Nationality and Borders Bill
Advice to Women for Refugee Women

Introduction

1. We have been asked to advise on the Nationality and Borders Bill ('the Bill') currently before Parliament and to identify and assess its implications, in particular for women seeking asylum and international protection. We give this advice having provided Women for Refugee Women (WRW) with the response prepared by Garden Court Chambers to the 'consultation' on the New Plan for Immigration which sets out in detail concerns about many of the proposals foreshadowed in the New Plan that are now contained in the Bill. That response focused on general concerns affecting all those subject to the extensive array of radical measures and as such women will be affected in the same negative way as men overall but will undoubtedly experience differential adverse impact and disadvantage as we explain below. We take as read the generic concerns raised in the consolation response and develop them only in so far as they have specific or additional discriminatory impact on women. Since the Bill was published, the Government published an Equality Impact Assessment (EIA) on 16 September 2021, which we consider herein.

2. The Bill is wide ranging and extensive in its scope and content. We have focussed, in light of the discussion in conference, on what we consider are the most significant provisions of the Bill for women and address each topic in turn as set out below (although ultimately, they must be considered cumulatively):

   i. Asylum and International Protection (Part 2)
   - *Two tier system for asylum (Clauses 11 and 13; Clauses 17-21)*
   - *Heightened Standard of Proof (Clause 31)*
   - *Particular Social Group (Clause 32)*

   ii. Reintroduction of accelerated detained (fast track) appeals (*Clause 26*)

   iii. Accommodation Centres (*Clause 12*)

   iv. Modern Slavery (Part 5)
   - *Victim identification: provision of information and damage to credibility (Clauses 57-58)*
   - *Identification of potential victims (Clause 59)*
   - *Disqualification from protection (Clauses 62-63)*

Part 2: Asylum

3. Part 2 of the Bill constitutes a fundamental abrogation of the purpose and obligations of the Refugee Convention. In particular, Clauses 11-13 and 17-21 introduce an unprecedented 'two-tier' system that will discriminate between treatment of refugees, depending on their method of travel and entry to the UK.

4. Clauses 29 to 37 of the Bill, which deals with the 'Interpretation of the Refugee Convention', also seek to redraw and confine the meaning of the Convention in an attempt to turn back the clock on well-established principles. This will have a consequential impact on *who* the Convention applies to and *how* that person should be treated. It will be seen that women who may well be recognised by the Secretary of State (SSHD) and the courts as refugees may well not be recognised under the newly defined provisions.

5. Clause 31 aims to change the standard of proof and the evidence required in asylum claims, while Clause 32 seeks in subsections (2)-(4) to change the test for the definition of a 'particular social group' (PSG). These changes reverse longstanding principles and are a clear attempt to reinstate approaches which have been repeatedly and roundly rejected by the courts. These changes can and will have a disproportionate adverse impact on asylum seekers who are women.

Two tier system for asylum (Clauses 11 and 13; Clauses 17-21)

3. The Bill proposes to introduce a highly legally controversial 'two-tier' asylum system, without any legal or any adequately evidenced policy justification:

- First, **Clause 11 empowers the SSHD to treat refugees differently if they came to the UK indirectly, delayed claiming asylum, or entered the UK unlawfully without a good reason**. Clause 13 will require an asylum applicant to make a claim in person at a '**designated place**.' The Bill would give the SSHD the power to refuse such a person access to public funds, restrict their family reunion rights, or bar them from obtaining settlement and a secure status. The clause is extremely widely drafted and places *no* restriction on the SSHD's ability to treat such refugees differently. This is extremely concerning since it deprives Parliament of any effective control on how this power will be exercised by the Executive despite concerning the fundamental rights flowing from the protected right to claim asylum.

- Second, Clauses 14-16 introduces **new provisions on admissibility, permitting the SSHD to declare certain asylum claims 'inadmissible'**. An asylum claimant whose claim is 'inadmissible', but who has a well-founded fear of persecution in their country of nationality and cannot be returned to a 'safe' third country, will be accorded 'temporary protected status' rather than asylum and a form of durable protection. 'Temporary protected status' will be granted for a limited period, without an automatic path to settlement and with no access to public funds except in cases of destitution.

- Third, Clauses 17-21 **empowers the SSHD to require asylum seekers to provide evidence supporting their asylum claim by a specified date.** Where a person does not submit evidence on time, asylum decision makers will be required to **doubt the person's credibility.**

4. These proposed changes are deeply concerning from the perspective of women claiming asylum. First, Clause 11 raises stark issues in terms of the freedom from discrimination, especially as regards the differential treatment of different refugees. Women and girls may have good reasons for not claiming asylum via a regular route, in particular, they are less likely to enjoy the socio-economic conditions or political or civil support in their own country of origin, which could enable them to organise to leave via a regular route and are more likely, therefore, to face a penalty for claiming asylum[1].

5. Second, in respect of admissibility of asylum claims, it is well established that there is no obligation under the Refugee Convention, to claim asylum in the 'first safe country'. Some element of choice is open to refugees as to where they may lawfully claim asylum.[2] There are a number of good

[1] As recognised by UNHCR in its Guidelines on International Protection: Gender Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, and in it Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked.

[2] *R v Uxbridge Magistrates' Court, ex parte Adimi* [2001] QB 667 per Simon Brown LJ: "I am persuaded by the applicants' contrary submission, drawing as it does on the travaux préparatoires, various conclusions adopted by UNHCR's executive committee (ExCom), and the writings of well respected academics and commentators (most notably Professor Guy Goodwin-Gill, Atle Grahl-Madsen, Professor James Hathaway and Dr Paul Weis), that some element of choice is indeed open to refugees as to where they may properly claim asylum. I conclude that any merely short term stopover en route to such intended sanctuary cannot forfeit the protection of the article, and that the main touchstones by which exclusion from protection should be judged are the length of stay in the intermediate country, the reasons for delaying there (even a substantial delay in an unsafe third country would be reasonable were the time spent trying to acquire the means of travelling on), and whether or not the refugee sought or found there protection de jure or de facto from the persecution they were fleeing." This was approved by the House of Lords in *R v Asfaw* [2008] UKHL 31.

reasons why a genuine refugee – in particular, a woman or a girl - might pass through third countries before travelling onwards to claim asylum in the UK, including:

- That they are under the control of an agent/smuggler and have no real choice about where to claim. asylum This is particularly relevant in the case of unaccompanied asylum-seeking children or those who are victims of trafficking/modern slavery, and other vulnerable applicants who have no or little control over their journey and its destination;

- That the putative 'safe' country is not safe, either generally or for that particular individual. For instance, the High Court has previously accepted that asylum seekers returned to Hungary faced a real risk of onward return to countries where they faced persecution;[3]

- That they will be street-homeless and destitute for an extended period and subject to inhuman or degrading treatment in the putative 'safe' country. This has previously occurred for example, in respect of Greece[4] and in respect of some 'particularly vulnerable' asylum seekers returned to Italy[5] with women and girls very frequently falling into the most vulnerable groups unable to support themselves economically and at risk of exploitation;

- That they have immediate or close family members in the UK, and none in the 'safe' countries they are passing through;

- That they reasonably believe that they will be safer in the UK than elsewhere because of historic links to their home country or the presence of hostile elements in the diaspora, for example where there has been civil war or ethnic conflict in the home county or risks particularly arising from criminal gangs particularly related to human trafficking in the putative safe county. Many victims of modern slavery have been trafficked into other European counties

[3] See *R (Ibrahimi) v SSHD* [2016] EWHC 2049 (Admin) in which it was held that there was a real risk that Hungary will return asylum seekers (via a chain of other countries) to countries where they will be persecuted.
[4] *MSS v Belgium and Greece* (2011) 53 EHRR 2
[5] See *R (SM) v Secretary of State for the Home Department (Dublin Regulation - Italy)* [2018] UKUT 429 (IAC) where it was accepted that some such "particularly vulnerable persons" would have an arguable claim to resist removal under Article 3 ECHR.

before they enter the UK and the traffickers remain present and active in those countries.

6. Thirdly, the reality for many women who claim asylum is that there may well be very good reasons to explain why their claim was not made at an embassy in their country of origin, or why their claim was delayed, or why evidence is provided at a later stage which relates to the particular forms of persecution to which women are subject, and their experiences of gender-based violence and inferior social status. This is in fact acknowledged in the SSHD's own asylum policy instruction, '*Gender Issues in the Asylum Claim*,'[6] (v 3.0, 10 April 2018) which states that:

> "***disclosure of gender-based violence at a later stage in the asylum process should not automatically count against their credibility. There may be a number of reasons why a claimant, or dependant, may be reluctant to disclose information, for example feelings of guilt, shame, and concerns about family 'honour', or fear of family members or traffickers, or having been conditioned or threatened by them.***
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> *[…] Those who have been* ***sexually assaulted and or who have been victims of trafficking may suffer trauma that can impact on memory and the ability to recall information****. The symptoms of this include persistent fear, a loss of self-confidence and self-esteem, difficulty in concentration, an attitude of self-blame, shame, a pervasive loss of control and memory loss or distortion.*
>
> *[…] You may, where necessary,* ***allow claimants a reasonable time to submit psychological or medical evidence where trauma may affect their ability to recall events consistently or to otherwise support their claim, where a claimant's account is doubted****…"*

7. To demonstrate one such example of those barriers in practice, in *R (R.O.O. (Nigeria) v Secretary of State for the Home Department* [2018] EWHC 1295, the SSHD sought to certify a 'late' asylum claim from a woman under section 96 of the Nationality, Immigration and Asylum Act 2002, where she had failed to claim asylum at an earlier opportunity. The effect of a section 96 certificate is to prevent the asylum seeker from bringing their appeal in-

[6] Gender Issues in the Asylum Claim, (v 3.0, 10 April 2018,) available online at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/699703/gender-issues-in-the-asylum-claim-v3.pdf

country, in the UK. As a result, she was liable to removal before her asylum claim could be adjudicated on by the independent Tribunal.

8. The Claimant had entered the UK lawfully on a student visa, to undertake graduate studies. Following in-country applications, she claimed asylum on the basis that she was subjected to FGM as a child, and that she was lesbian when the SSHD sought to remove her to Nigeria. The nature of her claim, and the intersection of sex, gender, sexual orientation and race all provide an intelligible basis for why she delayed claiming asylum until faced with removal. The subject matter of her claim is deeply personal, and for her, a matter on which she experienced and expressed great shame. Expert medical evidence showed that she had scarring and mental health diagnoses consistent with the physical and psychological trauma she had suffered. The High Court agreed that the SSHD had wrongly certified her claim, by failing to have adequate regard to her vulnerabilities when deciding to deprive her of an in-country right of appeal. As the Judge identified at §80:

> *"There are a number of concerning features about the way in which her claim was investigated and considered, most significantly: (1) the failure of the Defendant to obtain a Rule 35 Report [a medical report evidencing torture] before making a decision; and (2) the manner in which the questioning was conducted in her asylum interview, given that this was someone who was speaking of significant incidents of trauma in her life which potentially may have left her vulnerable and less able to express herself with the conviction which the decision-maker was evidently expecting during his confrontational approach."*

9. The existence of these statutory provisions shows that the SSHD already has *significant powers* at her disposal, in respect of claims she believes lack merit on the basis of the timing of the claim or disclosures. It also shows the existence of a hostile environment to the assessment of late claims, even with clear policy guidance indicating that there may well be genuine reasons to explain late evidence, and submission of expert medical evidence to corroborate a claim. Women already face significant barriers to the full investigation and recognition of their protection claims, and the provisions in this Bill particularly on late evidence will only exacerbate those obstacles lead to greater unfairness, and further undermine asylum seeking women's ability to secure protection and avoid return to ill treatment.

Heightened Standard of Proof (Clause 31)

10. This clause reverses the decision of the Court of Appeal in *Karanakaran* v *Secretary of State for the Home Department* [2000] 3 All ER 449, endorsed by the House of Lords in *Sivakumar v Secretary of State for the Home Department* [2003] UKHL 14.

11. Since *Karanakaran,* it has been settled law that there is a single standard of proof for asylum claims. The asylum seeker must show a 'real risk' or 'reasonable likelihood' of persecution on return. Clause 31, however, seeks to reverse 20 years of jurisprudence by introducing a dual standard of proof, in which past facts must be proved on the balance of probabilities, while the 'real risk' or 'reasonable likelihood' standard continues to apply to predictions of future risk.

12. This change will, in our view, significantly worsen asylum decision making, and will have a disproportionate impact on asylum-seeking women and girls. As Lord Justice Sedley pointed out in *Karanakaran,* asylum seekers face a 'notorious difficulty' in establishing the facts on which they rely. Asylum seekers have to convince the Home Office that their account is credible – and they often face an uphill struggle even when the lower standard is applied due to the culture of disbelieve that is well recognised to operate within Home Office decision making.

13. We note that many asylum-seeking women and girls have experienced traumatic events such as rape, sexual assault and domestic abuse, and that many are suffering from conditions such as post-traumatic stress disorder (PTSD) and depression. In this regard, it is well-documented that PTSD and depression can have a significant impact on autobiographical memory and that inconsistencies are to be expected in the genuine accounts of victims of trauma.[7] In particular, PTSD and depression are associated with 'over general' memory, which makes it more difficult to remember specific past events.[8] Human memory for temporal information such as dates, durations

[7] See UNHCR, 'Beyond Proof: Credibility Assessment in EU Asylum Systems', May 2013; UNHCR and European Refugee Fund, 'The Heart of the Matter: Assessing Credibility when Children Apply for Asylum in the European Union,' December 2014; Helen Bamber Foundation, 'Bridging a Protection Gap: Disability and the Refugee Convention,' April 2021

[8] Herlihy, J. and Turner, S. (2013) What do we know so far about emotion and refugee law? 64 *Northern Ireland Legal Quarterly* 1, 47–62; Graham, B. Herlihy, J. and Brewin, C. (2014) Overgeneral memory in asylum seekers and refugees, 45 Journal of Behavior Therapy and Experimental Psychiatry, 375-380

and sequences is also poor in general, even in non-traumatised people.[9] The fact that mental health conditions can explain inconsistencies in an account has been recognised in case law[10] and Home Office policy. Despite this, in our experience, the Home Office continues to disbelieve many asylum seekers' accounts on the ground that they are internally inconsistent or where disclosure is piecemeal or fragmented. There is a systemic failure to take account of the impact of trauma and depression on memory and the consequent impact on the ability to give a coherent and consistent account.

14. Certain forms of gender persecution such as rape or other forms of sexual assault or sexual exploitation are more difficult to prove because, unlike other forms of torture, they do not always leave physical scarring. Women and girls are also more likely to face persecution in the private sphere such as in the form of domestic abuse and/or retribution for transgressing social/religious norms which often occurs within the family and unlike other forms of persecution, particularly state persecution, this is not so well documented by human rights organisations, NGOs and civil society.

15. LGBTI+ asylum seekers also continue to face serious hurdles in 'proving' their sexuality or gender identity to the Home Office and continue to be disbelieved for spurious of weak reasons.[11]

16. In short, the standard of decision-making in asylum cases continues to be poor.[12] This existing problem of poor decision-making will be amplified by a higher standard of proof. The higher the standard of proof, the more likely accounts will be wrongly rejected as 'not credible'. This will have a disproportionate impact on women and girls and on LGBTI+ people for the reasons set out above.

17. A related problem is that Clause 31 introduces an approach which is essentially contradictory. The assessment of past facts and the assessment of risk cannot be straightforwardly separated from one another. If Clause 31 is enacted, protection will be denied to women who are reasonably likely to have been abused but cannot prove it 'on a balance of probabilities'. In this

[9] Cameron, H.E. (2010) Refugee status determinations and the limits of memory, 22 I*nternational Journal of Refugee Law* 4, 469-511.
[10] *AM (Afghanistan) v Secretary of State for the Home Department* [2017] EWCA Civ 1123 at [21]; *JL (medical reports – credibility) (China)* [2013] UKUT 00145 (IAC)
[11] See UK Lesbian and Gay Immigration Group, Still Falling Short, July 2018
[12] See Freedom from Torture, Lessons Not Learned: The Failures of Asylum Decision-Making in the UK September 2019

context, the retention of the 'real risk' standard for the prediction of future risk becomes virtually meaningless. Past abuse is recognised to be the best indicator of future risk, but it will be discounted unless established on the high balance of probabilities standard.

18. Clause 31 also introduces a mismatch between domestic asylum law and the requirements of the European Convention on Human Rights ('ECHR'). Article 3 ECHR prevents expulsion where 'substantial grounds have been shown for believing' that expulsion would result in the person being exposed to a 'real risk' of torture or inhuman or degrading treatment or punishment (as reaffirmed by the European Court of Human Rights in *Babar Ahmad v United Kingdom* (2013) 56 EHRR 1). Clause 31 therefore means that tribunals will have to apply two different standards of proof to the same facts, one for the asylum claim and the other for the human rights claim. Again, therefore, Clause 31 undermines the coherence of asylum law and undermines the utility of seeking the status of refugee if an impossibly high standard will be applied compared to the ECHR. This is important for female asylum seekers because Refugee Status provides an internationally recognised status, should provide security and a path to settlement and integration into the host state.

Particular Social Group (Clause 32)

19. In order to establish a claim for refugee status, a person must show that they have a well-founded fear of persecution on account of one of the five Convention reasons: race, religion, nationality, membership in a particular social group, or political opinion. Gender is not one of the five Convention reasons. As highlighted by Baroness Hale in *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department [2006] UKHL 46, 18 October 2006, paragraph 18*, despite the fact that sex or gender is not included as one of the Convention grounds and that the proposal to include sex in the list of factors of the non-discrimination clause in Article 3 of the Refugee Convention was opposed, it was nevertheless agreed at the 2001 San Remo Expert Roundtable that:

> *"The refugee definition, properly interpreted, can encompass gender-related claims. The text, object, and purpose of the Refugee Convention require a gender-inclusive and gender-sensitive interpretation. As such, there would be no need to add an additional ground to the Convention definition." (Fornah* §18*)*

20. Therefore some gender-based persecution can constitute persecution on account of 'membership in a particular social group'. Depending on the facts of the case, that group may simply be 'women', or it may be a more narrowly defined group such as 'trafficked women'.

21. Since 2004, much of UK asylum law has been based on the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection ('the Qualification Directive') which codified at an international level a consistent approach to the interpretation of the Refugee Convention.

22. It is of note and somewhat unsurprising that post-Brexit, Clause 29(4) repeals the Protection Regulations (Refugee or Person in Need of International Protection (Qualification) Regulations 2006 (S.I. 2006/2525), which were made in order to, at least in part, implement Council Directive 2004/83/EC. The Directive provided two touchstone criteria for whether a group to which a person belongs is a 'particular social group' for the purposes of the Refugee Convention:

> *"(i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and*
>
> *(ii)that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society"*

23. For many years there was a significant debate in UK asylum law about whether these requirements were cumulative (so that both must be met) or alternatives (so that it was sufficient to meet only one). However, the recent landmark Upper Tribunal decision in *DH (Particular Social Group: Mental Health) Afghanistan* [2020] UKUT 223 (IAC) decided firmly that they are alternative, not cumulative.

24. Clause 32(2) and (3), however, reverse *DH.* They provide explicitly that both of the criteria must be met, not just one.

25. This significantly impacts women and girls in particular. Since gender is not one of the five Convention reasons, Clause 32 will give many victims of gender-based violence an additional hurdle to meet in order to obtain

refugee status. If they are relying on membership in a particular social group, they must show not only that the group to which they belong shares an immutable characteristic, but also that that group has a 'distinct identity' in the relevant country. For example, a trafficked woman may need to show not only that her status as a trafficked woman is an immutable characteristic, but also that trafficked women as a group are perceived as having a distinct identity in her home country. The latter being very much more difficult to establish than the former.

26. We therefore consider that this clause – which was not heralded in the consultation – is an unexplained regressive step which will disproportionately impact women and girls seeking asylum on the basis of specific forms of gender persecution.

Reintroduction of accelerated detained appeals (*Clause 26*)

27. Clause 26 reintroduces an accelerated detained appeals process by amending s106 of the Nationality, Immigration and Asylum Act 2002. It applies to those who are (i) detained at the time at which they are given notice of the decision who is subject of the appeal and (ii) remains in detention. The decision must be a prescribed decision described in Regulations and certified by the Secretary of State. What will constitute a prescribed decision is not yet clear but will certainly include asylum and protection claims which were covered by the previous procedure and may well extend to other decisions such as deportation. The overriding criteria for the issue of a certificate is "*if the Secretary of State considered that any appeal…would likely be disposed of expeditiously*." Tribunal Procedural Rules will secure the following time limits: (i) 5 days to lodge a notice of appeal; (ii) the tribunal must make a decision on the appeal, not later than 25 working days after the date on which notice of appeal was given; and (iii) any application for permission to appeal must be determined by the Tribunal not later than 20 working days after the date of the notice of appeal. The Tribunal Rules must also secure that the tribunal may "*if it is satisfied that it is in the interests of justice to do so, order that the appeal is no longer to be treated as an accelerated detained appeal*."

28. The re-introduction of a detained 'fast track' appeals system is a deeply retrograde step. The Court of Appeal held in 2015 that the former Detained Fast Track (DFT) appeals system, which had been operated for a

decade, was 'structurally unfair and unjust'.[13] The problems identified by the Court of Appeal are in our view inherent to any 'fast track' system of determining asylum appeals and are not cured by additional days. The independent Tribunal Procedure Committee, having conducted a consultation, has rejected the Home Office's previous attempts to reintroduce a 'fast track' appeals system having regard to the fundamental concerns about fairness.[14] The Home Office ignored the advice and the concerns of the Tribunal Procedure Committee[15] before the 2014 Rules were amended and introduced, with the consequence that those rules were struck down as ultra vires and all appeals determined under them set aside with obvious adverse consequence not only to fair determination of asylum claims but to good administration and costs to the public purse.

29. The critical and central problem at the heart of the unlawful and unfair operation of the previous DFT was the inability of the Home Office to identify claims that could properly and fairly be decided speedily in detention and to distinguish those that could not and were unsuitable for determination in a detained accelerated process. The screening process was inadequate and the process for identification of unsuitable cases through Rules 34 and Rule 35 of the Detention Centre Rules 2001 was designed to assess suitability for detention, not for an accelerated procedure, and was in any event, failing. It was established in litigation that those from vulnerable groups where disadvantaged in this process and that women were particularly disadvantaged given a number of factors set out above namely: i) the obstacles to disclosure of claims of persecution, in particular rape and gender-based violence in the cursory screening processes and in accelerated procedures; ii) these obstacles are compounded in cases of modern slavery given the well-recognised constraints arising from a history of coercive control which may well still be operating at the point of detention; iii) fear, stigma and shame also operate to deter early and full disclosure particularly where no effective opportunity has been provided to establish trust and confidence in the system or with legal representatives; iv) social and cultural norms make women less able and willing to speak and advance their own claims particularly in pressurised and stressful situations; v) special

[13] *R (Detention Action) v First-tier Tribunal* [2015] EWCA Civ 840

[14] Response to the consultation on Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 and Tribunal Procedure (Upper Tribunal) Rules 2008 in relation to detained appellants, March 2019

[15] See the quotations from the Tribunal Procedure Committee in *R (Detention Action) v First-tier Tribunal* [2015] EWHC 1689 (Admin) at [25]-[29]

arrangements are required which are sensitive to the particular experience and needs of women and these are not usually afforded in accelerated procedures; vi) detention even for short periods is itself a damaging experience for women who often have acute vulnerability from past experiences of ill-treatment and trauma with mental health conditions exacerbated by detention; and vii) protection claims from women are more likely to turn on credibility and to require independent medical and country expert evidence that simply cannot be obtained within the time frames including a 25 day time frame and when the person is in detention.

30. The Home Office simply cannot be relied upon to lawfully ensure that unsuitable cases made by female asylum seekers are not included within an accelerated procedure, and that safeguards exist and are operated to ensure that such unsuitable cases are promptly removed. It will increase the number of female asylum seekers who are wrongly refused asylum and returned to countries where they face persecution. It will also, contrary to the Government's expectation, *increase* the number of female asylum seekers who need to make fresh claims for asylum, the very problem about which the Government is otherwise expressing concern and seeking to reduce. A non-expedited process is more likely to 'get it right the first time' and reduce the likelihood that a fresh claim will be needed. It is also very likely to generate collateral judicial reviews as it did during the previous decade.

31. It is important to note that in the Detention Action case, extensive evidence from organisations and practitioners[16] in the field including from the Helen Bamber Foundation, Freedom from Torture and the Equality and Human Rights Commission, addressed the position of vulnerable applicants, including victims of gender-based violence and potential victims of trafficking.[17]

Detention Action

32. On 9 July 2014, the High Court (Ouseley J) held that the DFT process was operating unlawfully because it carried an unacceptable risk of unfairness

[16] Helen Bamber Foundation (David Rhys Jones), Freedom from Torture (Dr Juliet Cohen), Refugee Action (David Garratt) and the Equality and Human Rights Commission (Wendy Hewitt) which intervened in that case; and the solicitor firms Duncan Lewis (Jenna McKinney), Islington Law Centre (Sonal Ghelani) and Wilson Solicitors LLP (Russell Blakeley and Muhunthan Paravesvaran); as well as the Law Society, the Immigration law Practitioners' Association

[17] *Detention Action 1* [139] –[145].

in *R (Detention Action) v Secretary of State for the Home Department* [2014] EWHC 2245 (Admin) ("*Detention Action 1*"). Ouseley J held that 'vulnerable' or 'potentially vulnerable' individuals were disproportionately disadvantaged by the constraints and timeframes of the DFT and it was in respect of this group that it was held that the DFT was operating unlawfully with an unacceptable risk of unfairness. Ouseley J noted that such individuals disproportionately included women as potential victims of torture, trafficking, FGM, rape and domestic violence, women in the first and second trimesters of pregnancy, nursing mothers, those with mental health problems, those with learning difficulties, women asylum seekers who had been sexually abused, and those with long-term physical, mental, intellectual and sensory impairments [114], [198].

33. As set out above Ouseley J accepted that almost every safeguard that had been built into the DFT system[18] did not work properly and as intended:

    (i) **The screening process was ineffective**: the screening interview form used up until Ouseley J's judgment was insufficient because it failed to ask focused questions of individual circumstances, the nature of the claim and the effect of the DFT timetable on its fair determination in detention [94]-[112] and [220]. Notably, the Independent Chief Inspector for Borders and Immigration, Sir John Vine, had expressed concern in 2012 that the asylum screening process was inadequately focused on ascertaining the suitability of a claim for fair determination in the DFT;

    (ii) **Rule 35 reports were not the effective safeguard for victims of torture and sexual violence which they were supposed to be and did not work as intended** to remove from the DFT those with independent evidence of torture or whose cases were no longer suitable for fair determination in the DFT timetable [134];

    (iii) **The Helen Bamber Foundation and Freedom from Torture concession which is no longer operated, whereby a detainee was released from the DFT once he or she had obtained an appointment with the Helen Bamber Foundation or Freedom from Torture, was the more effective safeguard in the system but there were problems accessing it in practice** [136-7], [173];

    (iv) **The approach to those suffering from mental illness was also flawed**. Decision makers should not merely be considering fitness for detention

[18] Those factors are summarised at paragraph 68 of the judgment and addressed individually by the Judge from paragraph 71 onwards.

or whether the claim was suitable for swift determination without also considering the impact on fairness of the applicant's mental health issues or learning disability [156-157];

(v) **Given that the test for removal of trafficking victims from the DFT was a 'reasonable grounds' decision, it was necessary that the screening process, or subsequent "*swift and effective safeguards*", be capable of identifying such persons so that a referral could be made to the National Referral Mechanism** [145]. Ouseley J accepted that the screening questionnaire was "*not designed to elicit relevant information for the purpose of establishing whether a referral is appropriate*"; and that it ought to elicit trafficking indicators by reference to the *Competent Authority Guidance*, and that it was insufficient to rely on screening officers to remember to ask ad hoc questions. Ouseley J noted at [145] that "*it ought to be clear to screening officers that they should refer a case on the basis of trafficking indicators, and other concerns which they may have, unless there is good reason not to do so, sanctioned with reasons by a senior officer*."

34. Ouseley J held that the ineffectiveness of the various safeguards did not by themselves establish that the DFT was inherently unfair provided that, what he described as the crucial safeguard – the availability of lawyers with sufficient time to take instructions and act on them so as to remedy the other failings in the system – was still in place. However, Ouseley J held that lawyers were being instructed too late, often on the day before the interview, and there was an unjustified period of inactivity between induction into the DFT and the allocation of a lawyer. As a result, the Judge was satisfied that, "*the period in detention before [lawyers] are allocated and the proximity of allocation to the substantive interview means that in too high a proportion of cases, and in particular for those which might be sensitive, the conscientious lawyer does not have time to do properly what may need doing.*" [196]. On this basis Ouseley J decided that the DFT as operated carried an unacceptable risk of unfairness. He concluded that the unfairness was "*one which I judge can be removed by the earlier instruction of lawyers*" (at [197]). The Judge left the task of organising the system so that the "*period of inactivity was better utilised*" to the SSHD at [198] & [200].

35. In the judgment on relief *R (Detention Action) v Secretary of State for the Home Department* [2014] EWHC 2525 (Admin) (25 July 2014) (*Detention Action 2*) Ouseley J made clear that, "*The series of criticisms however came together, intermingled in the judgment. The strands should not be disentangled. Shortcomings at various stages, short themselves of unlawfulness, contributed to*

the overall conclusion" [15]. The following declaration was made: "*It is declared that as at 9th July 2014 the manner in which the DFT was being operated, as set out in the judgment, created an unacceptable risk of unfair determination for those vulnerable or potentially vulnerable applicants, referred to in paragraphs 114, 198 and 221 of the judgment, who did not have access to lawyers sufficiently soon after induction to enable instructions to be taken and advice to be given before the substantive interview and was to that extent being operated unlawfully*."

36. Following *Detention Action 1*, the SSHD increased, from 1 to 4, the number of clear days between the allocation of lawyers and the interview; and did so without any wider review or prior consultation. Also, a screening pilot form was subsequently introduced, on or about 16 July 2016, so that at a new question 6.1 related to trafficking was added to the screening form: "*Have you been subjected to any forced work or any other type of exploitation in your country of origin, en route to or within the UK*?"[19] An affirmative answer was to be followed up on a continuation sheet "*to get brief details that can be used for an NRM referral (who/where/what/when/how*)."[20]

37. However, following *Detention Action 1* the SSHD had increased the time allocation for lawyers before asylum interviews, but this did not remedy the structural unfairness inherent in the operation of the DFT identified by Ouseley J and further judicial review proceedings were issued by a number of applicants, challenging the lawfulness and fairness of its operation because of the systemic failure of its safeguards, in particular the screening process and Rule 35 of the 2001 Rules as the mechanisms for identifying unsuitable cases and for ensuring the prompt release from the DFT of such individuals if identified. The failure of these safeguards had become critical because, by early 2015, the Helen Bamber Foundation had reached capacity and absent their being able to offer appointment dates for assessments, the SSHD was refusing to release those in the DFT whom the Foundation had identified as requiring further investigation of their claims of torture, trafficking or other serious abuse.

38. By 19 March 2015, 11 cases had been lodged in the High Court, four of which were selected as representative lead cases in which to decide whether since 5 January 2015 the DFT had and was being operated lawfully and fairly in identifying and ensuring the release of cases unsuitable for fair

[19] Sixth witness statement of Anthony Simm in *Detention Action 1* dated 16 July 2014, at [21]-[22].
[20] *Ibid.*

determination and detention in the DFT process; this cohort was known as '*JM & others*'.

39. Three other lead cases were also selected to address specific issues relating to women and the compatibility of the DFT with the law relating to human trafficking and sex discrimination contrary to the Equality Act 2010 and Article 5 read with Article 14 ECHR. This cohort was known as '*IK & others*'.

40. Both of these judicial review claims were resolved by consent on the basis that on 2 July 2015 the Immigration Minister, James Brokenshire, in a written statement to Parliament announced the suspension of the DFT procedure,[21] stating, "*Recently the system has come under significant legal challenge, including on the appeals stage of the process. Risks surrounding the safeguards within the system for particularly vulnerable applicants have also been identified to the extent that we cannot be certain of the level of risk of unfairness to certain vulnerable applicants who may enter DFT.*"

JM & others

41. On the following day on the 3 July 2015, the High Court (Blake J) gave a judgment *R (JM & others) v Secretary of State for the Home Department* [2015] EWHC 2331 (Admin) approving a consent order, in which the SSHD conceded[22] that "*the DFT as operated on 2 July 2015 created an unacceptable risk of unfairness to vulnerable or potentially vulnerable applicants.*"[23] This was because:

> "*there was an unacceptable risk of failure: a. to identify such individuals; and b. even when such individuals were identified, to recognise those cases that required further investigation (including, in some cases, clinical investigation). This created an unacceptable risk of failure to identify those whose claims were unsuitable for a quick decision within the DFT.*"

[21] House of Commons: Written Statement (HCWS83) by the Immigration Minister, Mr James Brokenshire.
[22] Paragraph 1 Set out in the Appendix to Blake J's ruling, after [55].
[23] Paragraph 2 of the Order defined "vulnerable" or "potentially vulnerable" individuals included to include "asylum seekers who may be victims of torture, significant ill-treatment, human trafficking, or may be suffering from mental disorder or other physical or mental impairment which may affect their ability to present their claims in the DFT". Paragraph 3 of the Order stated that these terms also included individuals identified in *Detention Action 1* at [114] and [198] set out above.

42. In the Statement of Reasons appended to the Consent Order in *JM & others* (approved and set out in the Appendix to Blake J's judgment), the SSHD accepted in particular that:

    i. The safeguards in the DFT including the screening process and Rule 35 of the Detention Centre Rules 2001 did not operate sufficiently effectively to prevent an unacceptable risk of vulnerable or potentially vulnerable individuals, whose claims required further investigation, being processed in the DFT [48];
    ii. Applicants whose cases require further investigation into their claims of torture, or ill-treatment or other vulnerability which cannot be obtained in detention, are not suitable for quick determinations in the DFT [49].

IK, Y & PU

43. The Consent Order in *IK & others* case was made by Blake J on 9 July 2015. It provided in particular that:
    i. The DFT was operating unlawfully as of 2 July 2015 because of an unacceptable risk of unfairness in respect of vulnerable and potentially vulnerable individuals. These categories of individuals "include potential victims of trafficking[24] whose claims require further investigation (including referrals to the NRM and/or the police and thus were not suitable for a quick decision in the DFT)" [1];
    ii. It was accepted that in the three lead case the SSHD had acted unlawfully, and in breach of her published policies on the DFT and trafficking and of Article 4 ECHR in (i) failing to identify indicators that the Claimant was a potential victim of trafficking; and (ii) to recognize that the Claimant's case required further investigation (including referrals to the NRM and/or police), and was therefore unsuitable for quick determination in the DFT; and (iii) to ensure that each Claimant had been informed fully of the NRM process and/or to document adequately how the Claimant had been so informed [2];
    iii. As at 2 July 2015, the DFT "was operated without full compliance with section 149 of the Equality Act 2010, to the extent that certain vulnerable groups were at unacceptable risk of unfairness" which included potential victims of human trafficking [4].

[24] By definition, a potential victim of trafficking was one who required referral to the National Referral Mechanism: see, for example, the SSHD's *Victims of Modern Slavery - Frontline Staff Guidance*, then in force. This was the context in which the SSHD agreed to the inclusion of this term in the Order.

44. In the Statement of Reasons appended to the Consent Order in *IK, Y & PU* Order the SSHD accepted that the failures in [2] of the Order had been in breach of Article 4 ECHR [38]. It was accepted that each claimant had "*disclosed the existence of indicators of trafficking/or other claims of torture, ill treatment or other vulnerability which required further investigation*" such that their cases could not fairly have been determined in the DFT [39]. The SSHD agreed that she would *"urgently review all the evidence about unfairness in the DFT and would address any shortcomings identified and that the review would"* comply with the section 149, Equality Act 2010 duty and she would publish *"in accordance with her own Equality and Diversity policy, how she has done so"* [35].

45. As far as we are aware the same fundamental failures in screening and the purported safeguards continue, have not been remedied. In our view and in light of the history and litigation explained above this is incorrect and these accelerated procedures will be operated in breach of Articles 3, 5 and 14 ECHR as far as women subject to it are concerned.

Accommodation centres (Clause 12)

46. Clause 12 proposes to introduce asylum accommodation centres, which are also particularly concerning given the impacts on vulnerable women. As the UNHCR Guidelines on the Protection of Refugee Women recognise, in addition to sharing the protection problems experienced by all asylum seekers, asylum-seeking women and girls have "*special protection needs that reflect their gender: they need, for example, protection against manipulation, sexual and physical abuse and exploitation, and protection against sexual discrimination in the delivery of goods and services."*[25]

47. Recognising the special protection needs of asylum-seeking women extends to ensuring gender-appropriate accommodation. Article 60, paragraph 3 of the Istanbul Convention provides that "*Parties shall take the necessary legislative or other measures to develop gender-sensitive reception procedures and support services for asylum seekers as well as gender guidelines and gender-sensitive asylum procedures, including refugee status and determination and application for international protection"* (emphasis added).[26]

[25] United Nations High Commissioner for Refugees, Guidelines on the Protection of Refugee Women, published on July 1991, accessible at <https://www.unhcr.org/publications/legal/3d4f915e4/guidelines-protection-refugee-women.html>

[26] The Council of Europe Convention on preventing and combating violence against women and domestic violence, known as the "Istanbul Convention", is accessible at < https://rm.coe.int/168008482e>

48. The New Plan for Immigration outlined the Government's proposals to establish reception centres that will provide 'basic accommodation' for asylum seekers and allow for the processing of asylum claims 'fairly and quickly onsite',[27] The Refugee Council estimates that between 5,900 and 14,200 people would potentially be accommodated in these centres each year.[28] Given that approximately 20% of applicants for asylum in 2020 were female,[29] the intended changes are likely to affect a substantial number of asylum-seeking women.

49. Notably, it appears that the Government intends for reception centres to serve as accommodation until the resolution of an asylum seeker's claim. Under Section 25 of the Nationality, Immigration and Asylum Act of 2002, the Secretary of State can accommodate a person in a reception centre for no more than 6 months.[30] This is to be amended to remove any time limit on their length of stay. In the light of extensive delays in the asylum decision-making process, an asylum seeker could be expected to remain in a reception centre for several months or even years.

50. In September 2020, the Home Office began trialling the use of former military barracks in Napier and Penally to house asylum-seeking men. Following an inspection in February 2021, the Independent Chief Inspector of Borders ("ICIB") published key findings that raised a number of serious concerns about the two sites.[31] Further, in a judgment issued by the High Court, Napier barracks were found not to meet the minimum legal standards for asylum accommodation.[32] The experience serves to illustrate the problems that large-scale, institutional accommodation can give rise to.

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[27] Home Office, New Plan for Immigration: policy statement, accessible at <https://www.gov.uk/government/consultations/new-plan-for-immigration/new-plan-for-immigration-policy-statement-accessible>

[28] Refugee Council, Briefing on The Impact of The New Plan for Immigration Proposals on Asylum, June 2021, accessible at < https://media.refugeecouncil.org.uk/wp-content/uploads/2021/05/27161120/New-Plan-for-Immigration-Impact-Analysis-June-2021.pdf>

[29] Refugee Council, Country Report on the UK: Statistics, accessible at <https://asylumineurope.org/reports/country/united-kingdom/statistics/>

[30] Section 25(2)(b) of the 2002 Act provides that in certain instances, a person's length of stay in a reception centre can be extended to nine months "if the Secretary of State thinks it appropriate in relation to a person because of the circumstances of his case"

[31] Independent Chief Inspector of Borders and Immigration, An inspection of the use of contingency asylum accommodation – key findings from site visits to Penally Camp and Napier Barracks, published on 08 March 2021, accessible at <https://www.gov.uk/government/news/an-inspection-of-the-use-of-contingency-asylum-accommodation-key-findings-from-site-visits-to-penally-camp-and-napier-barracks >

[32] R (NB & Others) v Secretary of State for the Home Department [2021] EWHC 1489 (Admin), accessible at https://www.judiciary.uk/wp-content/uploads/2021/06/Napier-Barracks-judgment.pdf

51. Impact on mental health. The ICIB found that residents of Napier Barracks and Penally Camp had *"little to do to fill their time, a lack of privacy, a lack of control over their day-to-day lives, and limited information about what would happen to them"*. These factors *"had had a corrosive effect on residents' moral and mental health"*. Women accommodated in reception centres, which are intended to be 'basic' and would inevitably have an institutional structure, would be at risk of experiencing similarly adverse effects on their mental health.

52. Isolation. Previous sites identified for the development of reception centres have been far from urban centres and amenities.[33] Asylum-seeking women living in an isolated location would find it more difficult to access groups in the community that could otherwise offer them an essential network of support. Their eventual integration into UK society would likely also be impeded.

53. Reduced access to specialist medical and other support services. Many asylum-seeking women require specialist support services to assist them in recovering from their experiences of torture, gender-based violence and/or trafficking. This might include one-to-one sessions with a psychologist or an anti-trafficking support worker. Specialised support services of this kind are likely to be less accessible to women accommodated in reception centres as compared to women living in the community.

54. Reduced access to legal advice. Asylum seekers residing in the community can approach law firms in their local area, whereas detention centres operate legal advice clinics. There is a risk that asylum seekers living in reception centres would find it more difficult to access legal assistance, particularly if reception centres are established in isolated areas.

55. Lack of privacy. Accommodation in reception centres is likely to afford women considerably less privacy than accommodation in the community. There is also a risk that the presence of male staff members in reception centres would expose female residents to violations of their dignity. In the context of immigration detention at Yarl's Wood, a report by Women for

[33] For example, over the course of 2020-2021, the Home Office considered 'pre-fab style "contingency accommodation" on government-owned sites next to Yarl's Wood IRC and on MOD-owned land at Barton Stacey in Hampshire", according to the House of Commons Library Briefing Paper on the Nationality and Borders Bill, published on 15 July 2021 and accessible at < https://researchbriefings.files.parliament.uk/documents/CBP-9275/CBP-9275.pdf >

Refugee Women found that 85% of those interviewed said that male guards had seen them in intimate situations.[34]

56. Harassment. The use of large-scale accommodation is likely to attract attention from individuals and groups hostile to asylum seekers. A House of Commons Briefing Paper, published on 24 November 2020, documented *"anti-asylum demonstrations"* at both Napier and Penally, as well as *"incidents of harassment of people seeking asylum"*.[35] On account of their gender, asylum-seeking women are particularly vulnerable in circumstances where their safety is threatened.

57. In summary, the Government's proposals to accommodate cohorts of asylum seekers in reception centres, rather than in regular housing in the community, give rise to a number of risks concerning the welfare and special protection needs of asylum-seeking women in particular.

Part 5: Modern Slavery

58. Part 5 of the Bill makes provision for modern slavery and trafficking cases. These are currently contained in Clauses 57-68 of the Bill. We have real concerns that these changes will make it harder for women and girls, who are victims of trafficking and modern slavery, to be positively identified and protected, contrary to the UK's obligations under both Article 4 of the ECHR and the Council of Europe Convention on Action against Trafficking in Persons ('ECAT').

Victim identification: provision of information and damage to credibility (Clauses 57-58)

59. Clauses 57-58 give the SSHD a new power to serve a 'slavery or trafficking information notice', to be issued only to potential victims of trafficking who have made a protection or human rights claim. This new notice requires the recipient to provide the SSHD with 'any relevant status information' relevant to the making of a Reasonable or Conclusive Grounds decision. Clause 58(2) of the Bill directs that the Competent Authority ***must*** find that

[34] Women for Refugee Women, 'I Am Human': Refugee Women's Experiences of Detention in the UK, published in January 2015, accessible at <https://www.refugeewomen.co.uk/wp-content/uploads/2019/01/women-for-refugee-women-reports-i-am-human.pdf>

[35] House of Commons Library, Briefing Paper on Asylum Accommodation: the use of hotels and military barracks, published on 24 November 2020, accessible at <https://researchbriefings.files.parliament.uk/documents/CBP-8990/CBP-8990.pdf>

the person's credibility is damaged if information is provided late, unless good reasons are provided. It is evident throughout the Bill that a policy aim of the Government is to penalise trafficking victims (and indeed, asylum seekers as set out above) for late disclosure of their claims.

60. However, this again fails to have regard to the recognised reality that victims of trafficking experience often face multiple barriers to disclosing their experiences and there are many reasons why they may initially give an inconsistent or incomplete account. These barriers are well-recognised and the Court of Appeal has recently given guidance on the need for anxious scrutiny and a high level of careful reasoning to be applied in assessing victims' credibility: *MN and IXU v SSHD* [2020] EWCA Civ 1746 at §253:

> *"Full weight must be given to the evidence (and guidance) about the difficulties* ***that victims of trafficking have in telling their stories, not only because of the effects of trauma but because their experiences often engender distrust of authority and sometimes entangle them in deceptions of various kinds from which it is difficult to escape.*** *It is also necessary to heed the caution expressed in the authorities about judging accounts to be implausible* ***without complete knowledge of the relevant circumstances, and making full allowance for how people can behave in circumstances of stress. Full weight must be given to the evidence (and guidance) about the difficulties that victims of trafficking have in telling their stories, not only because of the effects of trauma but because their experiences often engender distrust of authority and sometimes entangle them in deceptions of various kinds from which it is difficult to escape****. It is also necessary to heed the caution expressed in the authorities about judging accounts to be implausible* ***without complete knowledge of the relevant circumstances and making full allowance for how people can behave in circumstances of stress****."* [emphasis added]

61. UNHCR's International Protection Guidelines on Victims of Trafficking[36] recognise that trafficking victims may also qualify as refugees, depending on their individual circumstances. These claims are usually complex and

[36] United Nations High Commissioner for Refugees, Guidelines on International Protection, The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked , published on April 2006, accessible at <https://www.unhcr.org/uk/publications/legal/443b626b2/guidelines-international-protection-7-application-article-1a2-1951-convention.html>

require full examination on their merits in regular procedures.[37] UNHCR also recognises that it is *"necessary to ensure that victims of trafficking have access to fair and efficient asylum procedures as appropriate, and to proper legal counselling, if they are able to be able lodge an asylum claim effectively."*[38]

62. UNHCR recognises that gender and the particular impact of sexual and gender-based violence must be acknowledged and taken into account throughout the process of identification and examination:

> *"46. In the reception of applicants who claim to have been victims of trafficking, and in interviewing such individuals,* ***it is of utmost importance that a supportive environment be provided so that they can be reassured of the confidentiality of their claim. Providing interviewers of the same sex as the applicant can be particularly important in this respect. Interviewers should also take into consideration that victims who have escaped from their traffickers could be in fear of revealing the real extent of the persecution they have suffered. Some may be traumatized and in need of expert medical and/or psycho-social assistance, as well as expert counselling****.*
>
> *47. Such assistance should be provided to victims* ***in an age and gender sensitive manner. Many instances of trafficking, in particular trafficking for the purposes of exploitation of the prostitution of others or other forms of sexual exploitation, are likely to have a disproportionately severe effect on women and children****. Such individuals may rightly be considered as victims of gender-related persecution. They will have been subjected in many, if not most, cases to severe breaches of their basic human rights, including inhuman or degrading treatment, and in some instances, torture.*
>
> *48.* ***Women, in particular, may feel ashamed of what has happened to them or may suffer from trauma caused by sexual abuse and violence, as well as by the circumstances surrounding their escape from their traffickers. In such situations, the fear of their traffickers will be very real. Additionally, they may fear rejection and/or reprisals by their family and/or community which should be taken into account when considering their claims****. Against this background and in order to ensure that claims by female victims of trafficking are properly considered in the refugee status determination process, a number of measures should be borne in mind. These have been set out in Part III of UNHCR's Guidelines on International*

[37] Ibid at §45.
[38] Ibid at §45.

Protection on gender-related persecution and are equally applicable in the context of trafficking-related claims."

63. These barriers are also recognised in the existing Modern Slavery Statutory Guidance[39] issued by the SSHD pursuant to section 49 of the Modern Slavery Act 2015, which expressly deals with in detail at 'Annex D: Working with Vulnerable People':

    - *"Victims' early accounts may be affected by the impact of trauma. This can result in delayed disclosure, difficulty recalling facts, or symptoms of post-traumatic stress disorder. Victims may also be reluctant to self-identify for a number of other reasons that can make understanding their experiences challenging."* [para 13.1];
    - *"It is not uncommon for traffickers and exploiters to provide stories for victims to tell if approached by the authorities. Errors, omissions and inconsistencies may be because their initial stories are composed by others and they are acting under instruction. They can also arise due to the impact of trauma, which can, for example, lead to delayed disclosure or difficulty recalling facts."* [para 13.16];
    - *"Research demonstrates that normal, autobiographical memory for everyday things such as dates or non-traumatic events is fallible and becomes less reliable with time."* [para 13.19]
    - *"Memories for traumatic events are not easily narrated on demand and victims might not be able to recall concrete dates and facts. Their initial account might contain inconsistencies, discrepancies or contradict their later statement."* [para 13.21].

64. The Government's proposal to serve potential victims of trafficking who raise asylum or human rights claims, with a time-limited notice in which to disclose all relevant information is contrary to the acknowledgement in case law, guidance and policy, that such protection claims are necessarily complex and will often require extensive, careful preparation. The use of any sort of truncated time frame or accelerated procedure does not adequately ensure that the vulnerabilities and barriers to disclosure, particularly for women and girl victims of trafficking, are fairly accounted for.

[39] Modern Slavery Statutory Guidance (v 2.3, June 2021) available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/993172/Modern_Slavery_Statutory_Guidance__EW__Non-Statutory_Guidance__SNI__v2.3.pdf>

Identification of potential victims (Clause 59)

65. Clause 59 amends the Modern Slavery Act 2015, so that the test for a Reasonable Grounds decision from a person 'may' be a victim, to reasonable grounds that a person 'is a victim'. In the New Plan for Immigration, the SSHD outlined concerns that NRM referrals were being used to frustrate removal. However, gatekeeping access to the NRM on the basis of unspecified 'credibility concerns' at the referral stage is likely to result in genuine victims of trafficking not being identified. Victims of trafficking experience often face multiple barriers to disclosing their experiences and there are many reasons why they may initially give an inconsistent or incomplete account. As noted above in detail, the Court has already acknowledged the difficulties many victims of trafficking face in disclosing their account: *MN v SSHD* [2020] EWCA Civ 1746 applied. A referral into the NRM is required in order to properly investigate a potential victim's claim and explore the reasons behind issues such as the timing of their disclosure or any discrepancies in their account of events.

66. At present, there is no minimum threshold for referral into the National Referral Mechanism and a referral should be made where there is 'any suspicion or claim': *Secretary of State for the Home Department v Hoang (Anh Minh)* [2016] EWCA Civ 565, [2017] INLR 267 Burnett LJ at §36. Moreover, the Government's Article 4 ECHR procedural duty is engaged when there is a 'credible suspicion' that a person is a victim of trafficking: *Rantsev v. Cyprus and Russia*, Application no. 25965/04, 10 October 2010, §286. Any attempt to make it harder for potential victims to be referred into the NRM would be incompatible with these principles and potentially in breach of the Home Office's domestic and international law obligations. Equally, any attempt to raise the threshold for a positive Reasonable Grounds decision must be in line with the two-stage process under ECAT and the low threshold for a 'real risk' envisaged by the ECHR.

67. Any elevation of the threshold for referral into the NRM is likely to have a disproportionate impact on women and girls, since many women and girls are held in positions of exploitation until they are encountered by the Home Office, Police or other First Responders e.g. women held in brothels for the purposes of sexual exploitation, or women held in positions of domestic servitude, are simply not going to be in a position to break free from their traffickers so as to make a prompt, timely claim.

68. For many of these victims, the first time they may have the opportunity or even be made aware that they are being exploited is in the face of removal. The burden to positively identify a potential victim is on the State authorities, as recently restated by the European Court of Human Rights in *VCL and AN v the United Kingdom* (App Nos.77587/12 and 74603/12 at §199:

> *"In the cases at hand it is not necessary to determine whether the aforementioned shortcomings of the applicants' legal representatives reached this high threshold. In the context of Article 4 of the Convention,* ***it is the State which is under a positive obligation both to protect victims of trafficking and to investigate situations of potential trafficking and that positive obligation is triggered by the existence of circumstances giving rise to a credible suspicion that an individual has been trafficked and not by a complaint made by or on behalf of the potential victim (see paragraphs 152 and 155 above). The State cannot, therefore, rely on any failings by a legal representative or indeed by the failure of a defendant – especially a minor defendant – to tell the police or his legal representative that he was a victim of trafficking.*** *As the 2009 CPS guidance itself states, child victims of trafficking are a particularly vulnerable group who may not be aware that they have been trafficked, or who may be too afraid to disclose this information to the authorities (see paragraph 73 above).* ***Consequently, they cannot be required to self-identify or be penalised for failing to do so."*** [emphasis added]

Disqualification from protection (Clauses 62-63)

69. Article 13 of ECAT includes an exception to the requirement to provide a potential victim of trafficking with a minimum 30-day recovery and reflection period on 'public order' grounds. However, the Bill proposes to withhold identification as a victim of trafficking on the grounds of public order. As a matter of principle, there is nothing in ECAT that permits the state to withhold an identification decision from a putative victim of trafficking. Further, Article 4 ECHR is a non-derogable obligation: the state is under a positive obligation to identify potential and actual victims of trafficking. There is no qualification permissible under either ECAT or the ECHR. To introduce such a restriction would be contrary to the UK's obligations under international law.

70. Further, as a matter of practice, the Bill appears to conflate two separate issues: the *identification* of putative victims, and the *consequences* of that identification. It is not the case that a victim with a positive Conclusive Grounds decision will automatically or inevitably be granted Discretionary

Leave to remain in the UK or have an absolute right to not be prosecuted for serious criminal offences. Leave to remain is governed by policy guidance issued by the SSHD. The question of liability for criminal conduct is already governed by the Modern Slavery Act 2015, via the statutory defence at s 45. Parliament has already legislated that very serious crimes are excluded from that statutory defence: see the Schedule 4 excluded offences, including terrorism, murder, firearms offences etc. The analysis presented in the New Immigration Plan does not justify either a legal or practical case for withholding an identification decision from a potential victim or actual victim of trafficking where they have committed a criminal offence.

71. There is a particular concern about those who are exploited into forced criminality. The complexity of such cases mean that those exploited in forced criminality may not be identified as victims of trafficking until after they have served a criminal sentence, or at all. See for example, as recently as 16 February 2021, the European Court of Human Rights ('ECtHR') concluded that the UK Government had violated the Article 4 and Article 6(1) rights of two Vietnamese child victims of trafficking, who had been trafficked into cannabis cultivation and then prosecuted and sentenced to imprisonment: *VCL and AN v the United Kingdom* (App Nos.77587/12 and 74603/12). We are seriously concerned that these proposals envisage a watering down of protection for victims of trafficking, especially those who are forced to engage in criminal activities.

The Equality Impact Assessment

72. Following the Bill's second stage reading, the Government published an Equality Impact Assessment on 16 September 2021.[40]

73. The document is described by the Government as 'overarching', for both the Government's New Plan for Immigration, and the Bill itself. The consultation period on the New Plan was open for a period of six weeks, 24 March to 6 May 2021. No EIA had been produced during the consultation. This EIA is said to be a 'live document', that includes consideration of the consultation responses. However, we advise that the EIA is inadequate; discloses real risks in terms of equalities, and moreover, demonstrates that

[40] Available online at < https://www.gov.uk/government/publications/the-nationality-and-borders-bill-equality-impact-assessment>

the Government's policy justification for these significant changes to asylum and immigration law are not borne out by their own evidence base.

74. The EIA acknowledges that the Government policies that would be implemented by the Bill *do* carry a risk of indirect discrimination – see §18 of the EIA:

> *"There is a risk that our policies* ***could indirectly disadvantage protected groups.*** *However, our analysis is that with appropriate mitigation and justification, such impacts would not amount to unlawful indirect discrimination within the meaning of the 2010 Act."* [emphasis added]

75. We are not convinced at all by the Government's analysis that there is adequate justification or appropriate mitigation. For example, the Government acknowledge at §19(a) that among the groups likely adversely affected by their policies are:

> ***"Illegal entrants and arrivals from safe third countries****. Evidence indicates that 74% of those arriving in the UK by small boat 2020 were aged between 18-39 and 87% of all arrivals were male.* ***The top five nationalities arriving by small boat – both male and female – are people from Iran, Iraq, Sudan, Syria and Afghanistan.*** *Evidence suggests the measures to strengthen border controls and the differentiated approach to asylum claims are more likely to disadvantage this group, although the measures do not seek to actively target any specific group of persons protected under equalities legislation.* ***However, our analysis is that such disadvantages would be justified and proportionate, in order to support the overarching policy objectives of the Plan, in particular to deter illegal entry into the UK. There would therefore not be any unlawful discrimination."*** [emphasis added]

76. The top five nationalities arriving by small boat are nationalities that are likely to require full examination of their claims for international protection, because there is real plausible basis for risk, not limited to but including, for women and girls:

1. **Iran**: Iran is recognised by the Home Office in its current policy guidance as being an origin country for women refugees fearing honour-based violence[41]; fear of early and forced marriage[42]; accusations of adultery[43]; as

[41] Home Office, Country Policy and Information Note, "Iran: Women fearing 'honour-based' violence," (version 2.0, March 2021)

well as LGBT women.[44] In addition, there are other grounds for international protection that may arise in Iranian cases that apply regardless of gender, such as political opinion or religious grounds. The Home Office policy on Iranian honour crimes specifically acknowledges at §2.5.2 *"although women are protected by law, in practice this is not systemically enforced because of deep-rooted patriarchal, social and cultural barriers and prejudices. Women are regarded both legally and through patriarchal social systems as inferior to and of less worth than men."*

2. **Iraq:** The security and humanitarian situation in Iraq has produced varied and sometimes, complex profiles for international protection, including on political, religious and ethnic grounds. In addition, the Home Office recognises that women and girls may be in need of protection due to 'honour' crimes;[45] FGM,[46] and use in blood feuds as compensation for injury or death.[47] Home Office policy acknowledges at §2.4.1 that *"Iraq, including the Iraqi Kurdistan Region (IKR), is a patriarchal society with clearly defined gender roles. Women have a lower status in the family and are expected to be subservient to men with restricted interaction in public spaces. These attitudes are particularly prevalent within uneducated, rural and tribal populations."*

3. **Sudan**: All non-Arab Darfuris from Sudan are at risk in Sudan, and entitled to asylum as a result of the 2009 country guidance case, *AA (Non-Arab Darfuris – relocation) Sudan CG* [2009] UKAIT 00056, in which the Upper Tribunal found that: *"All non-Arab Darfuris are at risk of persecution*

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/973443/Iran-Women_fearing_honour_crimes-CPIN.v2.0_March_2021_.pdf> accessed on 22 November 2021.

[42] Home Office, Country Policy and Information Note, "Iran: Women – Early and forced marriage," (version 3.0, February 2021)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/965290/Iran-Women-Early_and_forced_marriage-CPIN.v3.0_February_2021_.pdf> accessed on 22 November 2021.

[43] Home Office, Country Policy and Information Note, "Iran: Adulterers," (version 3.0, October 2021)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836919/Iran_-_Adulterers_-_CPIN_-_v3.0__October_2019__-_EXT.pdf> accessed 22 November 2021.

[44] Home Office, Country Policy and Information Note, "Iran: Sexual orientation and gender identity or expression," (version 3.0, June 2019)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/810845/CPIN_-_Iran_-_SOGI_-_v3.0__June_2019__EXT.PDF> accessed 22 November 2021.

[45] Home Office, Country Policy and Information Note, "Iraq: 'Honour' crimes," (version 2.0, March 2021)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975221/Iraq_-_Honour_Crimes_-_CPIN_-_v2.0_-_March_2021_-_EXT.pdf> accessed 22 November 2021.

[46] Home Office, Country Policy and Information Note, "Iraq: Female Genital Mutilation," (version 2.0, February 2020)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/866087/Iraq_-__FGM_-_CPIN_-_v2.0_-_February_2020_-_EXT.pdf> accessed 22 November 2021.

[47] Home Office, Country Policy and Information Note, "Iraq: Blood Feuds," (version 2.0, February 2020)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/865876/Iraq_-_Blood_Feuds_-_CPIN_v2.0_-_Feb_2020_-_EXT__004_.pdf> accessed 22 November 2021.

in Darfur and cannot reasonably be expected to relocate elsewhere in Sudan." In the updating 2015 country guidance case, *MM (Darfuris) Sudan CG* [2015] UKUT 10 (IAC), the Upper Tribunal again recognised that non-Arab Darfuris continue to be at risk of persecution in Sudan. Further, at §13-§14 of the decision, the Tribunal held that 'Darfuri' is to be understood as an ethnic term relating to origins, not as a geographical term. Accordingly, it covers even Darfuris who were not born in Darfur. Thus, persons who are ethnic non-Arab Darfuri in origin, regardless of whether they have lived in Darfur or elsewhere in Sudan, would be at risk on return to Khartoum. The Tribunal in *MM* also found that there was, at the time of the hearing, no new, cogent evidence indicating that non-Arab Darfuris were not at risk of persecution in Sudan. The Home Office recognises in its published policy, recognises that non-Arab Darfuris are at risk**,** and that the state will not protect them, and that the general security situation remains unstable and the humanitarian and human rights situation is poor. Women are acknowledged as being at particular risk from sexual violence.[48]

4. **Syria:** The present situation in Syria is described by the Foreign, Commonwealth and Development Office as "*volatile and dangerous owing to a decade of ongoing conflict and insecurity.*"[49] Syria produced 6.8 million refugees that fell within the scope of UNHCR's mandate, as of mid-2021,[50] the highest state producer of refugees and displaced people per UNHCR's statistics. The Upper Tribunal recognised in a country guidance case, *KB (Failed asylum seekers and forced returnees) Syria CG* [2012] UKUT 426 (IAC), that *"in the context of the extremely high level of human rights abuses currently occurring in Syria, a regime which appears increasingly concerned to crush any sign of resistance, it is likely that a failed asylum seeker or forced returnee would, in general, on arrival face a real risk of arrest and detention and of serious mistreatment during that detention as a result of imputed political opinion. That is sufficient to qualify for refugee protection."* In practice, this is recognition that all Syrians are likely to require asylum. This case remains applicable to Syrian claims, as acknowledged in the Home Office's own present policy guidance[51] at §2.4.4.

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[48] Home Office, Country Policy and Information Note, "Sudan: Non-Arab Darfuris," (version 5.0, October 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1028042/SDN_CPIN_Non-Arab_Darfuris.pdf> accessed 22 November 2021.

[49] FCDO Travel Advice for Syria, available online at < https://www.gov.uk/foreign-travel-advice/syria> accessed 22 November 2021.

[50] UNHCR statistics, available online at <https://www.unhcr.org/refugee-statistics/> accessed 22 November 2021.

[51] Home Office, Country Policy and Information Note, "Syria: the Syrian Civil War," (version 4.0, August 2020) available online at

5. **Afghanistan:** As of mid 2021, Afghans were among the top five nationalities that fell under UNHCR's remit, with 2.6 million refugees.[52] On 15 August 2021, the Taliban seized control of Kabul, resulting in President Ghani fleeing the country, and the collapse of the Afghan National Government. This has resulted in the Home Office withdrawing and reviewing its published policy guidance to case workers on Afghan protection claims. We are aware from both our advisory and court practices, that the Home Office is actively conceding and granting asylum or humanitarian protection to Afghans currently in the UK. UNHCR has issued a non-return advisory, calling on States to bar any returns to Afghanistan.[53] In addition to its obligations in terms of international protection, the UK Government committed to providing leave to remain in the UK under two additional schemes for Afghans who are at risk. This includes the Afghan Relocations and Assistance Policy[54] (open and live), as well as the Afghan Citizens Resettlement Scheme (not yet open).[55] Both of these are additional policy concessions by the Government that acknowledge current circumstances in Afghanistan place a significant number of people at risk. It is well documented that women are particularly affected by the Taliban takeover. This includes but is not limited to Afghan women judges;[56] Afghan women's rights activists;[57] Afghan women athletes;[58] and countless Afghan women and girls prevented from accessing work and education and being confined to their homes due to fear.[59]

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/908419/CPIN_Syria_Civil_War.pdf > accessed 22 November 2021

[52] UNHCR statistics, available online at <https://www.unhcr.org/refugee-statistics/> accessed 22 November 2021.

[53] UNHCR Position on Returns to Afghanistan (August 2021), available online at <https://www.refworld.org/pdfid/611a4c5c4.pdf> accessed 22 November 2021.

[54] Ministry of Defence, ARAP Policy Guidance, available online at <https://www.gov.uk/government/publications/afghan-relocations-and-assistance-policy/afghan-relocations-and-assistance-policy-information-and-guidance> accessed 22 November 2021

[55] UKVI and Home Office, ACRS Policy Guidance, available online at <https://www.gov.uk/guidance/afghan-citizens-resettlement-scheme> accessed 22 November 2021.

[56] BBC, "Female Afghan judges hunted by the murderers they convicted," (28 September 2021) available online at <https://www.bbc.co.uk/news/world-asia-58709353> accessed 22 November 2021.

[57] The Guardian, "Women's rights activists shot dead in northern Afghanistan," (5 November 2021) available online at: <https://www.theguardian.com/world/2021/nov/05/womens-rights-activist-shot-dead-in-northern-afghanistan> accessed 22 November 2021.

[58] The Guardian, "Afghanistan's junior female football team to relocate to the UK,"(11 October 2021) available online at <https://www.theguardian.com/world/2021/oct/11/afghanistans-junior-female-football-team-to-relocate-to-uk> accessed 22 November 2021.

[59] NPR, "How life has change for Afghan women and girls since the Taliban takeover," (18 October 2021) available at: <https://www.npr.org/2021/10/18/1046952381/how-life-has-changed-for-afghan-women-and-girls-since-the-taliban-takeover?t=1637599144038> accessed 22 November 2021.

77. All five of those countries are origins which produce significant numbers of displaced people who genuinely entitled to international protection. None of those top five nationalities are states from which the SSHD would be entitled to deny an asylum seeker a right of appeal against a refusal of asylum via her current powers to certify claims. In addition, there are strong prima facie grounds already recognised in case law and policy showing that these nationalities are likely to need some form of international protection.

78. The policy lacks justification: it is said that the reason for introducing differential treatment of refugees is based on the abuse of the asylum system by late or 'bogus' claimants. However, the Government's own evidence base does not support that conclusion. The top five nationalities arriving by small boat are from States which produce genuine refugee claimants, in significant numbers. There is no rational connection between the policy behind the two-tier system, and the stated objective. In fact, given the nationalities of these asylum claimants, the introduction of a two-tier system is in fact likely to deny equal access to protection for genuine asylum seekers, and is contrary to the UK's obligations under international law.

79. The other group which the Government have identified in the EIA as being potentially disadvantaged by the Bill is breathtakingly wide – essentially, all vulnerable persons – at §19b:

> *"**Vulnerable people. This cohort may include children, disabled people and people who are vulnerable for reasons linked to other protected characteristics – including but not limited to gender reassignment, pregnancy and maternity, sexual orientation and sex. Members of this cohort might find it more difficult than others: to disclose what has happened to them; to participate in proceedings; and to understand the consequences of non-compliance with legal requirements. There may also be trauma-related considerations, in terms of how any vulnerable groups adduce evidence.***
>
> *We will continue to consider ways in which to mitigate adverse impacts on vulnerable people. For example, we will mitigate the risk of adverse impacts on unaccompanied asylum-seeking children by exempting them from the inadmissibility process. We will provide guidance to operational teams on interviewing and supporting vulnerable people and when determining the type*

of accommodation that would be appropriate for their needs. We will also provide increased access to legal aid.

Beyond these and other measures, it will be important to monitor and evaluate implementation. With adequate mitigation, we anticipate that many potentially adverse impacts will be removed, and that any remaining would be justified and proportionate, as they support the overarching legitimate policy objectives of the Plan, in particular, to increase the fairness and efficiency of our system so that we can better protect and support those in need of asylum through safe and legal routes and to deter illegal entry into the UK*. This would ensure that there is no unlawful indirect discrimination.*" [emphasis added]

80. The analysis presented here is superficial and inadequate. It does not grapple with fundamental discriminatory impacts of the Bill, which we have advised on extensively e.g. the impact of the late disclosure provisions on victims of sexual and gender-based violence, trafficking and trauma. No actual policy provisions have been put forward to address these issues, save for reference to evaluating actual implementation, and an assertion that legal aid access will be increased without any tangible or costed proposals.

81. The EIA therefore recognises that entire cohorts of vulnerable people – including women and girls – may well be disadvantaged by the Bill, yet fails to adequately engage with those concerns, and does not adequately justify why vulnerable persons should be disadvantaged by regressive systemic changes to the immigration system.

82. Nothing in the EIA provides us with any confidence that the Government has adequately turned its mind to the real and inherently discriminatory risks posed by this Bill.

Conclusion

83. It is, therefore, clear that the Bill will have multiple adverse impacts and create additional obstacles to women and girls seeking international protection in the UK. These measures individually and cumulatively increase the risk of claims being wrongly rejected and the UK acting in breach of the Refugee and/or Human Rights Convention. In so far as these measures can be demonstrated to disproportionately adversely disadvantage women and girls they are incompatible with Articles 3 and/or

5 and/or 8 read with Article 14 ECHR and are open to legal challenge on this basis.

84. It is our view, that the clauses highlighted above need to be removed wholesale from the Bill. The Government needs to abandon the plan to create a discriminatory regime for asylum seekers and refugees which will have a disproportionate impact on women. Its equality impact assessment is wholly inadequate and does not meet the requirements of the law. The proposals as they currently stand are contrary to the United Kingdom's obligations under international law and cannot be remedied by amendments. It will not achieve the purported aims of reducing litigation or saving public money; on the contrary, it is only likely to lead to substantial protracted litigation, delay and uncertainty for years to come.

23 November 2021

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