect life. The Government considers that Article 2 will not be infringed because clause 4 must be read in conjunction with clause 5 which prevents removal to P’s country of origin where they have made a human rights or protection claim and the Secretary of State considers that there are exceptional circumstances preventing P’s removal to that country in relation to nationals of countries listed in new section 80AA(1) of the Nationality, Immigration and Asylum Act 2002 (inserted by clause 50), and for non-section 80AA nationals where they have made a protection or human rights claim.
16. Article 3 establishes the right not to be subjected to torture, inhuman or degrading treatment or punishment. For the same reasons as for Article 2, the Government considers that there will be no infringement of Article 3 since a P will not be removed to their country of origin where that P has substantial grounds for believing that, if removed, would face a real risk of being subjected to treatment contrary to Articles 2 or 3 in the destination country. Where a P believes that there are such substantial grounds in relation to removal to a country listed in the Schedule to the Bill, the provisions in clauses 37 to 48 (suspensive claims) apply which allows a person to make a serious harm suspensive claim, which therein complies with the Article 13 ECHR consideration.
17. The Article 4 considerations in relation to a slavery or human trafficking claim are discussed below in the section on modern slavery.
18. *Article 8*: P’s family members may be removed along with P (clause 8) and so there is an argument that P’s Article 8 rights in relation to family life may not be infringed. P can make an application under clause 29 for re-entry and limited leave where it would be necessary for the UK to comply with its obligations under the ECHR or other international agreements. For family life outside of the definition of family

member, as well as private life, the Government's view is that the interference is justified under Article 8(2) for being in accordance with the law and necessary in a democratic society, and in any event P can make an application for re-entry.

19. **Clause 5** provides that the Secretary of State must ensure that arrangements are made for P's removal as soon as is practicable; P will be removed to:

- a) a country of which P is a national or citizen,
- b) a country or territory in which P has obtained a passport or other document of identity,
- c) a country or territory in which P embarked for the United Kingdom, or
- d) a country or territory to which there is reason to believe P will be admitted.

20. The provisions apply to a person in respect of whom the Secretary of State is required to make arrangements for removal and to an unaccompanied child to whom the Secretary of State has exercised the power ~~discretion~~ to make such arrangements.

21. Clause 5 provides for removal of persons who are nationals of a country listed in new section 80AA(1) of the Nationality, Immigration and Asylum Act 2002 (section 80AA national), and for non-section 80AA nationals. Section 80AA nationals who make a protection or human rights claim and the Secretary of State considers that there are exceptional circumstances preventing removal to that person's country of origin will not be removed to their country of origin, but instead may be removed to a country listed in the Schedule to the Bill (a Schedule country). Likewise, a section 80AA national and non-section 80AA national who makes a protection or human rights claim may be removed to a Schedule country. "Claims" include claims made after the date of introduction but not decided by the time the section comes into force.

22. Clause 5 may engage Articles 2, 3, 8 and 14.

23. It is the Government's view that clause 5 is compatible with Articles 2 and 3 because a person would not be removed to their country of origin where they have substantial grounds for believing that, if deported, would face a real risk of being subjected to treatment contrary to Articles 2 or 3 in the destination country. Article 8 is likely to be infringed but it is the Government's view that the interference is justified under Article 8(2) for being in accordance with the law and necessary in a democratic society, and in any event P can make an application for re-entry as stated above.

24. Article 14 (taken with Articles 2, 3, or 8) may be engaged with regards to differential treatment between section 80AA nationals, non-section 80AA nationals (collectively "Bill nationals") and those with claims predating the Bill, as well as those who have their claims decided before the section comes into force, and likewise those with claims that predate the Bill. With regards to section 80AA nationals vs non-section 80AA nationals, it is arguable that there is no differential treatment since such nationals will either be sent to their country of origin or to a Schedule country, so the treatment is the same. With regards to Bill nationals vs pre-Bill claims nationals, Article 14 could be engaged under the "other status"

consideration in Article 14; however, it is the Government's view that the difference in treatment does not arise due to a distinction between two groups of people but rather due to a factual event, which in this case is when a person made their asylum claim. Even if it could be argued that an "other status" was established in this instance, it would not be a suspect ground that would require very weighty reasons to justify differences in treatment and that any such difference in treatment was in pursuit of a legitimate aim and objectively justifiable.

25. **Clause 6** contains provisions to amend the Schedule to add or remove a country. In deciding whether to amend the Schedule, the Secretary of State must have regard to the circumstances of the country and information from appropriate sources. Articles 2, 3 and 8 may be engaged here when considering whether to add or remove a country from the Schedule. The Secretary of State, when deciding whether to add a country to the Schedule must ensure that all relevant issues are considered, which includes compatibility with the ECHR and section 6 of the Human Rights Act 1988 and as such the Government considers the provisions within clause 6 to be compatible with the ECHR.
26. **Clause 7** contains provisions on removal notices and to whom the Secretary of State may give directions to effect removal, as well as directions to prevent a person from leaving the removal vehicle. This clause should be read in conjunction with clauses 40 and 41 regarding suspensive claims. It is accepted that removal notices and the processes underlying such removal will prima facie interfere with a person's rights under Article 8, when exercised. However, the Government considers that the interference is justified under Article 8(2) for being in accordance with the law and necessary in a democratic society, accordingly, the Government considers the provisions to be compliant with Article 8 of the ECHR.
27. **Clause 8** contains provisions on the discretion to remove P's family members. A family member is defined as:
 - a) P's partner,
 - b) P's child, or a child living in the same household as P in circumstances where P has care of the child, in a case where P is a child,
 - c) P's parent, or
 - d) an adult dependent relative of P.
28. P's "partner" is defined as a spouse or civil partner or an unmarried partner where they have been living together in a relationship similar to a marriage or civil partnership for at least two years.
29. However, where the family member has leave to enter or remain in the UK or is a British or Irish citizen or has right of abode, they will be excluded from removal. Clause 8 also states which other provisions in the Bill also apply to the family member. It is arguable that there will be little to no infringement of Article 8 for those family members who are removed with P since they can continue enjoying family where they are removed. There may be, in some instances, infringement of Article 8 regarding extended family members, as well as private life. It is the Government's view that such interference is justified under Article 8(2) for being in accordance with the law and necessary in a democratic society. With regards to those family members who are not removed with P, since P can make an application under

clause 29 for re-entry into the UK and limited leave, accordingly, the Government considers that the provisions do not infringe Article 8 of the ECHR.

30. **Clause 9** amends the Immigration and Asylum Act 1999 and the Nationality, Immigration and Asylum Act 2022 so that those who make asylum claims and are caught within the duty can access asylum support. In *R (Limbuela) v SSHD* [2005] UKHL 66; [2006] 1 A.C. 396, the Court held that conditions could not be imposed on a person such that they would become destitute since that would breach Article 3. Where a person has not claimed asylum, they may access support under immigration bail as per paragraph 9 of Schedule 10 to the Immigration Act 2016. Likewise, with children, they will be supported by local authorities under sections 17 and 20 of the Children Act 1989. It is the Government's view that Article 3 would not be infringed.

Detention and bail

31. Clauses 11 to 14 deal with the detention of adults and children. Clause 11 provides for detention pending a decision on whether the four conditions are met/whether the duty applies, where an Immigration Officer suspects the conditions are met or the duty applies. Where the duty applies, clause 11 provides for detention pending the individual's removal from the UK. Clause 11 provides for the detention of unaccompanied children, pending a decision to give leave and pending a decision as to whether to remove them. It also provides powers to detain family members who fall within clause 8. Clause 12 codifies certain existing common law principles in relation to the period for which a person may be detained and applies across the totality of the existing statutory immigration powers, as well as the powers set out in clause 11. Clause 12 clarifies that a person may be detained for such period as is reasonably necessary and makes clear that it is for the Secretary of State to assess that period.
32. Given the legitimate policy aims set out at paragraph 2 above the duty to consult the Independent Family Returns Panel is disapplied, by clause 14, in order to ensure that, where the duty applies, the Secretary of State is able to remove individuals promptly and without delay.
33. Clause 13 provides that for the first 28 days of detention the First-tier Tribunal will not be able to grant bail and there will be no ability to challenge a decision to detain, by way of judicial review. There will be no restriction on the ability to apply for a writ of *habeas corpus* (or the equivalent procedure in Scotland) during this 28-day period. Individuals will also be able to apply to the Secretary of State for bail under Schedule 10 to the Immigration Act 2016, although it will not be possible to challenge a decision by the Secretary of State to refuse bail by way of judicial review. There will be no restriction on an individual's ability to access damages in respect of unlawful detention in relation to the 28-day period.
34. Given that individuals will be able to challenge their detention through the courts from the outset of their detention, via *habeas corpus*, and the courts will ensure compliance with Article 5 when determining applications for a writ of *habeas corpus*, the Government considers that these provisions are compatible with Article 5(4). Given that there will be no restriction on an individual's ability to secure

damages in relation to any period of unlawful detention the Government is satisfied in terms of Article 5(5) compliance.

35. To the extent that Article 14, taken with Article 5, is engaged, the Home Office considers that any difference in treatment is justified by the legitimate policy objectives of the bill and the need to use detention powers in order to achieve those objectives.
36. Articles 8 and Article 2 Protocol 1 may also be engaged by the detention of children. The Department has also considered whether the detention of children and of pregnant women could amount to a breach of Article 3. However, given that family groups will be detained together in appropriate accommodation, pregnant women and unaccompanied children will be detained in appropriate accommodation and appropriate provision will be made for education and any relevant support needs, the Government is satisfied these provisions are compatible.

Accommodation and support for unaccompanied children

37. Clauses 15 to 20 concern the provision of accommodation and support to unaccompanied children.

Section 55 of the Borders, Citizenship and Immigration Act 2009 and United Nations Convention on the Rights of the Child (“UNCRC”)

38. Section 55 of the Borders, Citizenship and Immigration Act 2009 was enacted in order to implement the UNCRC requirements around the best interests of children, set out particularly in Art 3 UNCRC. Parliament is not bound on the domestic plane to comply with or have regard to the UNCRC as an unincorporated convention, but the Secretary of State is required to have regard to the section 55 duty in the exercise of her functions. This would include the making of individual decisions and devising any policy or guidance in respect of unaccompanied children under clauses 15 to 20.

Article 8

39. The Article 8 ECHR rights of unaccompanied children may be engaged in respect of the decisions to provide accommodation and support under the powers in clauses 15 to 20. Any interference with Article 8 rights will be in accordance with the law, namely the duty under section 55 of the Borders, Citizenship and Immigration Act 2009 (best interests of the child) and section 17 of the Children Act 1989 (provision of services to children in need). In any cases where an unaccompanied child's Article 8 rights are interfered with, this will be justified under Article 8(2) as being both a necessary and proportionate means of achieving one of the legitimate aims outlined above.

Article 14

40. Article 14 ECHR rights (when taken together with Article 8) may also be engaged in respect of the decisions to provide accommodation and support under the powers in clauses 15 to 20. Unaccompanied children who are subject to the

scheme may be in a different position than other children, who are looked after by a local authority and not subject to removal. However, the duties owed by a local authority to a child who is physically present within their area will remain the same even if the child is accommodated by the Home Office. Furthermore, any difference in treatment would not be as a result of nationality. The Government considers that any difference in treatment would be minimal in any event and that it would be objectively justifiable in pursuit of a legitimate aim.

41. Accordingly, the Government considers the provisions to be compatible with the ECHR.

Modern slavery

42. Article 4 ECHR prohibits slavery and servitude (Article 4(1)) and forced or compulsory labour (Article 4(2)). Article 4(3) sets out what does not constitute forced or compulsory labour for the purposes of Article 4. Article 4 has also been held to apply to human trafficking.

43. The ECtHR has held that Article 4 contains positive obligations:

- a) to put in place a legislative and administrative framework to protect the right, see *C.N v France* and *C.N. v UK*¹;
- b) to take operational measures, such as to prevent those seeking to exploit victims and to support those victims. The case of *A.N. v UK* and *V.C.L*² made clear that there will be a breach of Article 4 where national authorities fail to take appropriate measures within the scope of their powers to remove the individual from a situation of slavery or trafficking; and
- c) to investigate where a person alleges breach of their Article 4 right. This is similar to the procedural obligations on states to investigate breaches of Articles 2 and 3.

44. Clauses 21 to 24 of the Bill apply, with the exceptions and safeguards noted below, to those in respect of whom the Secretary of State must make removal arrangements. They disqualify potential victims of slavery or human trafficking from: (a) modern slavery support under section 50A of the Modern Slavery Act 2015 and equivalent provisions in Scotland and Northern Ireland; (b) the express protection from removal from the UK pending a conclusive grounds decision, under sections 61 and 62 of the Nationality and Borders Act 2022; and (c) any requirement to grant leave under section 65 of the Nationality and Borders Act 2022 (and any leave already granted may be revoked).

45. The Government accepts that Article 4 and the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) are not identical. Clauses 21 to 24 reflect the position under Article 13(3) of ECAT and are premised on the fact that a person in respect of whom the Secretary of State is required under clause 2(1) to make arrangements for removal, is a threat to public order, arising from the exceptional circumstances relating to illegal entry into the UK, including the

¹ Cases C-67724/09 and C-4239/08 respectively.

² C- 77587/12 and C-74603/12.

pressure placed on public services by the large number of illegal entrants and the loss of life caused by illegal and dangerous journeys.

46. There are safeguards to protect rights under Article 4 ECHR:

- a) the disqualification from the provisions referred to above will not apply during the period the Secretary of State is satisfied that a person is cooperating with an investigation by a public authority into their alleged slavery or trafficking, the Secretary of State considers it necessary for the person to be present in the United Kingdom to provide that cooperation, and the Secretary of State does not consider that the public interest in the person providing that cooperation is outweighed by any significant risk of serious harm to members of the public which is posed by the person;
- b) the potential for the person to make a suspensive claim if they can provide compelling evidence that removal to the safe country in question would give rise to a real risk of serious and irreversible harm;
- c) the Home Office will ensure that receiving countries are able to investigate trafficking claims and, if made out, provide support to victims.

47. The Government is satisfied that these provisions are capable of being applied compatibly with Article 4 ECHR. The Government has concluded that radical solutions are required to put a stop to the small boats crossing the Channel and the approach adopted in these provisions is therefore new and ambitious but taking such an approach means that the Home Secretary is unable to make a statement under section 19(1)(a) of the 1998 Act.

48. The provisions do not apply to an unaccompanied child within the meaning of clause 3 (that is, until they reach the age of 18). The provisions will also be suspended two years after they commence, unless their operation is extended by regulations subject to the affirmative procedure. It is possible for the Secretary of State to suspend the provisions earlier than they would otherwise suspend, by regulations subject to the negative procedure. If the provisions suspend, they can be revived by regulations subject to the affirmative procedure, or the made affirmative procedure in cases of urgency.

Entry, settlement and citizenship

Entry and settlement

49. Those who have ever satisfied the conditions in clause 2 of the Bill and their family members as defined within the Bill cannot be granted leave to enter, entry clearance or an electronic travel authorisation ("ETA"). They also cannot be granted limited leave to remain or settlement.

50. The Secretary of State has the power to grant limited leave to enter, entry clearance, ETAs and limited leave to remain if it is necessary because of the UK's obligations under ECHR or an international agreement or the Secretary of State considers that there are compelling circumstances which mean it is appropriate to grant entry to the UK or the limited leave. The Secretary of State has the power to grant settlement if it is necessary because of the UK's obligation under the ECHR

or an international agreement. There are exceptions that relate to unaccompanied children and victims of modern slavery that fall within the provisions of this Bill.

Article 8 and potentially other ECHR articles

51. Article 8 ECHR requires the United Kingdom's immigration system to respect the right to enjoy a private and family life. There will be circumstances in which Article 8 ECHR may require a grant of leave to enter or remain. Clause 29 confers a discretion on the Secretary of State to waive the re-entry and limited leave to remain bans where the refusal to do so would breach ECHR. Accordingly, the Government considers clause 29 relating to entry and limited leave to remain to be compatible with Article 8 ECHR because it is capable of being operated in a compliant manner.
52. Neither Article 8 nor potentially any of the other ECHR articles guarantee someone the right to be granted a particular type of residence permit, such as settlement. In most cases, a grant of limited leave is sufficient to enable individuals to exercise their ECHR rights unhindered. There may however be some extremely rare cases where a grant of settlement is required for someone to enjoy their ECHR rights. The exceptions introduced to the settlement ban ensure that the Secretary of State can grant settlement where to deny it would be a breach of ECHR rights. Accordingly, the Government considers the provisions relating to settlement to be compatible with the ECHR.

Citizenship

53. Those subject to the duty to remove also cannot acquire British nationality (British citizenship, British overseas territories citizenship, British overseas citizenship and/or British subject status), except in cases where it is necessary in order to comply with the UK's obligations under the ECHR or another international agreement.

Article 8

54. A refusal in citizenship will not ordinarily engage an individual's Article 8 rights unless this constitutes an arbitrary denial of citizenship (*Karashev v Finland*); the test of arbitrariness is more stringent than conventional proportionality. In order to ensure there is no arbitrary denial of citizenship, the Secretary of State will be able to grant citizenship in cases where it is necessary to do so to avoid a breach of the ECHR, providing the usual requirements for naturalisation or registration have been met. In any rare cases where an individual's Article 8 rights would be engaged, any interference will be justified under Article 8(2) as in accordance with the law, pursuing one or more legitimate aims (detailed above) and be a proportionate means of achieving those aims.
55. Accordingly, the Government considers the provisions to be compliant with Article 8.

Legal proceedings

56. Clause 4(1) of the Bill provides that the duty to remove shall apply regardless of any - (a) protection claim, (b) human rights claim, (c) claim to be a victim of slavery or a victim of human trafficking, or (d) application for judicial review in relation to their removal from the United Kingdom under this Act.
57. Clause 45 of the Bill provides a safeguard in that removal will be suspended by a "*suspensive claim*". There is a bespoke appeal process created for suspensive claims in clauses 37 to 48 and removal will not occur until that appeal process is concluded.
58. "*Suspensive claim*" means- (a) a serious harm suspensive claim, or (b) a factual suspensive claim.
59. "*Serious harm suspensive claim*" means a claim by a person who has been given a third country removal notice that they would, before the end of the relevant period, face a real risk of serious and irreversible harm if removed from the United Kingdom under this Act to the country or territory specified in the notice.
60. "*Factual suspensive claim*" means a claim by a person who has been given a removal notice that the Secretary of State or an immigration officer made a mistake of fact in deciding that the person met the removal conditions.
61. Taken together, these provisions are not aimed at limiting the underlying ECHR rights of persons subject to the duty to remove. The focus of these provisions is whether claims in relation to those rights are conducted from the UK or a third country.
62. This process potentially engages Articles 2, 3, 4, 8 and 13.

Articles 2, 3, 4, 8 and 13

63. The definition of suspensive claim is mirrored on the relevant ECtHR threshold used as the basis of granting interim measures under Rule 39 of the ECtHR's rules of court.
64. The ability to certify a claim as clearly unfounded is modelled on existing, lawful processes (section 94(1) of the Nationality, Immigration and Asylum Act 2002 and rule 353 of the Immigration Rules). If a claimant believes that the decision to certify was made in error, they have the right to petition the Upper Tribunal to have them examine that certification, which shall include looking afresh at the evidence.
65. The limited ouster in relation to the ability of a claimant to judicially review the decision to certify raises potential issues under Article 13 (and potentially Articles 2, 3 and 4). However, the test for certification is a high bar that will have been given judicial scrutiny by the Upper Tribunal.
66. There will be a time limit on bringing suspensive claims. After the expiry of that time limit the Secretary of State will consider whether there were compelling reasons for

not bringing the claim in time. There is a right to petition the Upper Tribunal in respect of this determination. An ouster excludes judicial review of the Upper Tribunal's decision as to whether there were compelling reasons. However, the ouster does not remove the underlying right to judicially review the removal, and the Government considers that the compelling reasons test is sufficiently low to provide an adequate safeguard.

67. On timescales for expedited appeals, relevant timelines are in accordance with the requirement for due process and give sufficient scope for an individual to raise claims within time. In addition, the Bill provides a power for the Upper Tribunal to extend the deadline for a person to make an application and for the Upper Tribunal to decide and progress a Permission to Appeal Application or appeal and to require an oral hearing for Permission to Appeal Application in relation to certified claims where the judge considers it necessary for justice to be done.

Inadmissibility of certain asylum and human rights claims

68. Currently section 80A of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") (as inserted by the Nationality and Borders Act 2022), provides that asylum claims from EU nationals must be declared inadmissible to the UK's asylum system, unless there are exceptional circumstances as a result of which the Secretary of State considers that the claim ought to be considered under section 80A(4). Section 80A(5) provides a non-exhaustive list of exceptional circumstances. A combination of section 80A(4) and (5) provides a safeguard for asylum applicants.

List of safe States under new section 80AA of the NIAA 2022

69. Clause 50 amends section 80A by creating a list, in the new section 80AA(1) of the NIAA 2002, of countries to which section 80A applies, (see also clause 5(4)), by populating that list and empowering the Secretary of State, by regulations, to add or remove countries to that list. EU member states, EEA countries (Norway, Liechtenstein, and Iceland), Switzerland and Albania are included in the list on introduction. The Secretary of State may only add a country to the list if she is satisfied that the requirements set out in new section 80AA(3) are met. The power to add being by way of regulations made under the affirmative procedure and the power to remove being by way of the negative procedure.
70. The Grand Chamber in *Ilias and Ahmed v Hungary*, Application no. 47287/15 accepted that the Convention does not prevent states from establishing lists of countries which are presumed to be safe for asylum seekers. It is permissible for countries to apply a rebuttable presumption of safety. However, it also observed that any such presumption must be sufficiently supported at the outset by an analysis of the relevant conditions in that country. *Ilias* was a safe third country case but in the more recent case of *S.H. v. Malta*, Application no. 37241/21, where a safe country of origin presumption was applied, the Court did not decide that such presumptions could not be applied in safe country of origin cases despite finding violations of Article 3 on its own and in combination with Article 13. The Grand Chamber set out general principles to be observed in the case of country-

of-origin asylum in *F.G. v. Sweden*, Application no. 43611/11, a case which did not involve a presumption of safety relating to a safe country of origin.

ECHR claims

71. Clause 50 also expands the scope of claims captured under section 80A by encompassing all human rights claims as defined in section 113 of the NIAA 2002. Articles 2, 3, and 8 are considered to be most likely having regard to past cases but claims under other articles cannot be ruled out. It removes the rights of appeal for those human rights when declared inadmissible. The exceptional circumstances safeguard will apply to human rights claims as it does to asylum claims currently. The remedy for which will be Judicial Review.

Article 14

72. Article 14 enshrines the right not to be discriminated against in “the enjoyment of the rights and freedoms set out in the Convention”. If there were any difference in treatment this would not be because of the nationality of the person concerned but because of the objective circumstances in the country to which they would be returned. Those countries, as assessed, would be considered as safe and subject to the exceptional circumstances safeguard.

73. As such the Government considers the provisions to be compliant with the United Kingdom’s obligations under the ECHR.

Home Office
7 March 2023