

Mandates of the Special Rapporteur on the human rights of migrants; the Working Group on Arbitrary Detention; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; the Special Rapporteur on trafficking in persons, especially women and children and the Special Rapporteur on violence against women and girls, its causes and consequences

Ref.: OL GBR 9/2023
(Please use this reference in your reply)

4 May 2023

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the human rights of migrants; Working Group on Arbitrary Detention; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Special Rapporteur on contemporary forms of slavery, including its causes and consequences; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; Special Rapporteur on trafficking in persons, especially women and children and Special Rapporteur on violence against women and girls, its causes and consequences, pursuant to Human Rights Council resolutions 43/6, 51/8, 43/36, 51/15, 52/07, 44/4 and 50/7.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **the introduction of the "Illegal Migration Bill" (referred to hereinafter as "the Bill"), and the impact it would have, if adopted, on the human rights of migrants, including those in need of international protection.**

Concerns regarding the introduction of legal provisions affecting the human rights of migrants and asylum seekers were previously addressed through OL GBR 11/2021, OL GBR 3/2022, OL GBR 9/2022, and OL GBR 12/2022, sent to your Excellency's Government on 5 November 2021, 11 February 2022, 1 July 2022 and 17 August 2022, respectively. These letters raised concerns in relation to provisions of the Nationality and Borders Bill 2021, to the Memorandum of Understanding (the MoU) concluded between the Government of the United Kingdom of Great Britain and Northern Ireland (referred to hereinafter as "the United Kingdom") and the Government of the Republic of Rwanda, and some of the provisions of the draft Bill of Rights. We regret that, to date, no reply has been received to OL GBR 9/2022 and OL GBR 12/2022, and we wish to bring to your attention additional concerns in relation to the "Illegal Migration Bill" and its compatibility with the United Kingdom's obligations under international human rights and refugee law.

In this communication, we do not aim at providing a comprehensive analysis of the draft Bill introduced to the House of Lords, and its compatibility with international human rights standards. We focus on those provisions falling within the scope of the mandates entrusted to us by the Human Rights Council.

According to the information received:

On 7 March 2023, the Government of the United Kingdom introduced to the House of Commons the Bill with the stated purpose "to prevent and deter

unlawful migration, and in particular migration by unsafe and illegal routes”, by requiring the detention and removal from the country of certain persons who enter or arrive irregularly in the United Kingdom on or after 7 March 2023 (Clause 1 of the Bill). Clause 1(3) states that provisions made by or by virtue of the Bill “must be read and given effect so as to achieve the purpose mentioned in subsection (1)”. The Bill passed its third reading and the report stage in the House of Commons on 26 April and reached the House of Lords on 27 April 2023.

According to the announcement by the Home Office and Prime Minister's Office of the United Kingdom, made on the day of the Bill's publication, the proposed legislation is part of several actions to be undertaken by the government to stop small boat crossings and irregular migration to the country. In a public statement made on 8 March 2023, the Home Office further underlined that the Bill aimed to put a stop to “illegal” migration into the United Kingdom, “by removing the incentive to make dangerous small boats crossings”, as well as to speed up the removal of migrants deemed to have entered irregularly from the country. The proposal comes amid increasing levels of detected crossings by small boats across the English Channel.

If adopted, the Bill would require the Secretary of State to make arrangements to remove those migrants who irregularly enter the United Kingdom and meet the conditions set forth in the Bill, regardless of their protection needs and individual circumstances. Those arriving outside regular migration channels will be detained and swiftly removed, according to the Bill's provision. The Bill, if passed, would strengthen detention powers related to irregular migration and prevent judicial challenges; limit certain legal challenges and human rights arguments to prevent removal; make provision about unaccompanied children, as well as victims of slavery or human trafficking; ban people subjected to removal from re-entering the UK or seeking UK citizenship in the future; expand the list of safe third countries; and establish an annual limit on the number of people who can enter the United Kingdom through “safe and legal” routes.

Legal duty to make arrangements for the removal of persons arriving irregularly in the UK

Clause 2 of the Bill imposes a new legal duty on the Secretary of State to make the arrangements for the removal of persons who have entered the United Kingdom, when all of the following conditions are met: (1) they arrived irregularly to the UK on or after 7 March 2023; (2) they did not come “directly to the United Kingdom from a country in which the person's life and liberty were threatened” or if they passed through or stopped at another country in their way to the UK “where their life and liberty were not so threatened”; and (3) do not have the requisite leave to enter or remain in the UK.

These arrangements are to be made “as soon as is reasonably practicable after the person's entry or arrival” in the country (clauses 1(2) and 5(1) of the Bill). These measures are directed towards every person who arrives at or enters the UK on or after 7 March 2023 and requires permission under rules made by the Home Secretary. As clause 2(5) specifies that someone who “passed through or stopped” in a country considered safe while traveling to the UK did not “come directly”, only those persons

travelling directly from the country in which they are at risk would be exempted from removal.

Moreover, under the Bill, those subjected to removal arrangements outlined in the Bill would not have the opportunity to have their claim to stay in the UK considered. As provided in clause 4(1), the legal duty for the removal of those meeting the conditions set out in clause 2 of the Bill would apply regardless of whether the person has submitted a legal claim challenging their removal, including an application for judicial review. Furthermore, clause 4(2), would place a duty on the Secretary of State to declare the aforementioned claims as “inadmissible”. As a result, any human rights claim made by a person meeting the four conditions in clause 2 of the Bill would not be processed. A declaration of inadmissibility, moreover, is not considered a decision to refuse the claim, and therefore clause 4(4) would stipulate that, as a declaration of inadmissibility is not considered a decision to refuse the claim, there is no right to appeal against the decisions made by the Secretary of State. Clause 49 would empower the Secretary of State to make regulations about interim measures indicated by the European Court of Human Rights (ECtHR) prohibiting removal of a person from the UK.

Matters of refoulement

Provisions set in clauses 2 to 9 of the Bill seem to fail to adequately take into account the individual circumstances and protection needs of each person subjected to removal procedures. Therefore, if passed, the new legislation would risk the removal of migrants meeting conditions in clause 2 regardless of their protection needs and individual circumstances, and irrespective of any human rights and protection claims they may make. In the absence of appropriate procedural safeguards that explicitly require individual assessment on the circumstances and protection needs prior to deportation, legislative proposals would undermine international human rights law and the absolute principle of *non-refoulement*. In this connection, we wish to stress that, under international human rights and refugee law, migrants arriving at international borders, regardless of how they have travelled, should have access to their human rights, including individualized, prompt examinations of their circumstances, and referral to competent authorities for a full evaluation of their human rights protection needs, including access to asylum, in an age-sensitive and gender-responsive manner (A/HRC/47/30, para. 43).

States should ensure that all border governance measures taken at international borders, including those addressing irregular migration, are in accordance with the principle of *non-refoulement* and the prohibition of arbitrary and collective expulsions. The principle of *non-refoulement* forms an essential and non-derogable protection under international human rights, refugee, humanitarian and customary law. Under international human rights law, the principle of *non-refoulement* is explicitly guaranteed in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), ratified by the United Kingdom on 8 December 1988. In the context of the prohibition against torture and other forms of ill-treatment, the principle of non-refoulement is applicable to all situations with on exceptions, and to all human beings, without discrimination, regardless of their entitlement to refugee status. International human rights bodies, regional human rights courts, and national courts have also found this principle to be an implicit guarantee flowing from the obligation to respect, protect and fulfil human rights contained within other international instruments, including the International

Covenant on Civil and Political Rights (ICCPR), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which the United Kingdom ratified in 1991 and 1986 respectively. The principle is reaffirmed by the Human Rights Committee in its General Comment No. 20 on article 7 of the ICCPR. Moreover, the Revised Deliberation No. 5 of the Working Group on Arbitrary Detention on deprivation of liberty of migrants states that the principle of *non-refoulement* must always be respected, and the expulsion of non-nationals in need of international protection, including migrants regardless of their status, asylum seekers, refugees and stateless persons, is prohibited by international law.

In addition, involuntary returns cannot be lawfully carried out without due process of law: under international law, the decision to expel, remove or deport a non-national may only be taken after an examination of each individual's circumstances, in accordance with the law and when procedural guarantees have been respected. Individuals facing deportation should have access to a fair, individualized examination of their particular circumstances, and to an independent mechanism vested with the authority to review appeals of negative decisions. It should be noted that the principle of *non-refoulement* has been interpreted to apply to a wide range of risks of irreparable harm and should be applied to prevent the return of persons in cases of risk of serious human rights violations. These risks include to the rights to life, integrity or freedom of the person, and of torture and ill-treatment.¹ In addition, under certain circumstances, the individual assessment of the risk of irreparable harm can include, among other elements, access to or the level of enjoyment of economic and social rights. (A/HRC/47/30, para. 42). As an inherent element of the prohibition of torture and other forms of ill-treatment, the prohibition of *refoulement* is characterised by its absolute nature without any exception and overrides not only national immigration laws but also contradicting international obligations, such as those of extradition treaties (A/HRC/37/50, para. 37). Therefore, any steps taken to legalize policies effectively resulting in the removal of migrants without an individualized assessment in line with human rights obligations and due process are squarely incompatible with the prohibition of collective expulsions and the principle of *non-refoulement* (A/HRC/50/31, para. 70).

Collective expulsions, on the other hand, are prohibited as a principle of general international law. In this regard, we would like to draw the attention of your Government to paragraph 10 of General Comment No. 15 (1986) of the Human Rights Committee, where the Committee stressed that article 13 of the International Covenant on Civil and Political Rights “would not be satisfied with laws or decisions providing for collective or mass expulsions”. The Committee on the Elimination of Racial Discrimination has also recommended States to “ensure that non-citizens are not subject to collective expulsion” (Committee's general recommendation No. 30 (2004), para. 26). This prohibition requires an expulsion to be examined and decided individually, and to be based in the decision of a competent authority, and in accordance with the law and with respect of due process and procedural safeguards.

¹ OHCHR, “The principle of non-refoulement under international human rights law”, available at www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrinciplenonrefoulementUnderInternationalHumanRightsLaw.pdf.

Right to seek asylum and human rights protection

Furthermore, in its current form, the Bill seems to severely restrict access to asylum in the United Kingdom, effectively banning access to international protection procedures to virtually all persons arriving in the country outside regular migration channels. In this regard, we join the views of the UN High Commissioner for Human Rights and the UN Refugee Agency (UNHCR) that the new legislation, if adopted, would amount to a ban on seeking asylum for the majority asylum seekers in the United Kingdom.

The Bill also proposes a duty on the Secretary of State to make arrangements to remove persons meeting the conditions set forth clause 2, regardless of whether they have made a protection claim or human rights claim, they claim to be a victim of slavery or human trafficking or have made an application for judicial review in relation to their removal from the UK. This would essentially render human rights claims for protection inadmissible in the UK, as the Bill proposes to consider such claims subsequent to the person's removal from the UK. The current text would also fail to provide for clear alternative pathways for protection for those individuals who, despite meeting conditions set in clause 2, can nevertheless not be removed from the country.

The Bill, if adopted, would therefore be directly at odds with the United Kingdom's obligations under international human rights and refugee law. As stated under article 14 (1) of the Universal Declaration of Human Rights (UDHR), everyone has the right to seek and enjoy in other countries asylum from persecution. The United Kingdom has the obligation to individually assess the needs to protect the rights of migrants and refugees, as well as the obligation to guarantee effective access to the territory and to the asylum procedures and subsidiary international protection for people who require it. Moreover, asylum seekers should have access to a full and fair hearing of their claims, with adequate legal representation, and should be able to appeal decisions before they are returned to their country of origin. The exercise of the right to seek asylum is not subject to the regularity of arrival under international legal instruments that the United Kingdom is party to.

In relation to clause 2(5) of the Bill and the requirement to arrive directly in the UK from a country in which the person would face persecution, we would like to highlight that international law does not require that refugees claim asylum in the first country they reach. The 1951 Refugee Convention relating to the Status of Refugees, to which the United Kingdom has been a party since 11 March 1954, explicitly recognises that refugees may be compelled to enter a country of asylum irregularly. Most people fleeing conflict or persecution are unable to obtain the required documentation to access regular channels of migration. Restrictions on the access to procedures for international protection based on the mode of arrival undermines the purpose and protections established under the Refugee Convention. We recall that the act of seeking asylum is always legal, and effective access to territory is an essential precondition for exercising the right to seek asylum² (A/HRC/47/30, para. 43). On the other hand, criminalising irregular migrants based on their status or mode of arrival can lead to other human rights violations.

² Office of the United Nations High Commissioner for Refugees (UNHCR), Ten-Point Plan on Refugee Protection and Mixed Migration, chap. 3, available at www.unhcr.org/50a4c0a89.html.

Unaccompanied children

Clause 3(2) of the Bill authorizes but does not require the Secretary of State to remove unaccompanied children if they meet the same conditions outlined in clause 2, while some exceptions are provided limiting the power of the Secretary of State to arrange such removals. This authorization, however, becomes a legal duty once the child reaches the age of 18, as established in clause 5 (1, b). Furthermore, while the process for the forced removal of children and families has since 2014 included a duty on the Home Office to consult with the Independent Family Returns panel when a child is removed or detained, we are deeply concerned that clause 13 of the new Bill disappplies this safeguards when the provisions in clause 2 are applicable.

We would like to stress that every migrant child, regardless of their migration status, should be considered as a child first and foremost. All migrant children should be entitled in law and in practice to all the rights enshrined in the Convention on the Rights of the Child, to which the United Kingdom has been a party to since 1991. Heightened consideration must also be given to children in the context of *non-refoulement*, whereby the best interests of the child must be the paramount consideration in any actions or decisions taken by the State. As stated in the report of the United Nations High Commissioner for Human Rights on Principles and practical guidance on the protection of the human rights of migrants in vulnerable situations, a formal procedure to determine the best interests of the child should be conducted with certain safeguards. For example, such safeguards should include the meaningful participation of authorities responsible for child protection, as well as the right of the child to be heard and to have competent and independent legal representation (A/HRC/37/34, principle 6, guideline 6). In particular, a child should not be returned if such return would result in the violation of their fundamental human rights, and where a return is deemed not to be in the child's best interests, families should be kept together in the country of residence.

We further wish to emphasize that restrictive migration or asylum policies render migrant and asylum-seeking children, including unaccompanied or separated children, particularly vulnerable to suffering violence and abuse during their migration journey and in countries of destination. Unaccompanied migrant and asylum-seeking children should have access to the national child-care system on an equal basis as national children and enjoy all relevant safeguards with regard to the protection of children.

We also recall the Human Rights Council resolution 9/5, which addresses the issue of the human rights of migrants. The resolution "requests States to effectively promote and protect the human rights and fundamental freedoms of all migrants, especially those of women and children, regardless of their immigration status, in conformity with the Universal Declaration of Human Rights and the international instruments to which they are party." Resolution 9/5 also "reaffirms that, when exercising their sovereign right to enact and implement migratory and border security measures, States have the duty to comply with their obligations under international law, including international human rights law, in order to ensure full respect for the human rights of migrants" and "urge States to ensure that repatriation mechanisms allow for the identification and special protection of persons in vulnerable situations, including persons with disabilities, and take into account, in conformity with their international commitments, the principle of the best interest of the child and family reunification".

Removal to a safe third country and expansion of the list of safe countries

As per clause 5, those migrants and asylum seekers subjected to removal arrangements under the new Bill may be removed to a wide range of countries or territories, including: a country of which they are a national or citizen; a country or territory in which they have obtained a passport or other document of identity; a country or territory in which they embarked for the United Kingdom, or a country or territory to which there is reason to believe they will be admitted. Therefore, persons meeting the conditions in clause 2 would either be removed to their country of origin, if listed as safe under clause 57 of the Bill, or to a safe third country.

Clause 57 of the Bill would create a new section 80AA of the Nationality, Immigration and Asylum Act 2002, expanding the list of countries considered safe, and amend the existing section 80A, which currently requires the Secretary of State to declare asylum claims by EU nationals inadmissible and prohibits their consideration under the immigration rules, unless in exceptional circumstances. Under proposed provisions, section 80A would be amended as to apply to any country listed in the new section 80AA, which covers all EEA Member States, and includes Albania. In addition, if adopted, the Bill would grant the power to the Secretary of State to add further countries to the list if “satisfied” that there is “in general” no risk of persecution.

On the other hand, those countries considered as safe third countries are listed in a Schedule to the Bill, which mainly replicates an existing list of safe countries under section 94 of the Nationality, Immigration and Asylum Act 2002, with the addition of Rwanda and exclusion of Ukraine. The Bill would also grant the Secretary of State the power to amend the Schedule, via regulations, by adding countries to the list if satisfied that there is, in general, no serious risk of persecution or human rights violations there, and when the removal would not contravene the UK’s obligations under the European Court of Human Rights (clause 6 and Schedule of the Bill). According to the Home Office and Prime Minister's Office, by expanding the list of countries that are considered safe, the UK intends to make it “unquestionably clear”³ when an arriving migrant will not need protection in the UK, as it would be considered that they are at risk of persecution in their home country. The Secretary of State will not be required to assess whether removal would be safe or reasonable for a particular individual or whether they will be able to claim asylum there, which are fundamental elements of the right to seek asylum.

Returns or transfers to safe third countries may be appropriate only if certain thresholds for the protection of individuals are met. In this connection, we wish to refer thematic report of the Special Rapporteur on the human rights of migrants on “human rights violations at international borders: trends, prevention and accountability.” In this report the Special Rapporteur noted that initiatives to expand the use of the safe third country concept can result in violations of the prohibition of collective expulsions and the principle of *non-refoulement* and have led to limitations in accessing fair and efficient asylum and other protection-oriented procedures (A/HRC/50/31, para. 47). As provided in article 38 of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013, a country can only be designated as a safe third country when basic conditions relating to the safety and

³ Home Office and Prime Minister's Office, published 7 March 2023: <https://www.gov.uk/government/news/ground-breaking-new-laws-to-stop-the-boats#full-publication-update-history>

protection of migrants in the country, as well as conditions relating to the applicant, are fulfilled. Thus, we underline that the determination of a safe third country should be on a case-by-case basis, allowing an individualized assessment of whether the third country concerned is safe for a particular applicant. Applicants should also have the opportunity to challenge whether the country is safe for them to be returned to in their particular circumstances⁴.

Similarly, decisions to remove migrants to a “safe” country on the basis of readmission agreements can risk violating the prohibition of collective expulsions or the principle of *non-refoulement* if such decisions do not contain an individualized assessment of each migrant’s situation (A/HRC/37/50, para. 44). In this regard, we wish to refer to the inclusion of Rwanda on the list of third safe countries under the Schedule of the Bill. We take this opportunity to reiterate our deep concern in relation to the Memorandum of Understanding (MoU) concluded between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Rwanda for the provision of an asylum partnership arrangement to strengthen shared international commitments on the protection of refugees and migrants.

The legality of the MoU of 14 April 2022 is presently being decided by UK courts. Concerns and legal analysis in relation to the MoU were also previously raised by some mandates of the Special Procedures through OL GBR 9/2022, transmitted to your Excellency’s Government on 1 July 2022. In this letter, Special Procedures’ mandate holders stated their particular concern that the MoU would not provide sufficient guarantees to ensure effective protection against *refoulement*. Furthermore, we wish to echo the concerns raised by UNHCR, based on their legal analysis of the MoU’s compliance with international refugee law norms and principles⁵. This legal analysis concludes that the arrangement between the UK and Rwanda “fails to meet the required standards relating to the legality and appropriateness of bilateral or multilateral transfers of asylum-seekers. This arrangement, which amongst other concerns seeks to shift responsibility and lacks necessary safeguards, is incompatible with the letter and spirit of the 1951 Convention.”

While we welcome the fact that States are entering into bilateral and multilateral agreements to provide joint responses to migration-related challenges, we underline that such arrangements cannot be used as a strategy to bypass human rights obligations or to rubber-stamp migrant removals without individual safeguards. Passing the responsibility for the protection of these migrants to the Rwandan authorities without proper guarantees for their protection would not satisfy the UK’s international legal obligations.

Provisions for the detention of migrants.

Under new provisions, migrants arriving irregularly to the UK would be detained until they are removed from the UK, either to their country of origin or to a safe third country. Clauses 10 to 13 provide new powers to detain persons who meet, or are suspected to meet, the four conditions listed under clause 2, disapplying some existing restrictions on the detention of unaccompanied children and pregnant women.

⁴ See also UNHCR, “Legal Considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries”, April 2018

⁵ UNHCR Analysis of the Legality and Appropriateness of the Transfer of Asylum Seekers under the UK-Rwanda arrangement

Clause 10 (1-3) would amend the schedule 2 to the Immigration Act 1971, introducing new subparagraphs under paragraph 16 conferring these new powers for the detention when:

- the immigration officer suspects that the person meets conditions set in clause 2, pending a decision on whether the four conditions are met.
- the immigration officer suspects that the Secretary of State has a duty to make removal arrangements under that clause, pending a decision on whether the duty applies.
- the Secretary of State has such a duty, pending the person's removal from the UK.

A person liable to be detained under paragraph 16 may be detained for such period as, in the opinion of the Secretary of State, is “reasonably necessary” to enable the examination of the removal or other decision to be made. This assessment would be made in accordance with new subparagraphs to be inserted under paragraph 17 of schedule 2 to the Immigration Act 1971, based on clause 12 (1) of the new Bill. As per proposed new paragraph 17A(2), the powers to detain individuals under paragraph 16 would apply regardless of whether there was anything preventing those purposes of detention from being carried out for the time being. The consideration of what constitutes a reasonable period of detention would therefore fall under the discretion of the Secretary of State.

Additionally, subparagraphs 4 and 5 of clause 11 of the Bill enable the Secretary of State to detain persons for a further period “as considered necessary” even in those cases in which the purpose of detention could not be carried out within a reasonable period, to enable arrangements for the release. Such cases may include, for example, when the removal of the person from the UK may not be possible. This is reflected in proposed new paragraph 17A to the Immigration Act 1971. The Bill fails to indicate what type of arrangements might be made where a person is released from detention in such a scenario, including regarding their access to protection mechanisms.

Furthermore, clause 12 seeks to amend the immigration bail provisions in schedule 10 to the Immigration Act 2016, under which a person in immigration detention can apply to be released on bail by applying for immigration bail, either to the Secretary of State or the First-Tier Tribunal. If passed, the proposed amendments to the Immigration Act 2016 would restrict the jurisdiction of the courts to review the lawfulness of a decision to detain. Clause 12(3), moreover, prevents the First-tier Tribunal from granting bail during the first 28 days of detention under those powers, where under clause 12(4) the decision to detain is “final and is not liable to be questioned or set aside in any court or tribunal”. This would mean that, under the new Bill, migrants may be detained for 28 days with no recourse for bail or judicial review, besides the existing common law remedy of *habeas corpus*.

Arbitrary deprivation of liberty

The above-mentioned provisions of the Bill would allow for the detention of migrants and asylum seekers on the basis of extremely broad grounds and significant executive discretion. In this connection, we wish to recall that, according to

international human rights standards, detention for immigration purposes should be a measure of last resort, only permissible for adults for the shortest period of time and when no less restrictive measure is available. If not justified as reasonable, necessary and proportional, the use of this measure may lead to arbitrary detention, prohibited by article 9 of the UDHR and article 9.1 of the International ICCPR, ratified by the United Kingdom in 1976. The enjoyment of the rights guaranteed in the ICCPR is not limited to citizens of States parties but “must also be available to all individuals, regardless of their nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party” (ICCPR/C/21/Rev.1/Add. 13 (2004), para. 10).

We would also like to refer to the Revised deliberation No. 5 on deprivation of liberty of migrants issued by the Working Group on Arbitrary Detention (Annex, A/HRC/39/45), where the Working Group stressed that in the context of migration proceedings, “alternatives to detention must be sought to ensure that the detention is resorted to as an exceptional measure”. Commitment by Member States to use immigration detention only as a measure of last resort and work towards alternatives to detention was reaffirmed through the adoption of the Global Compact for Safe, Orderly and Regular Migration (objective 13, A/RES/73/195). We would also like to refer your Excellency’s Government to the report of the Special Rapporteur on torture (A/HRC/37/50), in which he concluded that “criminal or administrative detention based solely on migration status exceeds the legitimate interests of States in protecting their territory and regulating irregular migration and should be regarded as arbitrary (para. 25),” The Rapporteur further emphasised that detention of migrants should never be used as a means of deterrence, intimidation, coercion or discrimination (para. 73).

Furthermore, we note that the Bill allows for the detention of migrants and asylum seekers, including unaccompanied children and pregnant women, for a period of 28 days without any possibility of an application for bail or judicial review of immigration detention orders, which falls short of relevant international human rights standards. Judicial review is crucial so that the powers of the state, including to detain, can be kept within the bounds of the law and basic human rights standards. We wish to emphasize that “any form of detention, including detention in the course of migration proceedings, must be ordered and approved by a judge or other judicial authority” and that “anyone detained in the course of migration proceedings must be brought promptly before a judicial authority, before which they should have access to automatic, regular periodic reviews of their detention to ensure that it remains necessary, proportional, lawful and non-arbitrary” (Revised deliberation No. 5 by the Working Group on Arbitrary Detention, Annex, A/HRC/39/45).

Article 9(4) of the ICCPR stipulates that anyone who is deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful. The Basic Principles and Guidelines on remedies and procedures on the right of anyone deprived of their liberty to bring proceedings before a court also state that the right to challenge the lawfulness of detention before a court is an independent human right. Therefore, failure to provide for this right in law and practice constitutes a human rights violation. Furthermore, migrants should be enabled to challenge any decision relating to their treatment or deportation before a competent, impartial and independent judicial or administrative

body and in an individualized, prompt and transparent proceeding affording essential procedural safeguards, imperatively including accurate, reliable and objective interpretation services. These rights apply to all non-nationals, including migrants, regardless of their status, asylum seekers, refugees and stateless persons, in any situation of deprivation of liberty.

The duration of the detention falls under the discretion of the Secretary of State. In the absence of a clearly defined maximum detention period, the draft Bill may implicitly allow for indefinite detention of those migrants and asylum seekers meeting conditions under clause 2. The Human Rights Committee stated in its General Comment No. 35 on article 9, liberty and security of person, that detention in the course of proceedings for the control of immigration “must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time”. Additionally, the Working Group on Arbitrary Detention recommended that a “maximum detention period in the course of migration proceedings must be set by legislation”; and that when deportation orders cannot be implemented due to reasons that are not attributable to the subject of the removal order, “the detainee must be released to avoid potentially indefinite detention from occurring, which would be arbitrary” (Annex, A/HRC/39/45).

We would also like to bring to your attention the report on return and reintegration of migrants of the Special Rapporteur on the human rights of migrants (A/HRC/38/4), which highlights that “experience has shown that detention does not deter irregular migration, nor does it increase the effectiveness of removal procedures; it only increases the suffering of migrants, and may have a long-term detrimental impact on their mental health. Furthermore, detention has no influence on the choice of destination country, nor does it lead to a reduction in the number of irregular arrivals” (para. 40).

Immigration detention of children

The Bill lacks an explicit prohibition of immigration detention of children. Furthermore, proposed amendments under clause 10 (2, d, iv) would allow to detain unaccompanied children, pending removal under clause 3(2). As per clause 16, unaccompanied children could be accommodated anywhere the Secretary of State considers appropriate. The removal of existing limitations in domestic legislation on the detention of unaccompanied children and pregnant women under clause 11 would need to be reviewed.

We wish to emphasize that the detention of any child for reasons related to their, their parents’ or their legal guardians’ immigration status can never be considered in the best interests of the child and always constitutes a violation of the rights of the child, in accordance with the applicable international human rights standards. The Committee on the Rights of the Child has clearly stated that the immigration detention of any child is a violation of children’s rights and always contravenes the principle of the best interest of the child⁶. This position has been affirmed by joint General Comment No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return. Several special procedures mandate holders have also stressed that immigration detention of

⁶ Report of the 2012 day of general discussion, Committee on the Rights of the Child, para 32: <https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2012/DGD2012ReportAndRecommendations.pdf>

children should be prohibited (para. 11, Annex, A/HRC/39/45; para. 73, A/HRC/37/50; and para. 46, A/HRC/30/37). In its Revised Deliberation No. 5 on deprivation of liberty of migrants, the Working Group on Arbitrary Detention stresses that the deprivation of liberty of an asylum-seeking, refugee, stateless or migrant child, including unaccompanied or separated children, is prohibited.

For pregnant women, the impact of detention can be particularly acute. The Royal College of Midwives has noted that the detention of pregnant asylum seekers increases the likelihood of stress, which can risk the health of the unborn baby⁷ while the mother is likely to suffer irreparable damage both physically and psychologically.

Victims of modern slavery and trafficking

Under current laws in force in the UK, potential victims of modern slavery or human trafficking have temporary protection against removal from the country while their case is further considered. However, provisions under clauses 21 to 24 of the Bill would mostly disapply this protection (as provided for by sections 61 and 62 of the 2022 Act on removal of potential victims and the section 65 requirement to grant limited leave to remain to a confirmed victim) for those who have irregularly arrived in the UK, satisfying the conditions for removal in clause 2. The disapplication of modern slavery provisions applies even in situations where the victim entered or remained without leave in the UK against their will or under fraudulent pretences as a result of being trafficked and/or a victim of modern slavery. The Bill would create an exception for this disqualification when the individual affected was cooperating with a criminal investigation or criminal proceedings; however, even this narrow exception would only apply if the Secretary of State considers the individual's physical presence in the United Kingdom to be necessary for that cooperation. This would extend to a child or parent of someone cooperating with an investigation, as per clause 21(7).

The aim of the Bill, as stated by the Home Office of the United Kingdom, is to ensure the removal of those arriving irregularly, including by “cracking down on the opportunities to abuse modern slavery protections, by preventing people who come to the UK through illegal and dangerous journeys from misusing modern slavery safeguards to block their removal”⁸. These provisions, if passed, would be in violation of the State's obligations under international law, to identify, assist and protect victims of trafficking and persons at risk of trafficking, limiting access to assistance, support and protection in the UK, in addition to stigmatizing legitimate victims of modern slavery, who are already vulnerable and face social exclusion. These provisions would also embolden human traffickers and perpetrators of modern slavery, as it would be more challenging to obtain testimony that could lead to these perpetrators being held accountable, as victims would either be afraid to come forward and jeopardize their presence in the country or would be removed from UK territory before they can provide testimony against their traffickers.

It could also lead to a serious risk of *refoulement*, including risks of trafficking or re-trafficking of victims forcibly removed or transferred to a third country, without individualised assessment of the risks arising. In particular, we highlight the State's positive protective obligation, which applies to all victims of trafficking, or potential

⁷ https://www.refugeewomen.co.uk/wp-content/uploads/2023/04/Indefinite-detention-of-pregnant-women_joint-briefing-April-2023.pdf

⁸ Home Office, 8 March 2023: <https://www.gov.uk/government/collections/illegal-migration-bill#:~:text=The%20Illegal%20Migration%20Bill%20will,or%20a%20safe%20third%20country.>

victims, without discrimination, arising under article 4 ECHR, and the Council of Europe Convention on Action against Trafficking in Human Beings. There is no exception to the positive protective obligation arising for States in relation to victims of trafficking who arrive by irregular means, without permission to enter. We are concerned that clauses 21 to 24, if passed, would lead to violations of the State's obligation of non-*refoulement*, as protected under international human rights and international refugee law, and set out in article 14(1) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo Protocol).

The European Court of Human Rights (ECtHR) has recognised that, to effectively combat trafficking: “*member states are required [by article 4 ECHR] to adopt a comprehensive approach... states must, firstly, assume responsibility for putting in place a legislative and administrative framework providing real and effective protection of the rights of victims of human trafficking...*”: *Chowdury v Greece* App. No. 21884, 30 March 2017 §87. The state's positive obligations under Article 4 of the ECHR include “*facilitating the identification of victims by qualified persons*”: *VCL and AN v United Kingdom* (2021) 73 EHRR 9, §153. The “*early identification is of paramount importance*” *ibid* §160. This is in part because the duty to facilitate identification in Article 4 must be interpreted and applied so as to make its safeguards practical and effective (*SM v Croatia* (2021) 72 EHRR 1, §295).

We highlight the State's positive obligations arising under international human rights law, and under article 4 of the ECHR, read in conjunction with the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT), ratified by Your Excellency's government on 17 December 2008, specifically article 10 (Identification of the Victims). Article 10(2) provides: “[e]ach Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of ... (trafficking in human beings) has been completed by the competent authorities ...”. The positive obligations arising under article 4 ECHR, to ensure that victims of trafficking and contemporary forms of slavery are provided with assistance and protection.

Article 40(4) of the Council of Europe Convention on Action Against Trafficking in Human Beings provides (ECAT: “Nothing in this Convention shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-*refoulement* as contained therein.” The Explanatory Report to the Convention, with regard to article 40(4), notes: “The fact of being a victim of trafficking in human beings cannot preclude the right to seek and enjoy asylum and Parties shall ensure that victims of trafficking have appropriate access to fair and efficient asylum procedures. Parties shall also take whatever steps are necessary to ensure full respect for the principle of non-*refoulement*.” (Council of Europe Convention on Action against Trafficking in Human Beings 2005, Explanatory Report, para. 377).

The obligation of non-*refoulement* has been stated also by the monitoring body, the Group of Experts on Action against Trafficking in Human Beings

(GRETA)⁹. In its recent Country Report on the United Kingdom, GRETA urges the UK authorities to review the victim return and repatriation policies in order to ensure compliance in law and practice with article 16 of the Convention, including by: “[...] ensuring that the return of victims of trafficking is conducted with due regard for their rights, safety and dignity, is preferably voluntary and complies with the obligation of non-refoulement. This includes informing victims about existing support programmes, protecting them from re-victimisation and re-trafficking. Full consideration should be given to the UNHCR’s guidelines on the application of the Refugees Convention to trafficked people and to GRETA’s Guidance Note on the entitlement of victims of human trafficking, and persons at risk of being trafficked, to international protection.” (Evaluation Report, United Kingdom (Third Evaluation Round) Access to justice and effective remedies for victims of trafficking in human beings, GRETA (2021)¹², para. 322).

As is highlighted in the UNHCR Guidelines on International Protection: The application of article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked (2006): “Trafficked women and children can be particularly susceptible to serious reprisals by traffickers after their escape and/or upon return, as well as to a real possibility of being re-trafficked or of being subjected to severe family or community ostracism and/or severe discrimination” (para 19). The UNHCR Guidelines further provide that assistance to victims of trafficking seeking asylum, should be provided in an age and gender sensitive manner, they note that victims of trafficking may rightly be considered as victims of gender-related persecution: “They will have been subjected in many, if not most, cases to severe breaches of their basic human rights, including inhuman or degrading treatment, and in some instances, torture.” (para. 47).

We remind your Excellency’s Government of the obligation to ensure the rights of all victims of trafficking to seek and enjoy asylum, without discrimination. Specifically, with respect to the obligations of the State arising under article 4 ECHR; there appear to be a failure to provide sufficient guarantees against risks of trafficking or re-trafficking for those who may be removed, due to their irregular entry to the United Kingdom.

As has been noted by the Council of Europe Group of Experts on Action against Trafficking in Human Beings, (GRETA), in its Guidance Note on the entitlement of victims of trafficking, and persons at risk of being trafficked, to international protection:

“The Convention recognizes that trafficked people may have international protection needs, and it requires Parties to duly assess such protection needs. The essence of international protection is to provide relief from a potential future danger. Accordingly, the duty of international protection applies not only to victims of trafficking, but also to those at risk of being trafficked, should they return to their country of origin. Any removal of a person to a territory where they are at risk of being trafficked will constitute a violation of the principle of non-refoulement.”

As has been noted by the European Court of Human Rights in a series of cases, article 4 ECHR requires States to adopt a range of measures to prevent trafficking and to protect the rights of victims. There seems to be a failure to ensure

⁹ See: Guidance Note on the entitlement of victims of trafficking, and persons at risk of being trafficked, to international protection.” (GRETA(2020)062)

that these obligations are met in proposed legislation, and as such, the obligations arising under articles 3, 4, 13 and 14 ECHR, will not be discharged by the State. The consequences of the failure of the State to identify, assist, and protect victims were highlighted in the recent judgment in *V.C.L. and A.N. v. the United Kingdom*, where the failure to identify the victims resulted in a breach of the non-punishment principle, and violations of articles 4 (prohibition of slavery, servitude and forced or compulsory labour) and article 6 (right to fair trial) of ECHR. The application of the non-punishment principle should follow a full assessment of the individual situation of the victim of trafficking. The Bill, if enacted, would not ensure an adequate or effective trafficking assessment by a trained and qualified person, who is trauma-informed, and age and gender sensitive, recognising, “the important public interest in combatting trafficking and protecting its victims.”

The obligation on States to identify victims of trafficking is stated in CEDAW General Recommendation no. 38, 2020, on trafficking in women and girls in the context of global migration, which specifically states: “International human rights law imposes positive obligations on States to identify victims of trafficking. This duty is placed firmly on States irrespective of the lack of self-identification by a victim.” (CEDAW /C / GC/ 38, para 38).

We also highlight the recent Report on the United Kingdom and concerns raised by GRETA (GRETA (2021)12), stressing that, “the implementation of the new Plan for Immigration must be done in compliance with the obligations arising from the Council of Europe Anti-Trafficking Convention, in particular the obligations to identify victims of trafficking, including among asylum seekers, and to refer them to assistance, as well as the non-punishment provision contained in article 26 of the Convention.”(para. 48)

Therefore, the above-mentioned measures provided in the Bill seem to contravene the UK’s obligations to identify and protect victims of modern slavery and hold perpetrators accountable under the European Convention on Human Rights (ECHR) and the UK Human Rights Act 1998 which domesticates the provisions of the ECHR. The UK also ratified the Council of Europe Convention on Action against Human Trafficking in 2008, which explicitly requires that in any instance where there are reasonable grounds to suspect an individual is a victim of trafficking, no removal of that individual cannot take place until their identification process as victim of an offence has been completed. The Convention on Action against Human Trafficking also provides for a 30-day period in which no removal of an individual for whom there are reasonable grounds to believe is a victim of trafficking can take place, while the individual decides what course of action to take and whether to cooperate with authorities.

Access to regular pathways into the UK

The Bill would prevent persons who meet the conditions for removal set out in clause 2 from being given leave to enter or remain in the United Kingdom, as well as from settling in the UK. Clauses 30 to 35 of the Bill would also establish an entry ban for future re-entry of those migrants and asylum seekers arriving irregularly and prohibit them from applying for citizenship in the United Kingdom in the future. There are some exceptions to these provisions, including to ensure compliance with the UK’s ECHR obligations.

Finally, clause 58 of the Bill would establish an annual cap on the UK's receipt of people by "safe and legal routes". Based on this provision, the Secretary of State would be required to make regulations specifying the maximum number of persons who may enter the United Kingdom annually through regular pathways. However, what constitutes a "safe and legal route" is not specified in the Bill but would instead be defined in regulations made by the Secretary of State. The annual limit on the number of persons to be admitted into the UK through these safe pathways is to be set through secondary legislation. The limit would be decided after consultations with local authorities and other relevant bodies.

These legislative provisions, if adopted, would further limit options for safe, orderly and regular migration into the UK, and would effectively exclude from regular migration channels all those migrants and asylum seekers who attempt to reach the country irregularly. In this regard, we wish to recall objective 5 of the Global Compact for Safe, Orderly and Regular Migration, by which States committed to enhance availability and flexibility of pathways for regular migration, by adapting options and pathways for regular migration in a manner that facilitates labour mobility, optimizes education opportunities, upholds the right to family life, and responds to the needs of migrants in a situation of vulnerability, with a view to expanding and diversifying availability of pathways for safe, orderly and regular migration. We also recall objective 7 of the Global Compact, under which States committed to address and reduce vulnerabilities in migration and refer to the UN Guidance Note on Regular Pathways for Admission and Stay of Migrants in Situations of Vulnerability.

Similarly, the stated purpose of the Bill to serve as a deterrent and "to prevent and deter unlawful migration" to the UK, as reflected in clause (1) would need reconsideration. Particularly, we would like to highlight that restrictive migration policies do not stop migration movements. Migration has always been part of humanity and will not stop because of restrictive legislation and policies. Journeys through irregular routes are only made by those migrants and asylum seekers with no access to safer alternatives. By limiting access to regular and safe pathways, these provisions would contribute to exacerbating the already dire situation faced by migrants and asylum seekers who have no other options.

We wish to stress that addressing irregular migration ultimately relies on enhancing and increasing the availability and accessibility of safe pathways for regular migration. On the other hand, any migration governance measures, including those aimed at addressing irregular migration, shall not adversely affect the enjoyment of the human rights and dignity of migrants. Human rights apply to everyone, including all migrants notwithstanding their nationality, age, gender, migratory status, or other attribute. States' obligations under all the core, applicable international human rights treaties require that human rights be at the centre of their efforts to govern migration in all its phases. This includes ensuring that border governance measures respect, *inter alia*, the prohibition of collective expulsions, the principle of equality and non-discrimination, the principle of *non-refoulement*, the right to seek asylum, the right to life, the prohibition of torture, the promotion of gender equality, and the rights and best interests of the child. Crossing an international border in an unauthorized manner should not constitute a crime, and it does not deprive migrants of their human rights entitlements, including due process guarantees.

In sum, the proposed legislative text, in its current form, could severely restrict access to the territory of the United Kingdom, including by limiting the access through regular migration channels and to procedures for international protection. The provisions could also seriously undermine, inter alia, the right to seek asylum, the right to liberty, the principle of *non-refoulement*, the prohibition of collective expulsions, and the rights and best interests of the child, in violation of the United Kingdom's obligations under both international human rights and refugee law. It should be further noted that, when introducing the Bill, the UK Home Secretary stated that she was unable to make the statement as required under section 19(1)(b) of the Human Rights Act 1998 that the provisions of the Bill "are compatible with the [ECHR] rights" and noted that the Government nevertheless wishes the House to proceed with the Bill. In this connection, it is worrying that clause 1(5) exempts the Bill from section 3 of the Human Rights Act 1998, which requires legislation to be interpreted and given effect to in a way that is compatible with the ECHR.

Therefore, and in view of the above-mentioned analysis, **we urge Your Excellency's Government to halt the legislative passage and implementation of the Bill and to bring UK domestic law in line with international human rights standards.** We highly recommend that Your Excellency's Government consults the OHCHR's Recommended Principles and Guidelines on Human Rights at International Borders. We look forward to receiving further information on the issues mentioned in this letter, and we stand ready to cooperate with your Excellency's Government to enhance the protection of the human rights of all migrants in the United Kingdom.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

Felipe González Morales
Special Rapporteur on the human rights of migrants

Mathew Gillett
Vice-Chair of the Working Group on Arbitrary Detention

K.P. Ashwini
Special Rapporteur on contemporary forms of racism, racial discrimination,
xenophobia and related intolerance

Tomoya Obokata
Special Rapporteur on contemporary forms of slavery, including its causes and
consequences

Alice Jill Edwards
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or
punishment

Siobhán Mullally
Special Rapporteur on trafficking in persons, especially women and children

Reem Alsalem
Special Rapporteur on violence against women and girls, its causes and consequences