

## Opening the Door to Arbitrary Detention – Uncontrolled Detention Powers under the Illegal Migration Act

The Illegal Migration Act (the “Act”) has raised significant and justified human rights concerns among civil society, international bodies and the public.<sup>1</sup> While the Act undermines many of the protections enshrined in the European Convention on Human Rights (the “ECHR” or “Convention”), this article focuses on the key violations by the Act of Article 5 of the Convention<sup>2</sup> and of Articles 18, 17 and 14 taken together with Article 5. Article 18 breaches are rare and are usually imputed to authoritarian governments that misuse detention for political ends. A successful challenge under this provision against detention imposed pursuant to the Act would constitute the first finding of an Article 18 violation by the UK. If the Government were to be found in breach of Article 17, meanwhile, this would constitute the first finding of a violation of this provision by the European Court of Human Rights (the “Court”).

### Breaches of Convention protections against arbitrary detention

Article 5 sets out a list of exhaustive grounds for detention. The Act’s detention powers fall under Article 5 § 1 (f), which allows immigration detention only for the lawful arrest or detention of a person “to prevent his effecting an unauthorised entry into the country” (the “first limb”) or “against whom action is being taken with a view to deportation or extradition” (the “second limb”). Immigration detention is not permitted on any other basis.

Although the first limb permits the detention of an asylum seeker or other migrant before the State’s grant of authorisation to enter, such detention must be compatible with the overall purpose of Article 5, which is to protect against arbitrary deprivation of liberty.<sup>3</sup> Arbitrariness is assessed by reference to both domestic and Convention law. As such, a period of detention that complies with national law may still be found to violate the ECHR.<sup>4</sup> Although there is no global definition as to what constitutes arbitrariness under Article 5, some key aspects have developed in the Court’s jurisprudence, the most relevant of which are addressed below.

#### *Lack of a relationship between the aim of detention and its place and conditions*

Article 5 requires the existence of some relationship between the ground of permitted deprivation of liberty and the place and conditions of detention.<sup>5</sup> The Court has, in this

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<sup>1</sup> See the groundswell of opposition to the Act in the written submissions made to the Joint Committee on Human Rights inquiry: ‘Written evidence: Legislative Scrutiny: Illegal Migration Bill’, *UK Parliament Committees*, 2023, <https://committees.parliament.uk/work/7389/legislative-scrutiny-illegal-migration-bill/publications/written-evidence/?page=1> [Accessed 10 August 2023].

<sup>2</sup> The piece builds on evidence submitted by the author with Dr Matthew Gillett (Essex Law School) to the Joint Committee on Human Rights as part of its legislative scrutiny of the Illegal Migration Act – see ‘Written Evidence by Dr Sabina Garahan and Dr Matthew Gillett (IMB0015)’, *UK Parliament Committees*, 5 April 2023, <https://committees.parliament.uk/writtenevidence/119881/pdf/> and ‘Essex experts warn Illegal Migration Bill could see UK breach European law’, *University of Essex*, 25 May 2023, <https://www.essex.ac.uk/news/2023/05/25/illegal-migration-bill-could-breach-european-law> [Accessed 10 August 2023].

<sup>3</sup> *Saadi v the United Kingdom* (13229/03) (2008) 47 E.H.R.R. 17 at [66].

<sup>4</sup> *Saadi* (2008) 47 E.H.R.R. 17 at [60].

<sup>5</sup> *Saadi* (2008) 47 E.H.R.R. 17.

respect, emphasised that immigration detention is imposed not on those who have committed criminal offences, but on people “who, often fearing for their lives, have fled from their own country”.<sup>6</sup> As such, an asylum reception centre “specifically adapted to hold asylum-seekers” was found to be free from arbitrariness.<sup>7</sup> By contrast, an Article 5 violation was established where national legislation did not specify with sufficient clarity the places where asylum seekers could be held.<sup>8</sup>

The Act fails to ensure a link between the aim of detention and the place and conditions of detention since Section 11(2) allows persons of any age to be held “in any place that the Secretary of State considers appropriate”. The Act thus leaves this decision entirely at the behest of the Secretary of State, without ensuring the existence of a relationship between the aim and place of detention. The absence of a relevant nexus is already apparent in the Government’s housing of asylum seekers on a barge, raising significant concerns for migrant safety.<sup>9</sup>

Moreover, the assessment of whether or not the deprivation of liberty was, overall, arbitrary links the aim of detention to its conditions. Consequently, in *Saadi*, detaining the applicant for seven days in “suitable conditions” allowing his asylum claim to be “processed speedily” complied with Article 5.<sup>10</sup> The reference to “suitable conditions” reflects the Court’s finding that the place of detention was “specifically adapted to hold asylum-seekers and ... various facilities, for recreation, religious observance, medical care and, importantly, legal assistance, were provided”.<sup>11</sup> Thus while the judgment accepted that there had been an “interference with the applicant’s liberty and comfort”, his detention was not arbitrary.<sup>12</sup> By contrast, detention imposed pursuant to the Act is likely to be arbitrary due to the lack of a connection between the aims of immigration detention under Article 5 § 1 (f) and “any place” considered appropriate by the Secretary of State.

The Court in *Saadi* also relied on the fact that “the provision of a more efficient system of determining large numbers of asylum claims rendered unnecessary recourse to a broader and more extensive use of detention powers”, beyond the applicant’s seven-day detention.<sup>13</sup> Since the Act introduces the very detention powers that the majority in *Saadi* was seeking to avert, these powers will clearly not be found to create a link between the aim and place of detention.

### *Lack of a relationship between detention and its aim*

Section 12(1)(b) of the Act allows for individuals to be deprived of liberty even where examination or removal is not possible “for the time being”. This breaches Article 5 §

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<sup>6</sup> *Saadi* (2008) 47 E.H.R.R. 17 at [74].

<sup>7</sup> *Saadi* (2008) 47 E.H.R.R. 17 at [78].

<sup>8</sup> *Rashed v the Czech Republic* (298/07) (Unreported, November 27, 2008) (ECHR).

<sup>9</sup> Ione Wells and Joe Nimmo, ‘Bibby Stockholm barge migrants moved after Legionella bacteria found’, *BBC News*, 12 August 2023, <https://www.bbc.co.uk/news/uk-england-dorset-66476538> [Accessed 14 August 2023]; BBC News, ‘Bibby Stockholm: Migrant barge arrivals delayed amid fire concerns’, *BBC News*, 31 July 2023, <https://www.bbc.co.uk/news/uk-england-dorset-66361426> [Accessed 14 August 2023].

<sup>10</sup> *Saadi* (2008) 47 E.H.R.R. 17 at [80].

<sup>11</sup> *Saadi* (2008) 47 E.H.R.R. 17 at [78].

<sup>12</sup> *Saadi* (2008) 47 E.H.R.R. 17 at [78].

<sup>13</sup> *Saadi* (2008) 47 E.H.R.R. 17 at [80].

1 (f), which permits immigration detention only where these aims are being actively pursued. In view of the requirement of a link between the justification for detention and its place and conditions, detention pending examination under the first limb of Article 5 § 1 (f) is justified, as in *Saadi*, where its aim is the quick and efficient processing of an asylum claim.<sup>14</sup> Detention pending deportation under the second limb is equally justified only while deportation proceedings are in progress.<sup>15</sup> Where such proceedings are not pursued with due diligence, detention ceases to be permissible.<sup>16</sup> In breach of this, the Act's powers to detain apply even where an individual's examination or removal is not possible "for the time being". Any detention imposed during this time will consequently violate Article 5.

By allowing detention "for such period as, in the opinion of the Secretary of State, is reasonably necessary", Section 12(1)(b) additionally undermines fundamental standards of legal certainty, since the Secretary of State's opinion is neither foreseeable nor open to legal challenge. In requiring that any deprivation of liberty is applied "in accordance with a procedure prescribed by law", Article 5 § 1 refers to the "quality of law", a concept that implies that domestic law must be sufficiently accessible, precise and foreseeable in its application.<sup>17</sup> Factors relevant to evaluating the "quality of law" include, first, the existence of clear legal provisions for ordering, extending and setting time limits for detention. The unfettered discretion left to the Secretary of State is, in this respect, deficient. Second, there must be an effective remedy in place allowing a person to challenge the "lawfulness" and "length" of their continuing detention.<sup>18</sup> The Act however ousts the possibility of judicial oversight for the first 28 days of detention as well as human rights and protection claims. The Act therefore fundamentally fails to attain the quality of law standards mandated by the Convention.

### *Detention of vulnerable groups*

Section 11(2) of the Act allows persons of any age to be detained "in any place that the Secretary of State considers appropriate". Article 5 however permits the immigration detention of children only "where national authorities can show that this measure of last resort was taken after *actual verification* that no other measure involving a lesser restriction of their freedom could be put in place".<sup>19</sup> The Court also recognises the vulnerability of pregnant women in immigration detention.<sup>20</sup> While time limits on the detention of children and pregnant women have been reinstated,<sup>21</sup> Section 14 disapplies the duty to consult with the Independent Family Returns Panel, thereby ousting protections aimed at ensuring that detention of vulnerable groups is imposed only as a measure of last resort.

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<sup>14</sup> *Saadi* (2008) 47 E.H.R.R. 17.

<sup>15</sup> *Chahal v the United Kingdom* (22414/93) (1997) 23 E.H.R.R. 413 at [113].

<sup>16</sup> *Chahal v the United Kingdom* (22414/93) (1997) 23 E.H.R.R. 413 at [113].

<sup>17</sup> *J.N. v the United Kingdom* (37289/12) [2016] 5 WLUK 423 at [77].

<sup>18</sup> *J.N. v the United Kingdom* (37289/12) [2016] 5 WLUK 423 at [77].

<sup>19</sup> *A.B. and Others v France* (11593/12) (Unreported, July 12, 2016) (ECHR) at [123] (emphasis added).

<sup>20</sup> *Mahmundi and Others v Greece* (14902/10) (Unreported, July 31, 2012) at [104].

<sup>21</sup> 'Consideration of Lords Amendments', *UK Parliament*, 11 July 2023, <https://hansard.parliament.uk/commons/2023-07-11/debates/5D96460C-A67B-4782-B74B-89BDD8ACE51A/IllegalMigrationBill> [Accessed 14 August 2023].

Furthermore, the Convention requires that an assessment be conducted to ensure that children and other vulnerable individuals can access the additional safeguards against arbitrary detention to which they are entitled.<sup>22</sup> A lack of active steps in conducting a vulnerability assessment may be seen to indicate a lack of good faith on the part of national authorities.<sup>23</sup> The Act removes the possibility of vulnerability assessments altogether, further increasing the likelihood of the UK being held in breach not only of Article 5 but of Article 5 taken together with Article 18 due to the level of bad faith shown.

### **Lack of judicial oversight in breach of Article 5 § 4**

Article 5 § 4 enshrines the fundamental right to have the lawfulness of detention reviewed “speedily by a court” and to release where detention is deemed unlawful. In accordance with the traditional view, domestically, detention without power (in excess of jurisdiction) should be challenged via habeas corpus proceedings. The lawfulness of arguably unreasonable detention (imposed pursuant to a statutory power and so within jurisdiction) should, meanwhile, be decided through judicial review.<sup>24</sup> Since Section 13(3) permits detention for 28 days without judicial review, this will not be in excess of jurisdiction. The likelihood of successful habeas corpus applications under the Act, which introduces sweeping detention powers, would thus be minimal. The lack of reasonableness of detention, which should be assessed in judicial review, would at the same time not be open to challenge for the first 28 days of detention.

In addition, the Act ousts the possibility of substantive review of human rights and protection claims by mandating in Section 5 the removal of an individual even where they have made such a claim. This breaches Article 5 § 4 which bans the deportation of individuals before the legality of their detention can be reviewed.<sup>25</sup> Since the notion of “lawfulness” has the same meaning under Articles 5 § 4 and 5 § 1, a review of the “lawfulness” of detention must incorporate not only national but also ECHR requirements.<sup>26</sup> The Convention demands a consideration of the protection or human rights arguments excluded by the Act. Indeed, Article 5 § 4 review must be wide enough to incorporate factors that are crucial to determining the lawfulness of detention under the relevant ground of Article 5 § 1.<sup>27</sup> As such, habeas corpus proceedings that failed to consider whether or not a mental health disorder persisted in the context of detention on mental health grounds were found to breach ECHR standards.<sup>28</sup> The protection and human rights claims which the Act seeks to exclude, including those relating to modern slavery and trafficking, would necessarily form part of Convention review under Article 5 § 1 (f). This is based on the obligatory link between the aims of detention under Article 5 § 1 (f) and detention imposed pursuant to that ground. Since human rights and protection claims might preclude a person’s

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<sup>22</sup> *Thimothawes v Belgium* (39061/11) (Unreported, April 4, 2017) (ECHR). Immigration detention of vulnerable individuals also gives rise to possible breaches of Article 3, which prohibits torture and inhuman or degrading treatment – see, for example, *Mubilanzila Mayeka and Kaniki Mitunga v Belgium* (13178/03) (2008) 46 E.H.R.R. 23.

<sup>23</sup> *Abdi Mahamud v Malta* (56796/13) (Unreported, May 3, 2016) (ECHR).

<sup>24</sup> Judith Farbey, Robert Sharpe and Simon Atrill, *The Law of Habeas Corpus* (Oxford: Oxford University Press, 2011), p.19.

<sup>25</sup> *Čonka v Belgium* (51564/99) (2002) 34 E.H.R.R. 54 at [45].

<sup>26</sup> *A and Others v the United Kingdom* (3455/05) (Unreported, February 19, 2009) (ECHR) at [202].

<sup>27</sup> *H.L. v the United Kingdom* (45508/99) (2005) 40 E.H.R.R. 32 at [135].

<sup>28</sup> *X v the United Kingdom* (7215/75) (Unreported, June 12, 1979) (EComHR).

removal, on the basis of Convention if not domestic law, the scope of the lawfulness review that the Act allows will be found to fall short of Article 5 requirements.

It has been argued that habeas corpus in fact permits a broad scope of review, with “the courts [having] shown themselves ready to mould concepts and definitions so as to achieve the power to give a remedy where a remedy seems to be needed”.<sup>29</sup> Yet even this expansive view of the possible scope of habeas corpus applications is necessarily limited by the Act’s exclusion of human rights and protection claims.

### **Breach of Article 18 in conjunction with Article 5**

Article 18 bans the restriction of rights for any reasons not listed in the Convention. The Act allows detention regardless of whether the only permissible aims of immigration detention under Article 5 § 1 (f) are being pursued. The Act in this way openly allows for detention for ulterior motives within the meaning of Article 18, since restrictions to the right to liberty will be applied for purposes “other than those for which they have been prescribed”.<sup>30</sup> A migrant detained under the Act’s powers will be able to persuasively argue that their detention pursues, in bad faith, a purpose beyond those exhaustively listed by Article 5 – namely, the issuance of a political statement on the part of the Conservative Government that it is “stopping the boats”.<sup>31</sup> The Government’s pursuit of a “hostile environment” and anti-migrant rhetoric would serve as contextual factors in the assessment of whether detention imposed under the Act had a predominantly legitimate basis. This is because ECHR jurisprudence has shifted from recognising that the existence of *any* ulterior purpose constitutes an Article 18 violation towards requiring applicants to prove that, where both legitimate and illegitimate reasons led to detention, the ulterior motive played the predominant role.<sup>32</sup>

The abusive detention of individuals to serve political goals is not new in the context of Article 18 and 5 review. Existing jurisprudence has largely arisen with respect to the detention of political dissenters, whether members of opposition parties<sup>33</sup> or NGOs.<sup>34</sup> The Court has identified the ulterior purpose in these cases as the suppression of political pluralism,<sup>35</sup> with a likely chilling effect on human rights work.<sup>36</sup> Detention under the Act could analogously be challenged on the basis that it was imposed pursuant to an ulterior political goal – to dissuade, for electoral ends, a broad category of people (those making small boat crossings) from claiming asylum in the UK. The Act’s introduction declares its aim as “[preventing] and [deterring] unlawful migration”. While the first limb of Article 5 § 1 (f) allows the detention of a specific individual “to prevent his effecting an unauthorised entry into the country”, a general motive of deterrence cannot be used to restrict the right to liberty. Deliberately stripping asylum seekers of

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<sup>29</sup> Farbey, Sharpe and Atrill, *The Law of Habeas Corpus*, p.20.

<sup>30</sup> Article 18 ECHR.

<sup>31</sup> The Government has itself referred to the Act as the “Stop the Boats” Bill from the outset – ‘Ground-breaking new laws to stop the boats’, *Home Office and Prime Minister’s Office*, 7 March 2023, <https://www.gov.uk/government/news/ground-breaking-new-laws-to-stop-the-boats> [Accessed 14 August 2023].

<sup>32</sup> This “plurality of purposes” approach was developed in *Merabishvili v Georgia* (72508/13) [2017] 11 WLUK 679.

<sup>33</sup> *Merabishvili* [2017] 11 WLUK 679; *Navalnyy v Russia* (29580/12) (2019) 68 E.H.R.R. 25.

<sup>34</sup> *Kavala v Turkey* (28749/18) (2023) 76 E.H.R.R. 13.

<sup>35</sup> *Navalnyy* (2019) 68 E.H.R.R. 25 at [175].

<sup>36</sup> *Kavala* (2023) 76 E.H.R.R. 13 at [232].

their right to challenge executive detention powers is likely to meet the high threshold set by Article 18 and to convincingly show an ulterior political motive. The Act's expedited passage further indicates the existence of an illegitimate aim.

In determining the existence of bad faith, the Court considers direct as well as circumstantial evidence, such as reports or statements by international observers and NGOs.<sup>37</sup> The ulterior political motivations underlying the Government's migration policies have been noted by relevant expert bodies including the Council of Europe Commissioner for Human Rights.<sup>38</sup> UNHCR has identified the Government's distortion of facts surrounding asylum seekers<sup>39</sup> and appealed to the UK to uphold its international legal obligations.<sup>40</sup> Current Home Secretary Suella Braverman has referred to the arrival of asylum seekers in England as an "invasion",<sup>41</sup> sparking condemnation from the UN Human Rights Commissioner.<sup>42</sup> Prime Minister Rishi Sunak has stated that exempting children from detention under the Act would create a "pull factor" encouraging migration to the UK.<sup>43</sup> The evidence therefore suggests that, rather than a legitimate aim under Article 5, detention under the Act would serve the predominantly political goal<sup>44</sup> of showing the Government's unrelenting pursuit<sup>45</sup> of its "stop the boats" pledge,<sup>46</sup> demonstratively in contravention of its human rights obligations.

Indeed, the bad faith motivations are evidenced by the Government's refusal to make a statement of compatibility under Section 19 of the Human Rights Act. The blatant disregard of a constitutional statute impervious to implied repeal<sup>47</sup> in pursuit of a

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<sup>37</sup> *Merabishvili* [2017] 11 WLUK 679 at [317].

<sup>38</sup> Commissioner for Human Rights of the Council of Europe Dunja Mijatović, 'Report Following her Visit to the United Kingdom from 27 June to 1 July 2022', *Council of Europe*, 18 November 2022, <https://rm.coe.int/report-on-the-visit-to-united-kingdom-from-27-june-to-1-july-2022-by-d/1680a952a5> [Accessed 14 August 2023].

<sup>39</sup> UNHCR, 'Statement on UK Asylum Bill', *UNHCR*, 7 March 2023, <https://www.unhcr.org/uk/news/press/2023/3/6407794e4/statement-on-uk-asylum-bill.html> [Accessed 10 August 2023].

<sup>40</sup> UNHCR, 'UNHCR appeals to UK to uphold its international legal obligations', *UNHCR*, 13 December 2022, <https://www.unhcr.org/news/press/2022/12/6398b0914/unhcr-appeals-uk-uphold-its-international-legal-obligations.html> [Accessed 14 August 2023].

<sup>41</sup> Andrew Macaskill, 'UK home secretary complains of asylum seeker 'invasion'', *Reuters*, 31 October 2022, <https://www.reuters.com/world/uk/uk-interior-minister-braverman-sent-official-documents-personal-email-six-times-2022-10-31/> [Accessed 14 August 2023].

<sup>42</sup> BBC News, 'As it happened: Sunak pressed on 'broken' asylum system at PMQs', *BBC News*, 2 November 2022, <https://www.bbc.com/news/live/uk-politics-63471393> [Accessed 14 August 2023].

<sup>43</sup> BBC News, 'Not detaining child migrants creates pull factor – Sunak', *BBC News*, 28 March 2023, <https://www.bbc.com/news/uk-politics-65102133> [Accessed 14 August 2023].

<sup>44</sup> The aim of the Act is 'to make it very difficult for people arriving by small boat to secure their release from detention for the first 28 days where detention is unlawful' – Jed Pennington, 'Detention provisions in the Illegal Migration Bill', *Free Movement*, 13 March 2023, <https://freemovement.org.uk/detention-provisions-in-the-illegal-migration-bill/> [Accessed 14 August 2023].

<sup>45</sup> Most recently demonstrated by Conservative Party chairman Lee Anderson – Sky News, 'Tory deputy chairman Lee Anderson refuses to apologise for 'f\*\*\* off back to France' comment - but says government has failed to tackle illegal immigration', *Sky News*, 9 August 2023, <https://www.independent.co.uk/news/uk/politics/lee-anderson-asylum-seekers-gb-news-b2389815.html> [Accessed 14 August 2023].

<sup>46</sup> Eleni Courea, 'Stop the boats' now second-biggest concern of UK Tory voters — poll', *Politico*, 9 March 2023, <https://www.politico.eu/article/stop-the-boats-now-second-biggest-concern-of-tory-voters-poll/> [Accessed 14 August 2023].

<sup>47</sup> *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) at [62]-[63].

political goal indicates the predominance of an ulterior motive over a genuine Article 5 compliant justification that respects national law. For the Government, the Act serves as an opportunity to exhibit its discarding of fundamental rights as a constitutional value.<sup>48</sup> Successful legal claims against detention imposed under the Act, either domestically or at the Court, would serve as further impetus for the Government to proclaim that the UK must be freed from its Convention obligations. This would follow the pattern currently being displayed in response to the challenges lodged against its Rwanda policy.<sup>49</sup> The seeds of this approach have been sown within the Act itself by the attempt in Section 55 to limit the effect of interim measures issued by the Court.

### **Breach of Article 17 in conjunction with Article 5**

Article 17 ECHR bans “the destruction of any of the rights and freedoms set forth ... or ... their limitation to a greater extent than is provided for in the Convention”. Although its main role has been to prevent groups and individuals from relying on the ECHR to engage in subversive anti-democratic activities,<sup>50</sup> Article 17 also applies to States insofar as it prohibits the destruction or excessive limitation of rights.<sup>51</sup> No Contracting State of the Council of Europe has ever been held in breach of Article 17. The Act places the UK at serious risk of being the first State to have violated the provision. This is because the Act introduces wide-ranging executive discretionary powers while circumventing judicial scrutiny. This is accompanied by a refusal to issue a statement of compatibility. Pre-existing protections, such as the duty to consult with the Independent Family Returns Panel, have been stripped away. The Act thus limits the right to liberty of migrants far beyond the bounds permitted by Article 5. A finding by the Court that the Act is an attempt by the UK Government to deliberately and excessively limit, if not entirely destroy, the right to liberty of asylum seekers is certainly arguable, if not inevitable.

As in other areas, including Article 18,<sup>52</sup> the Court sometimes declines to examine an Article 17 claim on the grounds that a violation of the substantive provision that is being reviewed in conjunction with Article 17 has already been found.<sup>53</sup> However, owing to the extreme nature of the limitations introduced by the Act and the breadth of expert bodies indicating their concerns, the Court may nevertheless proceed to an Article 17 analysis. Indeed, an Article 17 complaint must “go beyond” the alleged breaches of other ECHR provisions.<sup>54</sup> Examining the Government’s actions in introducing the Act may certainly lead the Court to establish that the aims and impact of the new detention powers extend far beyond flagrant violations of the right to liberty alone.

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<sup>48</sup> Also apparent from the failed attempts to introduce the Bill of Rights Bill, withdrawn in June 2023 – ‘Parliamentary Bills: Bill of Rights Bill’, *UK Parliament*, 28 June 2023, <https://bills.parliament.uk/bills/3227> [Accessed 11 August 2023].

<sup>49</sup> Nick Eardley, ‘Tories could campaign to leave European human rights treaty if Rwanda flights blocked’, *BBC News*, 9 August 2023, <https://www.bbc.co.uk/news/uk-politics-66438422> [Accessed 11 August 2023].

<sup>50</sup> Paulien de Morree, *Rights and Wrongs under the ECHR: The Prohibition of Abuse of Rights in Article 17 of the European Convention on Human Rights* (Cambridge: Intersentia 2017), p.27.

<sup>51</sup> *Birsan v Romania* (79917/13) (Unreported, February 2, 2016) (ECHR) at [71].

<sup>52</sup> The Court will only proceed to an Article 18 analysis where the claim that a restriction has been applied for an ulterior purpose appears to be a fundamental aspect of the case – *Demirtaş v Turkey* (14305/17) (2019) 69 E.H.R.R. 27 at [421]. It is argued that this would be found in respect of the Act.

<sup>53</sup> *Engel v Netherlands* (5100/71 et al) (1979-80) 1 E.H.R.R. 647 at [104].

<sup>54</sup> *Maggio v Italy* (46286/09 et al) (2015) 61 E.H.R.R. 42 at [6].

## Breach of Article 14 in conjunction with Article 5

Detention under the Act may lead to a finding of a violation of Article 5 taken together with Article 14, which prohibits discrimination in the enjoyment of Convention rights. In line with Section 11, the detention powers can be deployed where an immigration officer suspects (among other conditions) that a person requires leave to enter or remain in the UK but does not have it. The grounds on which such suspicion is likely to be based may well engage Article 14, which explicitly prohibits discrimination on the grounds of race, colour, language, religion, national or social origin or association with a national minority – all factors that may be invoked by immigration officers to justify the suspicion ultimately leading to detention. This is because almost half of those crossing to the UK in small boats come from only five countries.<sup>55</sup>

An applicant will be able to argue that the Act affects individuals in a discriminatory manner, explicitly targeting as it does those making small boat crossings and, by extension, those seen by immigration officers as exhibiting certain protected characteristics; the comparator here will be a migrant who does not visibly appear to have entered the country via the Channel. It will then fall to the Government to prove that the difference in treatment in imposing detention chiefly on asylum seekers who arrived in small boats was objectively justified.<sup>56</sup> The fact that the majority of those crossing the Channel qualify for refugee status<sup>57</sup> will prove a particular obstacle in this respect. The Government will also need to establish that the differential treatment pursued a legitimate aim and that the means employed (namely, detention measures) were proportionate.<sup>58</sup> It is argued that, based on the bad faith motives underlying the Act and the disproportionality of the detention powers previously outlined, a finding of a breach of Article 14 taken together with Article 5 is equally likely.

## Conclusion

The Act's sweeping detention powers not only constitute clear breaches of the right to liberty but demonstrate bad faith, discrimination and an attempt to unlawfully limit the rights of asylum seekers beyond the bounds delineated by the Convention. The Government is committed to proving its antipathy to migrants crossing the Channel as well as to the domestic and European human rights acquis that grant them legal protection. In doing so, it shows its abject and politicised disregard both for fundamental domestic human rights protections and the international commitments that the UK itself was instrumental in creating.<sup>59</sup>

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<sup>55</sup> 'The Truth About Channel Crossings', *Refugee Council*, March 2023, <https://www.refugeecouncil.org.uk/wp-content/uploads/2023/01/Refugee-Council-Channel-Crossings-briefing-March-2023.pdf> [accessed 11 August 2023].

<sup>56</sup> *DH v Czech Republic* (57325/00) (2008) 47 E.H.R.R. 3 at [177] and *Andrejeva v Latvia* (55707/00) (2010) 51 E.H.R.R. 28 at [84]. For analysis of objective justifications under Article 14, see Charilaos Nikolaidis, 'Rethinking likeness and comparability in equality claims brought before the European Court of Human Rights' P.L. 2020, Jul, 448-467.

<sup>57</sup> 'The Truth About Channel Crossings', *Refugee Council*.

<sup>58</sup> *Fabris v France* (16574/08) (2013) 57 E.H.R.R. 19 at [56].

<sup>59</sup> The Convention was "[o]riginally proposed by Winston Churchill and drafted mainly by British lawyers" – Equality and Human Rights Commission, 'What is the European Convention on Human Rights?', *Equality and Human Rights Commission*, 19 April 2017, <https://www.equalityhumanrights.com/en/what-european-convention-human-rights> [Accessed 10 August 2023].

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