UNHCR
United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

UNHCR Observations on the New Plan for Immigration policy statement of the Government of the United Kingdom

May 2021

Main observations

1. The United Nations High Commissioner for Refugees ("UNHCR") appreciates the opportunity to provide observations on the New Plan for Immigration policy statement presented by HM Government to Parliament on 24 March 2021 ("Plan").[1] UNHCR's direct interest in the Plan emanates from its mandate and responsibility for supervising international conventions for the protection of refugees[2] as well as its longstanding work in the United Kingdom ("UK").

2. The scope of the Plan is broad, comprising over 40 suggested changes to UK laws, policies and procedures concerning immigration and asylum matters. UNHCR's observations relate to the text of the Plan as publicly released on 24 March 2021.

A Global Britain needs an asylum policy matching its international obligations

3. UNHCR wishes at the outset to acknowledge the UK's contribution as a humanitarian donor and global champion for the refugee cause. Such a global role must be matched with a commensurate domestic asylum policy that abides by the letter and spirit of the 1951 Convention relating to the Status of Refugees ("1951 Convention"). The UK was among the core group of States that drafted the 1951 Convention and was among the first to sign and ratify it, taking a leadership role in giving effect to refugee protection.

4. UNHCR encourages the UK to continue to display such leadership and maintain the broader perspective on its role in working together with UNHCR and the global community of States to find solutions to the refugee problem.[3] The international refugee protection system, underpinned by the 1951 Convention, has withstood the test of time and it remains a collective responsibility to uphold and safeguard it. If States, like the UK, that receive a comparatively small fraction of the world's asylum-seekers and refugees appear poised to renege on their commitments, the system is weakened globally and the role and influence of the UK would be severely impacted. UNHCR is concerned that the Plan, if implemented as it stands, will undermine the 1951 Convention and international protection system, not just in the UK, but globally.

The right to seek asylum does not discriminate based on mode of arrival

5. At the heart of the Plan is a discriminatory two-tiered approach to asylum, differentiating between those who arrive through legal pathways, such as resettlement or family reunion visas, on the one hand, and those who arrive irregularly on the other hand. For the latter, access to asylum and protection in the UK would become infinitely more challenging. While UNHCR welcomes the UK's continued commitment to legal

[1] UK Home Office, *The New Plan for Immigration policy statement*, available at: https://www.gov.uk/government/consultations/new-plan-for-immigration.
[2] UNHCR is the agency entrusted by the UN General Assembly to provide international protection to refugees and, together with Governments, seek permanent solutions to their plight. Paragraph 8 of UNHCR's Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees, whereas the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (hereafter collectively referred to as "1951 Convention") oblige State Parties to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR's duty of supervising the application of the provisions of the 1951 Convention (Article 35 of the 1951 Convention and Article II of the 1967 Protocol).
[3] Preamble to the 1951 Convention, available at: https://www.unhcr.org/uk/1951-refugee-convention.html.

pathways and better integration support offered to resettled and reunited refugee families, it remains clear that resettlement and other legal pathways cannot substitute for or absolve a State of its obligations towards persons seeking asylum at its borders, in its territory, or otherwise under its jurisdiction, including those who have arrived irregularly and spontaneously. This includes those arriving by boat. For the right to seek and enjoy asylum does not depend on the regularity of arrival of an asylum-seeker to a country. In reality, asylum-seekers are often forced to arrive at or enter a territory without prior authorisation.

6. The principle of non-refoulement, a foundational principle of international refugee protection, is central to this right. While the principle of non-refoulement does not entail a right to be granted asylum in a preferred State, in order to meet their obligations under the 1951 Convention, States are required to grant individuals seeking asylum access to their territory and to fair and efficient procedures, before taking action to effect their removal.

7. UNHCR calls upon the UK to guarantee the right to seek and enjoy asylum for *all* persons under its jurisdiction, including those who enter, or seek to enter, irregularly, and not merely those who have already been recognised as refugees outside of the UK and who arrive through resettlement or other legal pathways. In UNHCR's view, attempts to relieve pressure on the UK asylum system by narrowing access to it for those arriving irregularly are neither effective nor sustainable ways to address the system's current weaknesses.

International refugee law prohibits penalisation of irregular entry

8. The two-tiered approach proposed by the Plan impacts not only the exercise of the right to seek asylum, but also the legal status afforded to those irregular arrivals who stay in the UK. For those, the Plan proposes to create an inferior 'temporary protection status' based upon the circumstances of arrival in the UK. As a lesser status it creates a sub-class of refugees, denied the full set of rights afforded to them under the 1951 Convention, as well as the right to a family life and possibilities to integrate.

9. Temporary protection may be necessary as an emergency response in situations of mass-influx and crisis. Yet, the use of the temporary protection status as proposed in the Plan is not a response to a crisis or mass-influx, considering the comparatively low numbers of arrivals to the UK.

10. Central to the Plan is a misconstruction of Article 31(1) of the 1951 Convention, which prohibits the penalisation of asylum-seekers for irregular entry or stay except under certain circumstances and limits the nature of the penalties when they are permitted. The proposed 'temporary protection status' would impermissibly penalise asylum-seekers. UNHCR calls upon the UK to reconsider this proposal and align its plans with a proper interpretation and application of this provision.

11. The human consequences of this proposal will be very serious. Living under the constant threat of expulsion and being prevented from integrating will only push refugees with this 'temporary protection status' into precarious and potentially exploitative limbo situations in the UK – the very situations the UK seeks to take global leadership in eradicating.[4] Such limbo situations, when for an extended period, can cause serious consequences for mental health. A system that is designed to maintain a refugee in a precarious status intentionally frustrates, rather than facilitates, their integration and naturalisation.

[4] Since the introduction of the Modern Slavery Act 2015, the UK government has established itself as a world leader in eradicating modern slavery and human trafficking. This is reiterated at the start of Chapter 6 of the Plan.

Differentiating between lawful transfers in the spirit of solidarity, and externalisation

12. The Plan proposes a broad use of inadmissibility and safe country concepts, followed by removal of irregularly arriving asylum-seekers to third countries, where possible. UNHCR is concerned that the new inadmissibility proposals are built on the misunderstanding that "people should claim asylum in the first safe country they reach." Whilst international law does not confer an unrestricted right to choose where to apply for asylum, some might have legitimate reasons to seek protection in a specific country, including family ties or other meaningful links. Asylum should not be refused solely on the ground that it could be sought from another State.

13. Requiring refugees to seek protection in the first safe country to which they flee would undermine the global humanitarian and cooperative principles on which the refugee system is founded, and which were recently reaffirmed by the General Assembly, including the UK, in the Global Compact on Refugees. It would impose an arbitrary and disproportionate burden on countries in the immediate region(s) of flight and threaten the capacity and willingness of those countries to provide protection and long-term solutions. In turn, this would - and does - threaten to make these first countries unsafe, and encourage onward movement.

14. In international law, the primary responsibility for identifying and affording international protection rests with the State in which an asylum-seeker arrives and seeks that protection. Asylum-seekers and refugees may be returned to countries where they have, or could have, sought and found international protection as well as receive treatment reflecting international human rights standards. If States consider bi-lateral or multi-lateral return or transfer arrangements of this type, they must be undertaken with the aim of strengthening, rather than limiting, access to protection. UNHCR cautions that without the required safeguards in place, both in law and in practice, the proposed new inadmissibility rules could in fact constitute the externalisation of the UK's asylum and protection obligations and the shifting of its responsibility onto other States, at variance with international law.

15. The Plan also proposes legal amendments "to keep the option open, if required in the future, to develop the capacity for offshore asylum processing – in line with our international obligations." In UNHCR's view, the Plan does not provide sufficient detail on the proposed arrangements to enable an informed assessment of their compliance with the UK's international obligations.

16. As UNHCR has seen in several contexts, offshoring of asylum processing often results in the forced transfer of refugees to other countries with inadequate State asylum systems, treatment standards and resources. It can lead to situations in which asylum-seekers are indefinitely held in isolated places where they are 'out of sight and out of mind', exposing them to serious harm. It can also de-humanise asylum-seekers. UNHCR has voiced its profound concerns about such practices, which have "caused extensive, unavoidable suffering for far too long", left people "languishing in unacceptable circumstances" and denied "common decency."[5]The High Commissioner underlined that "UNHCR fully endorses the need to save lives at sea and to provide alternatives to dangerous journeys and exploitation by smugglers. But the practice of offshore processing has had a hugely detrimental impact. There is a fundamental contradiction in saving people at sea, only to mistreat and neglect them on land."[6]

[5] *UNHCR chief Filippo Grandi calls on Australia to end harmful practice of offshore processing*, 24 July 2017, available at: https://www.unhcr.org/en-au/news/press/2017/7/597217484/unhcr-chief-filippo-grandi-calls-australia-end-harmful-practice-offshore.html
[6] Ibid.

17. UNHCR urges the UK to refrain from adopting policies or laws that could in practice minimise and shift asylum and protection obligations either through an overly broad and blanket use of safe country concepts, or offshoring asylum processing.

Protect borders, but responsibly

18. The Plan proposes new powers to enable the UK Border Force to stop and redirect vessels out of UK territorial seas that they suspect are being used to facilitate illegal entry to the UK. This power also includes the ability to return intercepted vessels and those on board, to the country from which they started their journey, subject to that country's agreement.

19. Once a boat enters the United Kingdom's territorial waters, the country's primary responsibility for search and rescue is triggered. Under the law of the sea, States are obliged to proceed with all possible speed to the rescue of any person in distress at sea if it is safe to do so, and to disembark them in a place of safety. Importantly, this duty applies to all incidents of which the UK become aware, regardless of their status or circumstances, and regardless of whether it is suspected that the vessel in distress is operated by smugglers.

20. Similarly, because the UK's jurisdiction is engaged, it has the primary responsibility to process any asylum claims made by those on board such vessels. UNHCR is reassured that the Plan also foresees that any request for the return and disembarkation of a vessel encountered requires the agreement of the returning country to do so, and asks the UK to ensure that the necessary safeguards feature in any such agreement, and are in place in practice, before its implementation. In the absence of such regional or bilateral arrangements, such redirection of boats may lead to more loss of life in the Channel. It is entirely possible for the UK to protect its borders, and the security of its public, while implementing fair, humane and efficient policies towards asylum-seekers that are in line with the 1951 Convention. These objectives are not mutually exclusive.

The principle of non-refoulement is foundational and exceptions must remain exceptions

21. The Plan proposes to lower the criminality threshold that may trigger the application of Article 33(2) of the 1951 Convention. This provision permits an exception to the principle of non-refoulement in cases where there are reasonable grounds for regarding a refugee as a danger to the security of the country, or where a refugee , having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. Given the seriousness of removing protection from non-refoulement from a recognised refugee, this provision has always been considered a measure of last resort.

22. UNHCR reiterates its grave concerns about the proposal to further lower the threshold for what may be considered a "particularly serious crime" under Article 33(2) of the 1951 Convention. UNHCR underscores that like all exceptions to protections under international human rights treaties, this provision must be interpreted and applied *restrictively*. Only crimes of a particularly serious and therefore egregious nature should warrant an exception to the non-refoulement principle. UNHCR thus urges the UK government to adjust law and practice to this foundational standard of international refugee law.

Using appropriate standards to assess a "well-founded fear of persecution"

23. As regards the Plan's proposals for changing the "well-founded fear of persecution" test, UNHCR expresses its strong reservations about the UK's proposal to depart from widely accepted international approaches to interpreting the refugee definition. By introducing an excessively high standard of proof and restrictive notions of persecution and harm, the UK would create overwhelming obstacles in the procedure, which could prevent the people most at risk from properly presenting their asylum claims.

Children need particular protection in the asylum system

24. UNHCR welcomes the Government's commitment in the Plan to "protecting children and vulnerable people" and its intention to make the age assessment process more consistent and resolve cases more swiftly.

25. The Plan also proposes several changes to the way an asylum-seeker's age is assessed where the Government has doubts about their claim to be a child, which are not in line with international standards. In UHCR's view, policy or legislation which allows asylum-seekers to be treated as adults based on brief assessments of physical appearance and demeanour by immigration officials creates a considerable risk of children being subjected to adult procedures and of a violation of their rights under the Convention on the Rights of the Child and the 1951 Convention.

Instead, using tried and tested approaches to fix a broken system

26. Given the manageable numbers of asylum-seekers and refugees in the UK, and the fact that other longstanding and unmet recommendations for change to the system are absent from the Plan, UNHCR believes that the introduction of most of the proposals will not address identified shortcomings with the asylum and immigration system. Indeed, UNHCR is deeply concerned by the fundamental revision of the 1951 Convention being proposed.

27. Instead, UNHCR encourages the UK to resort to tried and tested approaches to address the identified shortcomings in the national asylum system. UNHCR reiterates its earlier offer to the UK government to assist with the identification of adequate processing modalities for fair and efficient asylum procedures, which is a more adequate solution.

28. UNHCR is already working closely with the Home Office to improve the quality of its asylum system end-to-end under the Quality Protection Partnership and provided detailed proposals for procedural reform to the Government in February of this year. These proposals draw upon global best practice for the adoption of fair and efficient asylum procedures, including simplified processing modalities supported by case triaging and enhanced screening procedures. We believe that greater investment in the asylum system 'upfront' will bring back-end gains of the type designed to address some of the issues identified in the Plan. In light of the concerns expressed in these observations, UNHCR stands ready to continue to work with the government to adopt a more sensible, humane and legally sound set of changes to address the problems it identifies with its asylum system.

In the Annex, UNHCR offers detailed legal observations on several key issues proposed in the Plan.

Annex: Detailed legal observations

Introduction

1. The United Nations High Commissioner for Refugees ("UNHCR") appreciates the opportunity to provide observations on the New Plan for Immigration policy statement presented by HM Government to Parliament on 24 March 2021 ("Plan").[7]

2. UNHCR's direct interest in the Plan emanates from its mandate and longstanding work in the UK. UNHCR is the agency entrusted by the UN General Assembly to provide international protection to refugees and, together with Governments, seek permanent solutions to their plight.[8] Paragraph 8 of UNHCR's Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,[9] whereas the 1951 Convention relating to the Status of Refugees[10] and its 1967 Protocol ("1951 Convention") oblige State Parties to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR's duty of supervising the application of the provisions of the 1951 Convention (Article 35 of the 1951 Convention and Article II of the 1967 Protocol). The UN General Assembly has also entrusted UNHCR with a global mandate to provide protection to stateless persons worldwide and for preventing and reducing statelessness.[11] Moreover, UNHCR has been working in close collaboration with the UK authorities for more than 20 years under the auspices of its Quality Initiative and Integration Projects, and most recently its Quality Protection Partnership, in the joint effort to improve refugee status determination in the UK and the wider system within which it operates.

3. UNHCR takes note of the broad scope of the Plan comprising over 40 suggested changes to laws, policies and procedures across the UK asylum and immigration system. Following an examination of these proposals, UNHCR has opted to focus its observations on the following key issues, as presented in the text of the Plan of 24 March 2021, without prejudice to other aspects on which UNHCR may express views at a later stage:

- Narrowing access to UK territory and asylum;
- The creation of an inferior protection status for certain refugees, depending on the circumstances of their arrival;
- Expanding the notion of "particularly serious crime" in the "danger to the community" exception to the non-refoulement principle;
- Changes to the definition of a "well-founded fear of persecution" and the standard of proof for assessing whether this requirement is met;

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[7] UK Home Office, *The New Plan for Immigration policy statement*, available at: https://www.gov.uk/government/consultations/new-plan-for-immigration.

[8] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: https://www.refworld.org/docid/3ae6b3628.html ("the Statute").

[9] Ibid., para. 8(a). According to para. 8(a) of the Statute, UNHCR is competent to supervise international conventions for the protection of refugees. The wording is open and flexible and does not restrict the scope of applicability of the UNHCR's supervisory function to one or other specific international refugee convention. UNHCR is therefore competent qua its Statute to supervise all conventions relevant to refugee protection. *UNHCR's supervisory responsibility*, October 2002, pp. 7–8, available at: http://www.refworld.org/docid/4fe405ef2.html.

[10] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189, available at: http://www.unhcr.org/refworld/docid/3be01b964.html. According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of the Convention".

[11] UN General Assembly Resolution A/RES/50/152, 9 February 1996, available at: http://www.unhcr.org/refworld/docid/3b00f31d24.html, reiterated in subsequent resolutions, including: A/RES/61/137 of 25 January 2007, available at; http://www.unhcr.org/refworld/docid/45fa902d2.html; A/RES/62/124 of 24 January 2008, available at: http://www.unhcr.org/refworld/docid/47b2fa642.html; and A/RES/63/148 of 27 January 2009 http://www.unhcr.org/refworld/docid/4989619e2.html.

- Amendments to asylum and appeal procedures;
- Changes to age assessment and the creation of a National Age Assessment Board.

Narrowing access to UK territory and asylum

Upholding the right to seek and enjoy asylum

4. At the heart of the Plan is a two-tiered approach to asylum, differentiating between those who arrive through legal pathways, such as resettlement or by family reunion visas, on the one hand, and irregular arrivals on the other hand, for whom access to asylum and protection in the UK will be infinitely more challenging. Three objectives are given for this overarching approach and other related proposals discussed below, notably:

   i. "To increase the fairness and efficacy of the UK system so that we can better protect and support those in genuine need of asylum."
   ii. "To deter illegal entry into the UK, thereby breaking the business model of criminal trafficking networks and protecting the lives of those they endanger."
   iii. "To remove more easily from the UK those with no right to be here."[12]

5. The right to seek and enjoy asylum is a universal human right expressed in Article 14 of the Universal Declaration of Human Rights of 1948 ("UDHR") and is inherent in the proper functioning of the 1951 Convention, the centrepiece of international refugee protection today.[13] The UK was among the core group of States that drafted the 1951 Convention and among the first to sign and ratify it,[14] taking a leadership role in giving effect to the right to seek and enjoy asylum that UNHCR encourages it to continue to play. The exercise of this right is not subject to the regularity of arrival**.** In reality, asylum-seekers are often forced to arrive at or enter a territory without prior authorization.[15]

6. Central to the right to seek and enjoy asylum is the principle of non-refoulement,[16] which prohibits, without discrimination,[17] any State conduct leading to the "return in any manner whatsoever" to an unsafe foreign territory, including rejection at the frontier or non-admission to the territory in which asylum is sought. While the principle of non-refoulement does not entail a right to be granted asylum in a preferred State, in order to give effect to their obligations under the 1951 Convention, **States are required to grant individuals seeking asylum access to their territory and to fair and efficient asylum procedures**.[18] As put by the European Court of Human Rights "(…) the effectiveness of Convention rights requires that (…) States make available genuine and

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[12] UK Home Office, *The New Plan for Immigration policy statement*, available at: https://www.gov.uk/government/consultations/new-plan-for-immigration.
[13] UNHCR, *Introductory Note to the 1951 Convention*, p.2, available at: https://www.unhcr.org/3b66c2aa10 See further reference to Article 14 UDHR in preambular paragraph 1 of the 1951 Convention.
[14] The United Kingdom signed the Convention on the date of its adoption by the Conference of Plenipotentiaries, 28 July 1951, and ratified it in 1954. See list of States parties to the 1951 Convention: https://www.unhcr.org/5d9ed32b4 (status: September 2019). The United Kingdom was also represented in the drafting committee of the UDHR by Charles Dukes, Member of the Commission of Human Rights. See drafting history and membership of the UDHR: https://www.un.org/en/about-us/udhr/drafters-of-the-declaration.
[15] See, *UNHCR Position on Hungarian Act LVIII of 2020 on the Transitional Rules and Epidemiological Preparedness related to the Cessation of the State of Danger*, June 2020, p.5, section 3, available at: https://www.refworld.org/docid/5ef5c0614.html.
[16] The principle of non-refoulement is most prominently expressed in Article 33 of the 1951 Convention, having been recognized as a norm of customary international law. Non-refoulement obligations are also codified in international and regional human rights law instruments.
[17] According to the 1951 Convention Article 3 of the 1951 Convention, '[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.'
[18] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, para. 8, available at: https://www.refworld.org/docid/45f17a1a4.html.

effective access to means of legal entry, in particular border procedures for those who have arrived at the border. Those means should allow all persons who face persecution to submit an application for protection (…). In the absence of appropriate arrangements, the resulting possibility for States to refuse entry to their territory is liable to render ineffective all the Convention provisions designed to protect individuals who face a genuine risk of persecution."[19]

7. While UNHCR welcomes the UK's continued commitment to third-country pathways and better integration support offered to resettled and reunited families, it remains UNHCR's clear view that resettlement and other third-country pathways[20] **cannot substitute for or absolve a State of its obligations towards persons seeking asylum at its borders, in its territory, or otherwise within its jurisdiction, including those who have arrived irregularly**.

8. **UNHCR therefore calls upon the UK to guarantee the right to seek and enjoy asylum for all persons under its jurisdiction**, including those who enter, or seek to enter, irregularly, and not merely those who have already been recognised as refugees outside of the UK and arrive through resettlement or other legal pathways. **Attempts to relieve pressure on the UK asylum system by narrowing access to it for those arriving irregularly are neither effective nor sustainable ways to address the system's current weaknesses.**

9. In this spirit, UNHCR has already recommended to the UK Home Office practical proposals[21] for a more streamlined asylum processing which have already been probed and tested in other countries and have the potential to make the UK asylum system more efficient, while remaining fair. These include proposals for the (a) frontloading of the asylum system by improving registration and screening; (b) enhancing triaging with a view to referring applications to simplified and accelerated procedures, depending on profile and background; (c) more effective management of subsequent applications, and (d) return of those finally determined not to have any international protection needs.

Prohibited penalisation of asylum-seekers for irregular entry or presence

10. Central to several of the new proposals in the Plan is a misconstruction of Article 31(1) of the 1951 Convention.[22] This includes proposals that narrow access to asylum, notably the two-tiered approach that disadvantages irregular arrivals, whom the Plan suggests are "not seeking refuge from imminent peril", and the greater criminalization of (attempted) illegal entry and facilitation thereof.

11. Article 31(1) prohibits the penalisation of refugees on account of their illegal entry or presence if they have come directly from a territory where their life or freedom was threatened, present themselves without delay and show good cause for their illegal

[19] European Court of Human Rights, Grand Chamber judgment *N.D. and N.T. v. Spain*, 13 February 2020, para. 209, available at: http://hudoc.echr.coe.int/eng-press?i=003-6638738-8816756.
[20] The important integration tool of community sponsorship, where UK leadership is most appreciated, and complementary pathways such as through employment or education, should be additional to resettlement, per the Global Compact for Refugees.
[21] These proposals shared with the Home Office on 23 February 2021 are based on many years of research, audits, and working in collaboration with the Government and other stakeholders to improve the UK's asylum system. For further reference on fair and fast asylum procedures, see *UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union*, 25 July 2018, available at: https://www.refworld.org/docid/5b589eef4.html; or more recently UNHCR, *Practical considerations for fair and fast border procedures and solidarity in the European Union*, 15 October 2020, available at: https://www.refworld.org/docid/5f8838974.html.
[22] On the relevance of Article 31(1) of the 1951 Convention for access to status rights, and the impact of the Plan's proposed temporary protection status on the access to the full set of status rights guaranteed by the Convention, see below section 2, paras. 44-51.

entry or presence. The material scope of Article 31(1) extends to the territory under a State's control, which includes its land and sea borders, while the personal scope extends to asylum-seekers as well.[23]

12. The requirement that, in order to benefit from exemption from penalties, an asylum-seeker should be coming "directly" from a territory where their life or freedom was threatened allows States parties to treat refugees differently only if they have already settled in a country and subsequently move onwards for reasons unrelated to their need for international protection.[24] **It is not meant to suggest that an asylum-seeker must claim asylum in the first country that could be reached without passing through another**.[25] Given that the 1951 Convention was drafted at a time when air travel was inaccessible to most, and overland travel was by far the most common mode of transport, such a principle would have relieved the very States that drafted and signed the Convention of any significant obligations under it. A literal, temporal or geographical interpretation of "directly" would also undermine the application of Article 31(1). Rather, reflecting leading UK jurisprudence, the term "directly" is to be interpreted broadly as meaning that refugees who have crossed through, stopped over or stayed in other countries *en route,* may still be exempt from penalties.[26]

13. The "directness" of travel needs, therefore, to be looked at in the context in which such travel often takes place – by circuitous routes, over land or by sea, with interruptions in intermediate countries to, for example, gather funds and seek ways to move forward. In recognition of the complex nature of these journeys, reasonable periods of "transit"– as distinct from *de facto* settlement in an intermediary country – should not necessarily be regarded as negating the "directness" of the journey. In sum, if States decide to impose penalties on asylum-seekers who have entered or are present irregularly on the basis that they have not come directly for the purposes of Article 31(1), these should **apply only to refugees who: were granted asylum or were lawfully settled, temporarily or permanently, in another country and had already found protection there; were rejected in a fair and efficient asylum procedure; or failed to seek asylum in a timely fashion or at all, in a country where they could reasonably have done so.**

14. Where asylum-seekers are not protected against the imposition of penalties under Article 31(1) (not having arrived directly, presented themselves without delay or shown

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[23] In light of the declaratory nature of refugee status determination, and in order to ensure the effectiveness of the protections offered in the 1951 Convention, Article 31 also applies to asylum-seekers. Consequently, a person entering a territory irregularly to seek asylum is protected by the prohibition on imposing penalties under Article 31(1) (as long as they meet the relevant qualifying conditions under that article), along with protection against refoulement, until they are found not to be in need of international protection as a refugee in a final decision following a fair procedure. See UNHCR, 'Summary Conclusions: Article 31 of the 1951 Convention' (June 2003), para 10(g), www.refworld.org/docid/470a33b20.html.

[24] UNHCR, *Summary Conclusions: Article 31 of the 1951 Convention*, June 2003, para 10(c), available at: www.refworld.org/docid/470a33b20.html.

[25] EXCOM Conclusion No 15 (XXX), *Refugees without an Asylum Country*, 1979, available at https://www.unhcr.org/uk/excom/exconc/3ae68c960/refugees-asylum-country.html ("Other States should take appropriate measures individually, jointly or through the Office of the United Nations High Commissioner for Refugees or other international bodies to ensure that the burden of the first asylum country is equitably shared. . . . asylum should not be refused solely on the ground that it could be sought from another State.").

[26] *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi* [1999] EWHC Admin 765; [2001] Q.B. 667, United Kingdom: High Court (England and Wales), 29 July 1999, para. 18, available at: www.refworld.org/cases,GBR_HC_QB,3ae6b6b41c.html; *R v. Asfaw* [2008] UKHL 31, United Kingdom: House of Lords (Judicial Committee), 21 May 2008, para. 15, available at: www.refworld.org/cases,GBR_HL,4835401f2.html; *R. and Koshi Pitshou Mateta and others* [2013] EWCA Crim 1372, United Kingdom: Court of Appeal (England and Wales), 30 July 2013, LJ Leveson, para. 21(iv), available at: www.refworld.org/cases,GBR_CA_CIV,5215e0214.html; *Decision KKO:2013:21*, Finland: Supreme Court, 5 April 2013, available at: www.refworld.org/cases,FIN_SC,557ac4ce4.html; also see UNHCR, *Guidance on Responding to Irregular Onward Movement of Refugees and Asylum-Seekers*, para. 39, September 2019, www.refworld.org/docid/5d8a255d4.html.

good cause for their irregular entry or presence) any penalising measure must not undermine the right to seek and enjoy asylum or be at variance with other provisions of the 1951 Convention and international and regional human rights law**. Thus, such penalties must not involve or indirectly result in denying asylum-seekers access to an asylum procedure.**[27] Nor, as addressed in more detail below (Section 2), can it involve the denial of the full set of rights guaranteed by the 1951 Convention. UNHCR further considers that the denial of entry or the summary removal from its territory of asylum-seekers based on their irregular entry or presence, without necessary safeguards regarding the application of safe third country concepts,[28] would also be in breach of the UK's obligations under the 1951 Convention and applicable international and regional human rights law.

15. The Plan, as part of its efforts to combat smuggling, further proposes to "introduce tougher criminal offences for those attempting to enter the UK illegally, including raising the penalty for illegal entry." UNHCR recognises that States have the legitimate right to control their borders and to address the smuggling and trafficking of persons. **Such border management must, however, remain consistent with obligations under international law, including the right to seek and enjoy asylum and the principle of non-refoulement.**[29] The proposed criminalisation of illegal entry and increased penalty for the facilitation thereof should not improperly target asylum-seekers and refugees.

16. The criminalisation of "migrant smuggling" must be distinct from penalties imposed on asylum-seekers or refugees on account of their irregular entry or presence.[30] However, asylum-seekers or refugees who are suspected or found to have organised or facilitated, aided or abetted the irregular journeys of themselves and others are sometimes improperly prosecuted for smuggling. Where refugees are the object of smuggling, or where they organised or facilitated their irregular entry into the UK in order to secure their own safety and/or that of family, associates or other persons in a 'humanitarian' or mutual assistance context without profit or other material benefit, any penalisation for migrant smuggling would violate Article 31(1).[31] Therefore, penalties

[27] See *UNHCR Position on Hungarian Act LVIII of 2020,*(n 15), p. 5, Section 3.
[28] See below paras. 18-35.
[29] The obligation to ensure that any activities undertaken to address human trafficking or migrant smuggling does not prejudice the right to seek and enjoy asylum, nor the good faith implementation of international human rights law including the 1951 Convention, is found in Art 14 of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime*, 2000 ("the Palermo Protocol"), available at: https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx; Art 19 of the *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime*, 15 November 2000, available at: https://www.ohchr.org/EN/ProfessionalInterest/Pages/TransnationalOrganizedCrime.aspx; and Article 40 of *Council of Europe Convention Against Trafficking in Human Beings*, 2005, available at: https://rm.coe.int/168008371d ("the Anti-Trafficking Convention"), all of which the UK is a signatory to. Further, the European Court of Human Rights also acknowledged the challenges facing States in terms of immigration control, while also stressing "that the problems which States may encounter in managing migratory flows or in the reception of asylum-seekers cannot justify recourse to practices which are not compatible with the Convention or the Protocols thereto". European Court of Human Rights, Grand Chamber judgment *N.D. and N.T. v. Spain*, 13 February 2020, paras. 169-170, available at: http://hudoc.echr.coe.int/eng-press?i=003-6638738-8816756.
[30] *Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, http://www.refworld.org/docid/479dee062.html, Article 6.
[31] *Palermo Protocol*, (n 29), Articles 3(a), 5, 6(a) and 19. *R. v. Appulonappa*, 2015 SCC 59, Canada: Supreme Court, 27 November 2015, para. 43, www.refworld.org/cases,CAN_SC,56603caa4.html, in which the Court stated that 'art. 31(1) of the Refugee Convention seeks to provide immunity for genuine refugees who enter illegally in order to seek refuge. For that protection to be effective, the law must recognize that persons often seek refuge in groups and work together to enter a country illegally. To comply with art. 31(1), a state cannot impose a criminal sanction on refugees solely because they have aided others to enter illegally in their collective flight to safety'. Article 5, *Protocol against the Smuggling of Migrants by Land, Sea and Air*, (n 29), prohibiting the criminal

imposed upon persons arriving illegally or for facilitating the irregular entry of others must not inadvertently target or penalise asylum-seekers and refugees acting in the course of seeking safety for themselves and/or each other.

17. Finally, it is clearly foreseeable that some of the refugees targeted by these penalties may be victims of trafficking. If they can show that they were compelled to travel to the UK, the penalties will arguably be inconsistent with Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings.[32] This will result in a permanent distinction between those who were trafficked into the UK (and cannot be penalised) and those who were smuggled, and is likely to have several perverse effects: incentivising trafficking claims and associated litigation, increasing delay and expense, and exempting the most exploitative forms of irregular travel from the hoped-for deterrence. These effects further undermine the legal and moral justification for the proposed penalties.

Use of safe third country concepts and inadmissibility to the UK's asylum procedure

18. The Plan proposes changes to "[e]nsure those who arrive in the UK, having passed through safe countries, or who have a connection to a safe country where they could have claimed asylum, will be considered inadmissible [to the UK's asylum system]". The Plan goes on to refer to a differently defined inadmissible group as those who arrive in the UK "illegally – where they could reasonably have claimed asylum in another safe country".[33] One consequence of finding an individual inadmissible is that the UK will seek to "rapidly return" them to their safe third country of most recent embarkation, contingent on return agreements which have not been secured at the time of writing of the Plan. The Government also commits under the Plan to pursuing transfer agreements with "alternative safe countries". This leaves a large degree of legal uncertainty with far-reaching and possibly unlawful consequences.

19. UNHCR is concerned that the new inadmissibility proposals are built on the misunderstanding that "people should claim asylum in the first safe country they reach".[34] Whilst international law does not provide an unrestricted right to choose where to apply for asylum, there is no requirement under international law for asylum-seekers to seek protection in the first safe country they reach.[35] **This expectation would undermine the global humanitarian and cooperative principles on which refugee protection is founded, as emphasized by the 1951 Convention and recently reaffirmed by the General Assembly, including the UK, in the Global Compact on**

prosecution of people who have been the object of smuggling. *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, Canada: Supreme Court, 27 November 2015, www.refworld.org/cases,CAN_SC,56603be94.html.

[32] *The Anti-Trafficking Convention* (n 29).

[33] Neither the concepts of illegal entry or reasonable opportunity to claim asylum in a previous country appear in the current Immigration Rules pertaining to inadmissibility. UNHCR is unclear whether the intention is to therefore narrow the inadmissibly criteria from what is currently in place under the Immigration Rules 345A-D. The current definition of inadmissibility applies to all of the following refugees and asylum-seekers, regardless their method of arrival or entry: those who have already applied for or been granted refugee status in another safe country; those who have could have made a claim for refugee status in a safe third country, unless they were prevented from doing so by "exceptional circumstances" (which, under UK law, is a higher threshold than unreasonableness); and those who have "a connection" with a safe third country that makes it "reasonable" for them to go there in the future to claim refugee status, but where they may have never been; and those who are EEA nationals or others from safe countries (with Canada, USA and New Zealand provided as examples).

[34] https://hansard.parliament.uk/Commons/2021-03-24/debates/464FFFBB-ECA5-4788-BC36-60F8B7D8D9D1/NewPlanForImmigration and UK Home Office guidance on admissibility.

[35] See UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers* (Lisbon Expert Roundtable, 9-10 December 2002), February 2003, www.refworld.org/docid/3fe9981e4.html.

Refugees.[36] It would impose an arbitrary and disproportionate burden on countries in the immediate region(s) of flight and threaten the capacity and willingness of those countries to properly process claims or provide acceptable reception conditions and durable solutions. This would (and does) threaten to make these first countries, in turn, unsafe and encourage onward movement.[37]

20. In international law, the primary responsibility for identifying and assessing international protection needs, including of irregular arrivals, ensuring appropriate reception conditions and procedural standards during status determination, and providing international protection, rests with the State in which an asylum-seeker arrives and seeks that protection (or, where relevant, the State whose jurisdiction that person engages).[38] This entails a duty of States to make independent inquiries as to the need for international protection of persons seeking asylum,[39] a duty recognized by a wide range of national and regional courts,[40] and provide asylum-seekers access to fair and efficient asylum procedures.[41]

21. **Asylum should not be refused solely on the ground that it could be sought from another State.** While asylum-seekers do not have a right to choose their country of asylum, some might have legitimate reasons to seek protection in a specific country, including family ties or other meaningful links.[42] Where it appears that a person, before requesting asylum, already has a connection or close links with another State, she or he may, if it appears fair and reasonable, be called upon to request asylum from that State in the first instance. While such a link is not a mandatory requirement under international law, in UNHCR's view it is essential to ensure that it is reasonable and sustainable for a person to seek asylum in another State.[43] This increases the viability

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[36] *Convention relating to the Status of Refugees* 189 UNTS 137 (1951 Convention), www.refworld.org/docid/3be01b964.html, Preambular Paragraph 4. UNGA, 'Report of the United Nations High Commissioner for Refugees, Part II: Global compact on refugees' A/73/12 (Part II*),* 17 December 2018, as part of its resolution on the Office of the High Commissioner for Refugees, A/RES/73/151, paras. 64, 67 and 70, www.unhcr.org/gcr/GCR_English.pdf (Global Compact on Refugees), paras. 2 and 4.

[37] UNHCR, *Guidance on Responding to Irregular Onward Movement* (n 26).

[38] 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, para. 2, available at: https://www.refworld.org/docid/5acb33ad4.html; see further, UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013 www.refworld.org/docid/51af82794.html. See further *UNHCR Observations on the Proposal for amendments to the Danish Alien Act (Introduction of the possibility to transfer asylum-seekers for adjudication of asylum claims and accommodation in third countries),* 8 March 2021, para. 17, available at: https://www.refworld.org/docid/6045dde94.html.

[39] *UNHCR intervention before the Court of Final Appeal of the Hong Kong Special Administrative Region in the case between C, KMF, BF (Applicants) and Director of Immigration, Secretary for Security (Respondents),* 31 January 2013, Civil Appeals Nos. 18, 19 & 20 of 2011, available at: http://www.refworld.org/docid/510a74ce2.html.

[40] *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: https://www.refworld.org/cases,ECHR,4d39bc7f2.html, *UNHCR intervention before the European Court of Human Rights in the case of M.S.S. v. Belgium and Greece*, June 2010, available at: https://www.refworld.org/docid/4c19e7512.html; *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, available at: https://www.refworld.org/cases,ECHR,4f4507942.html; *UNHCR intervention before the European Court of Human Rights in the case of Hirsi and Others v. Italy*, 22 June 2011, Application no. 27765/09, available at: https://www.refworld.org/docid/4e0356d42.html.

[41] See above para. 6. UNHCR, ExCom Conclusion No. 82 (XLVIII) 1997, para. (d) (iii); Conclusion No. 81 (XLVIII) 1997, para. (h) (A/AC.96/895, para. 18); Conclusion No. 82 (XLVIII) 1997 para.(d)(iii) (A/AC.96/895, para.19); Conclusion No. 85 (XLIX), 1998, para. (q) (A/AC.96/911, para. 21.3).

[42] UNHCR, *Legal considerations regarding access to protection* (n 38), para. 2; UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements* (n 38).
3(i), http://www.refworld.org/docid/51af82794.html.

[43] UNHCR, *Legal considerations regarding access to protection* (n 38), para. 6; UNHCR, *Considerations on the "Safe Third Country" Concept*, July 1996, http://www.refworld.org/docid/3ae6b3268.html. UNHCR, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, para. 16 (final sentence), http://www.refworld.org/docid/3b36f2fca.html. UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of*

of the return or proposed transfer from the viewpoint of both the individual and the State, reduces the risk of irregular onward movement, prevents the creation of 'orbit' situations and advances international cooperation and responsibility sharing.[44]

22. For all cases where inadmissibility and transfer procedures are pursued, **the UK authorities must in practice be able to properly identify the circumstances in which return to a safe third country would *not* be appropriate for any particular individual and where it may be more appropriate to assess the individual's claim in the UK**.[45] These circumstances include family links or relationships of dependency in the UK, compassionate grounds and, if concerning an unaccompanied and separated child,[46] their best interests. An assessment should be done through a formal admissibility procedure,[47] in which the individual has a meaningful opportunity to rebut the presumption that the proposed transfer will be safe and reasonable, based on their particular circumstances.[48] UNHCR is concerned, however, that the Plan is silent on the procedural safeguards required prior to "rapid removal" to a safe third country.

23. The Plan speaks of securing agreements to return inadmissible asylum-seekers to the safe country of most recent embarkation and alternative safe countries. At the time of writing, to UNHCR's knowledge, no readmission or transfer agreements are currently in place between the UK and any other country.

24. The 1951 Convention does not prohibit such transfer arrangements,[49] and asylum-seekers and refugees may be returned to countries where they have, or could have, sought and found international protection and provide standards of treatment commensurate with the 1951 Convention and international human rights standards. If States were to consider cooperative arrangements of this type, in order to be lawful, they must be undertaken with the aim of strengthening, rather than limiting, access to protection for those in need of it and sharing, rather than shifting, responsibilities for doing so.[50]

25. An inter-State transfer of asylum-seekers should be governed by a formal, legally binding and public agreement which sets out the responsibilities of each State involved, along with the rights and duties of the asylum-seekers affected. Further, the transferring State will be responsible for ensuring that international protection obligations are clearly assumed by the receiving State in law and met in practice, prior to entering into sharing arrangements and effecting any transfer,[51] as well as for monitoring conditions in the receiving State thereafter. These responsibilities are not likely to be met where

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Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002), February 2003, para. 12, http://www.refworld.org/docid/3fe9981e4.html.

[44] UNHCR, *Legal considerations regarding access to protection* (n 43).

[45] Ibid. and UNHCR, *Guidance on Responding to Irregular Onward Movement* (n 26).

[46] It is unclear from the proposals whether the UK intends to apply the proposed admissibility changes to children seeking asylum – accompanied or unaccompanied. The current Home Office guidance specifies that unaccompanied asylum-seeking children should not be considered for the inadmissibility provisions. UK Home Office, *Inadmissibility: safe third country Cases*, Version 5.0, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947897/inadmissibility-guidance-v5.0ext.pdf

[47] UNHCR, *Aide-Memoire & Glossary of case processing modalities, terms and concepts applicable to RSD under UNHCR's Mandate* (The Glossary), 2020, www.refworld.org/docid/5a2657e44.html, p. 15 (ft 21). See also: UNHCR, *UNHCR Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union* (n 21), pp. 3-4.

[48] United Kingdom: Supreme Court, *R (on the application of EM (Eritrea)) v. Secretary of State for the Home Department*, [2014] UKSC 12, 19 February 2014, available at: www.refworld.org/cases,UK_SC,5304d1354.html, per Kerr LJ for the majority, para 41

[49] UNHCR, *Legal considerations regarding access to protection* (n 38), para. 2.

[50] UNHCR *Observations on the Proposal for amendments to the Danish Alien Act* (n 38), para. 8.

[50] Ibid.

[51] Ibid., para. 20.

transfers are to remote places where the legal or administrative regimes or conditions make monitoring or access difficult in practice.[52]

26. The minimum standards that must, as a precondition, be guaranteed in law and met in practice include: admission to the receiving State; appropriate reception arrangements and protection against threats to physical safety or freedom; protection against refoulement; access to fair and efficient State asylum procedures, or to a previously afforded protective status by the receiving State; legal right to remain during the State asylum procedure, and an appropriate legal status if found to be in need of international protection; and standards of treatment commensurate with the 1951 Convention and international human rights law.[53] This includes recognition of the rights enshrined in the 1951 Convention, including but not limited to, access to courts and public welfare.[54]

27. The Plan asserts that "[a]nyone who arrives into the UK illegally - where they could reasonably have claimed asylum in another safe country – will be considered inadmissible to the asylum system, consistent with the Refugee Convention". **UNHCR cautions the government that without the above-mentioned safeguards, both in law and in practice, the proposed inadmissibility rules would in fact constitute externalisation[55] of the UK's asylum and protection obligations and the shifting of its responsibility onto other States, at variance with international law.**

28. UNHCR is further concerned that unless robust and relevant (re)admission agreements are already in place, implementing the inadmissibility rules risks placing individuals in extended limbo, after which they may ultimately be admitted to the UK asylum system. This is likely to have adverse consequences for their mental and physical health and their long-term prospects for integration. It will prolong the period for which those ultimately found to be in need of protection are prohibited from working and potentially required to reside in reception centres, increasing both their vulnerabilities and the costs to the public purse. Negotiating readmission agreements can at times be a lengthy, complex undertaking. Keeping applicants six months before even entering the queue to determine their status does not serve the interest of the State, hosting communities or applicants.

On the designation of countries of origin as safe

29. The Plan further proposes the introduction of legislation which would make EEA nationals or nationals from "other safe countries" ineligible to claim asylum in the UK, "unless in exceptional circumstances".[56] The Plan names Canada, USA and New Zealand as three examples of "other safe countries" but makes clear that any country could be designated safe. It goes on to propose a "rebuttable presumption" that the UK can "return individuals to all EEA member States and other designated safe countries".

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[52] Ibid., para. 21.

[53] These requirements are set forth in UNHCR, *Legal considerations regarding access to protection* (n 38), and UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements* (n 38).

[54] *UNHCR Observations on the Proposal for amendments to the Danish Alien Act* (n 38), para. 23.

[55] Over recent years, some States have adopted practices that might be consistent with the letter of the 1951 Convention, but that are inconsistent with the intention and spirit of the Convention. States have engaged in practices that directly or indirectly prevent asylum-seekers and refugees from reaching a particular country or region, and from being able to claim or enjoy protection there. For example, some States have attempted to shift their responsibilities to 'transit countries' through bilateral agreements for the involuntary transfer of asylum-seekers to a third State, the use of so-called 'safe havens' or 'transit processing centres', or 'offshore' asylum processing. Such measures typically involve shifting responsibility for identifying or meeting international protection needs to another State or leaving such needs unmet. Such State practices can be described as 'externalisation' of international protection responsibilities.

[56] The Plan uses "ineligible" in the context of the safe country of origin concept, however ineligible and inadmissible appear to be used interchangeably throughout the Plan.

30. Whilst the UK already has inadmissibility provisions for EEA nationals[57] and a non-suspensive (out-of-country) appeals process for cases that are presumed to be "clearly unfounded" based on a list of designated safe States,[58] the global expansion in the Plan of *inadmissibility* based on such designation calls for a particularly careful examination of compliance with international law.

31. UNHCR acknowledges the need for States to uphold the integrity of the asylum system by ensuring that claims that are clearly abusive or manifestly unfounded can be processed in accelerated procedures.[59] As such, UNHCR does not oppose designating countries as "safe countries of origin" *per se,* as long as the designation is used as a procedural tool to prioritise or accelerate the examination of applications in carefully circumscribed situations. **The designation of a country as a safe country of origin does not establish an absolute guarantee of safety for nationals of that country and it may be that despite general conditions of safety in the country of origin, for some individuals, members of particular groups or relating to some forms of persecution, the country remains unsafe**.[60]

32. It is important that the general assessment of certain countries of origin as safe is based on reliable, objective and up-to-date information from a range of sources. Also, the procedure for adding or removing countries from any list of safe countries of origin must be transparent, open to legal challenge, and reviewable in light of changing circumstances.[61]

33. Crucially the 'safe country of origin' concept must not result in the improper denial of access to asylum procedures, which can lead to violations of the principle of *non-refoulement.*[62] Although the caveats of "exceptional circumstances" (for admissibility) and "rebuttable presumption" (of returnability) are referenced in the Plan, proposals to consider these caveats under inadmissibility provisions, rather than via accelerated asylum procedures, raises concerns around proper access to asylum procedures and protection against refoulement. In UNHCR's view, the effective use of simplified and accelerated procedures is the most efficient approach to quickly determine protection needs for many applications.

34. UNHCR notes further that important procedural safeguards are missing from the current approach to inadmissibility. A decision on inadmissibility is currently not accompanied by a reasoned decision engaging with the facts of the case, unlike "clearly unfounded" certification decisions under section 94 of the Nationality, Immigration and Asylum Act 2002, nor is the evidential burden to adduce relevant country of origin information shared by the Secretary of State with the applicant.[63]

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[57] Paragraphs 326E-326F of the Immigration Rules; https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum
[58] Section 94 of the Nationality, Immigration and Asylum Act 2002.
[59] UNHCR, *Discussion Paper Fair and Fast - Accelerated and Simplified Procedures in the European Union* (n 21).
[60] See UNHCR, *UNHCR Provisional Comments on the Proposal for a European Council Directive on Minimum Standards on Procedures in Member States for Granting and withdrawing refugee status* (Council Document 14203/04, Asile 64, of 9 November 2004), 10 February 2005, p. 41 (Comment on Article 30), available at: http://www.unhcr.org/refworld/docid/42492b302.html. See also Executive Committee Conclusion No. 87 (L), General Conclusion on International Protection, (1999), para. (j): "(…) notions such as "safe country of origin", (…) should be applied so as not to result in improper denial of access to asylum procedures, or to violations of the principle of non-refoulement."
[61] UNHCR, *"Asylum Processes (Fair and Efficient Asylum Procedures)" in Global Consultations on International Protection* (31 May 2001), available at: https://www.refworld.org/docid/3b36f2fca.html, p. 9, para. 39.
[62] UNHCR, Executive Committee General Conclusion on International Protection No 87(L) – 1999, para (j)
[63] See *J.K. and Others v. Sweden*, Application no. 59166/12, Council of Europe: European Court of Human Rights, 23 August 2016, para 98 and UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, available at: https://www.refworld.org/docid/3ae6b3338.html.

35. For these reasons, UNHCR urges the Government to clarify the content and meaning of "exceptional circumstances" for admissibility, the procedural safeguards to provide a meaningful opportunity to rebut the presumption of safety, and on the designation and removal of safe countries of origin, including whether a court can challenge the designation. At present, UNHCR is not in a position to confirm the proposals' compatibility with international legal standards.

Interception and re-direction of boats as part of expanded border force powers

36. The Plan proposes to "introduce new powers to target the increasing use of vessels, both small and large, by criminal gangs to facilitate illegal entry to the UK. These powers will enable Border Force to stop and redirect vessels out of UK territorial seas that they suspect are being used to facilitate illegal entry to the UK. This power also includes the ability to return vessels intercepted, and those on board, to the country from which they started their journey, subject to that country agreeing to the vessel and persons' return."

37. Once a boat enters the United Kingdom's territorial waters, it engages the country's jurisdiction and thus its primary responsibility for search and rescue. Under the law of the sea, States are obliged to proceed with all possible speed to the rescue of any person in distress at sea if it is safe to do so and disembark them at a port of safety. Importantly, this duty applies in respect of all persons in distress at sea that the UK become aware of, regardless of their particular status or circumstances, and regardless of whether or not it is suspected that the vessel in distress is operated by smugglers.[64] **In light of the precarious type of vessels and numbers of persons on board them that have arrived in the UK across the English Channel in the past year – it is foreseen that there would be very few scenarios, if any, where the UK would have a legal basis to simply intercept and redirect small boats away from UK shores.**

38. Similarly, as the jurisdiction of the UK is engaged, it has the primary responsibility to process any eventual asylum claims made by those on board. As outlined in paragraphs 18 to 35 above, the 1951 Convention does not preclude arrangements for return and transfer to third countries, where required safeguards are met in law and practice. In this regard, UNHCR is reassured that the Plan also foresees that any request for the return and disembarkation of a vessel encountered requires the agreement of the returning country to do so, and asks the UK to ensure that the necessary safeguards are included in any such agreement, and are in place in practice, before its implementation.

Providing for the option to offshore asylum processing externalises obligations

39. The Plan proposes to amend sections 77 and 78 of the 2002 National Immigration and Asylum Act so as to enable removal of asylum-seekers while their claims (section 77) or their appeals (section 78) are still pending. The Plan asserts that "[t]his will keep the option open, if required in the future, to develop the capacity for offshore asylum processing – in line with our international obligations."

40. In UNHCR's view, the Plan does not sufficiently detail and elaborate on the proposed arrangements to enable an informed assessment on their compliance with the UK's international obligations under the 1951 Convention and other international and regional human rights instruments. In reference to above paragraphs 18 to 35, **UNHCR**

[64] See in particular the *International Convention for Safety of Life at Sea*, 1974 entered into force in 1980, Annex, Chapter V, Regulation 33(1), available at: https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS),-1974.aspx; and *International Convention on Maritime Search and Rescue*, 1979, entered into force in 1985, Annex, paragraph 2.1.10, available at: https://www.imo.org/en/About/Conventions/Pages/International-Convention-on-Maritime-Search-and-Rescue-(SAR).aspx.

urges the UK to refrain from enacting legislation that could in practice minimise and shift its asylum and protection obligations through offshoring asylum processing.

41. As UNHCR has seen in several contexts, offshoring of asylum processing often results in the forced transfer of refugees to other countries with inadequate State asylum systems, treatment standards and resources. It can lead to indefinite 'ware-housing' of asylum-seekers in isolated places where they are 'out of sight and out of mind', exposing them to serious harm[65] It may also de-humanise asylum-seekers. In this regard, UNHCR has voiced its profound concerns about such practices, which have "caused extensive, unavoidable suffering for far too long", left people "languishing in unacceptable circumstances" and denied "common decency." [66] The High Commissioner underlined that "UNHCR fully endorses the need to save lives at sea and to provide alternatives to dangerous journeys and exploitation by smugglers. But the practice of offshore processing has had a hugely detrimental impact. There is a fundamental contradiction in saving people at sea, only to mistreat and neglect them on land."[67]

The creation of an inferior protection status, based upon the circumstances of a refugee's arrival in the UK

42. The Plan introduces a new "temporary protection status" as follows: "If an inadmissible person cannot be removed to another country, we will be obliged to process their claim.[68] If they did not come to the UK directly, did not claim without delay, or did not show good cause for their illegal presence, we will consider them for temporary protection. Temporary protection status will be for a temporary period, no longer than 30 months, after which individuals will be reassessed for return to their country of origin or removal to another safe country. Temporary protection status will not include an automatic right to settle in the UK, family reunion rights will be restricted and there will be no recourse to public funds except in cases of destitution. People granted temporary protection status will be expected to leave the UK as soon as they are able to or as soon as they can be returned or removed."

43. UNHCR notes that the resort to temporary protection or stay may be necessary as an emergency response when existing refugee status determination systems are inadequate to deal with the large-scale arrival of asylum-seekers, humanitarian crises, or complex, mixed cross-border population movements. It must be time-limited, solutions oriented, and complementary to, rather than a substitute for, a State's obligations under the 1951 Convention and other international and regional human rights instruments. [69] Yet, **the use of temporary protection status as proposed by**

[65] Statement by Ms. Gillian Triggs, Assistant High Commissioner for Protection, to the 71th session of the Executive Committee of the High Commissioner's Programme, 7 October 2020, https://www.unhcr.org/admin/dipstatements/5f7e26744/statement-ms-gillian-triggs-assistant-high-commissioner-protection-71th.html.

[66] *UNHCR chief Filippo Grandi calls on Australia to end harmful practice of offshore processing*, 24 July 2017, available at: https://www.unhcr.org/news/press/2017/7/597217484/unhcr-chief-filippo-grandi-calls-australia-end-harmful-practice-offshore.html.

[67] See Ibid. See further, *UNHCR urges Australia to evacuate off-shore facilities as health situation deteriorates*, 12 October 2018, available at: https://www.unhcr.org/news/briefing/2018/10/5bc059d24/unhcr-urges-australia-evacuate-off-shore-facilities-health-situation-deteriorates.html

[68] UNHCR assumes that the words "*process their claim*" have their ordinary meaning and indicate an intention to admit a person's claim to the standard refugee determination process, as is currently required by the Home Office's published guidance on inadmissibility. (For the reasons mentioned above, the UK has a legal obligation to do so.) The UK Home Office guidance states: "An asylum claim must be admitted to the asylum system for substantive consideration if in the claimant's particular case, it is clear that there is no reasonable prospect of removal within a reasonable timescale" see *Inadmissibility: safe third country cases* (n 46).

[69] UN High Commissioner for Refugees (UNHCR), *Guidelines on Temporary Protection or Stay Arrangements*, February 2014, available at: https://www.refworld.org/docid/52fba2404.html.

the Plan is not a response to a crisis. To put this in context, in 2020 France had 93,470 asylum applications, Germany 122,955, Spain 88,530, Greece 40,560 and the UK 36,041 – a drop of over 20% year on year.[70] In total, there are around 135,000 recognised refugees in the UK, making it the 29th largest refugee host globally.[71] Given the relatively low number of arrivals in the UK compared to other European countries, and the fact that the UK does not lack the capacity to undertake individual identification of international protection needs through diversified processing modalities, **the introduction of a new and lesser status called "temporary protection status" is entirely unnecessary.**

Denial of rights under the 1951 Convention

44. **Temporary protection status is rather being imposed on persons found to be refugees at the end of the normal asylum process, as a deliberate penalty for the circumstances of their arrival. It is thus at variance with international refugee law and the 1951 Convention. This is because those found to be refugees but granted temporary protection status instead will be denied the benefits of the following provisions of the 1951 Convention:[72]**

45. A refugee granted 30 months' leave to remain is "lawfully staying" within the meaning of the 1951 Convention[73] and entitled **to public relief and assistance** on the same terms as nationals, as provided for by Article 23 of the 1951 Convention. A bar on

[70] Figures for EU countries from Eurostat, *Asylum and first time asylum applicants - annual aggregated data (rounded)*, available at: https://ec.europa.eu/eurostat/databrowser/view/tps00191/default/table?lang=en and figures from UK see UK Home Office, *Asylum applications, decisions and resettlement*, available at: https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets

[71] UNHCR Mid-Year Trends 2020 (figures as at end June 2020), See UNHCR Data Finder: https://www.unhcr.org/refugee-statistics/.

[72] It is possible that they might be denied other benefits of the Convention as well, in particular, the right to a travel document set out in Article 28, but this is not clear from the published proposals. The Plan could also be seen as violating Article 3, which prohibits discrimination between refuges.

[73] While the term "*lawfully staying*" is not specifically defined within the 1951 Convention, it must be interpreted "in accordance with the ordinary meaning to be given to the terms . . . in their context"." *ST Eritrea, R (on the application of) v Secretary of State for the Home Department* [2012] UKSC 12, para 31, (citing Article 31(1) of the Vienna Convention on the Law of Treaties, to which the United Kingdom is a party), available at: https://www.supremecourt.uk/cases/uksc-2010-0149.html. That context includes both the treaty's broad object and purpose (ibid., para. 30) and what the contracting parties intended to commit themselves to by their agreement, as recorded in the travaux préparatoires (ibid., para 31) The travaux préparatoires record that the term "lawfully staying" was deliberately chosen after a prolonged discussion, in which the UK played an active role. It was intended to be less restrictive than either "lawfully resident" in English or "*residence habituelle*" in French and was expressly understood to include temporary residence, as long as it was lawful under domestic law. What it did not include was "refugees who might be in a certain territory for a very short period" for example, "a musician staying in a country for one or two nights". See, UNHCR, "*Lawfully Staying" – A note on Interpretation*, 3 May 1988, available at: https://www.refworld.org/docid/42ad93304.html. The UK representative had suggested the phrase "lawfully resident (temporarily or otherwise)". Paul Weiss, *The Refugee Convention, 1951: the Travaux Préparatoires Analysed with a Commentary*, p. 266, available at: https://www.refworld.org/pdfid/53e1dd114.pdf. "Lawfully stay" is thus something more than a "transient visa" but including temporary permission to stay for a few months. *Observation by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the Inquiry "Uppehållstillstånd på grund av praktiska verkställighetshinder och preskription*", 2 March 2018, footnote 17, available at: https://www.refworld.org/pdfid/5c6ff3b47.pdf; Rosa da Costa, *Rights of Refugees in the Context of Integration: Legal Standards and Recommendations*, POLAS/2006/02, pp. 17-19, available at: https://www.refworld.org/pdfid/44bb9b684.pdf. Because "*lawfully staying*" was so clearly understood to include refugees who had been granted something less than permanent residence, Canada made a reservation to Articles 23 and 24 to enable it to apply this more restrictive definition of those articles there. The UK made no such reservation. A number of States parties to the Convention made reservations with respect to Article 23, but the UK did not, per https://www.unhcr.org/afr/protection/convention/5d9ed32b4/states-parties-including-reservations-declarations-1951-refugee-convention.html. Nor did the UK make reservations to any of the other articles implicated by the Plan's proposals.

access to mainstream benefits as a penalty for the circumstances of arrival would therefore be inconsistent with Article 23.[74]

46. The term "lawfully in the territory" that qualifies the **prohibition of expulsion** (save on grounds of national security or public order) in Article 32 of the 1951 Convention is by definition broader than "lawfully staying in", so as to include any form of presence that is authorised by domestic law, including the forms of brief and temporary presence excluded by the word "staying".[75] The UK Supreme Court described the concept as denoting "lawful presence" "according to the domestic laws of the contracting state" – in the case of the UK, a grant of leave to enter or remain.[76] Given this broad meaning, a person granted 30 months' leave to remain is clearly "lawfully in" the UK and can only be expelled on grounds of national security or public order. The expectation that refugees granted temporary protection status will leave the country "as soon as they are able to or as soon as they can be returned or removed" is inconsistent with this Article to the extent it means refugees who have been granted limited leave to remain can be removed on grounds *other than* national security or public order, namely on the grounds of the circumstances of their arrival.

47. Although the obligation **to facilitate integration and naturalisation** in Article 34 of the 1951 Convention is qualified by the term "as far as possible", it remains a positive obligation. A system that is designed to maintain a refugee in a precarious status without a right to settlement intentionally frustrates, rather than facilitates, integration and naturalisation.

48. The Plan foresees that persons claiming asylum will be considered for temporary protection status instead of refugee status, where they "did not come to the UK directly, did not claim without delay, or did not show good cause for their illegal presence", i.e. individuals who fall foul of Article 31(1) of the 1951 Convention. As a result, the Plan seeks to justify all of its consequences as lawful "penalties" under the 1951 Convention.[77]

49. **While Article 31(1) reserves a margin for States to impose penalties for unlawful entry on those who do not meet the conditions of entitlement for protection under Article 31(1), it does not create a general power for State Parties to choose to exclude asylum-seekers or refugees from express provisions of the 1951 Convention**. Had this been the intention, Article 31(1) would logically have been included among the initial "General Provisions" that inform the 1951 Convention's overall interpretation. These specify at Article 1D and 1E those to whom the 1951 Convention as a whole "shall not apply" because they are receiving protection or assistance from a United Nations organ other than UNHCR or because they enjoy protection akin to that of nationals in a country in which they have taken residence, and at Article 1F, those to whom "the provisions of the Convention shall not apply" because there are serious reasons for considering that they have "committed a crime against peace, a war crime, a crime against humanity, or a serious non-political crime outside

[74] British citizens can be denied access to benefits for which they would otherwise qualify only as a consequence of a conviction for or formal admission to serious benefit fraud, or for failure to comply with the fundamental conditions for receipt of the benefit (such as failure to look for work). There are no circumstances in which benefits are withdrawn as a penalty for adverse conduct that is unrelated to the benefit itself, as is proposed here.
[75] UNHCR, *"Lawfully Staying"* (n 73).
[76] *ST Eritrea* (n 73), para. 34. This was also the position taken by the Home Office. Ibid. para 24, 53. The Supreme Court noted that "some of the current thinking on the subject has developed substantially", so as to consider asylum-seekers whose presence was knowingly tolerated "lawfully in" a country, but found that a consensus had not yet emerged in this regard. Ibid, para. 34.
[77] It is generally accepted that the "penalties" prohibited by Article 31 are not only criminal sanctions but include "any detriment", such as denial of access to the asylum procedure. *B010 v Canada* (n 31), para. 57, and UNHCR, *Article 31 of the 1951 Convention Relating to the Status of Refugees*, July 2017, PPLA/2017/01, pp. 32-33, available at: https://www.refworld.org/docid/59ad55c24.html.

the country of refuge prior to arriving as a refugee, or […]have been guilty of acts "contrary to the purposes and principles of the United Nations." This is an exhaustive list, with the consequence that all of the provisions of the 1951 Convention must be understood as applying to all other refugees.[78]

50. Two further general provisions, **Articles 6[79] and 7[80] of the 1951 Convention**, address the degree to which the specific civil, social and economic rights enumerated in the rest of the 1951 Convention may be limited according to a refugee's circumstances (such as, in theory, their mode of entry). Refugees thus have several different categories of rights under the 1951 Convention: (1) Where the 1951 Convention is silent, they are entitled to the same treatment as accorded to aliens generally; (2) Where the 1951 Convention so specifies, they are to be accorded the same treatment as other aliens or foreign nationals who are in the same circumstances, as defined by domestic law; (3) Where the 1951 Convention so specifies, they are entitled to greater rights than other aliens.

51. If the 1951 Convention were silent as to refugees' rights with respect to integration and naturalisation, or their protection against expulsion, the UK would have the power to limit these rights in the same way as they limit the rights of other aliens: denying them mainstream benefits, placing them on an immigration route that does not lead to settlement, and curtailing their leave and removing them "as soon as" it became possible to do so. However, the rights which the Plan seeks to limit, are not ones where the 1951 Convention is silent. They are all rights in which the 1951 Convention contains "more favourable provisions." **By the clear language of Article 7 of the 1951 Convention, it is these more favourable provisions that must apply.**

Family life at risk

52. Under current UK Immigration Rules, refugees are entitled to be reunited in the UK with the their pre-flight partner and children under 18. The Plan proposes that, as a penalty for the circumstances of their arrival, inadmissible refugees will have their right to do so "restricted" in some unspecified way. Nor will they be able to sponsor their partners and children under the general "family life" immigration rules, because these require the sponsor to be either a British citizen or have indefinite leave to remain, refugee leave or humanitarian protection.[81] Without either refugee status or prospects for settlement, this route will be foreclosed. **Because by definition a person granted temporary protection status will have been found to be not only at real risk of persecution in their own country, but also un-removable to any safe third country, there will be no other safe country in which they can enjoy their family life.** This will continue to be the case for as long as they are in this status. The Plan anticipates that this is likely to be for at least three years, but without an automatic route to settlement, it may be forever.

53. This result is inconsistent with the 1951 Convention's purpose of promoting refugees' widest possible enjoyment of their fundamental rights. It is also likely to impede their recovery from any mental or physical ill health they may be suffering as a result of

[78] There is one exception under Article 33(2), the application of which may result in loss of protection under Article 33(1), under the narrow circumstances set out below at paragraphs 57-61.
[79] Article 6 of the 1951 Convention reads: "For the purposes of this Convention, the term "in the same circumstances" implies that any requirements (including requirements as to length and conditions of sojourn or residence) which the particular individual would have to fulfil for the enjoyment of the right in question, if he were not a refugee, must be fulfilled by him, with the exception of requirements which by their nature a refugee is incapable of fulfilling."
[80] Article 7 (1) of the 1951 Convention reads: "Except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally."
[81] Appendix FM of the Immigration Rules, Section E-ECP.2.1., available at: https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-fm-family-members.

traumatic experiences, either in their own country or during their journey to the UK. In turn, this is likely to impede, rather than facilitate their integration in violation of Article 34 including by reducing or even eliminating the emotional and economic wellbeing that family units can provide to their members.[82]

54. In addition, while the 1951 Convention does not contain a provision on the right to family reunification, the Final Act of the Conference of Plenipotentiaries at which the 1951 Convention was adopted affirmed "that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee", and adopted a strongly worded recommendation that States "take the necessary measures for the protection of the refugee's family, especially with a view to ensuring that the unity of the refugee's family is maintained.[83] **UNHCR's governing Executive Committee, of which the UK is a member, has repeatedly highlighted the need to protect the unity of the refugee family and has adopted a series of Conclusions that reiterate the fundamental importance of family reunification**.[84] UNHCR's approach is also informed by the recognition in public international law of a broader human right to family unity, including in the UDHR,[85] the International Covenant on Civil and Political Rights ('ICCPR'),[86] and the UN Convention on the Rights of the Child ('UNCRC').[87]

55. In Europe, the right to respect for family life is protected by Article 8 of the European Convention on Human Rights, to which the UK is a party. The European Court of Human Rights has recognised that "family unity is an essential right of refugees and that family reunion is an essential element in enabling persons who have fled persecution to resume a normal life" and found that "there exists a consensus at international and European level on the need for refugees to benefit from a family

[82] UNHCR, *Protecting the Family: Challenges in Implementing Policy in the Resettlement Context*, June 2001, available at: https://www.refworld.org/docid/4ae9aca12.html.

[83] UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons*, 25 July 1951, A/CONF.2/108/Rev.1, available at: https://www.unhcr.org/protection/travaux/40a8a7394/final-act-united-nations-conference-plenipotentiaries-status-refugees-stateless.html. UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, Annex 1 and para. 182, available at: https://www.refworld.org/docid/4f33c8d92.html.

[84] The Executive Committee is elected by the UN Economic and Social Council and consists of representatives of Member States and of specialist agencies. While not legally binding on State Parties its Conclusions are adopted by consensus by the States which are Members of the Executive Committee of UNHCR and represent statements of opinion that are broadly representative of the views of the international community. In Conclusions adopted in 1981, for example, the Executive Committee stated: "It is hoped that countries of asylum will apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family." UNHCR ExCom, Family Reunification No. 24 (XXXII) - 1981, 21 October 1981, No. 24 (XXXII), available at: https://www.refworld.org/docid/3ae68c43a4.html. In a further set of Conclusions adopted in 1998, the Executive Committee exhorted States: "[I]n accordance with the relevant principles and standards, to implement measures to facilitate family reunification of refugees on their territory, especially through the consideration of all related requests in a positive and humanitarian spirit, and without undue delay." UNHCR ExCom, Conclusion on International Protection No. 85 (XLIX) - 1998, 9 October 1998, No. 85 (XLIX), available at: https://www.refworld.org/docid/3ae68c6e30.html.

[85] 19 Article 16(3) of the 1948 *Universal Declaration of Human Rights* recognises the family as 'the natural and fundamental group unit of society…[e]ntitled to protection by society and the State'. UNGA, Universal Declaration of Human Rights, 10 December 1948, 217 A(III), available at: https://www.refworld.org/docid/3ae6b3712c.html.

[86] UNGA, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html. The Human Rights Committee, which monitors compliance with the ICCPR and publishes authoritative commentaries on its provisions, has declared that the right to found a family in Article 23 ICCPR implies, in principle, the possibility to live together. UN Human Rights Committee (HRC), *CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990, available at: https://www.refworld.org/docid/45139bd74.html.

[87] UNGA, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: https://www.refworld.org/docid/3ae6b38f0.html.

reunification procedure that is more favourable than that foreseen for other aliens".[88] UK courts, in turn, have recognised that refugees are likely to face "insurmountable obstacles" to enjoying family life in their country of origin, and that this weighs in favour of exempting even post-flight spouses and children from standard requirements of the rules, such as the minimum income requirement.[89] **When there is no country in the world other than the UK where a refugee and their family can live together, any rule that bars the family from entry will require strong justification**, even if the bar has the potential to be temporary.[90]

56. By restricting access to lawful family reunion, moreover, the Plan is likely to drive more women and children to make dangerous journeys, either at the same time as the men who might previously have sponsored them under current rules, or to join them afterwards.[91] In the two years after Australia first introduced "Temporary Protection Visas" (TPVs) in 1999, ending safe and legal routes to family reunion, the percentage of female and children refugees attempting to reach Australia by boat rose from 7% to 20%, and from 7% to 24% respectively.[92] When the SIEV X sank *en route* to Australia in 2001, drowning 353 people, three quarters of the passengers were women and children. Researchers who interviewed refugees who had attempted to reach Australia by boat after TPVs were introduced were repeatedly told that it was the bar on family reunion that had driven women and children make the journey.[93]**In summary, the Plan's proposed temporary protection status includes a combination of penalties that is designed to limit the ability of certain refugees lawfully in the UK to enjoy the right to family life, integrate, or achieve a durable solution to their situation. As such, they are inconsistent not only with the specific Articles listed above, but with the overall object and purpose of the 1951 Convention more generally.[94] The introduction of such a status is both unnecessary and unlawful. It also leaves concerned individuals in a legally insecure and precarious limbo situation, very likely for an extended period, with potential serious consequences for their mental health and wellbeing.**

Expanding the notion of "particularly serious crime" in the "danger to the community" exception to non-refoulement

[88] *Tanda-Muzinga c. France*, Requête no 2260/10, Council of Europe: European Court of Human Rights, 10 July 2014, para. 75, available at: https://www.refworld.org/cases,ECHR,53be80094.html; *Mugenzi c. France*, Requête no 52701/09, Council of Europe: European Court of Human Rights, 10 July 2014, para. 54, available at: https://www.refworld.org/cases,ECHR,53be81784.html.

[89] See para. 105, *MM (Lebanon) v SSHD* [2017] UKSC 10, available at: https://www.supremecourt.uk/cases/uksc-2015-0011.html.

[90] See paras. 23-25, *FH (Post-flight spouses)* [2010] UKUT 275, available at: https://tribunalsdecisions.service.gov.uk/utiac/37657. This found that the de facto five-year bar on sponsoring a post-flight spouse that arose after refugees were granted limited leave to remain rather than Indefinite Leave to Remain would require clear justification and was likely to be a disproportionate interference with Article 8.

[91] UNHCR, *Position on Safe and Legal Pathways*, 8 February 2019, para. 24, available at: https://www.refworld.org/docid/5ce4f6d37.html.

[92] Senate Legal and Constitutional Affairs Committee, *Questions Taken on Notice, Budget Estimates Hearing 21–24 May 2012*, Immigration and Citizenship Portfolio, available at: http://www.aph.gov.au/~/media/Estimates/Live/legcon_ctte/estimates/bud_1213/diac/BE12-0265.ashx

[93] Kaldor Research Centre, UNSW Sydney, *Research Brief: Temporary Protection Visas (TPVs) and Safe Haven enterprise Visas (SHEVs),* available at: https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Research%20Brief_TPV_SHEV_Aug2018.pdf; Sue Hoffman, *Temporary Protection Visas & SIEV X*, Sievx.com, 6 February 2006, available at: http://sievx.com/articles/challenging/2006/20060206SueHoffman.html; Sue Hoffman, *The Myths of Temporary Protection Visas*, 14 June 2011 available at: https://www.abc.net.au/news/2011-06-14/hoffman---the-myth-of-temporary-protection-visas/2757748.

[94] The proposed penalties of Temporary Protected Status would be imposed on anyone who was found to be inadmissible and to fall foul of Article 31(1). This would likely include persons entitled to humanitarian protection or discretionary leave, as well as refugees. Many of the concerns expressed above as to the proportionality of and justification for the penalties would apply equally to them.

57. Under the Plan, it is proposed that refugees who have been convicted and sentenced to at least 12 months' imprisonment (rather than the 24 months in current law),[95] and constitute a danger to the community in the UK, may have their refugee status revoked and be considered for removal from the UK.

58. UNHCR recalls, at the outset, that criminal conduct by a refugee may give rise to revocation of refugee status in circumstances falling within the scope of Article 1F(a) or (c) of the 1951 Convention, that is, if there are serious reasons for considering that they committed a crime against peace, a war crime or a crime against humanity, or that they have been guilty of acts contrary to the purposes and principles of the United Nations. This is to be distinguished from the application of an exception to the principle of non-refoulement under Article 33(2) of the 1951 Convention in cases where there are reasonable grounds for regarding a refugee as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. Article 33(2) does not, however, provide for the withdrawal of refugee status.[96]

59. UNHCR is gravely concerned that requiring a consideration of withdrawing the protection against refoulement from any refugee who has been sentenced to at least 12 months' imprisonment would exacerbate current practice, which misapplies Article 33(2) of the 1951 Convention. Article 33(2) aims to protect the safety of the country of refuge and hinges on the assessment that the refugee in question poses such a serious actual or future threat that it can only be countered by removing the person from the country of asylum. Because such a person remains a refugee, however, it is understood that their removal may nonetheless put them at real risk of persecution. For this reason, Article 33(2) has always been considered as a measure of last resort,[97] and must be interpreted and applied restrictively, in line with the general principle of limiting exceptions to human rights guarantees. UNHCR therefore takes the opportunity to reiterate its concerns, stressing that the applicability of Article 33(2) requires a case-by-case approach to ensure that both criteria are met; 1) a conviction by a final judgement for a particularly serious crime, and 2) an individualised finding gee constitutes a present or future danger to the community of the country.

60. Only crimes of a "particularly serious" and egregious nature should be considered to warrant exposing a person to the risk of persecution by making an exception to the non-refoulement principle. Introducing a threshold of a custodial sentence of 12 months or more would include a wide range of offences that seem incompatible with the definition of "particularly serious". Currently, too often those convicted of relatively minor crimes are put at risk of expulsion, a situation that would worsen were applicable provisions to go into effect. In addition, by focusing on the length of sentence as the trigger for considering removal, the proposal risks exacerbating the effects of reported disparities in sentencing, potentially producing racially or ethnically discriminatory effects.[98]

61. For these reasons, UNHCR reiterates its calls to the UK government for the proper application of Article 33(2) of the 1951 Convention, underscoring its exceptional nature as a measure of last resort. Moreover, UNHCR further recalls that the provisions of

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[95] UK Home Office, *The New Plan for Immigration policy statement*, available at: https://www.gov.uk/government/consultations/new-plan-for-immigration.

[96] UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, paras. 10 and 17, available at: https://www.refworld.org/docid/3f5857d24.html.

[97] Ibid., para. 10.

[98] *The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System*, p. 33, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf.

Article 33(2) of the 1951 Convention do not affect non-refoulement obligations under regional and international human rights law, which permit no exceptions.

Changes to the definition of a "well-founded fear of persecution"

62. There are three proposals for "strengthening the well-founded fear of persecution test" given in the Plan. These are described as intended to "make it harder for unmeritorious claims to succeed" but are better understood as redefining what makes a claim meritorious:

i. Asylum claimants will be required to "prove" their identity and that they "are experiencing genuine fear of persecution" to the civil standard of proof, i.e. the "balance of probabilities".
ii. The risk of persecution on return will continue to be assessed at the lower standard of "reasonable likelihood", but "reasonable likelihood" will be redefined so as to require the claimant to establish either that the group to which they belong "is suffering from systematic and widespread persecution" or that there is a "risk that is personal and individual to them."
iii. The definition of persecution will be "clarified" in statute, in line with the Refugee Convention.

Fundamental principles of refugee status determination

63. As the first element aimed at "strengthening the well-founded fear of persecution" test, the Plan proposes an approach whereby asylum-seekers would be required to "prove", on a balance of probabilities, "that they are who they say they are and that they are experiencing genuine fear of persecution".[99]

64. Although the process by which a State identifies refugees is not regulated under the 1951 Convention, in light of the significant consequences of an erroneous decision, UNHCR's Handbook on Refugee Status Determination emphasizes that asylum claims must be determined through a process that is non-adversarial, supports full disclosure by the applicant through a variety of approaches including trauma sensitive interviewing techniques, considers the enormous evidentiary challenges refugees face in proving their asylum claim and applies the 1951 Convention criteria in "a spirit of justice and understanding".[100]

65. Asylum-seekers may often be forced to flee without their personal documents and may not have other documentary proof to support their oral or written.[101] In many cases, the persecution they have experienced and/or fear (such as arbitrary detention or torture) is officially denied by the authorities in their home countries, meaning that no records of it are generated and witnesses cannot come forward without risk of reprisal. In other cases, there will be no records or even corroborating witnesses because the harm suffered is considered too shameful to report to the authorities or to seek medical treatment for (such as in cases of rape or familial violence),[102] and/or seeking treatment

[99] The Plan also indicates the need for a credibility assessment which is to include "consideration of opportunities the person had to claim asylum in other countries" and notes that "if previous opportunities to make a claim have not been taken, or if a claim is contradictory, that could impact on the credibility of a person's testimony." This reiterates Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, available at: https://www.legislation.gov.uk/ukpga/2004/19/section/8.
[100] UNHCR *Handbook* (n 83), pp. 37-42.
[101] UN High Commissioner for Refugees (UNHCR), *Submission from UNHCR to the legal representative in case of XXX v State Migration Service of the Ministry of Territorial Administration of the Republic of Armenia*, 2 December 2016, para. 12, available at: https://www.refworld.org/docid/586e21304.html; also see *Handbook* (n 83), para. 196.
[102] UNCHR, *Beyond Proof, Credibility Assessment in EU Asylum Systems: Full Report,* p.73 available at: https://www.refworld.org/docid/519b1fb54.html.

might in some circumstances have put the victim or a family member at risk of being reported to the authorities. Asylum-seekers may have been ostracised by their families or communities and be unable to approach them for corroborating evidence even after arriving in the country of refuge. Many suffer from trauma as a result of violations experienced in the country of origin and during their flight. For these and other reasons, asylum-seekers who "can provide evidence of all of their statements will be the exception rather than the rule."[103]

66. In assessing the credibility of the statements provided by an asylum-seeker, the adjudicator needs to consider the entirety of the available evidence, with due regard for the claimant's personal circumstances and, where appropriate, give them the benefit of the doubt[104] UNHCR also recalls that while the relevant facts will have to be furnished in the first place by the applicant, the adjudicator shares the duty to substantiate them and is thus required to guide the applicant and use all the means at his or her disposal to produce the necessary evidence in support of the application.[105] As a general rule, credibility will be established where the applicant has presented a claim which is coherent and plausible, not contradicting generally known facts, and therefore is, on balance, capable of being believed.[106]

67. Although different legal systems use different terms to express these principles, it is UNHCR's understanding that in the UK they currently inform the structured approach to asylum determination, in which the "reasonable likelihood" standard of proof for all elements of the claim has long played a central role.[107] Any proposition that introduces the requirement that a specific element of an asylum claim be proved in a manner, and to a standard of proof that does not preserve these principles, runs the risk of failing to recognise refugees and offer them the international protection to which they are entitled. This could be the case if the UK's existing "civil standard" were simply imported into the asylum context.

Subjective vs objective fear of persecution

68. As regards the question of whether an asylum-seeker is "experiencing a genuine fear of persecution", UNHCR is concerned by the over-emphasis on the 'subjective fear' element in the "well-founded fear of persecution" requirement in the refugee definition, which may result from the proposals put forward in the Plan. Although the expression "well-founded fear" contains two elements, one subjective (fear) and one objective (well-founded), both elements must be evaluated together,[108] and a person's fear of persecution is well-founded if it can be established, *to a reasonable degree*, that her or his continued stay in the country of origin has become, or would become, intolerable for reasons stated in the definition.[109] This determination forms part of the forward-looking assessment of the risks to the claimant in the event of return to the country of origin. This needs to be based on factual considerations, taking into account the

[103] UNHCR, *Handbook* (n 83), para.196.
[104] Ibid., paras. 195-196; see also UNHCR, *Note on Burden and Standard of Proof* (n 63), paras. 6-12.
[105] UNHCR, *Note on Burden and Standard of Proof* (n 63), paras. 6-12.
[106] Ibid., para. 11.
[107] The application of the "low standard of proof" to all aspects of an asylum claim, including past and present facts, has been understood as reflecting a number of unique features of asylum decision making. These include "the notorious difficulty many asylum-seekers face in "proving" the facts on which their asylum plea is founded.. This did not mean that there should be a more ready acceptance of fact as established as more likely than not to have occurred. On the other hand, it created a more positive role for uncertainty." In other words, the concept of the "low standard of proof" was adopted in part to capture that "positive role for uncertainty" also expressed in the concept of the "benefit of the doubt". In addition, it reflects the fact that an asylum determination is not a civil litigation between two parties, one of whose versions of events must ultimately be preferred, but a broad evaluative judgement. *Karanakaran v. Secretary of State for the Home Department* [2000] EWCA Civ. 11, available at: https://www.refworld.org/cases,GBR_CA_CIV,47bc14622.html.
[108] UNHCR, *Note on Burden and Standard of Proof* (n 63), para. 13.
[109] UNHCR, *Handbook* (n 83), para. 42.

personal circumstances of the applicant as well the situation in the country of origin,[110] and should not be conflated with the assessment of whether statements made by the person in presenting their asylum claim can be accepted as credible.

Systematic and widespread persecution

69. It is widely accepted that a fear of persecution may be well-founded even in the absence of a direct and personal threat. As set out in the UNHCR Handbook, a "well-founded" fear "need not necessarily be based on the applicant's own personal experience. What, for example, happened to his friends and relatives and other members of the same racial or social group may well show that his fear that sooner or later he also will become a victim of persecution is well-founded."[111] Various UNHCR Guidelines on International Protection refer to this as a well-founded fear based on the experiences of others who are "similarly situated."[112] What the Plan proposes is that it is only when the persecution of those similarly situated (e.g. of the same religious or ethnic group) is "systematic and widespread" that the fear of persecution will be considered "well-founded".

70. **The term "systematic and widespread" is not an appropriate threshold for a finding of risk under the 1951 Convention.** Systematic and widespread human rights violations may impact entire communities, strengthening community members' well-founded fear of persecution.[113] However, a well-founded fear of persecution can and does frequently arise even where persecution is neither widespread nor systematic. For example, even where discriminatory laws or policies, affecting a specific religious or ethnic group, are rarely, irregularly or never enforced, such laws can create or contribute to an oppressive atmosphere of intolerance. Such laws and policies can generate a fear of prosecution or of serious physical or psychological harm. They can be used for blackmail and extortion purposes by the authorities or by non-State actors, or promote or lead to the tolerance of political rhetoric that can in turn expose individual members of the group to risks of persecutory harm. They can also hinder individuals from seeking and obtaining Stat protection.

71. The proposal would also exclude from protection those who are at risk of persecution that is systematic, but not widespread, such as in a country where a small number of individuals may be publicly targeted for a 1951 Convention reason, to set an example to others.[114] It is difficult to understand, moreover, how the proposed new criteria could ever be met where many - if not most – individuals in a group may be hiding a protected characteristic, such as sexual identity or religious conversion, for fear of persecution. The criteria would therefore fall foul of the principle that a person cannot be denied refugee status based on the expectation that they change or conceal their identity, opinions or characteristics in order to avoid persecution.[115]

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[110] UNHCR, *Note on Burden and Standard of Proof* (n 63), para. 18.
[111] UNHCR, *Handbook* (n 83), para. 42-43.
[112] Repeated in UNCHR's Guidelines on International Protection (GIP), including *GIP No. 1: Gender Related Persecution*, para. 37, available at: https://www.unhcr.org/uk/publications/legal/3d58ddef4/guidelines-international-protection-1-gender-related-persecution-context.html; *GIP No. 6: Religion-Based Refugee Claims*, para. 14, available at: https://www.unhcr.org/uk/publications/legal/40d8427a4/guidelines-international-protection-6-religion-based-refugee-claims-under.html; and *GIP No. 10: Claims to Refugee Status related to Military Service*, paras. 13 and 39, available at: https://www.refworld.org/docid/529ee33b4.html.
[113] UNHCR, *GIP No. 12: Claims for refugee status related to situations of armed conflict and violence*, 2 December 2016, paragraphs. 17-19, available at: www.refworld.org/docid/583595ff4.html.
[114] See UNHCR, *GIP No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity*, 23 October 2012, available at: https://www.refworld.org/docid/50348afc2.html.
[115] *HJ (Iran) v Secretary of State for the Home Department (Rev 1)* [2010] UKSC 31, para. 110, available at: https://www.supremecourt.uk/cases/uksc-2009-0054.html; *RT (Zimbabwe) & Ors v Secretary of State for the Home Department* [2012] UKSC 38, paras. 26-28, available at: https://www.supremecourt.uk/cases/uksc-2011-0011.html; *Appellant S395/2002 v Minister of Immigration (2003) 216 CLR 473* [2003] HCA 71, para. 41, available at: https://www.refworld.org/cases,AUS_HC,3fd9eca84.html;, UNHCR, *GIP No. 2: "Membership of a Particular*

72. Conversely, persecution may be widespread, but not systematic, if it does not follow a policy or pattern. This is arguably the case with regard to many types of persecution by non-state actors, for example violence based on a person's faith, gender or sexual identity.

Clarification of the definition of persecution

73. The Plan does not set out what other clarifications of the definition of persecution would be envisaged. UNHCR looks forward to further substantive consultation when more information becomes available.

Proposed amendments to the asylum procedures

74. The Plan includes a "new one-stop process," although a "one-stop process" already exists, pursuant to Section 120 of the Nationality, Immigration and Asylum Act 2002.[116] Viewed against the background of the existing process, it is already the case that people who make a protection claim are served with a notice that they must put forward all of their reasons for remaining in the UK "at the start of the process". What is new is that:

i. all of the claims will be considered together "and ahead of an appeal hearing where applicable";
ii. when hearing protection and human rights appeals, the First-tier and Upper Tribunal (Immigration and Asylum Chambers) will have jurisdiction to determine whether a person should not be removed or deported because they have been a victim of modern slavery; and
iii. decision-makers, including judges, will be directed to give "minimal weight to evidence that a person brings after they have been through the 'one-stop' process, unless there is good reason."

Consideration of all protection and human rights issues in a single appeal

75. UNHCR supports in principle the idea that all reasons for remaining in the UK are assessed in a single process and notes that refugee and human rights claims are already normally considered and appealed together. We also welcome the proposal to give the First-tier and Upper Tribunal jurisdiction to consider trafficking grounds for remaining in the United Kingdom.

76. However, to ensure that refugees enjoy the rights to which they are entitled, asylum claims should be examined first to assess any Convention grounds for protection; only if these are not present should subsidiary/other complementary forms of protection

Social group", paras. 6 and 12, available at: https://www.unhcr.org/uk/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html; and UNHCR, *GIP No. 6: Religion-Based Refugee Claims* (n 112), para. 13.

[116] This provides that the SSHD or an immigration officer "may" serve a notice (commonly called a Section 120 notice) on any person who has made a protection or human rights claim, has applied for leave to enter or remain in the UK, or with regard to whom a decision to deport or remove "has or may be taken". The notice will require the person to "provide a statement setting out" their reasons for wishing to the stay in the United Kingdom and "any grounds" on which they should be permitted to enter or remain or should not be removed. It also creates an ongoing obligation on anyone who requires leave to enter or remain or does not have it, or who only has leave to remain because they have an application pending with the Home Office, to provide supplementary statements "as soon as reasonably practicable" after any change in circumstances. There are two consequences of failure to complete a Section 120 notice. The first is that under Section 96 of the same act, if a claim is later raised on a basis that could have been raised in response to a Section 120 notice, the SSHD may certify any refusal of such a claim so as to deny the person an in-country right of appeal. The second is that the person will not be able to raise a new reason for wishing to remain in the UK in a pending appeal without the consent of the SSHD. https://www.legislation.gov.uk/ukpga/2002/41/contents

grounds be considered. UNHCR recommends that such a sequence be explicit wherever a single one-stop process is introduced. In addition, we note that the UK's Single Competent Authority (SCA) frequently requires more than 12 months to make a conclusive grounds decision as to whether a person has been trafficked. We therefore recommend that the "one stop" process not operate so as to delay a decision on a refugee claim until after a conclusive grounds decision has been made, particularly where a basis for refugee protection exists that is not tied to an individual's claim to be a victim of trafficking. This could unnecessarily delay giving refugees access to the benefits of the 1951 Convention to which they are entitled, with adverse consequences for their integration, mental health and family life, and at additional expense to the public in the form of National Asylum and Support Service support and accommodation for those who would be fit to work. For the same reason, noting that well over 40% of asylum appeals determined by the First-tier Tribunal are allowed,[117] we would urge that procedures are put in place to ensure that asylum appeals are not unnecessarily delayed by the need to await a trafficking decision by the SCA.

Minimal weight given to late evidence

77. UNHCR is concerned by the intention to direct decision makers and judges to give "minimal weight" to evidence produced *after* a person has been served a one-stop notice. Although delays in making claims or presenting evidence may properly be taken into account in assessing credibility, the weight given to delay depends on the entirety of the individual and contextual circumstances.[118] A rule prescribing that particular evidence *should* be given *minimal weight* would run counter to fundamental principles governing the assessment of evidence, including that "everything capable of having a bearing has to be given the weight, great or little, due to it",[119] and that evidence must be approached objectively, with an open mind[120], and assessed in the round, rather than in isolation.[121] Moreover, the effect of delay on the weight of "late" evidence will necessarily vary depending on the nature of that evidence. For example, there is no reason that the probity of much third-party evidence, and in particular evidence from independent medical or country experts, should be affected by an applicant's delay.[122]

Accelerated appeals and review processes

78. The Plan refers to the possibility of fast-track appeal procedures: (1) for claims and appeals "made from detention" or being processed in reception centres; (2) against "manifestly unfounded" claims and (3) against "new claims, made late". It also proposes

[117] The percentage of asylum appeals allowed has risen from 31% in 2014/15: 31%, to 48% in 2019.20, and was 46.6% in the first three quarters of the 2020/21 year. https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-october-to-december-2020

[118] These include that applicants may: be suffering the symptoms of trauma and other mental health problems associated with their experiences; be bewildered or disoriented by the new environment of the country of asylum; feel anxious, desperate, or frightened; lack trust in the authorities; or experience feelings of shame. Timely disclosure may also depend on access to good-quality legal advice, the training competencies of interviewers or interpreters, the timescales of any initial procedure, or circumstances in the applicant's country. See UNCHR, *Beyond Proof* (n 102), pp. 33, 36, 97-103, 199-203 and 227; and paras. 4 and 198 of the UNHCR *Handbook* (n 83).

[119] See *Karanakaran* (n 108), para. 18. A similar approach is taken in Australia, Germany, and the Czech Republic. UNHCR, *Beyond Proof* (n 102), p.2401-241.

[120] UNHCR, *Beyond Proof* (n 102), p.38.

[121] *SM (Section 8: Judge's process) Iran* [2005] UKAIT 00116, available at: https://tribunalsdecisions.service.gov.uk/utiac/38086; the requirement to make credibility assessments in light of all of the evidence, rather than by assessing each material fact in isolation is broadly reflected in state practice, including in the Netherlands, Australia, and in Europe more generally. UNHCR, *Beyond Proof* (n 102), pp. 46-47.

[122] *Devaseelan v. Secretary of State for the Home Department* [2002] UKIAT 000702, distinguishing late-produced evidence of "facts personal to the appellant" from "Evidence of other facts – for example country evidence", which "may not suffer from the same concerns as to credibility.", available at: https://www.refworld.org/cases,GBR_AIT,40487ac32.html.

replacing current Judicial Review procedures with fast-track appeals in challenges to age assessments and to the denial of a right of appeal.

79. The provision of a meaningful appeal is a fundamental requirement in the context of refugee status determination, where the consequences of an erroneous decision can be particularly serious. Accelerated procedures may nonetheless be appropriate, particularly with regard to manifestly unfounded or repeat claims, as long as they are sufficiently flexible and contain adequate safeguards to ensure that they can be determined fairly and justly.[123] UNHCR also stands ready to discuss shorter processing timelines for adjudicators' handling of manifestly unfounded and/or manifestly well-founded applications.

80. Applications and appeals should not be accelerated, however, for reasons that are unrelated to their merits.[124] This would be the case if all cases processed within reception centres or made from detention were automatically channelled into accelerated procedures, or if cases were determined to be "late" without a careful consideration of all relevant circumstances.[125] This could result in cases that are complex and not capable of being decided fairly in an accelerated process nonetheless being routed into it. This is in clear contrast to manifestly unfounded claims and repeat claims that are not significantly different; we note that the latter are already denied a right of appeal in the UK under the existing "fresh claim" procedure.

81. In addition, ensuring timely access to free legal aid and legal representation is an important procedural safeguard for the efficiency as well as the fairness of the system, particularly in the context of accelerated procedures.[126] Legal aid providers could advise applicants on the duty to cooperate with the determining authorities, including the timely submission of all available evidence, and the consequences of not doing so, as well as ensuring that their claims are properly prepared. UNHCR therefore welcomes the proposal to expand access to legal advice, especially for those facing removal. However, given that the one-stop process will be triggered as soon as a person makes *any application* for protection or leave to enter or remain, it is important that it take account of the current lack of access to free legal aid across the immigration and asylum system,[127] including the exclusion of human rights claims from the scope of legal aid.

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[123] *UNHCR intervention before the European Court of Human Rights in the case of Mir Isfahani v. the Netherlands*, May 2005, Application No. 31252/03, available at: https://www.refworld.org/docid/454f5e484.html. For the importance of adequate safeguards in the asylum context, see, e.g., *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840, available at: https://www.judiciary.uk/wp-content/uploads/2015/07/lord-chancellor-v-detention-action-judgment.pdf; *Detention Action v First-Tier Tribunal (Immigration and Asylum Chamber) & Ors* [2015] EWHC 1689 (Admin), available at: https://www.refworld.org/cases,GBR_HC_QB,55896fc84.html.

[124] UNHCR, *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010, p. 66, available at: https://www.refworld.org/docid/4bab55752.html.

[125] UNHCR notes that there may be circumstances where a person, despite ample opportunity to apply for asylum, has not done so for understandable reasons. These include, for example: a lawful stay on a visa for other purposes; where trauma, shame, or other inhibitions may have delayed disclosure; or where a person may have received poor or no legal advice. Such behaviour does not, in itself, exclude a well-founded fear of persecution and should not be used to designate a claim as manifestly unfounded, or to examine it in an accelerated procedure. UNHCR, *UNHCR Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures* (n 60), p. 31.

[126] *Detention Action v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin), available at: https://www.refworld.org/cases,GBR_HC_QB,53bd255a4.html.

[127] See: Saira Grant, *An overview of immigration advice services in England and Wales*, available at: https://www.phf.org.uk/publications/an-overview-of-immigration-advice-services-in-england-and-wales/; and Refugee Action, *Tipping the Scales: Access to Justice in the Asylum System*, available at: https://www.refugee-action.org.uk/wp-content/uploads/2018/07/Access-to-Justice-July-18-1.pdf.

Changes to age assessment including the introduction of a National Age Assessment Board

82. UNHCR welcomes the Government's commitment in the Plan to "protecting children and vulnerable people" and its intention to make the age assessment process more consistent and resolve cases more swiftly. The Plan proposes several changes to the way an asylum-seeker's age is assessed where the Government has doubts about their claim to be a child. Before addressing the proposed measures in the Plan, UNHCR will set out concerns with some of the justification presented for these changes.

83. First, the Government highlights that the number of asylum-seeking children arriving in the UK has increased in recent years. Whilst this is correct, an increased number of unaccompanied children arriving does not justify the introduction of policies which may increase the risk of children being mistakenly identified as adults (see paragraphs 89-90). The rights and obligations of States towards children remain the same, regardless of their number.

84. Second, the Plan presents statistics that suggest that just over half of children subjected to an age assessment over the last five years were assessed as adults. However, this figure only includes cases where an individual's age was in doubt. The vast majority – around 90% of asylum-seekers who present as children - are in fact believed by the Government to be children.[128] Furthermore, the fact that just under half of those who underwent age assessment procedures were found to be children, indicates that a significant number of children go through age assessment unnecessarily.

85. Third, whilst the Plan properly identifies safeguarding risks for children if adults were to enter children's spaces (such as schools), the Plan contains no reference to the serious safeguarding risks faced by children who are wrongly diverted to reception and asylum support arrangements for adults and consequently do not receive child-specific and age-appropriate support.[129] UNHCR's research in the UK found that in several cases, asylum-seekers initially judged to be adults were later determined to be children including those as young as 15 years old.[130] The research highlighted the serious negative impact of treating a child as an adult, including being inappropriately accommodated with adults, denial of access to education, deterioration of mental and physical health, increased risk of absconding or being (re) trafficked and of being detained in an Immigration Removal Centre. [131]

86. To secure effective access to the rights set out in the Convention on the Rights of the Child[132] children must be properly identified. It follows that States have a duty to identify children as children and also whether they are separated or unaccompanied, as soon as their presence in the country becomes known to the authorities. It is accepted that identification measures to be carried out by States with respect to unaccompanied or

[128] UNHCR's analysis of Home Office data suggests that over 90% of asylum-seekers presenting as children were accepted as such since 2017. See Home Office Immigration Statistics, Year Ending December 2020, https://www.gov.uk/government/collections/immigration-statistics-quarterly-release.

[129] See case of *N.B.F* before the Committee on the Rights of the Child where the committee held that risk of sending a child under assessment to an adult-oriented facility was greater than that of transferring them to centre for children. Committee on the Rights of the Child, *N.B.F. v Spain*, No. 11/2017, available at: https://opic.childrightsconnect.org/view/jurisprudence/entry/1449/.

[130] UNHCR, *"A Refugee and Then…"*, 2019, available at https://www.unhcr.org/uk/publications/legal/5d271c6a4/a-refugee-and-then.html.

[131] Ibid.

[132] UN General Assembly, *Convention on the Rights of the Child* (n 87). See especially Articles 3 and 22 (bests interests of the child must be a primary consideration), Article 2 (non-discrimination), Article 6 (right to life survival and development), Article 12 (right to express their views freely) and Article 22 (appropriate protection and humanitarian assistance for asylum-seeking and refugee children).

separated children may include an age assessment.[133] In carrying out age assessments, UNHCR recommends the principles and safeguards below be taken into account:[134]

- Age assessment should only be carried out when there is a doubt regarding the minority of the applicant, as a last resort and not as a matter of routine;
- A holistic assessment of capacity, vulnerability and needs that reflect the actual situation of the young person is preferred to reliance on age assessment procedures aimed at estimating chronological age;
- Where conducted, age assessments must be carried out in a safe, child- and gender-sensitive manner with due respect for human dignity;
- Age assessment should not be carried out immediately following arrival to allow time for the child to build trust and properly recollect information which can be used when establishing their age;
- The assessment should be comprehensive and multidisciplinary assessment undertaken by qualified, trained professionals which balances a range of physical, psychological, developmental, environmental and cultural factors, taking into account documentary evidence;
- Information on the procedure and legal consequences should be provided in a "child-friendly" manner and language which children understand;
- Medical age assessments are highly contested and are subject to a high margin of error; UNHCR is consequently not in favour of medical processes to assess age. If used, States should use the least invasive option, and as a measure of last resort. Medical assessments should not take place without the consent of the child. Refusal to undergo medical age assessment should not have any adverse impact on the asylum eligibility assessment;
- Age assessment procedures for individual children should be clearly documented, including reasons for doubting the declared age and undertaking the assessment, the methodology used, the outcome and possible margin of error.
- There must be a procedure to appeal against an age assessment decision as well as the necessary support to do so. This should include access to legal assistance and counselling to understand their right to a legal remedy.
- Applicants should be treated and receive services as children until the conclusion of the assessment of age, including the appointment of a guardian, unless this would be clearly unreasonable;
- Where admission into asylum or other processes are placed on hold until the determination of age, age assessment should take place within a reasonable specified time frame to avoid undue delay in these processes;
- Where an age assessment remains inconclusive, the applicant should be given the benefit of the doubt and assumed a child. This should include cases

[133] UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para. 31, available at: https://www.refworld.org/docid/42dd174b4.html.

[134] UN Children's Fund (UNICEF), *Age Assessment: A Technical Note*, January 2013, available at: https://www.refworld.org/docid/5130659f2.html; *UNHCR observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum*, Case No. CIK-1938/2014 – Lithuanian Supreme Court, available at: https://www.refworld.org/pdfid/55759d2d4.pdf; *M.S. v. Slovakia and Ukraine (Appl. No 17189/11*) before the European Court of Human Rights available at: https://www.refworld.org/cases,ECHR,5ef0853c4.html; UNHCR, *The Way Forward to Strengthened Policies and Practices for Unaccompanied and Separated Children in Europe, July 2017,* available at: https://www.refworld.org/docid/59633afc4.html; and Separated Children in Europe Programme, *SCEP Statement of Good Practice*, March 2010, 4th Revised Edition (revised version forthcoming), available at: https://www.refworld.org/docid/415450694.html; UNHCR ExCom Conclusion No. 107 (2007), available at: https://www.unhcr.org/uk/excom/exconc/4717625c2/conclusion-children-risk.html.

where the margin of error allows for the possibility that the individual is under 18 years old;

- Should the age assessment conclude that the young person is not a child, the applicant should be provided assistance and protection based on a comprehensive assessment of their protection needs and vulnerabilities.

87. Currently, age assessments conducted in the UK must be compliant with extensive UK case law,[135] which reflects many of the principles outlined above. UK case law requires that assessments must, inter alia, be holistic and conducted by experienced professionals (two trained s with decision makers obliged to give reasons, and if in doubt, to recognise the young person as a child.[136]

88. The Plan now proposes the exploration of "scientific age assessment methods" which will be determined by the proposed National Age Assessment Board (NAAB). Whilst the Government's Plan does not detail areas of particular interest under "scientific methods", UNHCR takes this opportunity to re-emphasise that medical age assessment methods remain highly contested and are subject to a high margin of error.[137] The evidential value of such methods remains contested by UK courts[138] and in other jurisdictions,[139]and by medical professionals and associations.[140] In addition to

[135] Case law includes but is not limited to: *R (B) v Merton* [2003] EWHC 1689 (Admin), available at: https://www.bailii.org/ew/cases/EWHC/Admin/2003/1689.html; and *R(A) v Croydon* and *R(M) v Lambeth* [2009] UKSC 8, available at: https://www.supremecourt.uk/cases/uksc-2009-0106.html.

[136] The Association of Directors of Children's Services (ADCS) has published detailed guidance to assist social workers in undertaking age assessments in England in accordance with UK law. See ADCS, *Guidance to assist social workers and their managers in undertaking age assessments in England*, 2015, https://adcs.org.uk/assets/documentation/Age_Assessment_Guidance_2015_Final.pdf. There is similar guidance in Scotland (https://www.gov.scot/publications/age-assessment-practice-guidance-scotland-good-practice-guidance-support-social/) and Wales (https://www.wlga.wales/SharedFiles/Download.aspx?pageid=62&mid=665&fileid=2462).

[137] UNHCR, *Guidelines on Assessing and Determining the Best Interests of the Child*, November 2018, available at: https://www.refworld.org/docid/5c18d7254.html. See also Council of Europe compilation of members state practice from 2017 which concludes: "There is a broad consensus that physical and medical age assessment methods are not backed up by empirically sound medical science and that they cannot be assumed to result in a reliable determination of chronological age. Experts agree that physical and medical age assessment methods enable, at best, an educated guess" Council of Europe, A*ge assessment: member states' policies, procedures and practices respectful of children's rights in the context of migration,* September 2017, available at: https://www.refworld.org/docid/59d203a14.html.

[138] The UK Upper Tribunal (Immigration and Asylum Chamber) has questioned the reliability of dental x-rays in establishing age, see *R (AS) v Kent CC* [2017] UKUT 446, available at: *https://tribunalsdecisions.service.gov.uk/utiac/2017-ukut-446, and R (ZM and SK) v Croydon* [2016] UKUT 559 (IAC), available at: https://tribunalsdecisions.service.gov.uk/utiac/2016-ukut-559.

[139] In *N.B.F. v Spain* (n 130), the Committee on Human Rights held that the margin of error for a particular wrist x-ray method used to assess minority remains wide and therefor the method cannot be the sole basis for age assessment procedures. See also UNHCR, *Observations by the UNHCR Regional Representation for Northern Europe on the members of parliament's legislative motion concerning age assessment of children seeking asylum in Norway ("Representantforslag 93 S (2015–2016) om nye og mer treffsikre metoder for alderstesting av barn som søker asyl")*, 8 November 2016, available at: https://www.refworld.org/docid/582c24be4.html; UNCHR, *Observations by the United Nations High Commissioner for Refugees Regional Representation for Northern Europe on the draft law proposal "Age Assessment Earlier in the Asylum Procedure" ("Åldersbedömning tidigare i asylprocessen") Ds 2016:37*, available at: https://www.refworld.org/pdfid/5937a8e14.pdf; and for Lithuania, *UNHCR observations on the use of age assessments in the identification of separated or unaccompanied children seeking asylum*, 1 June 2015, available at: https://www.refworld.org/docid/55759d2d4.html.

[140] See for example Petter Mostad and Fredrik Tamsen, *Error rates for unvalidated medical age assessment procedures*, International Journal of Legal Medicine 133(2), 2019, pp. 613–623. The study found that of approximately 10,000 individuals subjected to a particular age assessment procedure (combined dental x-ray and bone imaging) in Sweden in 2017 children had a 33% change of being misidentified as adults by the procedure. In the UK the Royal College of Pediatrics and Child Health (RCPCH) notes that "The use of radiological assessment is extremely imprecise and can only give an estimate of within two years in either direction, and the use of ionising radiation for this purpose is inappropriate." and that "dental x-rays, bone age and genital examination will currently not add any further information to the assessment process" See RCPCH, *Refugee and unaccompanied asylum seeking children and young people - guidance for paediatricians*, available at: https://www.rcpch.ac.uk/resources/refugee-unaccompanied-asylum-seeking-children-young-people-guidance-paediatricians.

being subject to a high margin of error, medical methods used for age assessment can be potentially harmful (such as those that involve exposure to radiation through x-rays). For this reason, dental x-rays have previously been ruled out for use in assessing age in the UK by the UK Home Office citing the British Dental Association's views that they are "inaccurate, inappropriate and unethical".[141] The Committee on the Rights of the Child further confirmed in 2017 that "States should refrain from using medical methods based on, inter alia, bone and dental exam analysis, which may be inaccurate, with wide margins of error, and can also be traumatic and lead to unnecessary legal processes".[142]

89. UNHCR is especially concerned with the Government's proposal to empower, through legislation, front-line immigration officers and other staff (not social workers) to make initial age assessments based on physical appearance and demeanor. In UNHCR's view this cannot be considered an age assessment, which would satisfy the principles set out in paragraph 86. Decisions based on young people's "demeanour and physical appearance" are widely recognised as being (culturally) subjective and unreliable[143] and research conducted by UNHCR suggests that the policy, which already exists in interim guidance, can result in the misidentification of children as adults.[144]

90. In UNHCR's view, policy or legislation which allows asylum-seekers to be treated as adults based on brief assessments of physical appearance and demeanor by immigration officials, creates a considerable risk of children being subjected to adult procedures and of a violation of their rights under the Convention on the Rights of the Child and the 1951 Convention.[145] It is further unclear how unaccompanied children assessed as adults would be able, in practice, to challenge such assessments and/or whether they would be provided with full information and advice about their entitlement to subsequently approach their local authority of dispersal, ask to be supported as a child and receive a full age assessment.

91. The Plan proposes that social workers are empowered to make "straightforward assessment under/over 18 decisions with additional safeguards". UNHCR is unclear whether the safeguards in existing UK caselaw on age assessment will be retained[146] and looks forward in particular to understanding how an assessment described as

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[141] British Dental Journal, *Home Office rules out X-rays for asylum seekers*. Br Dent J 221, 539 (2016), available at: https://doi.org/10.1038/sj.bdj.2016.803.

[142] UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and 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*, 16 November 2017, CMW/C/GC/4-CRC/C/GC/23, para. 4, available at: https://www.refworld.org/docid/5a12942a2b.html.

[143] *UNHCR's submission to the Joint Committee on Human Rights' call for evidence on the United Kingdom's record on Children's Rights*, available at: https://www.unhcr.org/uk/protection/basic/58120917e/unhcrs-submission-to-the-joint-committee-on-human-rights-call-for-evidence.html. Note that in the case of *BF Eritrea* the England and Wales Court of Appeal determined that a similar policy was unlawful because it did not sufficiently account for that margin of error in estimating age creating a real risk of children being unlawfully detained. *BF (Eritrea) v Secretary of State for the Home Department* [2019] EWCA Civ 872, available at: https://www.bailii.org/ew/cases/EWCA/Civ/2019/872.html.

[144] UNHCR, *A Refugee and Then* (n 130).

[145] See especially UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims*, 22 December 2009, HCR/GIP/09/08, available at: https://www.refworld.org/docid/4b2f4f6d2.html.

[146] See *R (B) v Merton* (n 135). It is also unclear whether this proposal is in fact a restatement of the existing practice as provided for by current legislation and guidance as in *R (B) Merton,* at para. 27, the High Court found "…*there may be cases where it is very obvious that a person is under or over 18. In such cases there is normally no need for prolonged inquiry*." This nonetheless needs to be compliant with the principles established in relevant case law. See also UK Home Office guidance on the conduct of "short" age assessments. UK Home Office, *Kent Intake Unit social worker guidance*, Version 2.0, 3 December 2020, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947646/kent-intake-unit-social-worker-guidance-v2.0-gov-uk.pdf.

"straightforward" will incorporate the safeguards outlined in paragraph 86, including that the assessments are multidisciplinary, allow children to reflect and be properly heard, that reasons for the decision are provided and there is a mechanism to challenge the assessment.

92. The Plan makes clear that the NAAB would have responsibility for conducting age assessments (where requested by the local authority), thereby centralizing age assessment decision-making. UNHCR cautions that a centralised approach risks becoming formulaic and so the NAAB should be multidisciplinary and assessments must continue to draw on the expertise of those who play a role in the child's life (e.g. health professionals, psychologists, teachers, foster parents, youth workers, advocates, guardians and social workers).

93. The Plan announces a consultation on the creation of a "fast-track" statutory appeal right for young people to challenge age assessments of the proposed NAAB.[147] Given the inherent complexity in assessing age for undocumented young people it is important that any legal remedy pursued allows for proper consideration of complex evidence by appropriately trained specialist decision makers.[148] Young people assessed as adults must receive clear information about their right to appeal in a language they understand and have access to legal assistance. Those appealing age decisions should be treated as children until such time as the appeal is determined.

UNHCR's conclusions

UNHCR is concerned that the Plan, if implemented as stated (or as inferred herein), will among other adverse consequences undermine the application of the 1951 Convention in the UK and create a sub-class of refugees, denied a durable solution, based on an inappropriate penalisation under Article 31(1) of the 1951 Convention. Living under the constant threat of expulsion and being prevented from integrating will only push refugees under the new Temporary Protection Status into precarious and potentially exploitative situations in the UK – the very situations the UK seeks to take global leadership in eradicating.

As highlighted in these observations, many aspects of the Plan do not respect fundamental principles of refugee law. And while UNHCR welcomes any meaningful efforts to increase safe and legal pathways to the UK, these do not absolve the UK of its legal responsibility towards asylum-seekers who arrive spontaneously. This includes those arriving by small boats. UNHCR is deeply concerned that redirecting such boats away from the UK, in the absence of a regional or bilateral transfer arrangement of the kind discussed herein, may lead to more deaths in the Channel. It is entirely possible for the UK to protect its borders, and the security of its public, while implementing fair, humane and efficient policies towards asylum-seekers that are in line with the 1951 Convention. These are not mutually exclusive. UNHCR is already working closely with the Home Office to improve the quality of its asylum decision-making under the Quality Protection Partnership and provided detailed proposals for procedural reform to the government in February of this year. These proposals draw upon global best practice for the adoption of fair and efficient asylum procedures, including simplified procedures. In light of the concerns expressed in these observations, UNHCR stands ready to continue to work with the government to adopt a more sensible, humane and legally sound set of changes to address the problems it identifies with its asylum system.

[147] It is unclear from the Plan whether such a right could be exercised to challenge assessments conducted by local authorities.
[148] Studies in the UK have found that some judicial age assessments may not be any more accurate or reliable than those carried out by local authorities. Coram Children's Legal Centre, *Happy Birthday?: Disputing the age of children in the immigration system*, 2013, available at https://www.childrenslegalcentre.com/wp-content/uploads/2017/04/HappyBirthday_Final.pdf.

Beyond the immediate concerns that the Plan seeks to address, UNHCR encourages the government to adopt the broader perspective its global aspirations require. The international protection system, underpinned by the 1951 Convention, is only as strong as the resolve of States to uphold it. If prosperous States that receive a comparatively small fraction of the world refugees appear poised to renege on their commitments, the system is weakened globally. And the role and credibility of the UK, so far a strong advocate of that system around the world, would be severely diminished.

UNHCR Representation for the United Kingdom

4 May 2021