Stopping the Small Boats: a "Plan B"

Policy Exchange

A Policy Exchange proposal for addressing the crisis

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About the Report

This report was prepared by a team of Policy Exchange researchers and consultants, drawing on the expertise of colleagues in maritime law and practice, international law, constitutional law, immigration and asylum law, human rights law, border enforcement and foreign affairs. The team included Richard Ekins (Head of Policy Exchange's Judicial Power Project and Professor of Law and Constitutional Government, University of Oxford), John Finnis (Professor Emeritus in the University of Oxford), Christopher Forsyth (Professor Emeritus in the University of Cambridge), Dean Godson (Director of Policy Exchange), David Goodhart (Head of Demography, Immigration & Integration at Policy Exchange), Stephen Laws (former First Parliamentary Counsel and member of the Independent Human Rights Act Review), Simon Murray (barrister), Tony Smith (former Head of UK Border Force).

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Executive Summary

Small-boat crossings to UK shores from safe countries like France need to be brought back to their pre-2017 level: negligible. Under current policy and practice, people arriving in small boats know that getting to the UK and claiming asylum or international human rights protection secures them access – at least short-term, and very often effectively permanent – to UK accommodation and services, regardless of the merits of their claim.

This Policy Exchange paper focuses on the legal framework for appropriate policy responses. But it also outlines and explores two broad policy responses, their legality, and some major aspects of their practicality. Either policy would provide the platform for an enhanced programme of resettling genuine refugees. Other practical aspects of the suggested policies are left to further exploration, whether in Government or by another Policy Exchange report.

In the interests of France and Britain alike, far the most appropriate way of reducing small-boat crossings to a negligible number is what we call **Plan A**: an agreement under which authorised British vessels can intercept the boats at sea outside French waters (or even at disembarkation on the British coast) and escort them (or carry their passengers) back to a port in France. Similarly in relation to Belgium and the other Channel/North Sea coastal states from which such boats embark. An even better version of Plan A would include agreement for joint UK/EU patrols across the English Channel, with the mission of immediately returning those in such boats to France, Belgium or the other EU state from which they embarked.

Absent such agreement(s), a **Plan B** should be put into effect. Though more cumbersome and expensive, this could be at least as effective in preventing and disincentivising unauthorised maritime arrivals, and would like Plan A be fully compliant with the UK's international obligations – specifically in relation to refugees (and other persons with a right to international protection from being sent to an unsafe state), and to the law of the sea, including safety and rescue of seagoers.

Both Plan A and Plan B would carry out a fresh, well publicised policy addressed to everyone without a right of abode in the UK. It would say: No one, even a genuine refugee, who chooses to arrive or attempt to arrive unlawfully in the UK by small boat from a safe country like France will ever be granted a right to settle in the UK.

Under Plan A, every such person would be deported by immediate return to France (or the other Channel/North Sea coastal state from which they embarked), and could claim refugee status and seek asylum in that country instead.

Under Plan B they would (Stage One) be deported from UK territorial waters or, if they had reached shore, from the UK, and in either case be removed (after a <48 hour screening for fitness-to-fly, etc.) to a British territory overseas, for (Stage Two) the examination of their claims to refugee status (or international protection) and their requests for asylum. (The basic preliminary Stage One screening might be done onshore.) Though the Stage Two processing would be "offshore" – *outside the UK* – it would *not be "outsourced"*: it would be done by UK officials on UK responsibility. Anyone ascertained to be a genuine refugee (or to have a right to international protection) will be taken (Stage Three) from there – as the final stage of their deportation – to a third state which has agreed with the UK to accept refugees deported from UK waters (or the UK) under Plan B, and is *a state in which the refugee* – whether located at a UNHCR site there, or not – *will be safe within the meaning of international refugee law*. Thereafter, save in the most exceptional cases, refugees thus resettled will be automatically refused leave to enter the UK for any purpose.

Those persons assessed in Stage Two not to be genuine refugees will be repatriated, or be deported from the Stage Two territory to a safe third state where they may be admissible, with a similar penalty bar on any future leave to enter the UK.

Everyone taken to a British territory overseas as Stage Two of their deportation under Plan B will at all times be free to return either to their country of origin, or to any other country ready to admit them, and the costs of such return journey will normally be subsidised.

It is to be expected that the robust and consistent operation of Plan B will rapidly reduce to a negligible level the numbers of persons to whom it needs to be applied – or at least reduce the numbers to a level acceptable indefinitely to each participating British territory and third state. Consistently robust operation will not be possible unless its essential elements are not merely authorised by statute in a general way but are also specifically mandated by Parliament, that is, are defined statutory obligations of ministers, obligations that also specifically protect ministers and officials from liability for anything *bona fide* done by them in operating Plan B. Without such explicit and specific mandate giving impregnable legal validity to the whole policy, and legislatively accepting substantive political responsibility for it, there will be unacceptably high risk that the Plan – and its benefits in saving lives and maintaining a fair refugee and immigration policy – would be frustrated both by public service union opposition and non-cooperation and certainly by litigation of many kinds.

To prevent the frustration of either Plan by litigation, it is imperative that all the remedies provided by the Human Rights Act be disapplied to all elements of the

operation of these Plans. This is a practical necessity to avoid years of delay. So there is no inconsistency between disapplying the HRA and declaring the Plans to be in fact and in law fully compliant with the Convention rights as defined by the HRA. The Ministerial statement that (per HRA s. 19) must accompany the Bill can rightly – and should – declare this full compliance. (The ECHR's remedial provision, art. 13, is *not* a Convention right for purposes of the HRA.)

The "never settle in the UK" policy obviously could not reasonably be announced until either Plan A or Plan B was ready to operate. Getting Plan B ready to operate fairly and effectively needs wide cross-Government cooperation with the Home Office, especially involving the Treasury, the Foreign, Commonwealth and Development Office, the Ministry of Defence, and other ministries relevant to procurement and the like. This paper ends with a sketch of a checklist.

Both Plan A and Plan B are fully consistent with the international obligations of the United Kingdom. Counter-arguments such as those of Parliament's Joint Committee on Human Rights are examined and shown to be baseless (paras. 4, 10-13 and Appendix A.). And just as it is not punitive to put up a high fence to keep out trespassers, there is nothing punitive about either Plan. Both of them should be administered and operated without any harshness. The disincentivising effect that they seek is fully achievable by making small-boat crossings futile and disappointing; any adding of discomforts, either to the removals, or to Plan B's process of examining claims and arranging repatriation or resettlement, would be pointless as well as dishonourable and counter-productive.

Opening UK offices for asylum applications in France or other safe states would deepen rather than relieve the Channel crossing crisis. Such offices would be a very powerful pull-factor, and virtually all disappointed applicants would head for the Channel.

Nonetheless, one of the UK's international obligations under the Refugee Convention is "to co-operate with the Office of the United Nations High Commissioner for Refugees [UNHCR] in the exercise of its functions" (art. 35) and, "recognizing the social and humanitarian nature of the problem of refugees" (preamble), to cooperate with other states in alleviating the plight of refugees. Plans A and/or B can and should be integrated with an enhanced programme of resettling UNHCR-sponsored refugees. The programme's configuration would, to some extent, be reciprocal with the UNHCR's willingness to assist in resolving difficulties that might arise in relation to particular refugees or groups of refugees at Stage Three of Plan B. That willingness would, no doubt, be encouraged by generosity in the contours of the reinvigorated resettlement arrangements. Some such generosity would in any case be appropriate to a relatively stable and prosperous country such as ours.

Introduction

Are there legally feasible options for minimising the migratory flow into the United Kingdom by small-boat crossings to the UK from France (and Belgium and other North Sea littoral countries)? If there are, what primary legislation would be needed to make such options workable? This Policy Exchange report takes into account the Policy Exchange report in May 2020, by John Finnis and Simon Murray, *Immigration, Strasbourg and Judicial Overreach.*[1] It also includes a response to the Ninth and Twelfth Reports of the House of Lords and House of Commons Joint Committee on Human Rights, *Legislative Scrutiny: National[ity] and Borders Bill (Part 3) – Immigration offences and enforcement* and *Legislative Scrutiny: Nationality and Borders Bill (Parts 1, 2 and 4) – Asylum [etc]*.[2]

1. A Distinct Problem: Maritime Arrival by Small Boat

"Maritime arrival by small boat" is a convenient name[3] for a distinct and increasing problem: crossing the Channel or the North Sea by small boat or other unregistered vessel for the purpose –

(a) of making an irregular arrival in the UK in order immediately to make an asylum claim at a regular port of entry; or

(b) (far more common) of making an illegal and unintercepted arrival and landing in the UK by beach, inlet or small port, ready to make an asylum claim if apprehended on or after landing; or

(c) (increasingly more common) of being intercepted and picked up at sea by UK vessels (whether Coastguard, Border Force Coastal Patrol, or Lifeboat) so as to be transported to a place where an asylum claim can be lodged.

Detected irregular maritime arrivals by boat increased from virtually zero prior to 2017 to over 530 persons in 2018, then to about 1,800 persons in 2019, about 8,500 in 2020, and well over 28,000 detected in 2021. In January 2022 there were six times as many as in January 2021. On some fair-weather days in 2021 daily arrivals were in excess of 1,000 per day, putting a huge strain upon the government's capability to safely rescue, receive and accommodate them.[4] Among the various forms of irregular arrival in and/or illegally attempted entry to the UK, irregular maritime arrivals by small boat constitute a distinct type or

1. J. Finnis and S. Murray, *Immigration, Strasbourg and Judicial Overreach* (Policy Exchange, March 2021), foreword by Lord Hoffmann.
2. HC 885, HL Paper 112 published 1 December 2021; HC 1007, HL Paper 143 published 19 January 2022.
3. The European Border and Coastguard Agency's Frontex Risk Analysis for 2021 records:

   > The number of migrants attempting to cross to or succeeding in reaching the UK across the English Channel significantly increased in 2020. Simultaneous departures took place at high speed to increase the likelihood of avoiding interception. According to Europol, the main modus operandi involved the use of small boats (Rigid Inflatable Boats or Rigid Hull Inflatable Boats)...

   The Judgment in the important Court of Appeal Criminal Division decision of 21 December 2021 in four conjoined cases, *Bani* [2021] EWCA Crim 1958, is headed on each page "**Small Boat Appeals**". This Judgment gave some incidental approval (paras. 78, 86) to the Crown Prosecution Service's Guidance to Prosecutors of 8 July 2021 (issued in the wake of the parallel earlier and foundational decision of the Court of Appeal Criminal Division in *Kakaei* [2021] EWCA Crim 503), to the effect that the offence of facilitating unlawful entry to the UK is not committed if "the *sole* intention in putting to sea was to seek rescue...and claim asylum, or to head for a designated port in the UK and seek asylum." This defence (made possible by the 1971 Act's artificial concept of "entry") will no longer be available if the substance of clauses 39 and 40 of the Nationality and Borders Bill 2021 is enacted, making it an offence, for example, to "knowingly arrive in" the UK (or attempt to do so) without required entry clearance, and to facilitate (or attempt to facilitate) either unlawful entry *or arrival* in the UK.
4. For these statistics, see Joint Committee Ninth Report, pp. 10-11; for figures reported since November 2021, see Migration Watch "Channel Tracking Station" (page downloaded 10 February 2022).

category.

One substantial cause of the huge increase has been the efforts of UK authorities and institutions to intercept the boats for the purpose of conducting them safely to shore. Those efforts have the dual purpose of avoiding loss of life at sea and of preventing clandestine entry. Their effect, however, is obviously and predictably to enhance, greatly, the smugglers' and traffickers' incentives and business model, and increase the number of persons attempting the crossing. The likelihood of being intercepted and "rescued" improves the prospects of success of any particular attempt, and in adverse conditions dramatically enhances those prospects. The *overall* further effect of these interceptions is a cumulatively increased risk of loss of life at sea (or near the land at either end of the voyage). Precisely because so many journeys will be made safer by the presence of lifeboats, coastguards, and Border Force vessels, many more journeys will be attempted, some recklessly, and so the overall loss of life will most likely increase, and plainly has in fact increased. The presence of naval vessels and/or military personnel might serve to make such operations even more tactically efficient and strategically counter-productive, unless and until all such operations have a new purpose, a new Plan.[5]

2. The Problem Illustrated

One key facet of the problem is illustrated by the sinking in mid-Channel on 24 November[6] of an inflatable boat with about 30 passengers, of whom only two survived: at least 27 were drowned; 26 have been identified. On 26 December, the bodies of many of those 26 were flown back to Arbil in Iraqi Kurdistan for burial. Reporters from the London *Times* recounted or implied[7] that–

- 18 were men and boys, aged between 16 and 46; the other eight were women and girls;
- 16 were from Iraqi Kurdistan, another was an Iranian Kurd;
- there is no suggestion that any of the Kurds was a refugee,[8] or that Iraqi Kurdistan was unsafe for any of them;
- on the contrary, some or all of the women, and probably all of the males, were seeking employment: "my sister [Kazhal] wanted a better life" and "had spoken to a reporter days before her death about how scared she was to make the Channel crossing"; Kazhal had spoken to her sister in Kurdistan the night before her death – "we told them to take care... because it was so dangerous. They told us that they didn't have a choice, that this was their best chance at a future."

5. Sunder Katwala, "Headline-grabbing solutions on asylum fall flat in the real world", CapX 19 January 2022, argues that plans such as this paper envisages are too expensive, and reassures himself and readers that "It is not impossible for Britain, France, Germany and other EU countries to administer asylum and refugee systems that assess each person's asylum claim on its merits while reducing the number of dangerous crossings." He forgets that each such assessment results either in admission to the desired country, or refusal. Those refused all retain the present option: small-boat Channel crossing in the hope of getting by in the UK until such time as one has accrued a family life claim to stay or has disappeared from the radar. His self-styled "bleeding-heart liberal" solution falls as flat, in the real world, as deploying the Navy to escort the small boats to UK shores.
6. By happenstance this was the date on which the Joint Committee on Human Rights adopted its Report on the Nationality and Borders Bill.
7. *The Times*, 27 December 2021 p. 7 ("Migrant boat victims return home to be buried"); further elements of the same story were published in *The Times* online on the same date:
8. Other passengers were "a Somali, four Afghans and an Egyptian." The reports do not say they were refugees.

- similarly, three of the men were from one district of Kurdistan: in Arbil on 26 December, "relatives said the three had tried to make it to a better life in Europe as they had been unable to find employment in Iraq". About one of these three, a sibling said the 27-year old had graduated in oil engineering, and "many of his colleagues, those with connections, got jobs, except my brother... so he decided to migrate abroad."

Yet 98% of small-boat Channel crossers, when intercepted or ashore, claim asylum. They all had other options – not to make the journey at all (if they were migrating for economic rather than protection reasons, and did not qualify under the new immigration points based system), or to seek the UNHCR's protection in sites adjacent to their country of origin and apply for resettlement that way, or to seek protection in a safe third country en route to the UK.

About 80% of these claims are being rejected, mostly on the technically "non-substantive" basis that they should have been made in one or other of the safe countries through which the claimants passed on their way towards the Channel. (For one reason or another, 20% are not rejected on this ground, even though Channel crossings are virtually all from France or Belgium, each a manifestly safe country with a working system for receiving asylum claims.[9])

But in a great majority of cases, the claims help towards achieving their makers' purpose, for by the time any challenges to the rejections have been disposed of, even if adversely to the claimants, the asylum seekers have had a useful opportunity to acquire sufficient connections within the UK to be able to mount plausible claims that returning them to France or to their home country would violate their ECHR "right to private and family life",[10] if not also a claim that return to a country with poor medical or mental health facilities will so endanger them that return would violate their ECHR "right to life".[11] Furthermore, UK policy to provide access to accommodation, services and support to all asylum seekers (regardless of mode of entry) is significantly more favourable than that which applies in France (where many irregular migrants are unable to find accommodation or access to services and often resort to sleeping rough and reliance upon local charities for basic subsistence).

The "return" flights on 26 December suggest that if those who unfortunately perished in the Channel on 24 November – migrants, not refugees – had known in advance that small boat crossings would be intercepted and the passengers all denied access to the UK and taken to a territory outside the UK, they might well have abandoned the idea of entering the UK unlawfully. Or, if they had

9. The statistics, adopted by the Joint Committee's Ninth Report, p. 6, were supplied to the Home Affairs Committee by Abi Tierney, Director General, UK Visas and Immigration, Home Office on 3 September 2020, Q. 29. Presumably these statistics relate to *asylum seekers* in a sense of that phrase more in accord with common-sense – and the situation of someone not yet within the UK – than the artificially constricted definition of "asylum seeker" in and for the purposes of Immigration Act 1971 s. 25A ("a person who intends to claim that to remove him from or require him to leave the United Kingdom would be contrary to the United Kingdom's obligations under (a) the Refugee Convention... [or (b) the ECHR]"). Asylum-seekers in the common-sense sense claim that they *need to enter* for fear of persecution (under the Refugee Convention) or of torture or inhuman or degrading treatment (under the ECHR). Surprisingly, perhaps, the s. 25A definition of "asylum-seeker" reappears in the present Bill, cl. 13(6).

10. See *Immigration, Strasbourg and Judicial Overreach*, pp. 31-35, 78-87. In these circumstances, the failed asylum seeker becomes again (it appears) an asylum seeker under the definitions in cl. 13(6) of the Bill and s. 25A of the 1971 Act as amended in 2002.

11. See ibid., pp. 68-77. Such a person can again become an asylum seeker by virtue of the same definitions.

attempted it and been met with deportation to such a territory, they might well have been willing to accept the *offer of a real, subsidised direct return from there to their homeland or to any other safe country where they may be admissible*.

They did not leave either Kurdistan or France from any fear of persecution or torture or degrading or inhuman treatment, and – as is confirmed below – their return would be fully respectful of their human rights.

3. The need for a humane but game-changing solution

Although the Joint Committee on Human Rights Ninth Report of 1 December 2021, like its companion Twelfth Report of 19 January 2022, makes a number of erroneous and dubious claims about international and treaty law[12] it does quite reasonably emphasise that mass crossings in small boats involve a real and immediate threat to life.[13] This jeopardizing of human life would, even alone, be reason to seek a new kind of policy for protection of our borders against this particular type of irregular entry, maritime arrival by small boat.

But that reason does not stand alone. For *although the end results of maritime arrivals by small boat, and (in legal respects) their means, do not differ from the legal and humanitarian features and end results of all the other types and modes of irregular entry, small-boat crossings have* **specially objectionable features:**

(i) whether or not they deliberately solicit rescue attempts, they involve

12. See paras. 10–14 and 23 (Appendix A.) below. The Ninth Report also, at paras. 129-131, seems to give credence to erroneous claims by its witnesses, such as the claim by an Australian academic that –

> Australia is known for its very harsh asylum policies, but **we have never considered criminalising irregular entry**. It can be unlawful under immigration law, but criminalisation is an extraordinary step that **is in clear violation of Article 31 of the Refugee Convention.**

In fact, however, Australia criminalised irregular entry for over 90 years, from 1901 to 1992, as was recalled by the Chief Justice of Australia in a very well-known case, *Al Kateb* 2004 HCA 37, para. 86:

> From 1901 to 1994, federal law contained offence provisions respecting unlawful entry and presence in Australia, which was punishable by imprisonment as well as by liability to deportation. The legislation gave rise to various questions of construction which reached this Court. The first of these provisions was made by the *Immigration Restriction Act 1901* (Cth) ("the 1901 Act"). Section 7 thereof stated: "Every prohibited immigrant entering or found within the Commonwealth in contravention or evasion of this Act shall be guilty of an offence against this Act, and shall be liable upon summary conviction to imprisonment for not more than six months, and in addition to or substitution for such imprisonment shall be liable pursuant to any order of the Minister to be deported from the Commonwealth.")

Nor does such criminalising violate art. 31 Refugee Convention, provided it does not penalise the acts of persons who for the purposes of making an asylum claim came "*directly from a territory where their life or freedom was threatened* in the sense of Article 1, [and]...present[ed] themselves without delay to the authorities and show[ed] good cause for their illegal entry..." The Australian academic's highly misleading evidence appears in the Report immediately before evidence by Freedom from Torture and from the UNHCR, evidence which erroneously ignores the fact that small-boat arrivals in the UK are *directly from safe countries*, which renders art. 31 inapplicable (see para. 25 below). Art. 31 would become applicable in practice to the UK in relation to small boat arrivals only if France, Belgium, the Netherlands or Ireland had ceased to be safe countries, and become unsafe – as they were from 1940 to 1944. Attempts to inflate the reach of art. 31 by reference to the general need for cooperation (so that countries contiguous with unsafe countries will not be stuck with large numbers of refugees from the latter) ignore this fact of ebb and flow – good times and bad times – in a country's situation in relation to its near neighbours.

What is true is that two of the 3:2 majority Law Lords in *Asfaw* [2008] UKHL 31 seriously distorted the intent and original public meaning of Art 31(1), by following a "principle" (adumbrated by a Divisional Court in *Ex parte Adimi* [2001] QB 667 esp. at para. 18) that refugees have or should have "some element of choice" of which country to flee to, and so can *with impunity* pass through one or more safe countries before applying for asylum, deceiving the authorities in one country after another as they do so. **The incompatibility of that principle with the intended and actual public meaning of the Convention is convincingly demonstrated** by the dissentients, Lords Rodger and Mance (see especially paras. 147, 149 and 153-155 for the decisive statements of French delegates in the drafting meetings July 1951). The majority's "element of choice [of country]" principle in *Asfaw*, reaffirmed for example in *R v Mateta* [2013] EWCA 1372 esp. at para. 22, is substantially set aside in the Nationality and Borders Bill 2021, particularly in cll. 14 and 15, which will amend the Nationality, Immigration and Asylum Act 2002 so as to *require* (mandate) the Secretary of State to declare inadmissible asylum claims by EU nationals, and especially (cl. 15, prospectively s. 80B of the 2002 Act) *authorise* the Secretary of State to declare inadmissible any asylum claim made by a person who has a connection to a "safe third State", including having been "previously present in, and eligible to make a relevant claim in" the safe third State where "it would have been reasonable to expect them to make such a claim, and they failed to do so." This is a real but incomplete legislative reversal of the plainly erroneous decisions, misinterpreting the Refugee Convention, in *Adimi* and *Asfaw*. It is welcome but should be completed by direct reversal of the holding in those decisions in their application to criminal penalties for deceit and falsification of documents by Convention refugees unlawfully present and not satisfying the conditions specified in art. 31(1). See further para. 25 below.

13. "The Channel crossing is a very dangerous route and small boat crossings already too often end in loss of life." Joint Committee Ninth Report, Summary (p. 4).

deliberately incurred danger and predictably result, on unpredictable occasions, in death by drowning, not least of women and children;

(ii) by inviting the assistance of national rescue services, they involve the state as participant in the highly public spectacle of the conspicuously successful flouting of its control of irregular immigration, making the state an instrument and ring-master of its own impotence – a failure of democratic self-government;

(iii) they do not depend upon, or follow the schedules of trains, ferries and lorries, or planes – means of entry that can be battened down by carriers' liability and other penalties – and so are inherently open-ended, potentially ever-increasing to very large numbers.

Though anyone will sympathize with many who make or attempt these Channel crossings, their method of irregular entry to the UK does real damage to the civil and public order of the UK, invites ever larger numbers to set out for the UK from far-away places via numerous safe countries, and is a threat to human life that the UK government should not accept, let alone incentivize – as its present practices, however reluctantly, do.

It seems entirely clear that opening UK offices for asylum applications in France or other safe states would *deepen rather than relieve* the Channel crossing crisis. Such offices would be a very powerful pull-factor, and virtually all disappointed applicants would head for the Channel.

So, although other kinds of irregular and illegal arrival, whether clandestine or by other means, do not differ in legally significant ways from **maritime arrivals by small boat**, and create similar difficulties for our national life, it is reasonable to take the opportunity of treating these small-boat arrivals as a special category of irregular and unlawful arrivals – one that can and should be resisted by dedicated counter-measures. The three specially objectionable features just listed make this an easily definable category for subjecting it to a Plan – a special pattern of disincentives and discouragements that presuppose and include but also go beyond the existing system of controlling immigration.

4. "Claiming", "applying for" and "seeking" asylum: some basic distinctions

None of the many persons who have a right (a legally rightful claim) to be recognised as refugees within the meaning and protection of the Refugee Convention 1951/1967 – in short, as Convention refugee – have a right under that Convention to be admitted to any country outside their own. If found within such other country (having entered without leave), even genuine Convention refugees have no *right* under the Convention to be given leave to stay, though they do have a Convention right (art. 33(1)) not to be expelled to an unsafe

country. More briefly: being a Convention refugee – having refugee status – does not confer any Convention right to enter and stay in the UK.

Refugees who have been given leave to stay do have a Convention right, while they are thus lawfully in the country, not to be expelled "save on grounds of national security or public order" (art. 32(1)) established "with due process of law" (art. 32(2)). Does this restriction on expulsion of refugees lawfully resident prevent the leave to stay being granted (and renewed) subject to an explicit time limit? Probably not. But the operation of Plan A and Plan B in no way depends on the answer to that question.

The Refugee Convention leaves the admission of refugees – even genuine and verified Convention refugees – entirely up to the generosity or sense of fairness of the states that are party to it. The only restriction it imposes on the expulsion/removal of Convention refugees who (before or after their arrival) are denied leave to enter is, as just noted, that (art. 33(1)) they must not be removed to an unsafe state – any state where their life or freedom is threatened in the sense of art. 1 [of the Convention].

So the phrases "asylum claim", "claiming asylum", "claim for asylum", etc., are misleading compressions of two distinct ideas: (i) a person who fits the Convention's definition in art. 1 of a refugee has a *right* and *claim* to be recognised as a refugee (called here a Convention refugee); (ii) a Convention refugee, like anyone else, can *seek* (request) leave to enter-and-stay. Even before they enter the UK, such persons are "asylum seekers" in a common-sense sense: they are approaching the UK with the intent to *claim* recognition as refugees[14] and *seek* permission to enter-and-stay.

An entirely mistaken claim is put about by some public figures, that "Genuine refugees are not illegal immigrants" and that "If someone is a Convention refugee they are not and never were an illegal immigrant – that is incredibly important".[15] All such claims directly contradict the Refugee Convention, which devotes art. 31 to "Refugees unlawfully in the country of refuge". They are contrary to the principle that controls the drafting of the whole Convention, that every state retains the right to refuse entry to Convention refugees.[16]. Most of the Convention obligations arise only if the state chooses to give leave to enter-and-stay ("grant asylum").

The curious meaning of "asylum seeker" found in the Nationality and Borders Bill is derived from s. 25A(2) of the Immigration Act 1971 as amended in 2002/3:

14. Unfortunately, our legislation and Immigration Rules have adopted a jargon in which being "granted refugee status" means much more than being officially recognised as (or acknowledged to be) a Convention refugee: it means, in brief, that you are a Convention refugee *who has satisfied all the other conditions* for being granted *permission/leave to enter/stay*. See below, text to n. 17, on Rule 334.

15. The first assertion is by Lord Paddick, H.L Debates 1 Feb. 22 col. 848, the second by Baroness Chakrabarti, ibid. col. 831 (also col. 819). As Prof. Steve Peers made clear in his "Updated Qs and As on the legal issues of asylum-seekers crossing the Channel", 8 August 2020, "the [Refugee] Convention does not require States to give refugees a lawful status under national immigration law."

16. See further J. Finnis and S. Murray, *Immigration, Strasbourg and Judicial Overreach* (Policy Exchange, March 2021), pp. 18-19 and R. Ekins, "The State's Right to Exclude Asylum-Seekers and (Some) Refugees", ch.2 in D. Miller and C. Straehle (eds.), *The Political Philosophy of Refuge* (Cambridge University Press 2019), pp.39-58.

> (2) In this section "asylum-seeker" means a person who intends to claim that to remove him from or require him to leave the United Kingdom would be contrary to the United Kingdom's obligations under—(a) the Refugee Convention ... or (b) the [European Convention on Human Rights].

Probably few refugees seeking asylum have any actual intention other than to establish that they are Convention refugees and *request* leave to enter-and-stay. Do they cast their minds forward to the hypothetical situation in which they have arrived in the UK without leave to enter-and-stay and the UK authorities are removing them (or require them to leave)? Or to the question whether doing that would violate the UK's obligations? In any case, the fact is that **such removal (deportation), or requirement to leave, would not be a breach of UK obligations unless it would land them in (or drive them to) an unsafe country.**

The thinking behind the curious drafting becomes more understandable when one considers the present Immigration Rules. As Rule 334 makes clear, to be "granted refugee status in the United Kingdom" it is not enough that a person (i) is in the UK and (ii) **is a refugee, as defined in [art. 1 of the 1951 Convention[17]]**"; the **further** preconditions for being granted refugee status are that the person (iii) is not a danger to security or (iv) a serious criminal who endangers the UK community, **and** that (v) **"refusing their application would result in them being required to go... in breach of [art. 31 of] the Refugee Convention, to a country in which their life or freedom would be threatened on account of their race, religion, nationality, political opinion or membership of a particular social group."**[18]

The Rules are correct: the rights you have under the Refugee Convention by being a genuine refugee do not include the right to be given leave to enter or remain in a country which is party to the Convention and which acknowledges you are a genuine refugee entitled to Refugee Convention rights. Refugee Convention rights do not include a right to enter or a right to be granted leave to enter-and-stay, *unless* the *only* alternative to that grant is being sent (or driven back) to an unsafe country (that is, a country in which the deportee's life or freedom would be threatened on account of race, religion, nationality, political opinion or membership of a particular social group). The position if leave to stay *has been* lawfully granted is somewhat different – as noted, art. 32 confers a right not to be expelled without serious grounds and due process of law – but that right is not engaged by the operations considered in this paper. For present purposes the important point is that permission to enter-and-stay is a matter not of legal obligation, whether under the Refugee Convention or general international law,

17. The core of the art. 1A. definition: "any person who...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality..."

18. Rule 339C sets up a similar list of preconditions for grant of the "humanitarian protection" to which persons who have no right of abode or leave to enter but are "in the UK" may be entitled, under the European Convention on Human Rights as judicially extended. The key condition is (in effect) that removing the person from the UK to another country (the "country of return") would be a breach of the UK's ECHR obligations because "(iii) substantial grounds have been shown for believing that the person concerned, if returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail themselves of the protection of that country".

but only of generosity, "humane practice", or cooperative spirit.[19] Generosity, humane practice and cooperative spirit do not require a state to permit grossly irregular practices such as mass Channel crossings from a safe state, in preference to taking, instead, a negotiated number of pre-cleared refugees from among the very many, worldwide, who have brought themselves, or find themselves, within the care of the UNHCR and been established to be genuine.

The arguments that the Joint Committee's Twelfth Report raises against this understanding of international law are examined in Appendix A. below, which shows that all of them are unfounded. Plan A and Plan B are fully compliant with the UK's international obligations.

5. Plan A

The best special response to the problem of small-boat arrivals, "Plan A", would be interception, immediate turn-around and an escorted return to a port of France or the other country from which the small boat set out. For reasons of safety and international order, comity and relations, this requires agreement with and the cooperation of the authorities of that other country. That agreement would need to extend to the immediate return to France of those who have been discovered in the UK to have arrived in this way.

Joint patrols and interceptions by British and French or EU border control units might be among the elements of such an agreement.[20] But the key element is

19. Those are the terms rightly used in the great *Roma Rights Case* by Lord Bingham (*R v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre* [2004] UKHL 55 at para. 12). After hearing elaborate arguments on behalf of the UNHCR and of the Roma NGO, four of the five Law Lords agreed that "even those fleeing from foreign persecution have had no right to be admitted and no right of asylum" [para. 12], and that although it is easy to assume that the appellant invokes a "right of asylum", no such right exists. Neither under international nor English municipal law does a fugitive have any direct right to insist on being received by a country of refuge. Subject only to qualifications created by statute this country is entirely free to decide, as a matter of executive discretion, what foreigners it allows to remain within its boundaries. (ibid., quoting Lord Mustill with implied approval).

    Lord Bingham (with whom Lords Hope and Carswell and Lady Hale agreed) found that there is nothing in either the Refugee Convention or customary international law (past or present) that requires a state even to *examine* the claims of real or purported refugees seeking to arrive in the UK (paras. 22 and 28). He also agreed with Lord Hope's summary at para. 64:

    > What the Convention does is assure refugees of the rights and freedoms set out in Chapters I to V when they are in countries that are not their own. **It does not require the state to abstain from controlling the movements of people outside its borders who wish to travel to it in order to claim asylum.** It lacks any provisions designed to meet the additional burdens which would follow if a prohibition to that effect had been agreed to. **The conclusion must be that steps which are taken to control the movements of such people who have not yet reached the state's frontier are not incompatible with the acceptance of the obligations which arise when refugees have arrived in its territory.** To argue that such steps are incompatible with the principle of good faith as they defeat the object and purpose of the treaty is to argue for the enlargement of the obligations which are to be found in the Convention.

    It is important to note that the facts and arguments in the *Roma Rights Case* did not require the Court to consider what "the obligations which arise when refugees have arrived in [the state's] territory" actually are. When they are considered, it becomes clear that they do not include any obligation to give the refugee – even the genuine Convention refugee – leave to stay, unless there is no other safe country to which he can in fact depart or be removed. Other obligations arising under chapters I to V of the Convention arise *only when the refugee has been given leave to stay*. That grant of leave is what art. 31(2) calls "regulariz[ing]" the refugee's "status in the country", and until his status has been regularized by grant of *leave to stay* the refugee has no relevant Convention right except the right not to be removed to an unsafe country as defined in art. 33(1) (a country "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion"). In short: the proposition (established in *Roma Rights*) that no Convention rights exist until entry does not entail that after entry a Convention refugee has a Convention right to be allowed to stay. Convention refugees do not have any right to be given leave to stay, unless they fall into the special category of persons who cannot be removed without violating their Convention right not to be removed to an unsafe country.

    It follows that the UK Supreme Court spoke inexactly or at best obscurely when in *Bashir* [2018] UKSC 45 it said (apparently without the matter being argued between the parties): "5. The Convention (as amended) confers a number of rights *on persons who qualify as refugees in any territory of refuge in which they find themselves*. These rights include the right to engage in remunerated work, the right to public services such as housing, public education and social security, generally on the same basis as other aliens lawfully present there, and the right not to be expelled save on grounds of national security or public order. It is not disputed that the respondents are refugees for these purposes. Between July 1999 and March 2000, all of them were declared by the Chief Control Officer of the SBAs to be 'entitled to refugee status under the 1951 Convention and the 1967 Protocol'." The phrase here italicised – like the phrasing of the Chief Control Officer of the SBAs – omits or elides the crucial grant of leave to stay, logically and legally distinct from recognition as ("qualifying as") a Convention refugee.

20. Some have argued that the small boats phenomenon is directly related to the UK's decision to leave the EU (and thereby the Dublin Convention/Dublin Regulations ["Dublin"]). This is not so. Returns under Dublin were contingent upon the receiving state adducing evidence from another state that the applicant had claimed asylum there. Small boat arrivals are coached by human smugglers and others to destroy their identity documents – or not bring them at all – and to obscure their true identity (and sometimes their nationality) to preclude identification and return. The only effective way to establish third country removals under the Dublin Convention was via a fingerprint hit on

immediate return, whether or not a migrant has evaded interception and landed in the UK.

Until the success of this response reduced attempted crossings to a trickle, there would be difficult occasions when interception was followed by self-scuttling and even real or mock suicide attempts, threats to cause harm to others and so forth. There would be occasions when the dangers made interception and/or turn-around inadvisable. So even Plan A – the best response[21] – would be greatly strengthened by incorporating elements of Plan B, if Plan B proves, on all-round examination, to be **lawful** (or capable of being properly made lawful), **workable**, and **sustainably reasonable**.

The question of Plan B's lawfulness is considered in paras. 10-14. The question of its workability is considered in paras. 15-18. And its sustainable reasonableness in paras. 19-21. Those paragraphs, like the preliminary paras. 6-9, all assume that such a Plan A agreement with France or other Channel states or the EU is unavailable.[22] But, as just remarked, some of the suggestions made in these paragraphs should also be part of, or at least presuppositions of, any future turn-around or readmission agreement with those states.

6. Plan B

The elements and purposes of Plan B can be summarised in a policy statement such as might be made public *after* all the Plan's stages, elements, structures and personnel had been made ready for operation:

(i) If you do not have entry clearance or the right of abode in the UK, and arrive in the UK or its waters in a small boat, even with a valid basis for seeking asylum or refugee status, or for claiming international protection, *you will never settle permanently in the UK.*[23]

(ii) If you are intercepted in its waters, you will be transported (deported) to

the Eurodac system which many countries (including France) used sparingly. Indeed, under Dublin the UK received more returnees (mainly from the Republic of Ireland) than it removed! Note finally that the UK did not leave the Dublin arrangements until the end of 2020, by which time the Channel crossings had been accelerating dramatically since 2017, as noted above, para. 1.) The preferred version of Plan A would be a new readmission agreement with the EU which would surpass Dublin by facilitating the *immediate* return of small boat arrivals to *their point of embarkation* or the port nearest to it.

21. The "pushback" element in Plan A was implicitly approved by the EU Council's Declaration of Malta of 3 February 2017 on the external aspects of migration, para. 6(i), stating that the EU members are "ready to support Italy in the implementation of the Memorandum of Understanding signed on 2 February 2017 by the Italian authorities and Chairman of the Presidential Council al-Serraj", under which Italy supports Libyan authorities' very extensive interception and pullback to Libya of migrant boats bound for Italy or Malta on the "central Mediterranean route". The *Frontex Risk Analysis for 2019*, p. 38, notes that "the sudden uptick in activities by the Libyan Coast Guard in July 2017 was one of the key variables in irregular migration to Europe that changed from 2017 to 2018", and on p. 16 quantifies the efficacy of the EU-approved Libyan pull-backs: "departures from Libya, having fallen by 87%, accounted for the vast majority of the drop in detected migrants on this route."

22. Under existing agreements, the UK disburses substantial sums to France to pay for surveillance and patrolling of the French beaches and other points of embarkation, and the French authorities report success in intercepting many launches or attempts to launch, But the length of the French coastline is such that whatever the scale of the subsidy and the zeal of the French authorities, there is no realistic prospect that, without agreement on pushback/pullback to France, overall numbers of irregular arrivals in the UK by small boat could be significantly reduced.

23. Cl. 11(5) of the Nationality and Borders Bill appears to authorise the Secretary of State to adopt such a policy in relation to "Group 2 refugees", that is, persons who satisfy the Refugee Convention definition of a refugee but who do *not* satisfy the three "requirements" stated in sub-cll. (2) and (3) – derived from art. 31 of that Convention – viz, that "they have come to the United Kingdom directly from a country or territory where their life or freedom are threatened in the sense of Article 1 of the Refugee Convention" and "have presented themselves without delay to the authorities", and "can show good cause" for any unlawfulness in their entry to or presence in the UK. This important provision, cl. 11, is not considered at all in the Ninth Report of the Joint Committee on Human Rights. But it has been claimed, e.g. by the Joint Committee's Twelfth Report, and by Karolina Szopa, "Condemning the Persecuted: Nationality and Borders Bill (2021) and Its Compatibility with International Law", that its distinction between two categories ("Groups") of refugees contradicts the Refugee Convention. Such claims misconceive both the Bill and the Convention (see Appendix A. below). Removal of *any* "asylum seeker" is provided for (but not mandated) by Schedule 3 of the Bill, amending s. 77 of the Nationality, Immigration and Asylum Act 2002.

a place outside the UK for purposes of return either to France (or other country of last embarkation) or to some other safe third country or to your own country (where possible and permissible), never to the UK.

(iii) If you landed after coming this way and are found in the UK, whether or not on presenting yourself to the authorities to make an asylum claim, you will be dealt with as if you had been intercepted in UK waters, and promptly taken (deported) to a place outside the UK for purposes of return either to France (or other country of last embarkation) or to some other safe third country or to your own country (where possible and permissible), never to the UK.

(iv) You will be deported/taken away from the UK for the purpose, first, of processing any application you may make for asylum, and second, of making transfer arrangements that are safe but ensure that you do not make your abode in the UK. Even if the processing finds that you are a refugee under the 1951 Convention, or that you have some other valid claim to international protection from being returned to an unsafe country, the fact that you engaged in a *maritime arrival by small boat from a safe country* means that *under the Convention the UK is entitled to – and* **will** *– refuse you permission* to stay without returning you to an unsafe country. *You will not be granted asylum or "refugee status"*[24] *in the UK.* The only exception would be if you showed that France (or the other country from which your small boat set out for the UK) was *for you* not a safe country.

7. Plan B's Purposes

Plan-B deportations – removals from the UK and transfers from its waters – would have two specific purposes. One would be to arrange – outside the UK – the deportees' return (voluntary or otherwise), preferably to France, and otherwise to some other country willing to receive them, including their home country if it is now safe. The other purpose would be to examine the identity, circumstances and any claims of each person so deported. The rationale of these specific purposes of Plan B would be to save lives by disincentivising small-boat Channel crossings, by making good on the pledge that – with only the rarest of exceptions, if any – no one who attempts such a crossing for purposes of irregular arrival will settle in the UK.

8. Mandating Plan B

Though all that is necessary is *authorisation* by or under statute, it would be better by far if these measures – so certain to be challenged and re-challenged in the courts, the media and public service unions, at every step – were underpinned by direct Parliamentary *mandate* articulated directly and plainly in primary legislation (Act of Parliament), rather than simply authorisation.

A statutory mandate of this kind[25] imposes on ministers and public officers a legal

24. Notice again (see n. 14) the needlessly confusing terminology into which UK law and/or practice has fallen, while in substance remaining crystal clear that someone can be a UK-recognised Convention refugee within the UK without having been granted "refugee status" or leave to stay.

25. An example is cl. 14 of the present Bill, inserting into the 2002 Act s. 80A(1) "The Secretary of State must declare an asylum claim made by a

obligation to take action of the specified kinds essential to the operation of each stage or Stage of the Plan. It would be a directive by Parliament that the Secretary of State **shall** deport (remove or transfer) persons in the defined category of Channel/North Sea crossers to a place outside the United Kingdom designated for these purposes by statutory instrument as a territory in which the Secretary of State maintains one or more removal or reception centres for assessment of the circumstances and claims of persons so deported, pending departure for or deportation to another state or territory for settlement. (The legislation could appropriately authorise the Secretary of State to make exceptions by a procedure each instance of which would be notified to Parliament.)

Such a mandate is responsive to what our courts call "the principle of legality", and often articulate by quoting Lord Hoffmann in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131:

> Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.[26]

There are major differences between Plan B and the scheme ("Operation Sovereign Borders") that Australia has maintained since 2013. But there are similarities, and it is noteworthy that in Australia the Parliament has expressly issued such a mandate, by a modification of the Migration Act 1958 in 2012:

> [198AD](2) An officer must, as soon as reasonably practicable, take an unauthorised maritime arrival to whom this section applies from Australia to a regional processing country.[27]

person who is a national of a member State [of the EU] inadmissible."

26. Quoted with approval in, e.g., *Roma Rights* [2004] UKHL 55 at para. 29 (Lord Bingham, adding: "This is an important and valuable principle. But it has no application to the present case, since the appellants enjoyed no right which, on any construction, Parliament had legislated to infringe or curtail."); *B (Algeria) v Home Secretary* [2018] UKSC 5 at para. 29 (Lord Lloyd-Jones for the Court). Notice a related proposition of Lord Bingham, in *Asfaw* [2008] UKHL 31 at para. 29:

> It is plain from these authorities that the British regime for handling applications for asylum has been closely assimilated to the Convention model. But it is also plain (as I think) that the Convention as a whole has never been formally incorporated or given effect in domestic law. While, therefore, one would expect any government intending to legislate inconsistently with an obligation binding on the UK to make its intention very clear, there can on well known authority be no ground in domestic law for failing to give effect to an enactment in terms unambiguously inconsistent with such an obligation.

27. Here, unannotated, is the text of s. 198AD(2) inserted into the Migration Act 1958 by the Migration Legislation Amendment (Regional

Related provisions of the Act enable the Minister to determine that the mandate shall not apply to a person or class of persons. Any such determination – exception to the mandate – must be reported to Parliament (without naming anyone affected). There must in any case be an annual report to Parliament on the working of the arrangements with processing countries, the disposition of cases in those countries, the number of deported small-boat arrivers determined to be refugees, and so forth.

9. Plan B's three stages

Stage One: the detection and apprehension of small-boat Channel crossers at sea, on the beach or in a port, or subsequently elsewhere in the UK. Such apprehension would be followed by a preliminary screening, to ascertain fitness to fly, certified or readily demonstrable right of abode, and the like.

Stage Two: the immediate or very prompt deportation of such persons by transfer or removal to a "nearby"[28] or "far-away"[29] territory for processing of claims and assessment of circumstances. Though this processing would be *outside the UK*, it would *not be "outsourced"*: it would be done by UK officials on UK responsibility.[30]

Processing and Other Measures) Act 2012;

Taking unauthorised maritime arrivals to a regional processing country

(1) Subject to sections 198AE, 198AF and 198AG, this section applies to an unauthorised maritime arrival who is detained under section 189.

(2) An officer must, as soon as reasonably practicable, take an unauthorised maritime arrival to whom this section applies from Australia to a regional processing country.

(2A) However, subsection (2) does not apply in relation to a person who is an unauthorised maritime arrival only because of subsection 5AA(1A) or (1AA) if the person›s parent mentioned in the relevant subsection entered Australia before 13 August 2012.

Note 1: Under subsection 5AA(1A) or (1AA) a person born in Australia or in a regional processing country may be an unauthorised maritime arrival in some circumstances.

Note 2: This section does not apply in relation to a person who entered Australia by sea before 13 August 2012: see the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012* .

Powers of an officer

(3) For the purposes of subsection (2) and without limiting that subsection, an officer may do any or all of the following things within or outside Australia: (a) place the unauthorised maritime arrival on a vehicle or vessel; (b) restrain the unauthorised maritime arrival on a vehicle or vessel; (c) remove the unauthorised maritime arrival from: (i) the place at which the unauthorised maritime arrival is detained; or (ii) a vehicle or vessel; (d) use such force as is necessary and reasonable.

(4) If, in the course of taking an unauthorised maritime arrival to a regional processing country, an officer considers that it is necessary to return the unauthorised maritime arrival to Australia: (a) subsection (3) applies until the unauthorised maritime arrival is returned to Australia; and (b) section 42 does not apply in relation to the unauthorised maritime arrival's return to Australia.

Ministerial direction

(5) If there are 2 or more regional processing countries, the Minister must, in writing, direct an officer to take an unauthorised maritime arrival, or a class of unauthorised maritime arrivals, under subsection (2) to the regional processing country specified by the Minister in the direction;

(6) If the Minister gives an officer a direction under subsection (5), the officer must comply with the direction.

(7) The duty under subsection (5) may only be performed by the Minister personally.

(8) The only condition for the performance of the duty under subsection (5) is that the Minister thinks that it is in the public interest to direct the officer to take an unauthorised maritime arrival, or a class of unauthorised maritime arrivals, under subsection (2) to the regional processing country specified by the Minister in the direction.

(9) The rules of natural justice do not apply to the performance of the duty under subsection (5).

(10) A direction under subsection (5) is not a legislative instrument.

Not in immigration detention

(11) An unauthorised maritime arrival who is being dealt with under subsection (3) is taken not to be in *immigration detention* (as defined in subsection 5(1)).

Meaning of officer

(12) In this section, *officer* means an officer within the meaning of section 5, and includes a member of the Australian Defence Force.6

28. See para. 16 below.

29. See para. 17 below.

30. In oral evidence to the Joint Committee on Human Rights on 1 December 2021, a Home Office Minister stated that the model the Home Office was seeking to proceed with is: "one where individuals would be processed as part of the asylum system of the country that we had an agreement with, rather than people being offshore and processed as part of our asylum system." (Twelfth Report at n. 130). That is a different model from the one envisaged in this paper. There is no reason why one model should exclude the other. Under Australia's arrangements with Nauru since 2012, ascertainment of the deported migrants' refugee status under art. 1 of the refugee Convention is done in Nauru on the authority and responsibility of the Government of Nauru though for some years by Australian officials on secondment to the Government of Nauru. The Nauru Government's *Refugee Status Determination Handbook* (August 2013) used by Nauruan and Australian officials in Nauru

The main objective would be to ascertain which transferees are genuine Convention refugees and which are not.

Stage Three: transferees found not to be Convention refugees would be returned (deported) to their home country, or would voluntarily depart for that country or any other country willing to take them in. Convention refugees would be transferred to a safe third country under a bilateral agreement with the UK – a "treaty state". Refugees not acceptable to any treaty state would be transferred to the care of the UNHCR under a UK-UNHCR swap agreement.

10. Plan B complies with the UK's international obligations

The essence of Plan B is that it requires that persons seeking to arrive in the UK unlawfully by *setting out from a safe country in a small boat* be deported from UK territorial waters or from the UK itself and taken to British territory outside the UK for examination of their identity, claims and circumstances with a view to early return to their own country, or to a safe third country that has agreed to cooperate with this scheme. At no point does it infringe the principle of non-*refoulement* even on its loosest interpretation.[31]

Even if such deportation (transfer/removal) and resettlement were counted, by a loose and dubious interpretation of art. 31(1) of the Refugee Convention, as "penalties on account of... illegal entry and presence", they would nonetheless comply with the Convention because *nobody transferred or removed* would be within art. 31, which applies only to persons "coming directly from a territory where their life and freedom was threatened". Since "coming directly" was misinterpreted by the 3:2 majority of the House of Lords in *Asfaw* (2008), the primary legislation authorising and mandating Plan B might usefully declare for the avoidance of doubt that any persons who embarked in a small boat for the UK from France or another coastal state of the Channel or North Sea shall be deemed not to have come directly from a territory where their life and freedom was threatened unless they can show that *in that coastal state* their life and freedom was threatened by persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, or they were at serious risk of torture or inhuman or degrading treatment by state authorities. (For the narrower purposes of art. 31 of the Convention, and of partially rescinding the

is available on the UNHCR website. International agencies such as the United Nations and the UNHCR not unreasonably hold both Australia and Nauru responsible for the whole scheme, and the same would be the case with the UK and any cooperative third countries. By retaining control of Stage Two and the transition to Stage Three, the UK would be in a better position to secure the agreement of the UNHCR to an exchange or swap arrangement whereby, in some ratio, UNHCR-approved refugees would be accepted into the UK in proportion to the assistance rendered by the UNHCR in accommodating transferees found in Stage Two to be genuine refugees but unacceptable to any Stage Three safe state.

31. The *Report of the United Nations Special Rapporteur on the human rights of migrants on his mission to Australia and the regional processing centres in Nauru* (June 2017) declares (p. 9) without the slightest evidence or reasoning that the purpose of the Australian arrangements is "punitive", and that the arrangements violate the principle of *non-refoulement* simply because the legislation directs an officer to remove a migrant from Australia to Nauru regardless of whether an assessment has been made of the migrant's claims to international protection. The Rapporteur's mistakes are obvious: removal to Nauru without inquiry into asylum or protection claims in no way constitutes or threatens or risks *refoulement*, for Nauru is a safe country and the purpose of removal is to examine and determine any claims to asylum or protection, and to do so in full compliance with Australia's and Nauru's international obligations. The reason for the legislative direction is simply to avert the frustration of the removals policy by litigation. It is to be expected that Plan B would meet equivalently one-sided and irrational criticism, official and non-official.

erroneous interpretation of it in *Adimi* and *Asfaw*, cl. 36(1) of the Nationality and Borders Bill already stipulates such an interpretation of "coming directly from" an unsafe state.)

In short: although Plan B's opponents (and indeed Plan A's) will contend that it contravenes Britain's international legal obligations, these contentions will be mistaken.

Useful examples of such contentions are to be found in the Joint Committee on Human Rights' Ninth and Twelfth Reports on the Nationality and Borders Bill.

The Ninth Report contends that any form of "pushback" would contravene Britain's international legal obligations under (i) the A4P4 prohibition on collective expulsion, or its customary law equivalent; (ii) the principle of non-refoulement in art. 33(1) of the Refugee Convention; (iii) the ECHR art. 2 right to life.

All three contentions are mistaken. So is the version of them that was more vehemently stated (to the Joint Committee, and elsewhere) by the UNHCR (United Nations High Commissioner for Refugees), which demonstrated once again that it has a systematically unbalanced approach to the interpretation of the Convention which it is charged with administering. We take the contentions in turn.

11. Not Collective Expulsion.

The UK signed the ECHR's Fourth Protocol (A4P4), in which art. 4 forbids "collective expulsion".[32] But the UK, having never ratified it, is not subject to the prohibition imposed by art. 4. The Joint Committee strongly recommends that the UK now "after 58 years" promptly ratify it.

That would be a serious mistake. The meaning of A4P4 has been transformed by "living instrument" judicial "interpretation" so as to extend its meaning and operation to activities that have nothing to do with *expulsion* from territory, but instead refuse or repel *admission* to national territory. The UNHCR and the ECtHR contend that A4P4 imposes an obligation, owed to persons who approach the border, not to refuse admission without an *individualised* inquiry into and assessment of *each person's* circumstances and claims to or petitions for admission e.g. as a refugee. In most circumstances such an inquiry could only be conducted after admission across the border, so A4P4 – on this interpretation

32. See *Immigration, Strasbourg, and Judicial Overreach* at 35, 50, 53-57, 59, 61-63; e.g. p. 35 n. 51:

> Protocol 4 was adopted in 1963. The UK has signed but never ratified it – it is not in force in relation to the UK. Its art. 2 protects freedom of movement within the territory of a state by persons "lawfully within the territory", and everyone's freedom to leave any country. Even these rights (more properly, strong interests) are declared in the same article to be subject to legal restrictions protecting interests of the sort listed in art 8(2) ECHR, plus *ordre public*. Art. 4 Protocol 4 prohibits "collective expulsion of aliens" [with no restriction or qualifications at all]. Not until forty-nine years had passed did the ECtHR presume to say that maritime interdiction of, or even perhaps fences against and/or official refusals of permission for, the attempted entry of the state by masses of persons who had never entered it or its territorial waters would be "collective expulsion", a thought that the drafters of 1963 would have rejected out of hand.
>
> That mention of territorial waters should not be understood as implying that interception in, or interdiction or removal from those waters is an instance of expulsion within the original public meaning of A4P4.

– creates a right to be admitted for that purpose. No satisfactory argument has ever been produced in favour of this (mis)interpretation,[33] which if consistently adhered to would transform state practice in maintaining borders.

The Joint Committee contends that A4P4 applies to the UK because as a signatory it is bound, by art. 18 of the Vienna Convention on the Law of Treaties, to "refrain from acts that would defeat the object and purpose" of P4 or of A4P4. But this is certainly a misinterpretation of art. 18 of the Vienna Convention:

> As the International Law Commission recently observed, '[i]t is unanimously accepted that article 18, paragraph (a), of the Convention does not oblige a signatory state to respect the treaty, but merely to refrain from rendering the treaty inoperative prior to its expression of consent to be bound'.[34]

The UK's non-compliance with A4P4 does nothing to render the Protocol inoperative between the many states party to it, and nothing to prevent its becoming operative in relation to the UK if the UK were to decide to become party to it.

The better course of action for the UK may be to exercise its undoubted right to "unsign" A4P4, as can be done by formally notifying the Council of Europe that it does not intend to become a party to it. Alternatively, the UK can leave the matter where it rests, while rejecting erroneous claims such as the Joint Committee's, and the ECtHR's extravagant expansion of the obligation articulated in A4P4.

The UNHCR Special Rapporteur on the human rights of migrants, in his *Report on means to address the human rights impact of pushbacks on land and sea* (2021), contends that "Collective expulsions are prohibited as a principle of general international law", as was contended also in the UNHCR's intervention in the 2020 ECtHR Grand Chamber decision in *ND & NT v Spain*.[35] But there is no sound reason to accept the UN Rapporteur's contention, at least when "collective expulsion" is understood as he (like the UNHCR and ECtHR) understands it. Conspicuously, the first international Convention he cites as evidence of the alleged principle's acceptance is one that the UK, like e.g. Sweden and Ireland, has neither signed

33. This misinterpretation bends both "collective" and "expulsion" beyond their breaking-point – as is clear when one considers that it entails that there is "collective expulsion" if and when a single person, arriving alone at a border which no-one else has approached or will approach for a month, is blocked from entry without consideration of his claims. As the leading and very liberal European expert, Prof. Daniel Thym, wrote in 2020:

    Like many academics in the field of EU asylum law, I belong to the "end of history" generation. I had just turned 16 when the Berlin wall fell and it seemed self-evident that the liberal democratic project would keep expanding. The ECHR case law on migration is a potent expression of this cosmopolitan honeymoon. *Who would have thought thirty years ago* that the prohibition of inhuman and degrading treatment would turn into a strong human rights guarantee against refoulement? And *that the hitherto opaque prohibition of* ***collective expulsion*** *would be transformed into a de facto right to asylum? Or that the ECtHR might one day oblige states to establish meaningful legal pathways for refugees and migrants?* (emphasis added)

    On Thym, see *Immigration, Strasbourg and Judicial Overreach*, 30-36, 62-64, 79, 82, 84-85.

34. Paolo Palchetti, "Article 18 of the 1969 Vienna Convention: A Vague and Ineffective Obligation or a Useful Means for Strengthening Legal Cooperation?" in Enzo Canizaro, *The Law of Treaties Beyond the Vienna Convention* (OUP, 2011), p. 27.

35. The ECtHR Grand Chamber, though adhering to its earlier erroneous holdings that non-admission without examination of circumstances is in principle collective expulsion, held that in the circumstances Spain was not in breach of A4P4 for pushing back across a land frontier (without any pretence at examination of claims) groups of persons who had staged a mass entry at a frontier at or outside which (in a safe state) there were opportunities of lodging a claim. See *Immigration, Strasbourg and Judicial Overreach* pp. 61-63 (not departed from by the ECtHR First Section judgment of 18 November 2021 in *MH v Croatia*). The Grand Chamber's insistence on there being some pathways to lodging a claim has no authentic basis in either the Refugee Convention or the ECHR.

nor ratified.

The UK has no obligation *derived from a principle against collective expulsion* to allow foreign nationals to arrive in or enter the UK so as to have their claims to international protection considered, nor any obligation to consider such claims at sea before removing such nationals to a place outside the UK where their claims can and will be considered.

12. Not refoulement

The Joint Committee, like the UNHCR and many other persons and bodies, extends "the principle of non-*refoulement*" far beyond what was established by art. 33(1) Refugee Convention, considered in its original public meaning and context (see *Immigration, Strasbourg and Judicial Overreach*, pp. 20-23, 51-61). Nevertheless, very significantly, even the Joint Committee finally admits (Ninth Report, para. 64) that "Pushbacks to France, on the information currently available, would not necessarily breach the non-refoulement obligations under the Refugee Convention or the provisions of the ECHR prohibiting return on the grounds of Arts. 2, 3 or 4 ECHR."

The decisive facts are that France (like Belgium and other North Sea coastal states) is safe in itself and that it is a state that does not engage in *refoulement* contrary to either Convention however loosely interpreted. That makes unnecessary any discussion of whether the non-*refoulement* obligation of the Refugee Convention applies only inside the territory of the UK itself, only inside its territorial sea, or (as the UNHCR contends) wherever the UK happens to exercise its power or jurisdiction. **The Refugee Convention's non-*refoulement* obligation, authentically interpreted, only engages actions that result in asylum-seekers being returned to a state that is unsafe for them.**

So Plan B Stage-Two deportations or removals of small-boat Channel-crossers if not to France then to some safe transitional territory for processing and eventual Stage-Three return – either to France or dispositive transfer (or voluntary departure) to some other safe and non-*refouling* state or territory outside the UK – would not contravene the UK's obligations of non-*refoulement*, however broadly those obligations are responsibly interpreted.[36]

In short, **the UK non-*refoulement* obligations are fully satisfied by deportation to safe territories, whether from outside or inside the UK's territorial waters, or from inside the UK itself**.[37] There is no treaty-based or other legally established right to asylum that would be incompatible with Plan B.[38]

36. There are, of course, claims made about the principle that cannot properly be called interpretations.

37. Australia's sometimes expressed assumption that its interception operations since 2012/13 should only be outside the territorial sea is, we think, sound only to the extent that those operations were sometimes intended to result in the return of the passengers to territories that were or might well be regarded as unsafe for those passengers. To the extent that their purpose was to transfer them to the safe states, Nauru and/or Papua New Guinea, there was no need for those operations to be restricted to the high seas or the contiguous zone, or indeed to be outside Australia's mainland (and some at least were not).

38. Başak Çali, Ledi Bianku & Iulia Motoc, *Migration and the European Convention on Human* Rights (Oxford University Press, 2021), 7-8:
More crucially, **there is no right to migrate in international human rights law**. Whilst the right to seek and enjoy asylum from

13. Right to Life and Maritime Rescue

The UK's positive Law of the Sea obligations of maritime rescue are authentic, serious and entitled to full respect. So too are at least some of the art. 2 ECHR obligations of avoiding endangering life that the ECtHR has found in that article's right not to be intentionally killed. But however broadly those obligations are understood, the position in relation to Plan B's impact on small-boat Channel crossings seems to be this. The Channel is doubtless so rough sometimes that it would be dangerous to intercept a small boat for purposes of taking its passengers into detention for Stage One deportation (removal/transfer), but in most such cases it will be appropriate to make an interception whose primary and overriding aim is to rescue. Transfer to a Stage-Two territory can await the success of the rescue (or the boat's observed and accompanied landing). When sea conditions are safe enough to make rescue unnecessary, it will usually be safe to make interception for such a Stage-One transfer feasible. There will be exceptions to those generalisations, arising from the willingness of some or all of those in the boats to endanger themselves by e.g. scuttling their boat or drowning or threatening to drown the most vulnerable among them, so as to deter interception and removal. In such cases, the boat can be escorted or shadowed or tracked to shore, and the passengers detained there for prompt lawful deportation to a Stage-Two territory for processing and eventual Stage-Three return to France or dispositive departure for or deportation (transfer) to some other safe territory for settlement.

Both Plan A and Plan B can be put fully into effect compatibly with the UK's international obligations.[39]

14. Averting Litigation Risk despite Compatibility with "Convention rights"

Therefore, the Bill introduced to give effect to Plans A or B can and should be accompanied by a statement of compatibility under s. 19 of the Human Rights Act, to the effect that in the minister's view the provisions of the Bill are compatible with all the "Convention rights" set out in Schedule 1 of the Act. But to prevent Plans A or B being frustrated by litigation, the Bill needs to limit the application of the HRA remedies, so that the Bill constitutes Parliament's authoritative specification of how, consistent with the UK's international

> persecution (Article 14) and the right to nationality (Article 15) were included in the Universal Declaration of Human Rights in 1948, neither survived the negotiation process of the International Covenant on Civil and Political Rights and [they] are not part of states' legal obligations under [that] Covenant. (emphasis added)

Evidence of the merely aspirational status of many international declarations is the International Convention on the Rights of All Migrant Workers and Members of their Families, signed in New York by 39 states and effective from July 2003: it has only 55 parties, virtually all of them states from which persons migrate. States to which persons migrate – such as the UK, the US, the member-states of the EU, Russia, China, and Australia – have neither signed nor acceded. Nor does that Convention apply to refugees: art. 3(g).

39. A recent standard formulation of Ministers' stated intent, deployed in parliamentary Written Answers and other contexts, is:

> The UK is committed to providing protection to those who need it, in accordance with its international obligations. Those who fear persecution should claim asylum and stay in the first safe country they reach and not put their lives at risk by making unnecessary and dangerous onward journeys to the UK. Illegal migration from safe countries undermines our efforts to help those most in need. Controlled resettlement via safe and legal routes is the best way to protect refugees and disrupt the organised crime groups that exploit migrants and refugees.

Home Office, *Inadmissibility: safe third country cases*, published to Home Office Staff, 31 December 2020, p. 5.

obligations, Channel crossings are to be addressed. The Bill should also make provision to address wider litigation risk.

(A) *HRA remedies*. The Bill needs to contain not only the mandates and authorisations needed to operate Plans A or B, but also specific provision to exempt its provisions, and everything done under its provisions, from the Human Rights Act, secs. 3, 4, 6, 7 and 8. Those are the operative sections of the HRA, that is the sections which create or define or regulate legal remedies for violation of Convention rights as defined by the HRA.

For even though the Bill's provisions and all that they authorise or mandate are actually compatible with the ECHR, that compatibility will be widely denied and will be challenged directly and indirectly in a multitude of legal proceedings that will take years rather than months to bring to final resolution.[40] During that whole time, the operation of the Plan will be in suspense, by virtue of restraining orders by the courts (and agreements in lieu of such orders). Such challenges could be by way of judicial review of the Home Secretary's decisions, in the High Court or in the Court of the territory to which the Channel crosser had been transferred/removed; and/or by lodging appeals with the relevant Tribunals; and/or by launching civil proceedings – for false imprisonment or other torts – against an official or officials involved in removing Channel crossers to another territory and preventing them from setting out from there for the UK.[41] Plan B's purpose of shutting down and disincentivising small-boat Channel crossings and other irregular maritime arrivals will be frustrated unless the reach of the provisions of the Human Rights Act 1998 ("the 1998 Act") is curtailed,[42] along with the curtailing of analogous provisions of the Constitution or other governing law of the Stage Two territory to which a Channel crosser had been deported for off-shore processing.

In short: unless the Bill mandating the Plan(s) robustly disapplied HRA remedies, the Plan would for years rather than months be simply inoperative. The Plan and its enactment would be widely regarded as a failure. And indeed, for years

40. On the reach of the HRA over activities of the UK authorities (e.g. consular representatives) abroad, see e.g. *R ("B") v Secretary of State for the Foreign & Commonwealth Office* [2004] EWCA Civ 1344, [2005] QB 643. (The Court of Appeal judgement's descriptions of conditions and events at the Australian immigration reception and processing centre at Woomera should indicate the need to avoid conditions of detention, in Stage 2 of Plan B, such as would amount to inhuman treatment, e.g. of children – as may well have been the case at those now closed facilities at Woomera, an austere camp of forbidding construction, ambience and climate in a semi-desert region of South Australia's interior.)

41. The routine HRA grounds of challenge to removals would no doubt be rehearsed, including assertions that the deporting (transferring) of small-boat Channel crossers would violate either their art. 5 right to liberty, and/or their art. 8 ECHR rights to private and family life (by reason, it would be said, of relationships to those with permission to remain in the UK); or because there is some medical reason not to fly – perhaps in some cases connected with threats to self-harm in the event of attempts to transfer/remove them thus giving rise to claims under art. 3 (the prohibition of torture and inhumane treatment). Where transfers/removals are not directly from UK coastal waters to some other territory but are from the UK itself, Stage Two would doubtless be the target of more challenges than Stage Three, since lawyers acting for irregular small-boat Channel crossers will, for obvious reasons (and to avoid jurisdictional issues and secure publicly funded legal aid), be keen to give legal assistance enabling their client Channel crossers to remain in the UK for as long as possible – not least to have the opportunity to form relationships with lawful residents and so give rise to circumstances which may engage art. 8 ECHR rights to private life etc.

42. On 7 December 2021 the government stated that it was intended to conduct a review of the operation of the 1998 Act in this area of offshore processing and asylum claims.

> We intend to consult on substantial reform of the Human Rights Act and will set out our plans imminently in that regard. *Work is under way to develop a new phase of measures to ensure that the clauses in the [=Nationality and Borders] Bill are not undermined* and that legal processes cannot be instrumentalised to circumvent the will of the British people. As we have said, the Government have imminent plans to consult on reform to the Human Rights Act, which are under consideration as we speak. Likewise, work is under way in relation to resolving the question of retained EU law.

Hansard, 7th December 2021 Col. 321. The government has subsequently announced consultative proposals for such all-purpose reform of the HRA, the consultation to be complete by late March 2022: https://www.gov.uk/government/consultations/human-rights-act-reform-a-modern-bill-of-rights

rather than months the accelerating flow of small-boat crossings would be unchecked, despite Parliament's clear enactment of lawful and humane means for immediately stopping it, and an imperative mandate to do so. This would be a lamentable failure of governance.

The operation of Plan B, therefore, should proceed in effect as if the Human Rights Act 1998 had not been enacted, just as the United Kingdom conducted its affairs during the 45 years it was a party to the ECHR without domestic legislation to give effect to Convention rights as such in its own law, and indeed during the period in 1998 to 2000 when the HRA had been enacted but was not yet in force. No doubt some will argue that a minister cannot make a s.19 statement of compatibility in relation to a Bill that disapplies the HRA remedies because the Bill is incompatible with art.13 ECHR (the right to an effective remedy). But art.13 is not included in Schedule 1 of the HRA and is thus not a "Convention right" for the purposes of the Act, including s.19. The government memorandum in support of the ministerial s. 19 statement of compatibility might allude to the Bill's impact on remedies, affirming that nothing in the Bill is inconsistent with the Convention rights and pointing out that – in the ECtHR's doctrine about the ECHR – *impact* is one thing and *violation or derogation* is quite another, and that accordingly the United Kingdom has never accepted that it was violating or derogating from art. 13 by not providing for domestic enforcement of the ECHR until October 2000. Whether or not such propositions are included in the government's memorandum, they should be robustly affirmed at all deliberations about Plan B.

(B) *Wider litigation risks*. The operation of Plan B (like Plan A) will of course be subject to the basic protections that Habeas Corpus and its contemporary equivalents providing against abuse of statutory powers. But to avert the frustration of either Plan by litigation, the courts' supervision of its operation (whether by judicial review or by common-law tort actions) must be statutorily restricted to claims that an official is not acting in good faith: the mandates defining what is reasonable and authorised in the execution of the Plan will have been fully debated in Parliament and must not be made the subject of general judicial assessment.[43]

For again, the fact must be faced that if Plan B remained subject *either* to the HRA or to contemporary common-law judicial review or tort liability, irregular maritime arrivers and deportees, and those representing them, would have multiple opportunities to challenge – and frustrate – both Stage Two and Stage Three. Even before Plan B came into effect, campaigning organisations would institute court challenges to its legality, deploying the HRA and/or common-law judicial review, unless these are each and all excluded in respect of all good faith applications of the mandate and related authorisations. If the Human Rights Act were left applicable to Plan B, the object of the test litigation would be to

43. The Australian legislation provides a useful checklist of provisions for excluding general judicial review (review on grounds of natural justice, unreasonableness, and *ultra vires* or *Padfield* inconsistency falling short of bad faith), provisions reasonable only in the context of unequivocal legislative mandate and full Parliamentary and ministerial responsibility for actions whose benefit depends on implementation without litigiously contrived delay.

have the courts denounce the statutory or statute-based elements of the Plan as in whole or part incompatible with the Act (s. 4 HRA), and/or to subject those elements to minimizing or wrecking interpretations under any or all of the other HRA provisions that need to be disapplied to the relevant provisions of the Bill authorising and mandating either Plan.

15. Is Any Version of Plan B Workable?

This question is not fully severable from the third question, whether any version would be **sustainably reasonable**. And neither question can be answered concretely without access to information available only to Government. So the following paragraphs are in the nature of "blue-sky" thinking about scenarios.

Each of the territories involved in the following Stage Two scenarios is bound by the ECHR, by virtue of the UK's declarations to the Council of Europe, including (apparently "on a permanent basis") the right of individual petition to the ECtHR: the Bailiwick of Guernsey since 2006, the Sovereign Base Areas on Cyprus since 2004, and St Helena and Ascension since 2009. Whatever steps Parliament takes in relation to the UK itself, to override *pro tanto* the UK's obligations under the ECHR, would have to be applied in some form to any territory involved in Stage Two.

The most substantial difficulties in each Plan B Stage Two scenario relate to the availability or non-availability of Stage Three and of its foundation, an eventual agreed arrangement for return to France or dispositive departure or removal for settlement in some other safe state. For however satisfactorily – humanely and efficiently – it is managed, Stage Two is viable only if there is a clear and satisfactory Stage Three and, in relation to any particular person or group of small-boat Channel crossers, the clear prospect of a sufficiently early transition from Stage Two to Stage Three.

16. The close-to-France scenario

Since the aim of the policy would be to discourage (disincentivise) attempts to cross the Channel in small boats without leave to enter the UK, immediate return to France (Plan A) is the best policy, if available. If immediate return to France is not an available option, return to France at some later date is presumptively the next best option; it is one version of Plan B. Making this version of Plan B a reality would be facilitated by processing intercepted and/or removed Channel small-boat crossers-by-boat at some location outside the UK but proximate to France.

That suggests the ***Channel Islands*** These two Bailiwicks, Jersey and Guernsey, each a substantially self-governing Crown Dependency outside the United Kingdom, consist of a main island, heavily settled, and one or more island dependencies with some elements of self-government. The two main islands each have an airport suitable for large aircraft, but in other respects they seem distinctly less

suitable than Alderney, the main lesser island dependency within the Bailiwick of Guernsey, with elements of local government. Its location and topography make it suitable in many respects. But not all: its airfield is too small for large aircraft, and in the absence of its usual inhabitants the island was gravely misused during World War II by the Nazis. The airfield problem can be overcome by transfer when needed to the airport on Guernsey proper. The problem of bad associations may be less tractable.

Removal for processing to one or other of the Channel Islands would make apparent the futility of departing irregularly for the UK from France, only to find oneself a few miles west of the Cotentin/Cherbourg Peninsular, even closer to France, physically, than the UK (at least 60 miles away). On the other hand, the continuing proximity to the UK might sustain hopes of eventual transfer to the UK and thus dilute that disincentivising sense of futility and discouragement.

17. Far-away scenarios

Assuming that there is no early prospect of France agreeing to returns under either Plan A or Plan B, the other versions of Plan B's Stage Two locate the processing of persons transferred/removed in a territory rather distant from the UK. Two such possible locations are (i) the Sovereign Base Areas on Cyprus (SBAs), and (ii) probably more suitably, Ascension.

(i) The *Sovereign Base Areas* are two distinct areas in the south-east of the Republic of Cyprus, Akrotiri (on the coast) and Dekhelia, totalling 98 sq. miles, established and defined, in 1960, by a Treaty between the UK, Greece, Turkey and the Republic of Cyprus. As a careful reading of the Treaty makes clear, and the recent UK Supreme Court interim judgment in *Bashir* [2018] UKSC 45 tends at least indirectly to confirm, the UK's use of those Areas – as distinct from the sites available to the UK elsewhere on the Island, and from movement between the Base Areas and those sites – is not required to be confined to military purposes. In and over the SBAs the UK is sovereign, and its use of them is restricted, if at all, only by the UK's Declaration annexed to the Treaty and "duly noted" by the Republic but not part of the Treaty:

> [1.] Her Majesty's Government declare that the **main objects** to be achieved are :
>
> (1) Effective use of the Sovereign Base Areas as military bases.
>
> (2) Full co-operation with the Republic of Cyprus.
>
> (3) Protection of the interests of those resident or working in the Sovereign Base Areas.
>
> 2. Her Majesty's Government further declare that **their intention accordingly** will be—
>
> (I) **Not to develop the Sovereign Base Areas for other than military purposes**.
>
> (II) **Not to set up and administer "colonies".**
>
> (Ill) Not to create customs posts or other frontier barriers between the

> Sovereign Base Areas and the Republic.
> (IV) Not to set up or permit the establishment of civilian commercial or industrial enterprises except in so far as these are connected with military requirements, and not otherwise to impair the economic, commercial or industrial unity and life of the Island.
> (V) Not to establish commercial or civilian sea ports or airports.
> (VI) **Not to allow new settlement of people in the Sovereign Base Areas other than for temporary purposes.**
> (VII) Not to expropriate private property within the Sovereign Base Areas except for military purposes on payment of fair compensation.

It is reasonable to conclude, on the one hand, that the use of a small portion of the SBAs for temporarily housing persons removed from the UK or transferred from its waters for purposes of immigration control would be compatible in good faith with the UK's declared "main objects", and with intention (I), when understood in the light of those objects being main but not exclusive; and that such use would be fully compatible with intentions (II) and (VI) (and of course the other declared intentions).

On the other hand, the Declaration obviously provides ample material for more or less good faith political objections to the construction of facilities for housing and processing persons transferred/removed from the UK and its waters, even temporarily. There is *de facto* no physical separation between the SBAs and the Republic, upwards of 15,000 of whose citizens reside and/or work in the SBAs; construction of large reception facilities could probably not be effected without extensive involvement, at least for a time, of facilities and materials in the Republic. And the Republic is sensitised both to the unusual status of the SBAs, and to illegal immigration; indeed, it may have engaged from time to time in recent years in push-backs of maritime refugees or migrants travelling in small boats from Lebanon. Political problems and publicity would therefore abound.

If anything can realistically be accomplished, it will only be as a result of inter-governmental agreement at the highest level between the UK and the Republic of Cyprus, involving some substantial quid pro quo.

The use of the SBAs, with such agreement, as a point of transition (and some preliminary processing) on the way to a further removal (for definitive processing pending voluntary return to their own country or dispositive removal to France or another safe third state) would probably involve, therefore, identifying some further processing location.

It is possible, for example, to imagine that the **Republic of Nauru**[44] – an independent island state in whose 8 sq. mile territory are located facilities for relatively long-term processing of persons removed from Australia or its

44. Mandated to the British Empire in 1919, and administered by Australia under an agreement of 1919 between the UK, Australia and New Zealand, it became independent as the Republic of Nauru on 31 January 1968 by virtue of the Nauru Independence Act 1967 of the Australian Parliament and the termination by the United Nations of the Trusteeship. Nauru is now a full Member of the Commonwealth.

contiguous zone [45]– would be willing (for the sake of its national revenues) to agree to be such a location, at least for a specified number of persons. It has been used for that purpose in conjunction with Australia, off and on since 2001 and on a continuing basis since 2013; the long-term arrangements instituted in that year fairly soon evolved so that what began as 24/7 detention in one or other of two guarded reception centres is now a form of residence from which occupants are free 24/7 to come and go among the 10 or 11 thousand citizens on the Island.[46] Some hundreds of the migrants removed to Nauru have been accepted into the United States under a resettlement agreement with Australia, others into other third states.

Persons taken to Nauru are understood to be entirely free to depart from the Island to a country of their choice that is willing to receive them. As stated above, that would need to be an integral part of any policy of removal from the Channel and/or the UK for the purposes under consideration. Subsidization of the costs of travel to that country would be both cost-effective and fitting.

Analogous considerations apply to other places to which small-boat Channel crossers might be taken (whether or not via an SBA) for processing and determination of their claims.

18. Ascension: the Most Obviously Suitable Stage-Two Territory

This 34 sq. mile Island has previously attracted some attention as a possibly suitable base for a Stage Two scenario.[47] Since 2009 it is no longer a Dependency of St Helena but part of the grouped British Overseas Territory called St Helena, Ascension and Tristan da Cunha (constituted under a single Order in Council establishing in its Schedule three distinct but similar Constitutions with one person, based on St Helena, serving as Governor of each, with an Administrator resident in Ascension),

45. See Australian Parliamentary Library, *Australia's off-shore processing of asylum seekers in Nauru and PNG* for statistics 2012-2016, some narrative, and numerous pointers to further resources including (a) major legal decisions in Australia and Papua New Guinea to mid-2016, and Australian legal commentaries, (b) reports by the UNHCR in November 2013 and, (c) reportage and denunciation by Amnesty International, and (d) brief statistical reports by the Australian Government, indicating that irregular maritime arrivals (small-boat arrivals) have remained at nil, by contrast with the 278 small boats and over 17,000 persons arriving in 2012. Amnesty International's main claim in *Island of Despair: Australia's "Processing" of Refugees on Nauru* (2016), p. 7 is that:

> The inescapable conclusion is that the abuse and anguish that constitutes the daily reality of refugees and asylum-seekers on Nauru is the express intention of the Government of Australia. In furtherance of a policy to deter people arriving in Australia by boat, the Government of Australia has made a calculation in which intolerable cruelty and the destruction of the physical and mental integrity of hundreds of children, men and women, have been chosen as a tool of government policy.

That conclusion is neither inescapable nor reasonable. The calculation evidently made by the Australian Parliament and Government is that failure to reach and stay in Australia is a sufficient "deterrent" to setting out for Australia by small boat, provided that failure is made certain or all but certain. It would be greatly in the interests of the national policy if the hundreds of children, men and women diverted from Australia by removal to Nauru (and or Manus Island) were comfortably accommodated and promptly resettled in a safe third country, as many of them, after some delay, have been. **Plan B's elements, in Stages One, Two and Three, will be successful to the extent that they involve no cruelty or abuse whatever, no harsh conditions of travel or inadequate accommodation, and no oppressive delays in processing and resettlement** not only because these are requirements of human decency but also because the policy will be sustainable, and its desirable ends accomplished, only if its means are not open to just criticism as adding harshness or oppression to the *disappointment of expectations* that is the policy's necessary and sufficient means of deterring – more precisely, disincentivising – small-boat Channel crossings for irregular entry to the UK.

46. See *Plaintiff M68/2015 v Minister for Immigration and Border Protection* [2016] HCA 1 at [7]-[13], [17]-[18].

47. Patrick O'Flynn, "Processing illegal immigrants offshore is the only way to end the crisis", *Daily Telegraph* 6 December 21. At the time of the 2005 Conservative Party Manifesto there referred to, the Island was not subject to ECtHR jurisdiction and had no Bill of Rights in its own Constitution, as it has now: St Helena, Ascension and Tristan da Cunha Constitution Order 2009, SI 2009/1751: see n. 56 below.

Importantly, "there is no indigenous or permanent population. The inhabitants of the island comprise the employees of the organisations operating in the territory and their families."[48] No one has a right of abode, and entry to the Island is by written permit of the Administrator; everyone in the territory is there pursuant to their own or someone else's current contract of employment.[49] The population fluctuates between about 800 and 1200; there is currently a police force of three persons. There is a runway capable of handling large planes, which when repaired will be able once again to handle the largest plane.

Even more importantly, the climate is extremely stable and favourable: year-round the average temperature is 22.7C and the *record* highest and *record* lowest temperatures are only 5 degrees above and below that. Rainfall averages only 7 inches per year. Plan B should be able to do better than Australia did on Nauru, where too many were accommodated under canvas in wet and very markedly hotter conditions than Ascension's. But if, unexpectedly and regrettably, some use of canvas were temporarily necessary on Ascension, such accommodation would be much less austere there than in Nauru or Cyprus, let alone in the Channel Islands.

In all these cases, the main practical problems are:

(i) without more or less continuous detention or other constraints on movement, the numbers of persons brought for these purposes to the territory need to be kept proportionate to the numbers of other persons in the territory;

(ii) indefinite detention of persons, even when coupled with freedom to depart from the territory to any other country willing to receive them, starts to become – after an ill-defined but perhaps relatively short period[50] – unreasonable, not only for the purposes of the ECHR art.5 right to liberty and security of person, but also for two other reasons, one constitutional – the historic right to liberty that was mirrored in drafting the ECHR , and is considered below – and the other moral. The intrinsic conditions of a morally responsible human venture require that Plan B – which has nothing whatever to do with punishment – be resolutely and plausibly committed to avoiding dilatoriness in processing, disposing and settling, outside the UK and probably outside its Overseas Territories and Crown Dependencies, everyone who comes within its operation.[51] Plan B has nothing to do with imposing costs or penalties, and is entirely focused on removing an incentive to crossing the Channel without leave – the incentive constituted by the prospect or dream of life in the UK. All dilatoriness in arranging resettlement of refugees and

48. Ascension Island Government, "About Ascension Island". The major users are the US Air Force, the UK Ministry of Defence, the Composite Signals Organisation, the BBC and Sure South Atlantic. Other users in recent decades include the European Space Agency and NASA. The island's sole runway, though usable, is being repaired by the US Air Force for $170m, and is expected to be fully open to very large aircraft near the end of 2022. The duration of flights from RAF Brize Norton in Oxfordshire to Ascension is just over 8 hours, about the same as from London to Chicago, and about half the flight time from Perth, Western Australia to Nauru via Brisbane.

49. See Ascension Island Government, "Living on Ascension Island".

50. The EU's Removals Directive of 2008 stipulates a normal period not exceeding six months (art. 15 (5)) and an exceptional period not exceeding a further 12 months (art. 15 (6)). In the UK, the *Hardial Singh* target is a maximum of six months, but the courts permit more where there are reasonable grounds, and four years is not unheard of.

51. This is so, even if the costs of that departure and journey, like that of their upkeep throughout Stages One and Two, were borne by the UK.

repatriation of non-refugees would be negligent and somewhat heartless, and would give needless opportunity for the easy but unjust and groundless accusation that the Plan is designed to punish irregular small-boat Channel crossers.

19. The Right to Liberty

In a long and almost unbroken series of cases beginning (so far as concerns immigration-control detention) with a judgment of Woolf J. in *ex parte Hardial Singh*,[52] our courts have held and will continue to hold that the common law's favour for liberty is such that even when Parliament *mandates* (rather than merely authorises) detention – as it does in more than one context in the Immigration Act 1971 – the detention for the purposes of deportation will be unlawful if it continues beyond the "point" when there is no reasonable prospect of actually deporting the detainee, or if it continues without reasonably regular review of the question whether its continuance will be lawful and reasonable in all the circumstances. The courts do not deny that Parliament has the authority to override or exclude these implied limitations, but any such override would have to be exceptionally clear in expressing the Parliament's intent to require and authorise the continuance of detention beyond that "point" and/or without review as frequently as courts have conventionally regarded as reasonably necessary.[53]

Plan B is for purposes of immigration control (by removal with definitive effect and disincentivising aim). Some may contest that it is for purposes of "deportation". In any event, nothing short of explicit *statutory* authority – or better, mandate – on the face of an Act of Parliament, will suffice to authorise measures involving indefinite detention, or restriction of movement.[54] Such a statutory provision would fittingly be accompanied by a declaration, in the

52. *R v Governor of Durham Prison, ex parte Hardial Singh* [1984] 1 WLR 704:

> Although the power which is given to the Secretary of State in paragraph 2 [of Immigration Act 1971, Sch. 3] to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained . . . pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to m be wrong for the Secretary of State to seek to exercise his power of detention.

This dictum is now regarded as establishing or reflecting four principles, articulated by Lord Dyson in *Lumba* [2011] UKSC at para. 22:

> (i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose; (ii) the deportee may only be detained for a period that is reasonable in all the circumstances; (iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention; (iv) the Secretaray of State should act with reasonable diligence and expedition to effect removal.

Note that ECHR art. 5(1)(f) provides that the right to liberty and security of person is not infringed by "(f) the lawful . . . detention of a person . . . against whom action is being taken with a view to deportation . . ."

53. See *Tan Te Lam v. Superintendent of Tai A Chau Detention Centre* [1997] AC 97 at 111 (JKPC, Lord Browne-Wilkinson):

> the legislature can vary or possibly exclude the *Hardial Singh* principles. But in their Lordships' view the courts should construe strictly any statutory provision purporting to allow the deprivation of individual liberty by administrative detention and should be slow to hold that statutory provisions authorise administrative detention for unreasonable periods or in unreasonable circumstances.

The Judicial Committee in *Tam Te Lam* expressed agreement with the trial judge's findings that, although the period during which the applicant Vietnamese boat people had been in detention pending deportation (in one case over five years in all) [by the time of the determination of the Privy Council appeal, 40 months "pending removal"] was "truly shocking" and "at first blush, an affront to the standards of . . . civilized society", it was nonetheless reasonable and lawful, given circumstances such as the policies and practices of the Vietnamese authorities, the refusal of some detainees to apply for repatriation, and in another case the detainee's apparent withdrawal of his application.

54. For recent authoritative exposition of the courts' duty – independently of art. 5 of the ECHR – to give strict and restrictive interpretation to legislation restricting liberty (e.g. detention) or freedom of movement (e.g. bail), see *B (Algeria) v Home Secretary* [2018] UKSC 5 at paras. 24-29, 56.

same Act, that removal to, and retention within, a designated territory pursuant to the Act's directive shall be deemed for all purposes to be action taken with a view to deportation (whether the initial removal was from within the UK or its territorial sea or its contiguous zone[55]). Such a declaration, however controversial and controverted, would be inherently reasonable. Accordingly, if the ECtHR in Strasbourg takes a contrary view, the UK should respond as it reasonably (and robustly) did to the erroneous and unreasonable judgments of the ECtHR, including its Grand Chamber, concerning the question whether "free elections" means elections in which convicted criminals in prison have the vote.

20. The Crucial Issue

Even if Parliament authorised and mandated all Stages of the policy, and authoritatively declared them to be for purposes of deportation,[56] the question of the intrinsic reasonableness and fairness of the policy would become difficult to affirm if the operation of Plan B was stalled for too long in Stage Two. That is, if return-to-France arrangements remained out of reach, and the UK was unable – because of its protection obligations (of non-*refoulement* to real risk) – to return significant numbers of persons to their own home state, the persons involved might face indefinite detention, or at least exile in the rather confined space of a small remote territory. This condition would result squarely from the UK's transfer of them from the Channel or removal of them from the UK. It would be a condition of deprivation of liberty that was pursuant not to any sentence for crime, nor to the need to protect others from a real security risk posed by the particular persons involved, but pursuant rather to the carrying through (by Plan B's Stages One and Two) of a national policy of deploying front-foot deportation to disincentivise small-boat Channel crossings for the sake of preserving life and minimising unlawful immigration.

55. Under art. 33 of the United Nations Convention on the Law of the Sea (1982), states are entitled to enforce their immigration law and regulations in a zone extending up to 12 miles beyond their territorial sea – that is, up to 24 miles beyond the territorial sea's coastal baselines. The UK in 1987 extended its Territorial Sea out to 12 miles, but has not claimed a Contiguous Zone. It would be appropriate to take this occasion to give renewed consideration to declaring such a zone, which would be of relevance to small boat crossings in the North Sea and the south-western reaches of and approaches to the Channel, not to mention the Irish Sea. The Republic of Ireland established a Contiguous Zone in 2006, France only in 2016 (ratified in 2019).

56. It would be necessary, too, to modify *pro tanto* the provisions for the right to liberty in applicable local constitutional instruments. This would not require primary legislation: the St Helena, Ascension Island and Tristan da Cunha Constitutional Order 2009, SI 2009/1751, s. 14 provides that "There is reserved to Her Majesty full power to make laws from time to time for the peace, order and good government of St Helena, Ascension and Tristan da Cunha including, without prejudice to the generality of the foregoing, laws amending or revoking this Order or the Schedule." The Schedule is the Constitution, which in chapter 2 (Ascension) provides by s. 126(1):

> **126**— (1) No person shall be deprived of his or her personal liberty save as may be authorised by law in any of the following cases—(a) as a result of his or her unfitness to plead to a criminal charge; (b)in execution of the sentence or order of a court, whether established for Ascension or some other country, in respect of a criminal offence of which he or she has been convicted; (c)in execution of an order of a court punishing him or her for contempt of that court or of another court or of a tribunal; (d)in execution of the order of a court made in order to secure the fulfilment of any obligation imposed on him or her by law; but no person shall be deprived of his or her liberty merely on the ground of inability to fulfil a contractual obligation; (e)in order to bring him or her before a court in execution of the order of a court; (f)on reasonable suspicion of his or her having committed or of being about to commit a criminal offence under any law; (g)in the case of a minor—(i) under the order of a court or in order to bring him or her before a court; or (ii) with the consent of the minor's parent or guardian, for his or her education or welfare during any period ending not later than the date when the minor attains the age of majority or such lower age as may be provided by law; (h) in order to prevent the spread of an infectious or contagious disease; (i) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, in order to care for or treat him or her or for the protection of the community; or (j) in order to prevent the unlawful entry of that person into Ascension, or to effect the expulsion, extradition or other lawful removal of that person from Ascension, or to restrict that person while he or she is being conveyed through Ascension in the course of his or her extradition or removal from one country to another as a wrongfully removed or retained child or as a convicted prisoner.

The Supreme Court of Papua New Guinea in *Namah v Pato* [2016] PGSC 13 held, surely correctly, that a provision like s. 9(j) does not protect deprivation of liberty consequent upon introduction into the territory pursuant to an arrangement with another state to process its immigration detainees. So provision would need to be made to override or make further exception to ss. 9 and 126 of the 2009 Constitution, as can readily be done by Order in Council: see SI 2009/1751, s. 14 (just quoted).

21. Stage Three

It is therefore of critical importance to the viability of Plan B that from the outset there be in place, at least in credibly deliverable outline, arrangements with a safe "third country" or preferably two or three safe "third countries" willing – with a view to aid for their own trade, economic wellbeing and development – to accept, if need be for settlement, all the Channel crossers unable or unwilling to be returned to their own state(s). Some, perhaps many, of those needing this "third-country" resettlement would be genuine refugees under the Refugee Convention definitions (and perhaps some would be persons entitled to international protection under wider definitions such as the judicial "living instrument" extensions to art. 3 ECHR). Others needing resettlement might be persons who are not refugees in any authentic sense, but who are unwilling to return to their home state or are *de facto* or *de jure* stateless. Non-refugees, notably the economic migrants who would doubtless be caught up in interceptions early in the operation of Plan B, would mostly be willing to return home rather than be resettled in a Plan B Stage-Three resettlement treaty state ("third country").

Indeed, it is reasonable to expect that, as an early and lasting effect of a fully operative Plan B, robustly but lawfully and responsibly conducted, the numbers of small-boat Channel crossers would soon revert to its pre-2018, negligible level.[57] Thus the commitments of the Stage Three country or countries of reception would be manageable and not intolerably open ended.

Refugees with characteristics making them unacceptable to the Stage Three country or countries should be accepted by the UNHCR into one or other of its worldwide facilities, as part of a new UK-UNHCR cooperation programme of resettling in the UK larger numbers and wider categories[58] of refugees from UNHCR facilities. The success of Plan B would provide the politically solid basis for such a calibrated enhancement of the UK's participation in the cooperative international response to the refugee problem.

Plan B's success would not solve the whole problem of irregular migration into the UK – for the pressure might well revert to other routes or switch in part to new routes – but at least the distinct problem that small-boat Channel crossings create as manifest threats to human life and to the morale, dignity and tangible wellbeing of the British people and their self-governance.

57. Australia's "Operation Sovereign Borders", analogous to a combination of Plan A and Plan B, was authorised and initiated in 2012, becoming fully operational only in 2013, in which year 300 boats arrived with over 20,000 unauthorised passengers; in 2014 only one boat arrived, and in the following years there were no boats and no unauthorised maritime arrivals. That remains the position.

58. The UK Resettlement Scheme that commenced in March 2021 prioritises the resettlement of refugees, including children, who have been recognised as refugees by the UNHCR and judged by it to be in need of resettlement. Other existing UK Home Office resettlement schemes using UNHCR referral rather than free-standing application by the refugee are the Mandate Resettlement Scheme, which began in 1995, and the Afghan Citizens Resettlement Scheme announced in August 2021 (and incorporating the formerly freestanding Community Sponsorship Scheme.

22. Necessary and desirable statutory provisions

The Plans outlined in this report, if found suitable for adoption, would deserve a separate Bill. In principle, however, they might have been introduced by additional provisions in the Nationality and Borders Bill, supplementing and reinforcing the Bill's existing provisions, for example its further criminalizing of unlawful immigration, with accompanying enhanced penalties for it (and heavier punishments of connected activities). It is worth noting that those and other existing features of the Bill are reasonable and consistent with the genuine obligations of the UK, notwithstanding the criticisms which the Joint Committee and a number of its witnesses have made in reliance on widely credited but in fact unwarranted understandings and misinterpretations of those obligations.

It bears repeating: implementation of any version of Plan B needs very explicit new statutory provisions authorising each Stage and mandating key aspects of each Stage of Plan B. The remedial provisions of the Human Rights Act (and of similar provisions in the Constitution of any British Overseas Territory involved in Stage Two) would need to be made inapplicable to all aspects of the Plan's carrying out. But that alone would not be sufficient. By now the courts are more than inclined to hold that the common-law constitution has acquired the content of much of the ECHR/Human Rights Act. So a statutory disapplication of the remedial provisions of the Human Rights Act (or analogous provisions in an overseas territory) is necessary but not by itself sufficient to reliably protect Plan B from being crippled or brought to a halt by the courts. The Plan itself needs to be authorised and mandated by clear statutory provisions. Anything left to secondary legislation or executive decision or direction will be subjected by the courts to the full rigours of the constitutional doctrine that the executive has no constitutional entitlement to restrict liberties such as freedom of movement (freedom from detention without trial), and that Parliament itself must take full responsibility for explicitly authorising or mandating action involving such restrictions. And in taking such responsibility, Parliament could appropriately, and should, exclude the availability of all non-HRA judicial remedies, except in respect of actions not done in *bona fide* pursuit of the statutorily defined and authorised Plan. Any deficiency in such authorisation, mandate, and protection from litigious delay would result in the same outcome as the *Belmarsh Prison Case* in 2004: effective judicial nullification of the plan, despite the legal freedom of the detained suspected international terrorist aliens to leave Belmarsh Prison at any time for any country willing to receive them.[59]

But Plan B is surely doable, with political resolution, good diplomacy, administrative and lawyerly care and resourcefulness, and a willingness to integrate it into a new phase of significantly expanded refugee resettlement in bilateral cooperation with the UNHCR.

59. *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 58.

APPENDIX A

23. The Joint Committee on Human Rights Twelfth Report

The Nationality and Border Bill's Explanatory Notes affirm (para. 146) that under the Bill "all individuals recognised as refugees by the UK will continue to be afforded the rights and protections required under international law, specifically those afforded by the 1951 Refugee Convention." What rights and protections does the Convention require the UK to afford to persons it recognises as Convention refugees? In answering this question, the Ninth and Twelfth Reports of the Joint Committee on Human Rights on the Bill fundamentally misunderstand the Convention, unwarrantably truncate its text, and misread – indeed, fail to read – UK Court decisions on which these Reports rely. The Ninth Report's misapprehensions are considered in paras. 10-13 above. This Appendix (like para. 4 above) focuses on the Twelfth Report, especially as it touches on "differential treatment" of refugees, "inadmissibility" of asylum claims by refugees coming from safe states, and "offshore processing". Some of the basic but widely overlooked principles of the Refugee Convention have been mentioned in para. 4 above (on "refugee status" as distinct from "right to asylum").

24. The structuring principle of the Refugee Convention

The fundamental principle for understanding the Refugee Convention is that the states party to it have no obligation to admit refugees, even persons whom they recognise to be entirely genuine Convention refugees. Each state also retains the right to expel genuine Convention refugees, provided it does not expel them to an unsafe territory and does not, without due process of law and serious grounds, expel refugees whom it has previously given leave to settle.

This is plainly explained in the UNHCR-sponsored commentary on art. 31(2) of the Convention, a provision which the Ninth and Twelfth Reports (like other critics)[60] avoid quoting or even mentioning, essential though it is to understanding art. 31(1) and the Convention as a whole:

60. Karolina Szopa, "Condemning the Persecuted: Nationality and Borders Bill (2021) and Its Compatibility with International Law" U.K. Const. L. Blog (6th January 2022).

31.REFUGEES UNLAWFULLY IN THE COUNTRY OF REFUGE

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, **coming directly from a territory where their life or freedom was threatened** in the sense of article 1, enter or are present in their territory without authorization, **provided** they present themselves without delay to the authorities and **show good cause for their illegal entry or presence**.

2. The Contracting States shall not apply to the movements of **such** refugees restrictions other than those which are necessary and such **restrictions shall only be applied until their status in the country is regularized** or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country. (emphases added)

Art. 31(2) pointedly provides that even "*such* refugees" as satisfy the three requirements specified in art. 31(1) – and now in cl. 11(2) & (3) of the Bill – may be restricted in their movements, though no longer than is necessary and only "until their status in the country is regularized." It thus leaves the position of other genuine Convention *refugees* subject to wider restrictions on movement and regularization, provided these are compatible with maintenance of the provisions of arts. 3–30. The total effect of all this is stated in Paul Weis's UNHCR-published analysis of and commentary (c. 1967) on the Convention's *travaux préparatoires*. Commenting on art. 31(1), Weis says:

> The term 'coming directly' has acquired considerable importance because, while it relates in Article 31 to penalties only, *Contracting States frequently* use it as the criterion for entertaining an asylum request. (emphasis added)

And again, in relation to the "regularization" mentioned in art. 31(2), which means (as he says) being given leave/permission to (enter-and)-stay, Weis says:

> Paragraph 1 [of art. 31] *does not impose an obligation to regularize the situation of the refugee... , the Article does not provide what should happen to a refugee whose situation is not regularized* and who is unable to comply with an expulsion order. Article 3 of the 1933 Convention provided that in such a case the Contracting Parties *reserve the right to apply such internal measures as they deem necessary. This would also seem to apply now* and as regards such internal measures paragraph 2 of Article 31 applies. (emphases added)

To repeat: art. 31(2) only applies to "such refugees" as, over and above being genuine and recognised Convention refugees, satisfy the three additional requirements (more strictly: have the three further characteristics mentioned) in art. 31(1)). Weis goes on:

> Paragraph 2 [of art. 31] speaks of restrictions to the movement of refugees

> which are necessary but does not define what restrictions may be considered as necessary. Restrictions for reasons of national security were mentioned. *The question whether one could keep a refugee in custody, who had entered illegally, was raised by the President of the Conference but not answered.* …
> Regularization of status means the grant of a residence permit, *even if of a temporary character*. (emphases added)

What critics of the Nationality and Borders Bill (and of much else) forget is that *the Refugee Convention* (as Weis here reminds the attentive reader) *does not confer on refugees, even those who fully satisfy the Convention's definition and comply with its requirements, any right to be admitted or any Convention right not to be expelled to a safe state*. In relation to first grant of leave to enter-and-stay, the only right conferred by the Convention – and it is a very valuable right – is not to be returned (expelled, *refouled*) to an unsafe state or territory.

The Convention does not create, embody or guarantee a right to asylum: it was intended, designed and worded throughout *not* to do so. On all matters of admission and permission to stay (as distinct from removal), it relies on the generosity and cooperativeness of states, acting in full autonomy. Those people who come within the Convention's definition of refugee have a claim and a right to be *recognised as refugees*, but that right, status and/or recognition does *not* confer on them a Convention right to be admitted and/or allowed to stay, or to be "granted refugee status" in the sense used in the Immigration Rules.

25. First safe country: mistakes about art. 31, *Adimi* and *Asfaw*

The Ninth and Twelfth Reports work hard but unsuccessfully to find an inconsistency between the Bill and the Refugee Convention. A prime example:

> 67. While the Bill seeks to avoid clashing with Article 31 of the Refugee Convention — it also seeks to reinterpret its protections. In clause 36 of the Bill the Government sets out a new binding statutory interpretation of Article 31. This means that whether or not refugees are treated as "coming directly" for the purposes of the differentiation policy in clause 11 will be determined in accordance with clause 36(1):
>
> > A refugee is not to be taken to have come to the United Kingdom directly from a country where their life or freedom was threatened if, in coming from that country, they stopped in another country outside the United Kingdom, unless they can show that they could not reasonably be expected to have sought protection under the Refugee Convention in that country.
>
> This interpretation of Article 31 is consistent with the Government's view that all asylum seekers should claim asylum in the first safe country they reach. It would not allow for the penalisation of asylum seekers who pass through unsafe states, but it could nevertheless, in practice, exclude from

> the protection of Article 31 almost any asylum seeker who travels to the UK by means other than air travel from the persecuting state. The UK's immediate neighbours are all states that respect the rule of law and operate asylum systems that purport to comply with the Refugee Convention. It will therefore be very difficult for any asylum seeker who reaches the UK having passed through, for example, France, Ireland, Belgium, the Netherlands, Germany or any Scandinavian country to show that they could not 'reasonably be expected to have sought protection' there and therefore should be entitled to protection from penalisation under Article 31. Such a position is starkly inconsistent with the interpretation of Article 31 preferred by experts assembled by the UNHCR in 2001, who concluded, following analysis of the travaux préparatoires, that "the drafters [of the Refugee Convention] only intended that immunity from penalty should not apply to refugees who found asylum, or were settled, temporarily or permanently, in another country."

Experts "assembled by the UNHCR" can be expected to reach conclusions lopsidedly favourable to refugees and their supporting NGOs (including the UNHCR), and cool towards the right of states to maintain their borders. This 2001 group, whose findings were searchingly criticised in *Asfaw* (2006) by Lord Rodger and again by Lord Mance, did not disappoint that expectation. Purporting to interpret art. 31(1)'s phrase "coming directly from a territory where their life or freedom was threatened", the experts announced:

> (a) Article 31(1) requires that refugees shall not be penalized solely by reason of unlawful entry or because, being in need of refuge and protection, they remain illegally in a country.
> (b) Refugees are *not required to have come directly from territories where their life or freedom was threatened*.
> (c) Article 31(1) was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries or who are unable to find effective protection in the first country or countries to which they flee. *The drafters only intended that immunity from penalty should not apply to refugees who found asylum, or who were settled, temporarily or permanently, in another country*. (emphases added)

No wonder that the Bill proposes a more responsible approach to the text of the Convention. In *Asfaw*, the judgments of Lords Rodger and Mance each show the baselessness of the italicised passages.[61] But the Committee, professing to rely on *Asfaw*, is serenely unaware even of these judgments' existence. Referring first to the main judgment in the Queen's Bench Divisional Court in *Adimi* [2001] QB 667, a case which did not ascend to the Court of Appeal, the Twelfth Report says (para. 69):

61. See *Asfaw* paras. 147, 149 and 153-155 for the decisive statements of French delegates in the drafting meetings July 1951). The words of para. (b) of the experts' conclusions do have a true sense: refugees are not required by the Convention to do anything except (art. 2) conform to the laws of the country in which they find themselves. But in the context of expounding art. 31(1), the main *requirement for immunity* from penalties for violating the duty of compliance mentioned in art. 2 is precisely that the refugee has "come directly from a territory in which his life or freedom is threatened."

> the Court of Appeal concluded "that some element of choice is indeed open to refugees as to where they may properly claim asylum [and] that any merely short term stopover en route to such intended sanctuary cannot forfeit the protection of [Article 31]…"[fn....This interpretation[62] *was not questioned when it was discussed by the House of Lords* in the subsequent case of *R v Asfaw* [2008] UKHL 31... According to Lord Bingham: "It seems to me that *Adimi* is fully supported by such authority as there is, both before and since, and was rightly decided." (emphasis added)

This is a bundle of mistakes. The *Adimi* interpretation, though supported by Lord Bingham (with whom Lord Carswell simply concurred), was devastatingly refuted by pages of argument and analysis of the recorded intentions of the Convention drafters, in the judgments of Lords Rodger and Mance, to which Lord Bingham offered no counter-argument at all. (Lord Hope agreed with the result favoured by Lord Bingham but by a route that avoided approving *Adimi*.)

The *Adimi* "element of choice" approach is ripe for legislative reversal. *No one disputes that refugees have the choice to go to any country they choose*, if that country is willing to take them. But every country has the right, carefully left to states by the Convention and overlooked by the Joint Committee, to choose to refuse entry to even genuine Convention refugees. Accordingly, every country has the right to decide that it will use, as *one* of its own criteria for refusing leave to enter, the fact that the applicant refugee has *chosen* not to apply for asylum in safe countries through which he or she has passed. *That is the choice, decision, right and authority which is relevant to Plan A and Plan B*, a right and authority of the UK as a sovereign state party to the Convention.

The Twelfth Report (para. 73) is quite correct when it says "There is no requirement under the Refugee Convention for asylum seekers to claim asylum in the first safe country they reach." But it misleads itself when it continues: "The Bill should not establish in domestic law an interpretation of Article 31 of the Refugee Convention that explicitly or implicitly says the opposite." The "interpretation" of art. 31 in cl. 36 and elsewhere in the Bill neither explicitly nor implicitly "says the opposite".[63] It says that if you exercise your right to choose the UK as your destination after passing through one or more safe countries where you could reasonably be expected to apply for asylum, the UK will exercise its right to choose not to take you in, its right to penalise you if you use deception or other criminal means of entry, and its right to deport you *unless the only place to send you is unsafe* in the sense of art. 33(1) or some provision of

62. As the Twelfth Report put it, in the same sentence of para. 69:

> Furthermore, the new test in clause 36 is inconsistent with the well-established interpretation of Article 31 made by the domestic courts in *R (Adimi and others) v CPS and Secretary of State for the Home Department*, when the contention that Article 31 allows the refugee no element of choice as to where he should claim asylum was expressly rejected. Having taken into account the travaux préparatoires of the Refugee Convention, conclusions adopted by UNHCR's executive committee, and the analysis of well-respected academics and commentators, the Court of Appeal concluded...

63. Art. 31 Refugee Convention, like cl. 36 of the Bill, concerns a topic not directly relevant to Plan A or Plan B: penalties for unlawful entry or use of false documents and so forth. Art. 31(1) authorises each state to impose such penalties on those refugees who chose to violate its criminal law *after choosing* not to apply for asylum in a safe country or countries through which they passed, *unless*, in the words of cl. 36(1) of the Bill, "they can show that they could not reasonably be expected to have sought protection under the Refugee Convention in that country" – in which case art. 31(1) withdraws its authorisation or permission of penalties. Cl. 36(1) is in fact a *generous* and humane interpretation of art. 31(1)'s phrase "coming directly from territories where their life or freedom is threatened". But in any event, Plan A and Plan B concern diversion, not prosecution, of Channel crossers.

the ECHR.

In short, there would be nothing inconsistent with the Refugee Convention in saying that no refugee can come by small boat or other irregular means from any of the safe countries listed by the Joint Committee, and that the UK will entertain refugee claims to family connection etc. by regular means, and discharge its obligations under art. 35 – to cooperate with the UNHCR – by appropriate participation in UNHCR resettlement schemes. The UK already participates in UNHCR resettlement schemes, and the adoption of Plan A or Plan B would provide a solid platform for enhancing that participation (see para. 21).

26. Refusal of admission

The Twelfth Report (para. 99) asserts:

> There is no basis in the Refugee Convention to refuse to consider a claim because the receiving State decides that it would have been more reasonable for the claimant to have claimed elsewhere.

But the Refugee Convention's whole structure demonstrates that receiving states do not need any "basis in the Convention" for deciding not to consider a claim. States parties to the Convention have no Convention obligation to consider any refugee's claim to enter. They have no obligation to consider any refugee's request of or claim to leave to stay *except* a claim that by refusing or failing to grant the request/claim the state would be in breach of its Convention obligation under art. 33(1) not to return a refugee to an *unsafe* state or territory (or of its Convention obligation under art. 32(1) not to expel refugees lawfully in the country – that is, already given leave to stay – except "on grounds of national security or public order" after due process of law).

The same Report claims (par. 97) that "the UK cannot divest itself of all its obligations under the Refugee Convention simply by declaring an application inadmissible." That is of course literally true. But, once again, the *only* Convention obligation in relation to admissibility is not to refuse a claim (or declare it inadmissible) where doing so would result in the applicant refugee being returned to an unsafe state. Nothing in the present Bill or in the Plans envisaged in the present paper contemplates any such refusal, declaration or purported divestment or evasion of any of the UK's Convention obligations in relation to the control of its borders.

APPENDIX B

27. Sketch of a Checklist for Plan B

In rough chronological order of priority:

1. with clear Treasury backing, (a) negotiation of agreement(s) with one or more safe Stage Three third countries willing to accept persons determined in Stage Two to be refugees; and (b) budget for at least all initial phases of all Stages of Plan B;
2. arrangements with government(s) of any Stage Two territory, for securing water and other supplies and installing accommodation, and for enhanced and sufficient transport links from and to the UK, sufficient to provide for UK processing officials and medical, maintenance and security staff, and deported persons; and for provision for schooling of deported children;
3. drafting, announcement, and enactment of Bill mandating immediate removals under Plan A and/or Plan B; ministerial statement of compatibility with the HRA's "Convention rights" and of special grounds for disapplying the HRA's remedial provisions (and many but not all grounds of common-law judicial review) to the extent that their litigious deployment might delay and/or frustrate the operation of Plans A or B; likewise for analogous remedial provisions of any Overseas Territory constitution or law;
4. discussion with UNHCR about swapping (at some agreed ratio) Stage Two deportees who are unacceptable to Stage Three third countries for UNHCR-processed Convention refugees appropriate for admission to the UK;
5. selection and relocation of staff and contractors for Stage Two processing and Stage One interceptions, <48-hour "fit-to-fly" screening, and deportations;
6. selection and then announcement of date after which irregular small-boat Channel crossers, whether refugees or not, will lose permanently the opportunity to settle in the UK and will be deported pursuant to (Plan A or) Plan B.

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