



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Response to Public Consultation on the
Home Office's 'New Plan for Immigration'**

May 2021

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Summary of Recommendations

The Northern Ireland Human Rights Commission (NIHRC):

- 12.0.** recommends that the Home Office insert a provision into the proposed Immigration Plan which contains a commitment to respect, protect, and fulfil the human rights of all refugees and asylum seekers.
- 13.0.** recommends that a new provision is inserted into the Immigration Plan which affirms the Home Office's commitment to the principle of non-refoulement in all circumstances.
- 14.0.** recommends that the Home Office ensure that all refugees and asylum seekers have access to, and enjoy, their socio-economic rights such as housing, health, and education on an equal basis to everyone else.
- 15.0.** recommends that the Home Office discontinue the use of the phrase 'illegal routes' given that this term has no basis in international refugee or protection law and could generate negative and stigmatizing attitudes towards refugees and asylum seekers.
- 25.0.** recommends that the proposed Immigration Plan contain a clear commitment that the rights and duties which are set forth within the ECHR will be upheld in all refugee, asylum and immigration decisions.
- 33.0.** recommends that the proposed Immigration Plan contain an express commitment that the UNCRC's four guiding principles (non-discrimination, best interests principle, right to life survival and development, and the right to participate) will underpin the delivery and implementation of all future refugee, immigration and asylum policies that will affect children and young people.
- 34.0.** recommends that the best interests principle in Article 3 UNCRC is expressly referenced within the Immigration Plan. Further to this, the Commission suggests that the Immigration Plan contain a clause which states that in all actions, decisions, policies, laws, and regulations which are enacted, that the best interests of the child shall be a primary consideration.
- 35.0.** recommends that the child's rights to express their views in all matters which affect them, pursuant to

Article 12 UNCRC is expressly included within the proposed Immigration Plan.

- 36.0. recommends that all relevant training about children's rights and in particular their right to be heard, be provided to all staff and professionals working across immigration and asylum services in the UK.**
- 46.0. recommends that the Home Office provide further information on the establishment of the proposed National Age Assessment Board and further provide a detailed breakdown in relation to the statutory powers and functions which it, and its officers, will have in order to facilitate a thorough analysis of its human rights compliance.**
- 47.0. recommends that statutory guidance be published to accompany the establishment of the National Age Assessment Board which clearly outlines the powers, functions and responsibilities of the Board and the wider human rights, legal and regulatory obligations which will attach to the Board's operations.**
- 48.0. recommends that the Home Office provide further information on how and where age assessments will be carried out in Northern Ireland given that local authorities do not possess comparable powers and/or responsibilities in this jurisdiction. The Commission further recommends that the Home Office engage with the Northern Ireland government to ensure a clearly defined process, with sufficient oversight mechanisms, is established for future age assessments.**
- 49.0. recommends that, in the event of the extension of the power to grant all border and immigration officials power to carry out age assessments that the Home Office publish what training and guidance will be provided to such officials in order to allow an assessment of their compatibility with human rights law.**
- 55.0. recommends that regionally consistent and accurate data is collected and made available in relation to the number of refugee and asylum applications which are made in Northern Ireland.**
- 56.0. recommends that refugees in Northern Ireland (and across the UK) are issued with appropriate travel documentation, which enables them to travel outside the jurisdiction on an equal basis as all other citizens.**

- 57.0.** recommends that refugees in Northern Ireland, and across the UK, should have full access to, and enjoyment of, the rights set forth in the Common Travel Area, on an equal basis with all other citizens in the UK. The Commission further recommends that, at a minimum, the UK Government should consider granting 'reasonable exemptions' to refugees in Northern Ireland which enables them to cross the Irish border and benefit from the Common Travel Area.
- 58.0.** recommends that the Home Office ensure that all funds allocated to the VPR Scheme are used to secure acceptable and appropriate housing in NI.
- 59.0.** recommends that the Home Office ensure that consideration is given to the UK Government's legal obligation to ensure that there will be no diminution of rights for refugees and asylum seekers in Northern Ireland because of the UK's departure from the EU.
- 62.0.** recommends that the Immigration Plan provide further clarity on what is meant by the 'Good Faith' obligation and particularly in what circumstances will the actions of a legal representative impact a claimant's application.
- 72.0.** recommends that the Government refrains from introducing new standards which require applicants to bring all relevant evidence upfront, and attach minimal weight to evidence introduced thereafter.
- 73.0.** recommends that in relation to how the credibility of an applicant should be assessed, that the Government adopts an approach consistent with the guidance set out by the UNHCR and jurisprudence of the ECtHR, particularly where there is a risk that Article 3 of the ECHR may be contravened.
- 74.0.** recommends that, in view of the prevalence and impact of trauma upon those seeking asylum and refugee status, the Home Office ensure that adequate training around trauma-informed practice is provided to all officials working with children and adults within the immigration, asylum and immigration system.
- 81.0.** recommends that the Government ensure that the asylum claims and appeals procedure entails sufficient safeguards, especially given the risk that an inadequate

opportunity to bring a claim or appeal could give rise to a violation of Article 3 of the ECHR.

87.0. recommends that the Government reconsiders its proposal to apply rights and protections differently to refugees on the basis of their mode of entry into the United Kingdom.

88.0. recommends that the Government ensure that all asylum seekers and refugees are guaranteed, at a minimum, basic civil and political rights and social and economic rights, regardless of how they entered the United Kingdom.

Background

- 1.0. The Northern Ireland Human Rights Commission (NIHRC) pursuant to Section 69(1) of the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland. The Commission is also mandated in accordance with Article 2(1) of the Protocol on Ireland/Northern Ireland of the European Union Withdrawal Agreement to ensure there is no diminution of rights protected in the 'Rights, Safeguards and Equality of Opportunity' chapter of the Belfast (Good Friday) Agreement as a result of United Kingdom's withdrawal from the European Union. In accordance with these functions the following statutory advice is submitted to the Home Office in response to its consultation on the 'New Plan for Immigration'¹ which will also impact Northern Ireland.
- 2.0. The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998 and the treaty obligations of the Council of Europe (CoE) and United Nations (UN) systems.² The relevant regional and international treaties in this context include:
 - European Convention on Human Rights 1950;³
 - The Refugee Convention 1951⁴
 - International Convention on the Elimination of All Forms of Racial Discrimination 1965⁵
 - UN International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR);⁶
 - The 1967 Optional Protocol to the Refugee Convention 1951⁷
 - UN Convention on the Elimination of All Forms of Discrimination Against Woman (CEDAW),⁸
 - UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment⁹
 - UN Convention on the Rights of the Child 1989 (CRC);¹⁰

¹ Home Office (2021), New Plan for Immigration, Policy Statement, (HM Government, March 2021).

² The Northern Ireland Executive (NI Executive) is subject to the obligations contained within the specified regional and international treaties by virtue of the United Kingdom (UK) government's ratification. In addition, the Northern Ireland Act 1998, Section 26(1) provides that "if the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations... [s]he may by order direct that the proposed action shall be taken". The NIHRC further recalls that the Northern Ireland Act 1998, Section 24(1)(a) states that "a Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act... is incompatible with any of the Convention rights".

³ Ratified by the UK in 1951

⁴ Ratified by the UK in 1954.

⁵ Ratified by the UK in 1969.

⁶ Ratified by the UK in 1976.

⁷ Ratified by the UK in 1968.

⁸ Ratified by the UK in 1986

⁹ Ratified by the UK in 1988.

¹⁰ Ratified by the UK in 1991.

- UN Convention on the Rights of Persons with Disabilities 2006 (CRPD);¹¹

3.0. In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding but provide further guidance in respect of specific areas. The relevant standards in this context include:

- UN Committee on the Rights of the Child, General Comment No.6¹²
- UN Human Rights Committee, General Comment No. 20¹³
- UN Human Rights Committee, General Comment No. 15¹⁴
- UN Committee on the Rights of the Child, General Comment No 14¹⁵
- UN Committee on the Protection of the Rights of All Migrant Workers and their Families, Joint General Comment No. 3¹⁶
- UN Committee on the Elimination of Discrimination Against Woman No. 38¹⁷
- Concluding Observations of the UN Economic and Social Council¹⁸
- Concluding Observations of the UN Committee on the Elimination of Racial Discrimination¹⁹
- Concluding Observations of the UN Committee on the Rights of the Child²⁰

4.0. The Commission welcomes the opportunity to respond to this important consultation but notes the Immigration Plan is silent on several significant areas. These include:

- The absence of any detail on future refugee resettlement targets and figures.
- The absence of any engagement around the non-applicability of the Dublin III Regulation and the connected issues which arise under it including future bi-lateral refugee/asylum agreements with other

¹¹ Ratified by the UK in 2009.

¹² UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6,

¹³ N Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992.

¹⁴ UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986.

¹⁵ UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14,

¹⁶ UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, 16 November 2017, CMW/C/GC/3-CRC/C/GC/22

¹⁷ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration*, 20 November 2020

¹⁸ UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland*, 14 July 2016.

¹⁹ UN Committee on the Elimination of Racial Discrimination (CERD), *Concluding observations on the combined twenty-first to twenty-third periodic reports of the United Kingdom of Great Britain and Northern Ireland*, 3 October 2016.

²⁰ CRC/C/GBR/CO/5, UN CRC 'Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland', 12 July 2016.

countries, family reunification, fingerprint retention protocols, and how the loss of EU asylum funds will, if at all, be replaced.²¹

- The absence of any reference to how any retained EU law, such as the EU Qualification Directive, the EU Asylum Procedures Directive and the EU Anti-Trafficking Directive and the caselaw arising thereunder, will underpin the development of future Immigration law and policy.
- The absence of any reference to the principle of non-refoulement.
- The absence of any reference to Northern Ireland, particularly in view of the impact of Brexit on the island of Ireland and the border.
- The absence of any reference to existing human rights protections in the area of refugee, asylum and immigration matters under the European Convention on Human Rights (ECHR).

5.0. In view the range of practical and legal issues which arise in this consultation, the NIHRC has sought to highlight relevant human rights standards and principles, where they may be of assistance in developing the Home Office's proposed 'Immigration Plan'. Therefore, the NIHRC's response to some of the consultation questions have been grouped together for ease of reference.

INTERNATIONAL HUMAN RIGHTS STANDARDS

6.0. International human rights law sets out a comprehensive array of human rights which are directly relevant within a refugee and an asylum/immigration context. First, Article 1 of the 1951 Refugee Convention defines a refugee as someone 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 and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country*". Guidance by the United Nations High Commissioner for Refugees (UNHCR) further states that an assessment of the "well-founded fear" criteria "needs to be fact-based, focusing on both the individual and the contextual circumstances of the case",²² and further that "it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term "well-founded fear" therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration."²³ An asylum seeker is someone who's claim for refugee status has not been determined.

²¹ House of Commons Library (2020), 'Brexit: the end of the Dublin III Regulation in the UK', (Briefing Paper, 21 December 2020)

²² UNHCR, (1979) 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees', 174.

²³ Ibid, para 38.

- 7.0 The 1951 Refugee Convention and related 1967 Protocol set out the minimum standards expected of states in their treatment of refugees. The Convention sets down the basic rights to which refugees are entitled to. These include the right to non-discrimination (Article 2), the right to freedom of religion (Article 3), the right to property (Article 13), the right of access to the Courts (Article 16), the right to employment (Article 17), the right to housing (Article 21), the right to education (Article 22), the right to social security (Article 24), the right to freedom of movement (Article 26), the right to identification documentation (Article 27) and the right to travel documentation (Article 28). All these rights aim to ensure that refugees enjoy the same rights and benefits as all others within the state.
- 8.0. The foremost legal standard of international refugee law is the principle of 'Non-Refoulement'. This protects against the expulsion or forcible return of refugees to their country of origin. Article 33 of the Refugee Convention states that: "*no Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*". This principle finds further expression in Article 3 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Committee Against Torture has further stated that the principle is not only "absolute"²⁴ but that it "exists whenever there are "substantial grounds" for believing that the person concerned would be in danger of being subjected to torture in a State to which the person is facing deportation, either as an individual or as a member of a group that may be at risk of being tortured in the State of destination."²⁵ The European Court of Human Rights has stated, within the context of the prohibition against torture, inhuman or degrading treatment under Article 3 ECHR, in the case of *Chahal v United Kingdom*²⁶ that: "It is well-established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country."²⁷
- 9.0. The UN Human Rights Committee has further stated in General Comment No. 20 that Article 7 of the ICCPR prohibits states parties from exposing "individuals to the danger of torture or cruel, inhuman

²⁴ UN Committee Against Torture (CAT), *General Comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22*, 9 February 2018, para 9.

²⁵ *Ibid*, para 11.

²⁶ (Application no. 22414/93) 15 November 1996.

²⁷ *Ibid*, para 74.

or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”²⁸

10.0. However, the reality for refugee’s and asylum seekers in the UK, including Northern Ireland, is often far removed from the content of the legal guarantee’s which are outlined under international human rights law. The Special Rapporteur on Extreme Poverty and Human Rights recently concluded after a countrywide visit to the UK that: “Destitution is built into the asylum system. Asylum seekers are banned from working and limited to a derisory level of support that guarantees they will live in poverty”.²⁹ Similarly, in their 2016 Concluding Observations, the Committee on Economic, Social and Cultural Rights expressed concern “that refugees, asylumseekers and refused asylumseekers ... continue to face discrimination in accessing health-care services”³⁰ while in their concluding observations, the Committee on the Rights of the Child expressed concern regarding the difficulties experienced by “asylum-seeking, refugee and migrant children and their families in accessing basic services, such as education and health care, and are at high risk of destitution”.³¹ These adverse socio-economic conditions have long been highlighted by numerous NGO and civil society organisations including just recently, the British Red Cross³² and the Refugee Council.³³

11.0. International treaty-monitoring bodies have further expressed concern regarding the negative portrayal of refugees and asylum seekers within the UK. In their 2016 concluding observations, the Committee on the Elimination of Racial Discrimination expressed concern regarding “the negative portrayal of ethnic or ethno-religious minority communities, immigrants, asylum seekers and refugees by the media in the State party, particularly in the aftermath of terrorist attacks, and at the rise of racist hate speech on the Internet.”³⁴ While every country retains the right to regulate their asylum and immigration system, care should nonetheless be exercised in relation to the language used in furtherance of such aims. While the Commission welcomes the Home Office’s intentions to create a fair system of immigration and asylum, it is, however, concerned

²⁸ UN Human Rights Committee (HRC), *CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para 9.

²⁹ Statement on Visit to the United Kingdom, by Professor Philip Alston, United Nations Special Rapporteur on extreme poverty and human rights, (16 November 2018)

³⁰ E/C.12/GBR/CO/6, ‘UN Committee on Economic, Social and Cultural Rights, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland’, 14 July 2016, para 55.

³¹ CRC/C/GBR/CO/5, UN CRC ‘Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland’, 12 July 2016, at para 75(f).

³² British Red Cross (2021), ‘Far from a home: why asylum accommodation needs reform’, (British Red Cross, 2021)

³³ Refugee Council (2021). “‘I SAT WATCHING LIFE GO BY MY WINDOW FOR SO LONG’: The experiences of people seeking asylum living in hotel accommodation’, (Refugee Council, April 2021).

³⁴ UN Committee on the Elimination of Racial Discrimination, (2016) Concluding observations on the twenty-first to twenty-third periodic reports of United Kingdom of Great Britain and Northern Ireland, CERD/C/GBR/CO/21-23, 26 August 2016, para 15.

regarding the choice of language used within the Immigration Plan. In particular, the Commission notes the persistent use of the term 'illegal routes' to describe entry to the UK and is concerned regarding the potential negative and stigmatizing effect this may have on an applicant, especially given the fact that such a term has no basis in international refugee or protection law.

12.0. The Commission recommends that the Home Office insert a provision into the proposed Immigration Plan which contains a commitment to respect, protect and fulfil the human rights of all refugees and asylum seekers.

13.0. The Commission recommends that a new provision is inserted into the Immigration Plan which affirms the Home Office's commitment to the principle of non-refoulement in all circumstances.

14.0. The Commission recommends that the Home Office ensure that all refugees and asylum seekers have access to, and enjoy their socio-economic rights such as housing, health and education on an equal basis to everyone else.

15.0. The Commission recommends that the Home Office discontinue the use of the phrase 'illegal routes' given that this term has no basis in international refugee or protection law and could generate negative and stigmatizing attitudes towards refugees and asylum seekers.

European Human Rights Standards

16.0. Although the European Convention on Human Rights (ECHR) contains no explicit reference to refugee or asylum/immigration matters, the European Court of Human Rights (ECtHR) has nonetheless interpreted its provisions to accord refugees and asylum seekers important substantive and procedural protections under the ECHR. Article 1 ECHR states that: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". In the case of *N.D and N.T. V Spain*³⁵ the ECtHR stated that:

*"the Court has previously stated that the special nature of the context as regards migration cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction".*³⁶

³⁵ (Application No.8675/15 and 8697/15) 13 February 2020.

³⁶ Ibid, para 110.

Thus, the rights set forth within the ECHR apply to everyone within the UK, irrespective of their refugee or immigration status.

17.0. Article 3 ECHR contains the prohibition against torture, inhuman and degrading punishment and treatment. This is an absolute and non-derogable protection. In *Soering v United Kingdom*,³⁷ the ECtHR stated that: "This absolute prohibition of torture and of inhuman or degrading treatment or punishment under the terms of the Convention shows that Article 3 (art. 3) enshrines one of the fundamental values of the democratic societies making up the Council of Europe".³⁸ Article 3 ECHR has further been interpreted to incorporate the principle of non-refoulement and in the case of *Sufi and Elimi v The United Kingdom*³⁹ the ECtHR held that the removal of the applicants to Somalia would violate Article 3 ECHR on account of not only the dire humanitarian conditions which they would be exposed to, but also "that the situation of general violence in Mogadishu is sufficiently intense to enable it to conclude that any returnee would be at real risk of Article 3 ill-treatment solely on account of his presence there, unless it could be demonstrated that he was sufficiently well connected to powerful actors in the city to enable him to obtain protection".⁴⁰

18.0. Article 3 ECHR (often in conjunction with Article 2 which enshrines the right to life) has provided important guidance to states in terms of their domestic approach to immigration and asylum enforcement and in particular, the removal of individuals from the state. In *F.G. v Sweden*,⁴¹ the ECtHR stated that:

*"the Court observes that in the context of expulsion, where there are substantial grounds to believe that the person in question, if expelled, would face a real risk of capital punishment, torture, or inhuman or degrading treatment or punishment in the destination country, both Articles 2 and 3 imply that the Contracting State must not expel that person".*⁴²

Article 3 also extends to the dangers stemming from the actions of non-state or private actors in the destination country should an individual be expelled from the state.⁴³

19.0 Article 3 ECHR also imposes an obligation on the state to ensure that refugees and asylum seekers, do not suffer from a level of destitution and poverty, the result of which would engage the legal protections of Article 3. In *R (Limbuella) v Secretary of State for the Home*

³⁷ (Application No. 14038/88) 7 July 1989, para 88.

³⁸ Ibid, para 88.

³⁹ (Application No. 8319/17 and 14497/17), 28 June 2011.

⁴⁰ Ibid, para 293.

⁴¹ (Application No. 43511/11) 23 March 2016

⁴² Ibid, para 110.

⁴³ *J.K. and Others v Sweden*, (Application no. 59166/12), 23 August 2018, para 80.

*Department*⁴⁴, the House of Lords per Lord Bingham, held that: "A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life".⁴⁵

20.0 States must also respect the right to personal and family life under Article 8 ECHR when considering the removal of an individual from the state. In the case of *Uner v the Netherlands*⁴⁶ the ECtHR set out a number of factors that must be considered before an individual who has been settled within the state can be removed or expelled - typically for a criminal offence - in order to assess the legality of the decision with Article 8 ECHR. Such an assessment ensures that the decision to expel satisfies the human rights requirements of proportionality and necessity. These factors include:

- the nature and seriousness of the offence committed by the applicant;
- the length of the applicant's stay in the country from which he or she is to be expelled;
- the time elapsed since the offence was committed and the applicant's conduct during that period;
- the nationalities of the various persons concerned;
- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children of the marriage, and if so, their age; and
- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.⁴⁷

21.0. Although Article 8 ECHR does not provide an automatic entitlement to family reunification,⁴⁸ the ECtHR does however engage in a detailed assessment of the decision of the state in order to assess the compatibility of an impugned measure and /or decision with the principles of proportionality and necessity. These were outlined in the case of *Jenuesse v the Netherlands*⁴⁹ where the Court stated:

"...in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of

⁴⁴ [2005] UKHL 66

⁴⁵ *Ibid*, para 7.

⁴⁶ (Application no. 56410/99), 18 October 2006.

⁴⁷ *Ibid*, para 57.

⁴⁸ *Biao v Denmark*, (Application no. 38590/10), 24 May 2016.

⁴⁹ (Application 12738/10), 3 October 2014.

persons residing there will vary according to the particular circumstances of the persons involved and the general interest. Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion".⁵⁰

22.0. In cases involving children and young people under the age of 18, the ECtHR will consider the best interests of the child principle pursuant to Article 3 UNCRC in its determination of alleged interferences with family unification and/or reunification. In *Jenuesse v the Netherlands*,⁵¹ the ECtHR stated, in the context of their assessment of the legal weight to be attached to the best interests principle, that:

"Whilst alone they cannot be decisive, such interests certainly must be afforded significant weight. Accordingly, national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interests of the children directly affected by it".⁵²

23.0. Domestically, the importance of the best interests principle was considered in the case of *ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)*.⁵³ Here the Supreme Court held that the best interests principle was an inseparable determinative aspect of the proportionality assessment to be carried out in relation to Article 8 ECHR considerations, and further, that listening to the views of the child pursuant to Article 12 UNCRC was an important means in understanding their best interests.⁵⁴ Thus, in refugee and asylum matters which engage children and their rights, the UK must attach the appropriate weight to these obligations.

24.0. Further protections exist under Article 13 ECHR which guarantee's the right to an effective remedy and in Article 14 ECHR which enshrines the right to non-discrimination. The Commission recognises that the former has not been incorporated within the Human Rights Act.

⁵⁰ Ibid, para 107.

⁵¹ Application 12738/10, 3 October 2014

⁵² Ibid, para 109.

⁵³[2011] UKSC 4

⁵⁴ The Court stated that "In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration", para 33.

25.0. The Commission recommends that the proposed Immigration Plan contain a clear commitment that the rights and duties which are set forth within the ECHR will be upheld in all refugee, asylum and immigration decisions.

CHILDREN'S RIGHTS CONSIDERATIONS

26.0. In the context of immigration and asylum law, children and young people under the age of 18 years of age⁵⁵ possess a number of distinct human rights under the UNCRC. These include, *inter alia*, the right of an asylum seeking child, whether accompanied or unaccompanied, to "receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties",⁵⁶ the right to non-discrimination (Article 2 UNCRC), the right to life, survival and development (Article 6 UNCRC), the right to family life (Article 16 UNCRC), the right not be separated from their parents (Article 9 UNCRC), the right to family reunification (Article 10 UNCRC) and the right to be free from cruel, inhuman or degrading punishment or treatment and the arbitrary or unlawful deprivation of liberty (Article 37 UNCRC). While the Commission respects the objectives of the Home Office to reform current immigration and asylum law and practice "so that it is fair for everyone"⁵⁷ the Commission remains concerned regarding the lack of reference to children's rights throughout the Immigration Plan.

27.0. All children, and particularly unaccompanied minors, are especially vulnerable within an immigration and asylum context. According to Amnesty International, family separation is a traumatic experience and "can leave children more vulnerable to exploitation and abuse and can create toxic stress which could harm children's long-term development".⁵⁸ These sentiments have been further underscored by the House of Lords,⁵⁹ the Joint Committee on Human Rights,⁶⁰ the UNHCR⁶¹ and the UN Committee on the Rights of the Child.⁶² The European Court of Human Rights has also stated that the child's vulnerability "is the decisive factor and it takes precedence over

⁵⁵ Article 1 of the UNCRC states that "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".

⁵⁶ Article 22 UNCRC.

⁵⁷ Home Office (2021), *New Plan for Immigration, Policy Statement*, (HM Government, March 2021), 4.

⁵⁸ Amnesty International (2020), *Without my family: The impact of family separation on child refugees in the UK*,

⁵⁹ House of Lords, European Union Committee (2016), *Children in Crisis: unaccompanied migrant children in the EU*, (HoL, 26th July 2016)

⁶⁰ Joint Committee on Human Rights, *Human Rights of Unaccompanied Migrant Children and Young people in the UK*, First Report of Session, 2013-14, (12 June 2013)

⁶¹ UNHCR (2019) *Putting the Child at the Centre: An Analysis of the Application of the Best Interests Principle for Unaccompanied and Separated Children in the UK*, (UNHCR, June 2019)

⁶² UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para 3.

considerations relating to [their] status as an illegal immigrant”⁶³ and further that the State owes a duty of care towards “highly vulnerable members of society ... as part of its positive obligations under Article 3 of the Convention”.⁶⁴

28.0. Children are entitled to have their best interests taken as a primary consideration in all matters which affect them. Article 3 UNCRC states that: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. The Committee on the Rights of the Child has further stated that the guarantee contained in Article 3 ‘is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the convention and the holistic development of the child’.⁶⁵ In the context of asylum and immigration, the Committee on the Rights of the Child has further stated that it “must also be a guiding principle for determining the priority of protection needs and the chronology of measures to be applied in respect of unaccompanied and separated children”.⁶⁶ They have further stated that: “Non-rights-based arguments such as those relating to general migration control, cannot override best interests considerations”. In the case of *ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)*⁶⁷, the Supreme Court stated that the best interests principle:

*“must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them”.*⁶⁸

29.0. The Committee on the Rights of the Child has further articulated a three-fold legal framework which underpins operation of the best interests principle. Article 3 entails, first, a substantive right; that is the individual personal right of the child to have his or her best interests taken as a primary consideration; secondly, a fundamental, interpretative legal principle; where a legal provision is open to more than one meaning, it must be construed in a manner which best serves the child’s best interest’s; and thirdly, a rule of procedure where any decision likely to impact on the best interests of the child

⁶³ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium (Application no. 13178/03)* para 55.

⁶⁴ *Ibid.*

⁶⁵ Committee on the Rights of the Child, General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art.3, para.1)(2013) at paragraph 4.

⁶⁶ UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para 31.

⁶⁷ [2011] UKSC 4

⁶⁸ *Ibid.*, para 46.

must include an evaluation as to the probable impact such a decision will have on the child's best interests.⁶⁹

30.0. In relation to children's participatory rights, Article 12(1) UNCRC states that: "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child". In asylum and immigration matters, the Committee on the Rights of the Child has stated that "in determining the measures to be adopted with regard to unaccompanied or separated children, the child's views and wishes should be elicited and taken into account (art. 12 (1)). To allow for a well-informed expression of such views and wishes, it is imperative that such children are provided with all relevant information concerning, for example, their entitlements, services available including means of communication, the asylum process, family tracing and the situation in their country of origin (arts. 13, 17 and 22 (2))".⁷⁰

31.0. In their 2016 concluding observations, the UN Committee on the Rights of the Child expressed concern that "the right of the child to have his or her best interests taken as a primary consideration is still not reflected in all legislative and policy matters and judicial decisions affecting children".⁷¹ The Committee also stated that in relation to the child's right to participate and for their views to be given due weight in relation to their age and maturity, that: "Children's views are not systematically heard in policymaking on issues that affect them".⁷²

32.0. However, the Commission is concerned regarding the absence of children's rights within the proposed Immigration Plan. Under the UNCRC, states are under an obligation to comply with the conventions four guiding principles when developing and enacting laws and policies, including those in the area of asylum and immigration.⁷³ These include the principles of non-discrimination (Article 2), the child's best interests principle (Article 3), the child's right to life, survival and development (Article 6) and the child's right to participate in matters which affect them (Article 12). As guiding principles, this means that all other convention rights, including those which relate to asylum and immigration such as Article 22 UNCRC, must be realised according to these principles. In addition to their status as guiding principles, they are also free-standing independent entitlements.

33.0. The Commission recommends that the proposed Immigration Plan contain an express commitment that the UNCRC's four

⁶⁹ Ibid, at para 6.

⁷⁰ Ibid, at para 25.

⁷¹ CRC/C/GBR/CO/5, UN CRC 'Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland', 12 July 2016, at para 26.

⁷² Ibid, para 30(a).

⁷³ CRC/GC/2003/5 UN Committee on the Rights of the Child (CRC), General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, 27 November 2003.

guiding principles (non-discrimination, best interests principle, right to life survival and development, and the right to participate) will underpin the delivery and implementation of all future refugee, immigration and asylum policies that will affect children and young people.

34.0. The Commission recommends that the best interests principle in Article 3 UNCRC is expressly referenced within the Immigration Plan. Further to this, the Commission suggests that the Immigration Plan contain a clause which states that in all actions, decisions, policies, laws, and regulations which are enacted, that the best interests of the child shall be a primary consideration.

35.0. The Commission recommends that the child's rights to express their views in all matters which affect them, pursuant to Article 12 UNCRC is expressly included within the proposed Immigration Plan.

36.0. The Commission recommends that all relevant training about children's rights and in particular their right to be heard, be provided to all staff and professionals working across immigration and asylum services in the UK.

AGE ASSESSMENT CONSIDERATIONS

37.0. In the context of refugee, immigration and asylum law, one of the most problematic legal issues arises in cases where a child's age is in dispute. This is because the legal rights and protections which children and young people are entitled to are vastly different to those afforded to adults. An incorrect age assessment will also give rise to serious safeguarding issues should a child be incorrectly assessed as an adult and would also interfere with their legal rights under the Children (Northern Ireland) Order 1995.⁷⁴ In their evidence to the House of Lords Committee, the UNHCR stated that: "If a child is wrongly considered to be an adult, they may miss being supported by children's services; miss access to education or college; they may be dispersed to a different part of the country and might be accommodated or detained with adults".⁷⁵

38.0. Under the proposed immigration reforms, the Commission notes the objective of the Home Office to create "a robust approach to age assessment to ensure we act as swiftly as possible to safeguard against adults claiming to be children"⁷⁶ and to use "new scientific methods to improve abilities to accurately assess age".⁷⁷ Further plans

⁷⁴ Section 18 (a) of the Children Order 1995 imposes a general duty on every local authority to "to safeguard and promote the welfare of children within its area who are in need".

⁷⁵ House of Lords, European Union Committee (2016), *Children in Crisis: unaccompanied migrant children in the EU*, (HoL, 26th July 2016), para 51.

⁷⁶ Home Office (2021), 'New Plan for Immigration: Policy Statement', (HM Government), 18.

⁷⁷ Ibid.

include the establishment of a National Age Assessment Board (NAAB) which will act as a first point of review for any Local Authority age assessment decision and to carry out age assessment decisions itself "when required or where invited to do so by a local authority".⁷⁸ Additional plans include legislating to give front line immigration officers "and other staff" the power "to make reasonable initial assessments of age"⁷⁹ and to establish a fast-track statutory appeal system to challenge NAAB age assessment decisions.⁸⁰ While the Commission appreciates the desire of the Home Office to streamline current age assessment practices, it equally retains considerable reservations regarding the human rights compliance of these proposals. The Commission is especially concerned regarding the lack of detail surrounding:

- the establishment and operation of the proposed NAAB itself;
- the circumstances which would give rise to the NAAB having to carry out an age assessment in the first instance;
- the type of 'scientific methods' which are envisaged as part of future assessments;
- the ability and competency of immigration and front-line officers to carry out an age assessment; and
- the definition of who is included within the phrase "other staff".

39.0. The task of carrying out an age assessment must comply with established children's rights principles and the wider regional and international human rights obligations of the UK Government. At the domestic level, section 55 of the Borders, Citizenship and Immigration Act 2009 states that the Secretary of State, including those who carry out functions on his/her behalf, must have "regard to the need to safeguard and promote the welfare of children who are in the United Kingdom",⁸¹ while the statutory guidance which accompanies the legislation requires "the Secretary of State to make arrangements to ensure that immigration, asylum, nationality and customs functions are exercised having regard to the need to safeguard and promote the welfare of children in the United Kingdom".⁸² Further reference is made within the statutory guidance for the UK Border Agency to comply with the best interests principle, the right of the child to participate and be heard and for children's applications to be dealt with within a timely fashion.⁸³ In the case of *JO and Others (section 55 duty) Nigeria*⁸⁴ the Upper Tribunal held that the section 55 duty "operates to protect all children who are in the United Kingdom: there

⁷⁸ Ibid, 23.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ <https://www.legislation.gov.uk/ukpga/2009/11/section/55>

⁸² Home Office (2009), 'Every Child Matters', Statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children, (HO, 2009).

⁸³ Ibid, 15.

⁸⁴ [2014] UKUT 00517 (IAC)

is no qualification such as residence or nationality”⁸⁵ and that the fulfilment of the duty requires the decision-maker to be fully informed and to reach a decision on the basis of a proper consideration of all the material facts and circumstances relevant to the case under consideration. As stated in the judgment:

*“The antithesis, namely something cursory, casual or superficial, will plainly not be in accordance with the specific duty imposed by section 55(3) or the overarching duty to have regard to the need to safeguard and promote the welfare of any children involved in or affected by the relevant factual matrix.”*⁸⁶

40.0. Age assessment is a sensitive, complex and intricate process. The Royal College of Paediatrics and Child Health has stated that: “There is no single reliable method for making precise estimates. The most appropriate approach is to use a holistic evaluation, incorporating narrative accounts, physical assessment of puberty and growth, and cognitive, behavioural and emotional assessments”.⁸⁷ Similarly, the Committee on the Rights of the Child has stated that decision-makers must “not only take into account the physical appearance of the individual, but also his or her psychological maturity. Moreover, the assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity; and, in the event of remaining uncertainty, should accord the individual the benefit of the doubt such that if there is a possibility that the individual is a child, she or he should be treated as such”.⁸⁸

41.0. The importance of the presumption of minority has been further outlined in Council of Europe guidelines on ‘Age Assessment for Children in Migration’. This states that “The failure of authorities to routinely apply the presumption of minority principle has left children who have arrived in a new country, believing that they will find safety and be looked after, exposed afresh to human rights violations.”.⁸⁹ In the case of *S, R (on the application of) v London Borough of Croydon*,⁹⁰ the High Court affirmed its importance by holding that the local authority did not have good reason for departing from the statutory guidance which mandated it to provide suitable accommodation and support to a minor pending an age assessment.

42.0. Specific legal criteria has been established by the Courts in relation to age assessments. In *R(B) v Merton*⁹¹ the Court stated that age

⁸⁵ Ibid, para 6.

⁸⁶ Ibid, para 12.

⁸⁷ The Royal College of Paediatrics and Child Health, Policy statement on the assessment of the age of refugee children, 2007.

⁸⁸ UN Committee on the Rights of the Child (CRC), *General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, para 31(i).

⁸⁹ Council of Europe (2019), ‘Age Assessment for Children in Migration: A human rights-based approach’ (CoE, 2019) 11.

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⁹¹ EWHC 1689 (Admin).

should not be determined “solely on the basis of the appearance of the applicant”⁹² while in the more recent case of *BF (Eritrea) v Secretary of State for the Home Department*,⁹³ the Court of Appeal held that government guidance relating to age assessments was unlawful on the basis that it did not sufficiently counteract the risk of children being detained as adults. According to the Court of Appeal: “anyone claiming to be a child must be given the benefit of the doubt. That is not only because the detention of a child is now positively unlawful, and any policy must seek so far as possible to avoid the Secretary of State acting unlawfully”.⁹⁴ Home Office guidance has now since been revised to permit applicants to be treated as adults “if their physical appearance and demeanour very strongly suggests that they are 25 years of age or over”.⁹⁵

43.0. Children and young people also possess a number of procedural safeguards when age assessments are carried out. Not only must the best interests principle (Article 3 UNCRC) and the right of the child to be heard (Article 12 UNCRC) be complied with, but children should be provided, in a child-friendly and accessible manner, with all the relevant information regarding the assessment in question and should also have an ‘appropriate adult’ present during the assessment.⁹⁶ This also extends to monitoring linguistic or translation issues.⁹⁷ The European Court of Human Rights has also stated that, in view of the particular vulnerability of asylum seekers, they should receive the benefit of the doubt regarding the credibility of statements made or documents produced, in support of their claim.⁹⁸

44.0. Age assessments should also comply with the rights as outlined in the ECHR, and in particular Article’s 3 and 8 as outlined earlier and should only be carried out by trained professionals. In its guidance the UNHCR has stated that: “It is important that such assessments are conducted in a safe, child- and gender-sensitive manner with due respect for human dignity ... Children need to be given clear information about the purpose and process of the age-assessment procedure in a language they understand. Before an age assessment procedure is carried out, it is important that a qualified independent guardian is appointed to advise the child”.⁹⁹ Additionally, in their guidance on age assessment protocols, the Association of Directors of Children’s Services (ADCS) in England have highlighted the critical role played by social workers in conducting such assessments by virtue “of their education, experience and specialist skills in working

⁹² Ibid, para 37.

⁹³ [2019] EWCA Civ 872

⁹⁴ Ibid, para 57.

⁹⁵ Home Office (2020), ‘Assessing Age’, (December 2020), 12.

⁹⁶ *R (FZ) v London Borough of Croydon* [2011] EWCA Civ 59.

⁹⁷ Ibid.

⁹⁸ *M.A. v. Switzerland*, (No. 52589/13), 18 November 2014, para.55

⁹⁹ UNHCR, (2009), Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, para 75.

with and interviewing vulnerable children and young people”.¹⁰⁰ The role of social workers was affirmed in the case of *AW (A Child) (R, on the application of) v London Borough of Croydon [2009] EWHC 3090 (Admin)* where the court stated that: “if a firm conclusion is reached by experienced and properly trained social workers ... then it will be difficult to persuade this court, perhaps impossible, that that decision is one which can be said to be wrong in law”.¹⁰¹

45.0. In Northern Ireland, responsibility for refugee and asylum matters is dispersed across several government departments¹⁰² and the powers and duties of local councils are not comparable to those of local authorities in England for instance.¹⁰³ Therefore, the absence of any reference to where and how age assessments will be carried out in Northern Ireland, and by whom, under the proposed reforms, is of concern to the Commission.

46.0. The Commission recommends that the Home Office provide further information on the establishment of the proposed National Age Assessment Board and further provide a detailed breakdown in relation to the statutory powers and functions which it, and its officers, will have in order to facilitate a thorough analysis of its human rights compliance.

47.0. The Commission recommends that statutory guidance be published to accompany the establishment of the National Age Assessment Board which clearly outlines the powers, functions and responsibilities of the Board and the wider human rights, legal and regulatory obligations which will attach to the Board’s operations.

48.0. The Commission recommends that the Home Office provide further information on how and where age assessments will be carried out in Northern Ireland given that local authorities do not possess comparable powers and/or responsibilities in this jurisdiction. The Commission further recommends that the Home Office engage with the Northern Ireland government to ensure a clearly defined process, with sufficient oversight mechanisms, is established for future age assessments.

49.0. The Commission recommends that, in the event of the extension of the power to grant all border and immigration officials power to carry out age assessments that the Home Office publish what training and guidance will be provided to

¹⁰⁰ ADCS (2015) ‘Age Assessment Guidance: Guidance to assist social workers and their managers in undertaking age assessments in England’, (October 2015), 3.

¹⁰¹ *AW (A Child) (R, on the application of) v London Borough of Croydon [2009] EWHC 3090 (Admin)*, para 10.

¹⁰² Northern Ireland Assembly (2014), ‘Refugees and Asylum Seekers in Northern Ireland’, Research and Information Service Research Paper, (6 June 2014).

¹⁰³

such officials in order to allow an assessment of their compatibility with human rights law.

NORTHERN IRELAND SPECIFIC CONCERNS

50.0 While the Commission recognises that control and reform of asylum and immigration law and policy is an excepted matter,¹⁰⁴ it also acknowledges that Northern Ireland (NI) stands apart from the rest of the UK on two distinct fronts. First, NI is the only part of the United Kingdom which shares a land border with another country, and second, the legal, political and social realities which exist on the island of Ireland have been subject to extensive international negotiations underpinning the United Kingdom's departure from the EU, the objectives of which have included the avoidance of a hard border on the island of Ireland. Therefore, the absence of any reference to NI within the proposed Immigration Plan is concerning to the Commission.

51.0. First, Northern Ireland has, of February 2020, received approximately 1,815 Syrian refugees under the UK Government's Vulnerable Person Relocation (VPR) Scheme.¹⁰⁵ With some exceptions, the scheme has largely worked effectively in Northern Ireland. Under this scheme, it is the Home Office who determines suitability for resettlement and subsequently refers such cases onto the devolved administrations, for consideration,¹⁰⁶ with the first 12 months of a refugees resettlement costs fully funded by central government using the overseas aid budget.¹⁰⁷ Under this scheme, refugees can apply for a Home Office Travel Document which is not a passport and so are therefore exempt from the reciprocal benefits which attach to the Common Travel Area between the UK and Ireland. In practical terms, this prevents refugees from crossing the Irish border for whatever reason and may directly impact their ability to fully enjoy their educational, recreational, health or employment rights. However, Article 28(1) of The Refugee Convention states that: "The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents". It is therefore contended that the rules which regulate the provision of travel documents and passports are disadvantageous towards this group of refugees in practical terms and are contrary to the legal protections accorded to refugees under the Refugee Convention.

¹⁰⁴ Northern Ireland Act 1998, schedule 2.

¹⁰⁵ See <https://www.communities-ni.gov.uk/sites/default/files/publications/communities/dfc-svprs-briefing-feb20.pdf>

¹⁰⁶

See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/631369/170711_Syrian_Resettlement_Updated_Fact_Sheet_final.pdf

¹⁰⁷ Ibid.

- 52.0 Second, for families arriving through the VPR Scheme, evidence at the local level suggests that their human rights to housing and a decent standard of living are regularly violated. A 2018 investigation carried out by the Participation and Practice of Rights (PPR) concluded that: “conditions in the temporary houses appear to be well below both domestic and international standards, and clearly exacerbate physical and mental health issues faced by both parents and children. In some cases, the housing allocated is also unsuited to the family’s particular health needs - all of which would have been known to the authorities prior to allocation”.¹⁰⁸ Further research commissioned by the Racial Equality Unit at the NI Executive Office highlight numerous issues faced by asylum seekers and refugees in NI which are impacting their human rights. These include the provision of substandard and inadequate housing, the lack of mental health support services available to asylum seekers and refugees especially those who have been the victims of torture, the lack of adequate legal support during the asylum process and the lack of employment and political participation opportunities.¹⁰⁹
- 53.0. Third, at present, NI does not publish disaggregated data in relation to the number of asylum and refugee applications which are made in NI, or indeed how many age assessment examinations have been carried out. While figures do nonetheless exist, these are often computed on the basis of sporadically released incomplete estimates from a variety of sources including the Northern Ireland Strategic Migration Partnership, Home Office Official Immigration Statistics (UK wide), the Home Office NI Asylum Stakeholders Forum and the Refugee & Asylum Forum and other local non-governmental organisations.¹¹⁰ According to the Law Centre NI: “Access to data is essential for planning and monitoring. It is also important to counter scaremongering claims”.¹¹¹ Similarly, the Expert Group on Refugee and Internally Displaced Persons Statistics have stated that robust and accurate data on refugees, asylum seekers and refugee related populations is critical for informed decision-making, enhanced policy formulation, more effective monitoring, evaluation and accountability of policies and programmes and more improved public debate and advocacy.¹¹²
- 54.0. Fourth, under the terms of Article 2 of the Ireland/Northern Ireland Protocol¹¹³ the UK Government is under a legal obligation to ensure that there is no diminution of rights, safeguards and equality of

¹⁰⁸ Practice and Participation of Rights (2018), “‘We came here for sanctuary’ Syrian refugee families’ experience of racism and substandard housing conditions in West Belfast’, 19.

¹⁰⁹ F Murphy & U M.Vieten (2017) ‘Asylum seekers’ and refugee’s experiences of Life in Northern Ireland: Report of the first study on the situation of asylum seekers and refugees in NI – 2016’, (TEO, 2017).

¹¹⁰ See https://www.embraceni.org/wp-content/uploads/2020/02/2015Briefing_HowManyRefugeesInNI_Oct.pdf

¹¹¹ Ibid.

¹¹² Expert Group on Refugee and Internally Displaced Persons Statistics (2018), International recommendations on Refugee Statistics (European Union and the United Nations, March 2018).

¹¹³ [Revised Protocol to the Withdrawal Agreement.pdf \(publishing.service.gov.uk\)](#)

opportunity, as set out in that part of the 1998 Good Friday/Belfast Agreement entitled Rights, Safeguards and Equality of Opportunity, as a consequence of its withdrawal from the European Union. This also extends to the right “to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or *ethnicity*”¹¹⁴ [emphasis added] and applies to everyone in Northern Ireland. However, the Commission is concerned about the lack of detail surrounding how the Home Office will ensure that refugees and asylum seekers in Northern Ireland will not suffer any diminution in their rights as a result of the UK’s withdrawal from the EU, which includes its withdrawal from the Dublin III Regulation and the Common European Asylum System.

55.0. The Commission recommends that regionally consistent and accurate data is collected and made available in relation to the number of refugee and asylum applications which are made in Northern Ireland.

56.0. The Commission recommends that refugees in Northern Ireland (and across the UK) are issued with appropriate travel documentation, which enables them to travel outside the jurisdiction on an equal basis as all other citizens.

57.0. The Commission recommends that refugees in Northern Ireland, and across the UK, should have full access to, and enjoyment of, the rights set forth in the Common Travel Area, on an equal basis with all other citizens in the UK. The Commission further recommends that, at a minimum, the UK Government should consider granting ‘reasonable exemptions’ to refugees in Northern Ireland which enables them to cross the Irish border and benefit from the Common Travel Area.

58.0. The Commission recommends that the Home Office ensure that all funds allocated to the VPR Scheme are used to secure acceptable and appropriate housing in NI.

59.0. The Commission recommends that the Home Office ensure that consideration is given to the UK Government’s legal obligation to ensure that there will be no diminution of rights for refugees and asylum seekers in Northern Ireland because of the UK’s departure from the EU.

GOOD FAITH REQUIREMENT

60.0. While the Commission appreciates the desire of the Home Office to enhance the efficiency of the asylum and refugee process, including its appellate systems, the Commission is concerned regarding the

¹¹⁴

[Explainer UK Government commitment to no diminution of rights safeguards and equality of opportunity in Northern Ireland.pdf \(publishing.service.gov.uk\)](#)

vague formulation of the good faith requirement as outlined within the proposed Immigration Plan. In particular, the requirement that claimants “representatives will be required to act in good faith at all times”,¹¹⁵ the failure of which could result in negative findings regarding the credibility of the applicant, should the behaviour of their representative be found wanting, is of deep concern to the Commission. Such a measure, which in practical terms punishes the claimant for the behaviour of their legal representatives, is disproportionate and punitive.

61.0. The European Court of Human Rights has consistently held that the benefit of the doubt must and should be accorded to those seeking asylum on account of their vulnerable position. In *R.C. v. Sweden*,¹¹⁶ it held that: “... it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof.”¹¹⁷ Similar statements were outlined in *M.A. v Switzerland*.¹¹⁸

62.0. The Commission recommends that the Immigration Plan provide further clarity on what is meant by the ‘Good Faith’ obligation and particularly in what circumstances will the actions of a legal representative impact a claimant’s application.

Credibility Considerations

63.0. The Commission notes the intention of the Government to introduce a new ‘one-stop’ process where applicants will be required to raise all protection-related issues upfront at the start of the process. The Government is also planning to introduce new powers so that decision makers, such as judges, should give minimal weight to evidence that a person adduces after having been through the ‘one-stop’ process.¹¹⁹

64.0. The Government’s stated aims for these end-to-end reforms are to “reduce the extent to which people can frustrate removals through sequential or unmeritorious claims, appeals or legal action, while maintaining fairness, ensuring access to justice and upholding the rule of law”. The Commission is concerned that the new ‘one-stop’ process and negative bias towards an applicant’s credibility, introduced through these procedures, will entrench inequalities and unfairly impede the rights of a group of people who are already marginalised in society. Further, there is a risk that this approach will

¹¹⁵ Home Office (2021), ‘Immigration Plan’, 31.

¹¹⁶ *R.C. v. Sweden*, 41827/07, 9 March 2010.

¹¹⁷ *Ibid*, para 50.

¹¹⁸ (Application no. 52589/13) 18 November 2014, para 55.

¹¹⁹ HM Government ‘New Plan for Immigration’, March 2021, at 28.

result in claims of asylum seekers being denied, who could then be returned to a situation where they are at risk of being subjected to torture, inhuman, degrading treatment or punishment, as set out in Article 3 of the ECHR.

- 65.0. Refugees and asylum seekers present high prevalence rates of trauma-related mental disorders. Many refugees and asylum seekers have experienced severe pre-migration trauma, including mental and physical torture, mass violence, witnessing the killings of family members and friends, sexual abuse, kidnap of children, destruction and looting of personal property, starvation and lack of water and shelter.¹²⁰ The departure and journey to a safe place is often a complex endeavour, often fraught with life threatening risks. A recent systematic review and meta-analysis on the prevalence of mental illness in refugees and asylum seekers found that 31% of refugees and asylum seekers experienced Post Traumatic Stress Disorder (PTSD) (compared to 3.9% of the general population) and 31.5% suffered depression (compared to 12% of the general population).¹²¹ Refugees and asylum seekers who have fled from armed conflicts and persecution in their countries report high rates of pre-migration trauma and high frequencies of mental health problems, particularly PTSD and depression.¹²²
- 66.0. Guidance issued by Public Health England on the health needs of migrant patients for healthcare practitioners cites that 78% of trafficked women and 40% of trafficked men taking part in the survey screened positive for anxiety, depression or PTSD. The Guide also cautions that PTSD sufferers may not present for treatment for months or years after the onset of symptoms despite the considerable distress experienced.¹²³
- 67.0. Forced migrants often arrive in places where they have no contacts and or knowledge of the language, which contribute further to increased isolation and limited opportunities. Conscious of the psychological impacts linked to forced migration, the British Psychological Society has developed Guidelines for Psychologists Working with Refugees and Asylum Seekers in the UK. The Guidelines draw attention to need for due regard to cultural differences and societal contexts that psychologists need to be aware of when working with refugees and asylum seekers. For many, the act of talking about their thoughts, feelings and experiences may be seen as a bizarre and culturally incongruous notion. The Guidelines further

¹²⁰ Craig, T., Jajua, P.M. & Warfa, N. (2009). Mental health care needs of refugees. *Psychiatry*, 8(9), 351-354.

¹²¹ Blackmore et al. 'The prevalence of mental illness in refugees and asylum seekers: A systematic review and meta-analysis' (2020).

¹²² Stenmark, H., Catani, C., Neuner, F., Elbert, T., & Hohen, A. (2013). Treating PTSD in refugees and asylum seekers within the general health care system. A randomized controlled multicenter study. *Behaviour Research and Therapy*, 51, 641-647.

¹²³ Public Health England '[Mental health: migrant health guide](#)', 24 January 2019

note that trust may also be a problem, particularly for those who have lived in a repressive regime or within a civil war, where secrecy becomes a functional strategy.¹²⁴

68.0. Guidance from the UNHCR states that “it is incumbent on decision-makers to have realistic expectations of what an applicant should know and remember”. Accordingly, it is unreasonable to expect an asylum seeker to be expected to raise all protection-related issues upfront in one go at the start of the process. Language and translation issues aside, refugees and asylum seekers, particularly those who have faced trauma, will need time to build the necessary trust with their legal team and comprehensively recall details that are relevant to their protection claim.

69.0 Recent case law from the Court of Appeal in England and Wales on the issue of credibility cautions against reaching conclusions about, in this case, the credibility of victims of trafficking credibility without assessing the full range of circumstances. Notably, the Court explains that:

“Full weight must be given to the evidence (and guidance) about the difficulties that victims of trafficking have in telling their stories, not only because of the effects of trauma but because their experiences often engender distrust of authority and sometimes entangle them in deceptions of various kinds from which it is difficult to escape. It is also necessary to heed the caution expressed in the authorities about judging accounts to be implausible without complete knowledge of the relevant circumstances, and making full allowance for how people can behave in circumstances of stress”.¹²⁵

70.0 Case law from the ECtHR has established that it is in principle the responsibility for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, they would be exposed to a real risk of being subjected to torture, inhuman, degrading treatment or punishment, in violation of Article 3 of the ECHR¹²⁶.

71.0. Where such evidence is adduced, it is the duty of national authorities to conduct a thorough and rigorous assessment in order to dispel any doubt regarding the credibility of asserted facts, given the importance of Article 3 of the ECHR, and the irreversible nature of the harm in case of the realisation of the risk of ill-treatment¹²⁷.

¹²⁴ The British Psychological Society ‘Guidelines for psychologists working with refugees and asylum seekers in the UK: Extended version’, February 2018.

¹²⁵ *MN v Secretary of State* EWCA 2020 at para 253

¹²⁶ *N v Finland* at para 167

¹²⁷ *NA v the United Kingdom* at para 111.

72.0. The Commission recommends that the Government refrains from introducing new standards which require applicants to bring all relevant evidence upfront, and attach minimal weight to evidence introduced thereafter.

73.0. In determining how the credibility of an applicant should be assessed, the Commission recommends that the Government adopts an approach consistent with the guidance set out by the UNHCR and jurisprudence of the ECtHR, particularly where there is a risk that Article 3 of the ECHR may be contravened.

74.0. The Commission recommends that, in view of the prevalence and impact of trauma upon those seeking asylum and refugee status, the Home Office ensure that adequate training around trauma-informed practice is provided to all officials working with children and adults within the immigration, asylum and immigration system.

Access to Justice Considerations

75.0. The Commission notes the aim of the Government is to introduce a new fast-track appeal process for cases “that are deemed to be manifestly unfounded or new claims made late” which will also apply to cases where applicants raise modern slavery issues later in the process.

76.0. The Commission further notes that within the proposed immigration reforms that the Government has argued that some applicants attempt to introduce manifestly unfounded or new claims late to intentionally frustrate the process, which in turn negatively impacts those “genuinely in need of protection”. To support this claim, the Government cites the statistic that: of the approximate 6,000 cases determined on paper, 90% were dismissed or refused and out of these dismissals 17% were classified as “Totally Without Merit” by the court.¹²⁸

77.0. The Commission considers that this percentage lacks probative value in terms of claiming that some asylum seekers are especially seeking to stall the process. Civil Justice Statistics show that 17% of the judicial review applications made in 2020 that reached the permission stage were found to be ‘totally without merit’.¹²⁹ Accordingly, the percentage of cases classified as ‘totally without merit’ in asylum

¹²⁸ HM Government ‘New Plan for Immigration’, March 2021, at 9.

¹²⁹ <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-october-to-december-2020/civil-justice-statistics-quarterly-october-to-december-2020>

seeking claims is consistent with judicial review cases found in the civil justice system generally.

- 78.0. The Committee of Ministers' 'Guidelines on human rights protection in the context of accelerated asylum procedures' stipulate that "States should only apply accelerated asylum procedures in clearly defined circumstances and in compliance with national law and their international obligations". Moreover, in the context of access to justice, "Asylum seekers shall have a reasonable time to lodge their application. The time taken for considering an application shall be sufficient to allow a full and fair examination, with due respect to the minimum procedural guarantees to be afforded to the applicant". Further, "Asylum seekers whose applications are rejected shall have the right to have the decision reviewed by a means constituting an effective remedy... Where asylum seekers submit an arguable claim that the execution of a removal decision could lead to a real risk of persecution or the death penalty, torture or inhuman or degrading treatment or punishment, the remedy against the removal decision shall have suspensive effect."¹³⁰
- 79.0. A quick processing of an applicant's asylum claim should not take priority over the effectiveness of the essential procedural guarantees to protect them against arbitrary removal. In the case of *K.R.S. v. the United Kingdom*, the European Court of Human Rights held that "while it is in principle acceptable for Contracting States to set procedural requirements for the submission and consideration of asylum claims and to regulate any appeals process from adverse decisions at first instance, the automatic and mechanical application of such procedural requirements will be considered at variance with the protection of the fundamental value embodied in Article 3 of the Convention."¹³¹
- 80.0 An unreasonably short time-limit to submit a claim, such as in the context of accelerated asylum procedures, can undermine the exercise and the effectiveness of the remedy. The ECtHR has examined this issue in the context of torture, inhuman or degrading treatment under Article 3 of the ECHR. In *IM v France*, a case concerning the deportation of a Sudanese national from France, the ECtHR found that a five-day time-limit for lodging an initial asylum application and a 48-hour time-limit to challenge the subsequent removal decision were far too short¹³². Those and other elements in the case rendered the remedy practically ineffective and in breach of Article 13, taken together with Article 3 of the Convention.

¹³⁰ Council of Europe: Committee of Ministers 'Guidelines on human rights protection in the context of accelerated asylum procedures', 1 July 2009.

¹³¹ Application No. 32733/08, decision of 2 December 2008.

¹³² *IM v France* No. 9152/09, decision of 2 February 2012.

81.0. The Commission recommends that the Government ensure that the asylum claims and appeals procedure entails sufficient safeguards, especially given the risk that an inadequate opportunity to bring a claim or appeal could give rise to a violation of Article 3 of the ECHR.

Tiered Approach Concerns

82.0. The Commission notes the Government's intention to apply different treatment to asylum seekers, depending on how they entered the country. Under the Plan for Immigration, the Government proposes to provide irregular migrants that are successful in their asylum claims with a new temporary protection status rather than an automatic right to settle. They will be regularly reassessed for removal from the UK, will have limited family reunion rights and will have no recourse to public funds except in cases of destitution.¹³³

83.0. The Plan for Immigration's use of language is problematic. By referring to irregular migrants as 'illegal migrants', this automatically creates a distinction in the treatment of those entering through regular compared to irregular methods. Further, the Government's intention to differentiate in the protections afforded to successful asylum claimants, depending on their original mode of entry has the effect of stigmatising those who entered irregularly as 'illegal'.

84.0. The European Commissioner for Human Rights' Recommendation Concerning the Rights of Aliens Wishing to Enter a Council of Europe Member State and the Enforcement of Expulsion Orders states that "everyone has the right, on arrival at the border of a member State, to be treated with respect for his or her human dignity rather than automatically considered to be a criminal or guilty of fraud."¹³⁴ The Government's proposed treatment will result in labelling migrants who entered irregularly as 'illegal migrants', whereas those who enter regularly will be considered 'legal migrants'. This classification automatically gives the connotation that the migrants entering irregularly are 'criminals' or 'guilty of fraud', while this distinction and systematic erosion of their rights and protections could result in stigmatisation and a loss of dignity.

85.0. Noting the need for protection of the human rights of irregular migrants, the Parliamentary Assembly of the CoE in its resolution of 4 May 2006, stated:

¹³³ HM Government 'New Plan for Immigration', March 2021, at 20.

¹³⁴ Council of Europe: Commissioner for Human Rights, 'Recommendation of the Commissioner for Human Rights Concerning the Rights of Aliens Wishing to Enter a Council of Europe Member State and the Enforcement of Expulsion orders', 19 September 2001.

“It should be noted that as a starting point, international human rights instruments are applicable to all persons regardless of their nationality or status. Irregular migrants need protection and are entitled to certain minimum human rights in order to live in a humane and dignified manner. These rights include certain basic civil and political rights and social and economic rights.”

86.0. The effect of reducing the rights and protections offered to asylum claimants who entered irregularly may interfere with a number of rights guaranteed under the ECHR and other international human rights instruments that the UK has ratified. For instance, an individual’s right to private and family life under Article 8 of the ECHR may be violated, depending on how the Government plans to limit this right. Article 8 is not an absolute right, and the State may interfere, providing that the interference is in all circumstances proportionate, in pursuit of a legitimate aim, and in accordance with the law set out in Article 8(2) of the ECHR. Temporary protection status combined with regular reassessment for removal from the UK is also likely to infringe on an individual’s right to private and family life. It could also contravene an individual’s right to dignity by limiting their employment opportunities and ability to generate a livelihood. This is a particularly acute issue since the Government is planning to withhold access to public funds “except in cases of destitution”.

87.0. The Commission recommends that the Government reconsiders its proposal to apply rights and protections differently to refugees on the basis of their mode of entry into the United Kingdom.

88.0. The Commission recommends that the Government ensure that all asylum seekers and refugees are guaranteed, at a minimum, basic civil and political rights and social and economic rights, regardless of how they entered the United Kingdom.

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