Handbook for Legal Practitioners: Using the UN Global Compact for Safe, Orderly and Regular Migration as an Interpretative Tool

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Acronyms and Abbreviations

CEDAW	UN Convention on the Elimination of All Forms of Discrimination against Women (1974)
ECHR	European Convention on Human Rights (1950)
ECtHR (Strasbourg Court)	European Court of Human Rights
ECAT	Council of Europe European Convention on Action against Trafficking in Human Beings (2005)
EU	European Union
EUQD	EU Qualification Directive (2004/83/EC)
ICCPR	International Covenant on Civil and Political Rights 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights 1966
IOM	International Organization for Migration
Marrakesh Compact	UN Compact for Safe, Orderly and Regular Migration (2018)
Palermo Protocols:	
Smuggling Protocol	Protocol against the Smuggling of Migrants by Land, Sea and Air (2004)
Trafficking Protocol	Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (2000)
Refugee Convention	Convention relating to the Status of Refugees (1951 and its 1967 Protocol)
UKVI	UK Visas and Immigration
UN	United Nations
UNCRC	UN Convention on the Rights of the Child (1990)

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This Handbook is designed to help legal practitioners use the Marrakesh Compact. The Marrakesh Compact sets high standards regarding the treatment of migrants and asylum seekers. The UK's Ministerial commitment to Parliament that national law is in accordance with the Compact provides a basis for practitioners to use the Compact.

To make this Handbook user-friendly, we have divided it into chapters which cover the most controversial aspects of UK domestic law and practice. Furthermore, at the end we have included an Appendix. This contains a number of cases in which international law, including 'soft' law and unincorporated international law have been used by courts. We have provided information on the UK's Commitments under the Compact and how they can be used to assist in the protection of migrants rights. As UK immigration and asylum law and practice is subject to considerable annual change, we plan to update this handbook regularly to accommodate these changes.

The Marrakesh Compact, and the objectives and commitments therein, may be used:

1. As evidence of state practice, and of the UK's international commitments;

2. To interpret the UK's domestic obligations by providing detail on the content of the existing international obligations to which the UK is a party vis-à-vis migrants, for example in strategic litigation; particularly, where the primary and secondary legislation has been passed subsequent to the Marrakesh Compact coming into force.

The Marrakesh Compact

The Global Compact for Safe, Orderly and Regular Migration (now known as the Marrakesh Compact) is the first, inter governmentally negotiated instrument to cover all dimensions of international migration. It presents an opportunity to address the challenges people face in countries of transit and stay. Its provisions reflect existing UN human rights law (to which the UK has signed up) and provides clarification as to how these obligations apply **specifically** to migrants.[1] The Marrakesh Compact was endorsed by states in Marrakesh on 10-11 December 2018[2] and was adopted by a UN General Assembly resolution on 19 December 2018.[3]

The objectives

The Marrakesh Compact provides 23 objectives for safe, orderly and regular migration:

1. Collect and utilize accurate and disaggregated data as a basis for evidence-based policies.
2. Minimize the adverse drivers and structural factors that compel people to leave their country of origin.
3. Provide accurate and timely information at all stages of migration.
4. Ensure that all migrants have proof of legal identity and adequate documentation.
5. Enhance availability and flexibility of pathways for regular migration.
6. Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work.
7. Address and reduce vulnerabilities in migration.
8. Save lives and establish coordinated international efforts on missing migrants.
9. Strengthen the transnational response to smuggling of migrants.
10. Prevent, combat and eradicate trafficking in persons in the context of international migration.
11. Manage borders in an integrated, secure and coordinated manner.
12. Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral.
13. Use migration detention only as a measure of last resort and work towards alternatives.
14. Enhance consular protection, assistance and cooperation throughout the migration cycle.
15. Provide access to basic services for migrants.
16. Empower migrants and societies to realize full inclusion and social cohesion.
17. Eliminate all forms of discrimination and promote evidence-based public discourse to shape perceptions of migration.

[1] The UK is a signatory to the European Convention on Human Rights (1950), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), The Convention against Torture (1984), the International Convention on the Elimination of All Forms of Racial Discrimination (1966), the Convention on the Elimination of all forms of Discrimination Against Women (1979), the Convention on the Rights of the Child (1990), the International Convention on the Rights of Persons with Disabilities (2006); Two protocols attached to the UN Convention Against Transnational Organised Crime: one against smuggling of migrants and the other against trafficking in human beings (2000) and the Convention on Domestic Workers (2011); See Elspeth Guild, Stefanie Grant and CA Groenendijk (eds), *Human Rights of Migrants in the 21st Century* (1 edition, Routledge 2017) for details on the human rights contained within these documents as they apply to migrants.

[2] Over 100 countries delivered statements welcoming the Marrakesh Compact at the meeting.

[3] The Marrakesh Compact was adopted by the General Assembly with 152 votes in favour, 12 abstentions, and five votes against, namely by the Czech Republic, Hungary, Israel, Poland, and the United States of America. See more: https://news.un.org/en/story/2018/12/1028941

18. Invest in skills development and facilitate mutual recognition of skills, qualifications and competences.
19. Create conditions for migrants and diasporas to fully contribute to sustainable development in all countries.
20. Promote faster, safer and cheaper transfer of remittances and foster financial inclusion of migrants.
21. Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration.
22. Establish mechanisms for the portability of social security entitlements and earned benefits.
23. Strengthen international cooperation and global partnerships for safe, orderly and regular migration.

The structure behind the objectives

Under each objective are commitments which the parties undertake in order to realise the objective. They are followed by a series of actions that parties are encouraged to take. These actions represent 'best practise'. For example, under Objective 13: 'Use migration detention only as a measure of last resort and work towards alternatives', the commitments are as follows:

> "We commit to ensure that any detention in the context of international migration follows due process, is non-arbitrary, based on law, necessity, proportionality and individual assessments, is carried out by authorized officials, and for the shortest possible period of time, irrespective of whether detention occurs at the moment of entry, in transit, or proceedings of return, and regardless of the type of place where the detention occurs. We further commit to prioritize noncustodial alternatives to detention that are in line with international law, and to take a human rights-based approach to any detention of migrants, using detention as a measure of last resort only."

There are then eight categories of actions which parties will 'draw from' to implement the objective and commitments. For example, one of the eight actions under the immigration detention objective reads as follows:

> "g) Ensure that all governmental authorities and private actors duly charged with administering immigration detention do so in a way consistent with human rights and are trained on non-discrimination, the prevention of arbitrary arrest and detention in the context of international migration, and are held accountable for violations or abuses of human rights."

The phrase 'draw from' suggests that not all the actions must be undertaken, but rather that states should make an effort to ensure that they work towards each of the high-level objectives in the spirit of the Marrakesh Compact. There is an expectation that the objectives will be respected by states and in order to do so, states will draw upon the 'toolbox' of actionable commitments.

Legal Status of the Marrakesh Compact

Debates regarding the legal status of a 'Compact' have been extensive.[4] The final document clarifies that the Marrakesh Compact is non-legally binding at the international level; both scholars and states have affirmed this position.[5] There has been controversy as some States, including the UK, have sought to make clear the Marrakesh Compact does not create any new obligations and does not limit their sovereignty to create migration policy to 'control borders'.[6] This Handbook agrees with these assertions and does not propose that there are any *new* human rights applicable to migrants contained within the Marrakesh Compact.

Nevertheless, the Marrakesh Compact remains important to domestic practitioners for two reasons. Firstly, it provides evidence of UK state practice. Through the adoption of the Marrakesh Compact, the UK has acknowledged that existing international human rights obligations apply to migrants, are in line with the UK's domestic policy and that it commits to uphold the principles of non-regression and non-discrimination. This helps shine a light on state practices and policies which seek to avoid giving full effect to the rights of migrants. Secondly, as a result, the Marrakesh Compact assists in the interpretation of domestic obligations by providing detail on the content of the existing international obligations to which the UK is a party vis-à-vis migrants. As the UN Secretary General stated in his 2020 report, 'the [Marrakesh] Compact provides States with a tool to better meet their legal obligations to protect, include and empower all migrant children and young people regardless of status…[7]'. This Handbook outlines how this can be put into practise.

The following sections will elaborate how the Marrakesh Compact can be used by practitioners and how it can help ensure that the UK fulfils its obligations towards migrants. The Handbook then provides a thematic analysis of the Marrakesh Compact provisions and how these relate to UK immigration cases. In each case it explores how immigration lawyers can use the provisions of the Marrakesh Compact to bolster their argument. In short, the handbook aims to look at the more practical effects of this new global tool and how it can inform the work of practitioners.

[4] See Guild and Grant, *Migration Governance in the UN: What is the Compact and What does it mean?* (Queen Mary University of London, School of Law Legal Studies Research Paper No. 252/2017); Gammeltoft-Hansen, Thomas, Guild, Elspeth, Moreno-Lax, Violeta, Panizzon, Marion and Roele, Isobel, *What is a Compact? Migrants' Rights and State Responsibilities Regarding the Design of the UN Compact for Safe, Orderly and Regular Migration* (Raoul Wallenberg Institute of Human Rights and Humanitarian Law, October 11, 2017)

[5] See Goodwin-Gill and McAdam statement: https://www.kaldorcentre.unsw.edu.au/news/australia-wrong-not-sign-global-compact-migration-statement-professor-guy-goodwin-gill; See also New Zealand legal advice on the status of the Marrakesh Compact in domestic law: http://img.scoop.co.nz/media/pdfs/1812/5008076_Advice_to_Minister_regarding_Global_Compact.pdf

[6] See the UK's National statement for the International Organization for Migration (IOM) Council by Ambassador Julian Braithwaite (26 November 2019). Available at: https://www.gov.uk/government/news/uks-national-statement-for-the-international-organization-for-migration-iom-council; see also the UK Parliamentary Briefing on the Marrakesh Compact: Stefano Fella, *Briefing Paper number 8459: The United Nations Global Compact for Migration* (16 August 2019) available at: https://commonslibrary.parliament.uk/research-briefings/cbp-8459/ which includes the text of the UK's 'Explanation of Position' that was delivered by the UK Mission to the UN during the vote on the GCM.

[7] UNGA, '*Global Compact for Safe, Orderly and Regular Migration, Report of the Secretary-General*', A/75/542 (October 2020) para 14 (Available at: https://reliefweb.int/report/world/global-compact-safe-orderly-and-regular-migration-report-secretary-general-a75542)

Evidence of State Practice

The Marrakesh Compact provides evidence of the commitments the UK has made at the international level and the frameworks they have agreed to work within at the domestic level.[8] The Marrakesh Compact is the product of a state-led negotiation process and has been endorsed by the UK at the UN General Assembly and subject of a Ministerial Statement in Parliament[9]. The UK has adopted the Marrakesh Compact and agreed to implement the objectives which the Marrakesh Compact sets out, as evidenced by paragraph 41 of the Marrakesh Compact:

> "We commit to fulfil the objectives and commitments outlined in the Global Compact, in line with our vision and guiding principles, by taking effective steps at all levels to facilitate safe, orderly and regular migration at all stages…"

This provides clear political intent and approval. While the Marrakesh Compact does not legally bind the UK in international law, it indicates its political will for the purposes of interpreting domestic law (including rules and guidance). The endorsement of the Marrakesh Compact by a Minister in his capacity as such to Parliament is evidence that the UK commits to implement the objectives within the Marrakesh Compact and accepts the application of human rights obligations to migrants.[10]

The UK Government has made clear that national policy is not in conflict with the Marrakesh Compact.[11] The statement by Alistair Burt, Minister for the Middle East, in writing to Parliament, highlights the non-binding nature of the Marrakesh Compact but demonstrates that the UK acknowledges it is bound by existing human rights obligations, that these are owed to migrants and that UK polices are in line with these. He stated on 10 December 2018:

> "The GCM emphasises that migrants are entitled to the same universal human rights as any human being, and does not create any new "rights" for migrants. As a result, the UK does not interpret the Marrakesh Compact as being in conflict with its current domestic policies."[12]

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[8] As a soft law commitment, the GCM represents the 'goals to be achieved in the future rather than actual duties, programs rather than prescriptions, guidelines rather than strict obligations…' See Pierre-Marie Dupuy, Soft Law and the International Law of the Environment, 12 Michigan Journal of International Law 420, 428 (1991)

[9] Alistair Burt, Minister for the Middle East, Global Compact for Migration: Written statement - HCWS1163 (DFID) 10 December 2018, available here: https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-12-10/HCWS1163/

[10] See Global Compact on Migration, para 15: Guiding Principle – Human Rights 'The Global Compact is based on international human rights law and upholds the principles of non-regression and non-discrimination. By implementing the Global Compact, we ensure effective respect, protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stages of the migration cycle.

[11] See DFID Written Statement to Parliament on the Marrakesh Compact available at: https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2018-12-10/HCWS1163/. In particular, the UK issued an Explanation of Position, alongside likeminded EU Member States, which will publicly capture the UK's interpretation of the text; See also: UK ministerial briefing: http://researchbriefings.files.parliament.uk/documents/CBP-8459/CBP-8459.pdf

[12] See, Hansard, Written Statements: Global Compact for Migration, Volume 651: debated on Monday 10 December 2018, available at: https://hansard.parliament.uk/Commons/2018-12-10/debates/1812106000015/GlobalCompactForMigration (accessed on 18 December 2020)

Under para 11.40 of Erskine May, 'it is of paramount importance that ministers give accurate and truthful information to Parliament.'[13] This requires Ministers to provide honest representations to Parliament regarding all domestic and international policy. Thus, this statement evidences the UK's acknowledgement that their policies are, and need to continue to be, in line with the requirements under the Marrakesh Compact and that these respect the universal human rights of migrants. Furthermore, the UK Ambassador's statement to the IOM demonstrates the UK is committed to the implementation of the Marrakesh Compact, through the development of the 'Stand Up Fund' and ensuring policies are in line with the Marrakesh Compact.[14] In the UK's 2020 report to the European Regional Review of the Marrakesh Compact, it stated that 'the GCM is fully integrated into the UK policy architecture… GCM principles are reflected in wider UK migration policy and maintains senior official/ministerial focus on the GCM.[15]' Thus, this is clear evidence of the UK government's understanding of the position of the Marrakesh Compact with UK policy and the applicability of the obligations therein.

Utilising the Marrakesh Compact as evidence of the UK's international commitments in a domestic case would not be without precedent. There are other examples of a non-legally binding international instruments being utilised as evidence of a State's commitments and recognition that these need to be taken into account when the government is drafting new domestic policies. The Paris Agreement, a non-legally binding international instrument, was utilised in *R (Friends of The Earth)* to establish the nature of the UK Government's international commitments regarding climate change, and in particular carbon emissions. The Court held that Ministers had to ensure these specific commitments were taken into account when making policy decisions.[16] In finding that the government had failed to do so in regards to commitments not to pursue domestic policies that would increase emissions the Courts held the Government had to redraft policy in line with the Paris Agreement commitments. Such an argument could also be presented regarding the application of the commitments made in the Marrakesh Compact if new immigration rules are developed that are in conflict with the Marrakesh Compact objectives.

When States make commitments at the international level, in this case, the Compact, and undertake to their national parliaments that existing policies are in line with these commitments, administrators who implement national law must take into account this clear political commitment in their daily work. This means that any application of existing rules or guidance, and any proposed rule changes, should be consistent with the Compact commitments. In the event of deviation from the Compact commitments, national law (rules or guidance etc) should be interpreted as far as possible

[13] Erskine May's 'Treatise on the law, privileges, proceedings and usage of Parliament' (25th edition, 2019) Part 2 Chapter 11.40: Ministerial accountability to Parliament

[14] Braithwaite, n6: *"I would like to reiterate the UK's support for the GCM. International coordination is essential to address complex transnational challenges. The GCM champions a pragmatic approach, facilitating co-operation without creating new rights or norms, and without infringing on sovereignty. We welcome the progress made this year to build a framework for GCM implementation, including via the Start Up Fund for Safe, Orderly and Regular Migration. The UK Government will provide £3 million over three years to this Fund, working with the UN, Member States and Civil Society to shape it into an effective mechanism to achieve shared objectives, including through combatting modern slavery and promoting evidence-based approaches*."

[15] *The Global Compact for Migration European Regional Review, Submission by the United Kingdom*' (2020) p4. Available at: https://migrationnetwork.un.org/sites/default/files/docs/uk_submission_-_gcm_european_regional_review_.pdf

[16] *R (Friends of The Earth) v Secretary Of State For Transport and* others [2020] EWCA Civ 214 [184, 226, 229] wherein the Court held that the government's commitment in the Paris Agreement was part of government policy, with firm statements to that effect made before parliament which the executive must comply with.

consistently with the UK's Compact commitments. Legal practitioners who are representing clients, need to check that national rules and guidance as applied by the Home Office in respect of individual cases is consistent with the UK's commitments in the Compact and draw to the attention of the Home Office any inconsistencies which should be remedied, in particular, where this affects their clients' applications and status. In the event of a dispute between the Home Office and the applicant which results in an appeal against a negative decision, the UK courts are obliged to take into account commitments acknowledged in Ministerial Statements to Parliament in determining the correct interpretation of national law, rules, guidance and practice (see below for the Supreme Court judgments relevant to this position). The Marrakesh Compact is an internationally developed standard, adopted by the UK in Marrakesh and at the UN General Assembly, such that it can be used by domestic courts to ensure government domestic policies are aligned with the commitments and objectives they have made at the international level.

The Marrakesh Compact makes explicit reference to non-discrimination and non-regression in Paragraph 15(f) as fundamental to the protection of the human rights of migrants. These two principles are fairly new to the migration field. Non-regression as a principle comes mainly from environmental law and may be viewed as "a negative obligation inherent in all positive obligations associated with fundamental rights".[17] The principle is that a State's commitment towards a particular objective prohibits it from taking retrogressive actions. Its objective is to ensure that states which have higher standards than those in the relevant instrument, are prohibited from diminishing those higher standards to the lower standard of the instrument.[181] It is a sort of standstill provision where the law at the time of the entry into force of the commitment must be maintained or changed only in the direction of the commitment taken. Standstill provisions have been extensively explored by the European Court of Justice in relation to the EU-Turkey agreement, highlighting that they are intended to freeze in time existing restrictions (if any) and ban the introduction of new restrictions.[19] In the context of migration, this could amount to the raising of fees for migrants to access healthcare or bringing in of new restrictions on family reunification constituting regressive actions. For our purposes, the Global Compact was endorsed and adopted in December 2018, the principle of non-regression suggests that future immigration rules should not diminish the standards found in the UK immigration rules as of December 2018, which, as we have seen, the UK government views as in line with the requirements under the GCM.

Turning to non-discrimination, this area has always had a problematic relationship in the context of border control and immigration governance. Migration as a field has been excluded from the general principles of non-discrimination (see for instance Article 1(2) UN Convention on the Elimination of all

[17] Lynda Collins, 'Principle of Non-Regression' in Orsini and Morin, : *Essential Concepts of Global Environmental Governance* (Routledge 2020) <https://www.taylorfrancis.com/chapters/principle-non-regression-lynda-collins/e/10.4324/9780367816681-83> accessed 29 January 2021.

[18] See S Alegre, submission to ***R Ferguson v AG & OUTBermuda et al v AG*[2018] SC (Bda) 46 Civ (6 June 2018)** on non-regression in rights of same sex couples; available at: https://www.islandrights.org/wp-content/uploads/2018/06/Submissions-relating-to-the-contravention-of-the-European-Convention-on-Human-Rights.pdf; see UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No.3: The Nature of States Parties Obligations*, Art.2, Para.1 of the Covenant, 14 December 1990, E/1991/23, on the prohibition of "any deliberately retrogressive measures" (Para.9) The idea that once a human right is recognised it cannot be restrained, destroyed or repealed is shared by all major international instruments on human rights.

[19] See for example, the EU-Turkey Association Article 41(1) of the Additional Protocol and Article 13 of Decision 1/80 of the EU-Turkey Association Council. Case law includes *Doğan Case C-138/13*, *Demir Case C-225/12,*and *Genc, Case C-561/14*

forms of Racial Discrimination 1965).[20] The issue has been that non-discrimination requires citizens and foreigners be treated equally; leaving no place for differentiating on the basis for nationality. However, the premise of migration control *is* discrimination on the basis of nationality. The ambit of a general principle of non-discrimination in the context of migration, while excluding nationality, needs to bring back into immigration law the CERD definition which prohibits "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." (Article 1(1)). Furthermore, reliance on principles of 'necessity' for permitting differential treatment must be interrogated.[21] The material scope of the prohibition on discrimination must be interpreted with that of the Marrakesh Compact itself. The centrality of these principles to the Marrakesh Compact are important for understanding the nature of the commitment that the UK has made in acknowledging the rights of migrants.

In the UK there is no single comprehensive legal framework covering immigration law. The basis remains the 1971 Immigration Act but this is subject to almost annual amendment since 2000 by Acts of Parliament. The Immigration Rules and Guidance, made under the Act, are also subject to continual change, undermining foreseeability and clarity.[22] This instability makes it difficult to ascertain what obligations are owed to migrants and their compatibility with domestic rules. The Marrakesh Compact provides stability by clarifying the ongoing international standards the UK has affirmed and outlines their application to migrants. In doing so it **does not** create new obligations but consolidates and clarifies those pre-existing ones to ensure gaps are filled.[23] The Marrakesh Compact expresses the political will of states parties to uphold human rights obligations for migrants. Given this role, the Marrakesh Compact can be utilised by UK practitioners to evidence the duty on the Home Office in the application of the international commitments the UK has made in relation to the treatment of migrants.

The Marrakesh Compact clarifies that its signatories consider themselves bound by human rights obligations as they relate to migrants and that domestic policy will be in line with these requirements.[24] As such, the term 'politically binding' is appropriate, as it represents an agreement that the UK has endorsed and committed to fulfil. To act in 'good faith,'[25] the UK government must ensure that domestic legislation and policy are not in conflict with the human rights commitments it

[20] UN Convention on the Elimination of all forms of Racial Discrimination 1965), Article 1(2)

[21] See *R. (on the application of Saadi and others) v. Secretary of State for the Home Department* [2001] EWHC Admin 670, [2001] for application, or lack thereof, of the necessity test and how this compares to treatment of nationals.

[22] See the Law Commission, 'Simplifying the Immigration Rules (13 January 2020) Available at: https://www.lawcom.gov.uk/document/simplifying-the-immigration-rules-report/

[23] See Busuttil in Guild and Basaran, Global Compact for Migration Final Commentary Objective by Objective; available at: https://rli.blogs.sas.ac.uk/themed-content/global-compact-for-migration/

[24] See: para 2 of the Preamble of the Marrakesh Compact; para 4 of the preamble states that '*Refugees and migrants are entitled to the same universal human rights and fundamental freedoms…'* and para 11 '*and an overarching obligation to respect, protect and fulfil the human rights of all migrants…*' and para 41 *'We commit to fulfil the objectives and commitments outlined in the Global Compact, in line with our vision and guiding principles, by taking effective steps at all levels to facilitate safe, orderly and regular migration at all stages. We will implement the Global Compact, within our own countries and at the regional and global levels, taking into account different national realities, capacities and levels of development, and respecting national policies and priorities...'*

[25] Good faith acts to give legal value to the expectations that States have in the actions of other States, see Steven Reinhold, Good Faith in International Law, 2 *UCL Journal of Law and Jurisprudence* (2013)

has made as they apply to migrants. The Marrakesh Compact is thus of substantial value for the UK Government and legal practitioners. It clarifies and elucidates the substance of the existing international obligations the government owes to migrants.

Assisting in the interpretation of domestic obligations

As well as providing evidence of the UK's commitment to uphold the human rights of migrants, the Marrakesh Compact is also a tool for the interpretation and clarification of the content of the existing legal obligations of the UK regarding migrants. This can inform legal interpretation of the Immigration Acts, Rules and Guidance.

In interpreting the domestic legislation and obligations of the UK, practitioners and judges must keep in mind the international commitments the state has made.[26] *Per* Lord Dyson in *Assange v Swedish Prosecution Authority* [2012] UKSC 22 "There is no doubt that there is a "strong presumption" in favour of interpreting an English statute in a way which does not place the United Kingdom in breach of its international obligations." The international instruments a state has adopted have a role to play in interpreting the compliance of national policies with national and international law. The Marrakesh Compact can provide such interpretive guidance for courts and practitioners in understanding the content of the UK's obligations vis-à-vis migrants; at least in relation to those statutes which were passed after the Treaty was signed.[27]

The Marrakesh Compact is underpinned by pre-existing legal obligations, including those found in human rights, trafficking, labour, employment and child protection laws.[28] It brings together the international legal standards relating to migrants into one document[29]. Thus, the Marrakesh Compact sets out common 'principles, commitments and understandings'[30] with regard to existing rules and their interpretation in established areas of international law. The objectives and commitments can elucidate the content and application of international legal standards in national law cases as we have seen has been the practice of the UK Courts. They are an aid to interpretation of a state's international legal obligations. However, the Marrakesh Compact is not binding law and has not been incorporated into domestic legislation. This section will outline how the Marrakesh

[26] See *Regina v Lyons et al* (UKHL) 15 Nov 2002 which finds that the relationship between obligations accepted under international convention and national law are to be seen as complementary: 'rules of international law not incorporated into national law confer no rights on individuals directly enforceable in national courts. But although international and national law differ in their content and their fields of application they should be seen as complementary and not as alien or antagonistic systems.'

[27] In exceptional circumstances, possibly, it may be argued that this may even affect the interpretation of certain terms in earlier statutes: see the logic of Lady Hale in *Yemshaw v London Borough of Hounslow* [2011] UKSC 3 at [24]. This may particularly be the case where use of a word or a phrase evolved over time.

[28] See for full analysis of legal obligations underpinning the Marrakesh Compact: *The UN's Global Compact for Safe, Orderly and Regular Migration: Analysis of the Final Draft*, 13 July 2018, Objective by Objective (Refugee Law Initiative, Blog series, 2018) available at: https://rli.blogs.sas.ac.uk/themed-content/global-compact-for-migration/

[29] See for discussion of this and the capacity of the GCM for governance over international migration: Marion Panizzon and Daniela Vitiello; Governance and the UN Global Compact on Migration: Just another Soft Law Cooperation Framework or a New Legal Regime governing International Migration? (EJIL:Talk! March 2019) Available at: Vincent Chetail, 'The Human Rights of Migrants in General International Law: From Minimum Standards to Fundamental Rights' (2013) 28 Georgetown Immigration Law Journal 225. This is without prejudice to those (rare) instances where the objectives within the GCM go beyond the binding obligations derived from international law. For example, where Objective 13 defines that migration detention must be used "only as a measure of last resort", this arguably exceeds the guarantees under Article 5 ECHR. This is also evident in objective 5 and 6 (labour migration and recruitment) where the GCM goes further than international law, these political aspirations demonstrate a commitment to a higher threshold.

[30] UN General Assembly, Modalities for the intergovernmental negotiations of the global compact for safe, orderly and regular migration, UN Doc. A/Res/71/280, 1

Compact can still assist with interpretation of domestic policy documents through an examination of how unincorporated and 'soft law' commitments have been utilised by domestic courts.

Where international legal instruments have been incorporated into domestic legislation, they have direct effect.[31] However, where courts have discretion, they should exercise it compatibly with the UK's international law obligations through a purposive approach, even in relation to unincorporated international law (*Rantzen v Mirror Group Newspapers (1986) Ltd.* [1994] QB 670). Furthermore, where the common law is uncertain, or there is a gap in the law, courts should make decisions compatibly with the UK's international obligations (*DPP v Jones* [1999] 3 WLR 625). The Supreme Court in *Nzolameso v City of Westminster* found that:

"Where Convention Rights under the Human Rights Act 1998 are engaged, it is well established that they have to be interpreted and applied consistently with international human right standards, including the UN Convention on the Rights of the Child (UNCRC)."[32]

The UNCRC has not been integrated into UK law but it was still found to be relevant for interpreting the provisions of the European Convention of Human Rights (ECHR) as incorporated by the Human Rights Act 1998 because the Convention should be interpreted in light of international law and agreements.[33] The Court went on to acknowledge the possibility that even where no Convention right is involved, national policy should still be construed consistently with the international legal obligations of the UK.[34] In *ZH (Tanzania)*, the Court had also drawn upon the UNCRC to ensure UK policy was in line with international standards.[35] Where a clear link between an internationally protected right is found to be in conflict with domestic legislation or policy, UK courts should interpret national rules in line with international obligations. In doing so, they may draw upon international instruments to elucidate the content of these obligations.

The practice of Courts and legal practitioners drawing upon soft law to interpret and elucidate the content of existing rights and obligations is not new.[36] National courts have long used Council of

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[31] See *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry ("Tin Council" case)* [1990] 2 AC 418, para 500: ''…as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation;' *Thomas v Baptiste* [2000] 2 AC 1 (PC) para 430.

[32] *Nzolameso v City of Westminster* [2015] UKSC 22 para 29; see also see *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, *H(H) v Deputy Prosecutor of the Italian Republic Genoa (Official Solicitor intervening)* [2012] UKSC 25, [2013] 1 AC 338, *Stevens v Secretary of State for Communities and Local Government* [2013] EWHC 792 (Admin), [2013] JPL 1383, approved in *Collins v Secretary of State for Communities and Local Government* [2013] EWCA Civ 1193, [2013] PTSR 1594.

[33] See *R (on the application of SG and others) v Secretary of State for Work and Pensions* (2015) UKSC 16 para 137

[34] *Nzolameso v City of Westminster* [2015] UKSC 22 para 29

[35] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, para 21 and subseq; see also *The Advocate General for Scotland (Appellant) v Romein (Respondent) (Scotland) [2018] UKSC 6* regarding the application of CEDAW (not in Sumption's judgment but in that of the Scottish Court) being used to interpret the UK's obligations.

[36] The term 'soft law' encompasses soft rules that are included in treaties, nonbinding or voluntary resolutions, recommendations, codes of conduct, and standards. Moreover, it covers those weak provisions of international agreements not entailing obligations. Soft law's nature has been the subject of passionate debates and there is no single definition. However, that provided by Shelton is often cited as influential. It finds that soft law are those: "normative provisions contained in non-binding texts" Shelton, Dinah, ed. *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (Oxford University Press, 2000) 292

Europe recommendations to interpret national obligations under the ECHR.[37] UK Courts have previously drawn upon internationally negotiated standards to elucidate the content of the State's obligations at the domestic level. In *KV Sri Lanka* the UK Supreme Court reflected upon the appropriate use of the Istanbul Protocol[38] as guidance for medical experts finding them to be an authoritative guideline on the interpretation of what amounts to torture.[39] Similarly, the UK Supreme Court takes account of non-binding guidance for national interpretative purposes. For example, General Comments of the UN Human Rights Committee have provided authoritative guidance to interpret details of the substantive content of obligations and to ensure consistency of international law as well as legal stability.[40] In *A and Others v Secretary of State for the Home Department*, Lord Bingham made use of UN Human Rights Committee General Comment 20 (1992) to elaborate on the duty of States.[41] Thus, documents which provide detail on the content of obligations are used by national and regional courts to ensure the coherence of policy with obligations.

There are examples of UK Courts drawing on UN Security Council (UNSC) Resolutions to provide context and detail to existing international obligations. In *Al-Waheed v Ministry of Defence* [2017] AC 821, Lord Sumption discussed that, whilst UNSC resolutions are not binding in international law, they may constitute authority in international law, where such resolutions provide detail as to the content of the international obligations of a State.[42] The Court in *Al-Sirri* also drew upon UNSC Resolutions with Sedley LJ holding that they provide authority on the context of international actions and are a legitimate indicator of the meaning and scope of the UN Charter.[43] It is evident that Courts can draw on authoritative documents that provide interpretive guidance if the context of the case calls for it to ensure that State conduct is in line with international provisions.

Soft law instruments specific to the migration field have also been found to have interpretive authority by Courts. The UN High Commission for Refugees (UNHCR) Handbook, which has no legal authority, has been utilised by courts to elucidate the nature of State's international obligations at the domestic level. In *R (Adan) v Secretary of State for the Home Department* [2001] 2 A.C. 477 at p.520, Lord Steyn, acknowledged this holding that:

> 'the UNHCR Handbook, although not binding on states, has high persuasive authority, and is much relied on by domestic courts and tribunals.'[44]

[37] E.g. App. No. 10593/08 *Nada v Switzerland* [2012] ECHR 1691, IHRL 2059 (ECHR 2012)

[38] 'Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' ("Istanbul Protocol"), 2004, HR/P/PT/8/Rev.1. This was the result of three years of work by over 75 experts in law, health and human rights.

[39] *KV (Sri Lanka) v Secretary of State for the Home Department* [2019] UKSC 10

[40] *Diallo* at para 66. In *A and Others v Secretary of State for the Home Department*, Lord Bingham made use of General Comment 20 (1992) to elaborate on the duty of States, at 52; See also *R v Asfaw* [2008] UKHL, 31, speech of Lod Hope, para 53; *R v Special Adjudicator, ex parte Ullah* [2004] UKHL 26; *Babar Ahmed and Ors v UK,* No. 24027/07 (ECHR) para 76, 174-5, stating at para 175 that, 'interpretive assistance can be derived from the approach of the Human Rights Committee.' See also *DA &Others* (2019) and *J v K and another* (2019) where General Comments were used as authoritative guidance and been found to be an alternative source of law on human rights obligations.

[41] *A and Others v Secretary of State for the Home Department*, at 52

[42] *Al-Waheed v Ministry of Defence* [2017] AC 821 [25]. In this instance UNSC Resolutions were utilised to elaborate the content of the obligations of States to combat terrorism and to elucidate what 'terrorism' was;

[43] Ibid, para 30

[44] Aust, Modern Treaty Law and Practice (2000), p.191 [now (2013) (3rd edn) (Cambridge) p.212]

The starting point for the status of the Handbook is Plender's argument in *Musisi* that it is evidence of state practice in the implementation of the Refugee Convention, which itself is a legally binding obligation.[45] By analogy, the Marrakesh Compact is evidence of state practice and the acceptance of the international community of the standard necessary for state practice. The UK's Ministerial Statement to Parliament that UK practice is already consistent with this standard of international state practice has legal consequences as argued in *Musisi* and accepted by the UK courts.

Further, in *Al-Sirri,* the UKHL confirmed the need for interpretive consistency and that there should be only 'one true meaning' for international obligations.[46] The Court held that the UNHCR Guidelines are intended to provide interpretive legal guidance.[47] It has been argued that this interpretive authority is given to the UNHCR Guidelines because there is not an international court that has oversight of implementation of the Refugee Convention and thus, the Office of the UNHCR has a supervisory role in providing guidance on the operation of the Refugee Convention.[48] However, whilst this argument is recognised it does not deflect from the role of the UNHCR Guidelines in providing useful understanding of the UK obligations and how to integrate international commitments into domestic law. Thus, there are numerous examples of soft law instruments being utilised by UK Courts to interpret the substance of the international obligations the UK has ratified. The Marrakesh Compact can similarly provide clarity on the content of obligations vis-à-vis migrants and how these international commitments can be integrated into domestic law.

To sum up, the Marrakesh Compact is not a legally binding document and does not create a 'right' to migration or new human rights for migrants. What it does is demonstrate that the UK acknowledges the application of existing, binding, human rights to migrants, including the principles of non-regression and non-discrimination, and provides detail of *how* these human rights apply to migrants. The Marrakesh Compact need not have legal force to be used to interpret the international obligations that the state has agreed to be bound by.[49] It provides evidence of the political will and intent of the State at the international level, along with context in which other, legally binding, instruments are interpreted to ensure the UK is acting in 'good faith' with its international obligations.[50]. Our hope is that this can now be utilised by practitioners, and courts, to interpret these obligations and as evidence of what the UK has agreed it needs to do in order to give effect to its existing international obligations at the domestic level. Over the past two decades, UK domestic courts have developed a consistent judicial doctrine regarding the use of international law instruments, both legally binding and otherwise. This legal doctrine requires the Home Office and the courts themselves to ensure that implementation of national law and policy is consistent with the UK's international obligations as guided by international non-binding commitments endorsed by the UK Government.

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[45] *Re Musisi, [1987] 1 AC 514, [1987]* that the UNHCR Handbook is evidence of state practice in the implementation of the Refugee Convention, which itself is a legally binding obligation.

[46] *Al- Sirri* quoting Lord Steyn in *Ex Parte Adan* p.516

[47] Ibid, para 39

[48] See for example Loescher G. The UNHCR and World Politics: State Interests vs. Institutional Autonomy. *International Migration Review*. 2001;35(1):33-56.

[49] See discussion regarding the use of Hansard for interpreting obligations in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593

[50] The basic rule for interpretation of legal instruments is found in the Vienna Convention on Law of Treaties. Article 31(2) and (3) defines that treaties must be interpreted in line with subsequent agreements or agreements made in connection with the treaty; this includes relevant soft law agreements.

The Global Compact for Practitioners

This handbook is organised by theme, focusing on those that are the most problematic as regards treatment of migrants in the UK and their access to protection. These themes reflect a large proportion of the most contested cases coming to immigration law practitioners and before the courts. The sections are designed to highlight the relevant provisions of the Marrakesh Compact for our practice and how the Marrakesh Compact can assist in addressing some of the most common issues faced by migrants. We use national case law extensively to illustrate where the added value of the Marrakesh Compact lies.

Each section:

1) Outlines the overarching international legal obligations that the UK is bound by in relation to that thematic issue,
2) Presents recent case examples of how state practise has undermined or threatened the provision of this obligation,
3) Introduces the specific provisions of the Marrakesh Compact that relate to this overarching legal obligation and then provides a commentary on what these provisions mean,
4) Sets out some examples of how we may use these provisions to strengthen our practise.

Communication of Rights and Obligations, particularly in cases of vulnerability

Overarching legal obligations:

Article 3 Convention on the Rights of the Child (CRC)

(1) 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.

Article 3, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

(1) States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Article 6, CEDAW

(1) States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

Cases where this has been an issue:

Vulnerability has been considered in many of the Dublin III family reunion cases (it being well-documented with expert reports), the majority of which involved unaccompanied minors and some of which involved girls and women. See for example: *AT and another* [2016] UKUT 227 (IAC) (24 March 2016) which concerned Article 8 ECHR, family reunification of an Eritrean woman and her son, *MS and others* [2009] UKAIT 00041 (15 September 2009) which concerned a Somalian family reunion (a young woman and her two children) in order to seek asylum and *AM, (a Child), R (on the application of) v Secretary of State for the Home Department* [2017] UKUT 262 (IAC) (5 June 2017) which concerned the functioning of the Dublin system in the context of unaccompanied children and the need for procedural safeguards. These cases demonstrate that the vulnerability of women and children is often exacerbated through poor communication of procedures and human rights support by state services.

Case law demonstrates that women and children are in a situation of heightened vulnerability when arriving in the UK seeking asylum or seeking to secure a right to remain. In these circumstances, full access to information and support is essential to ensure they can properly navigate the social service and immigration systems.

Furthermore, two Local Government and Social Care Ombudsman decisions are relevant to the communication of rights and obligations – and may provide an opportunity for the Marrakesh Compact to be used in future complaints to the Ombudsman.

1. In *Royal Borough of Greenwich (13 019 106),* it was held that the council had failed to act appropriately and in a timely manner to help a young woman regularise her immigration status. The young woman originally came to the UK from Nigeria to live with her mother in 2006 when she was 10. In early 2010 her mother returned to Nigeria without her. She became a 'looked after child' (ie a child in Social Services care) in September 2010 and she turned 18 in May 2013. There was a failure to provide consistent support and advice to her as a 'looked after child'. In discussing improvements that needed to be made the Ombudsman held that

the Council needed to ensure its staff understand the requirements of the immigration rules, as they apply to children seeking asylum and those seeking leave to remain, and to ensure it gives full and proper consideration to its duties to all its 'looked after children' who may be in need of legal advice, to meet its obligations as their corporate parent to safeguard and promote their welfare, including provision of timely information.

2. In *Sandwell Metropolitan Borough Council (18 017 459)* Miss X complained about Sandwell Council's decision to stop support for her children because it considered she had not applied to the Home Office for leave to remain in the UK, despite the fact that she had provided them with proof of postage of her application. It was held that there was fault in how the Council made this decision as Miss X had made such an application. There were errors in communication and assistance. This fault had put Miss X in considerable distress and left her, and her children, without support.

What does the Marrakesh Compact say?

Guiding Principles: Common understanding

10. …We must ensure that current and potential migrants are fully informed about their rights, obligations and options for safe, orderly and regular migration, and are aware of the risks of irregular migration.

Objective 7: Address and reduce vulnerabilities in migration

24. We commit to respond to the needs of migrants who face situations of vulnerability, which may arise from the circumstances in which they travel or the conditions they face in countries of origin, transit and destination, by assisting them and protecting their human rights, in accordance with our obligations under international law. We further commit to uphold the best interests of the child at all times, as a primary consideration in situations where children are concerned, and to apply a gender-responsive approach in addressing vulnerabilities, including in responses to mixed movements.

a) Review relevant policies and practices to ensure they do not create, exacerbate or unintentionally increase vulnerabilities of migrants, including by applying a human rights-based, gender- and disability-responsive, as well as an age- and child-sensitive approach

b) Establish comprehensive policies and develop partnerships that provide migrants in a situation of vulnerability , regardless of their migration status, with necessary support at all stages of migration, through identification and assistance, as well as protection of their human rights, in particular in cases related to women at risk, children, especially those unaccompanied or separated from their families, members of ethnic and religious minorities, victims of violence, including sexual and gender-based violence, older persons, persons with disabilities, persons who are discriminated against on any basis, indigenous peoples, workers facing exploitation and abuse, domestic workers, victims of trafficking in persons, and migrants subject to exploitation and abuse in the context of smuggling of migrants.

c) Develop gender-responsive migration policies to address the particular needs and vulnerabilities of migrant women, girls and boys, which may include assistance, health care,

psychological and other counselling services, as well as access to justice and effective remedies, especially in cases of sexual and gender-based violence, abuse and exploitation

g) Ensure migrants have access to public or affordable independent legal assistance and representation in legal proceedings that affect them, including during any related judicial or administrative hearing, in order to safeguard that all migrants, everywhere, are recognized as persons before the law and that the delivery of justice is impartial and non-discriminatory

Commentary:
Article 3.1 of UNCRC and Article 3 CEDAW both make clear that the State must ensure proper processes are in place that put the best interests of the child, or the advancement of women, at their core. The cases of *ZH (Tanzania)* and *Romein* make clear that these human rights conventions (unincorporated into UK domestic law) are nonetheless relevant in interpreting the UK State's human rights obligations.[51] Objective 7 of the Marrakesh Compact focuses on vulnerabilities in the context of migration. It acknowledges that situations of vulnerability may take place everywhere (i.e., in countries of origin, transit or destination) and outlines a number of measures whereby States commit to respond to the needs of migrants in such circumstances, by assisting them and protecting their human rights. States are invited to pay particular attention to specific categories of "at-risk" migrants, such as children unaccompanied or separated from their families, victims of sexual and gender-based violence, workers facing exploitation and abuse.

States also agree to uphold in all circumstances the best interests of the child principle, and to adopt a gender-based approach to address these vulnerabilities. Proposed actions include:

- Critically reviewing existing laws, policies and practices, with a view to eliminating those that create or exacerbate migrants' vulnerability;
- Involving relevant stakeholders in the identification, referral and assistance of migrants in a situation of vulnerability;
- Improving access to legal services for vulnerable migrants and facilitating their transition to a more secure status (see discussion in section 2)
- States are also required to design and apply certain support measures in the case of "migrants caught up in situations of crisis", such as consular protection and humanitarian assistance.

Example: failure to properly advise looked-after children regarding their immigration and nationality options

Where a local authority has failed to give proper advice to a 'looked-after child' (a child in care) regarding their immigration and nationality options, complaints can be sent by the child in care (or care leaver) to the Local Government and Social Care Ombudsman. The Ombudsman's powers, if upholding the complaint are to direct the Council involved to pay a sum of money to acknowledge distress caused, to apologise, and to take concrete steps to improve their practice. Local authorities are explicitly mentioned in Paragraph 44 of the Marrakesh Compact as being one of the groups responsible for implementing the Marrakesh Compact.

[51] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, para 21; *The Advocate General for Scotland (Appellant) v Romein (Respondent) (Scotland) [2018] UKSC 6*

See also ‘the facilitation of British citizenship for children’ in the ‘Children’ section of this handbook.

A failure to provide proper advice to children in their care on immigration is arguably a breach of the obligation in 7(g). This could be pointed out in a letter of complaint to the Local Government and Social Care Ombudsman by the lawyer in charge of the case.

Access to Legal Aid and Assistance

Overarching legal obligation:[52]

Article 14 International Covenant on Civil and Political Rights (ICCPR)

(1) *Right to a fair and public hearing by a competent, independent and impartial tribunal established by law*[53]

Article 16, ICCPR

(1) Everyone shall have the right to recognition everywhere as a person before the law.

Cases where this has been an issue:

In the case of *IS v The Director of Legal Aid Casework & Anor* [2015] EWHC 1965 (Admin) the exceptional case funding (ECF) scheme was deemed as being unlawful. In this case, the court held that there had been a systematic failure in providing funding to enable the claimant to apply to the Home Office to recognise his position in this country.

In *R (Duncan Lewis Solicitors Ltd) v Director of Legal Aid Casework and the Lord Chancellor (2018),* a claim was brought for judicial review of the Legal Aid Agency's refusal to backdate legal aid certificates, even where solicitors have made a legal aid application as promptly as possible and it is necessary to begin work to secure access to justice for a client before the Legal Aid Agency has time to grant a certificate. In response to that claim, the Government agreed, in open correspondence, to amend the Civil Legal Aid (Procedure) Regulations 2012 to expressly allow for legal aid certificates to be backdated to the date of application for legal aid. This has improved migrants' ability to obtain legal aid to challenge decisions made by public bodies in very urgent circumstances, such as unlawful removals and unlawful detentions by the Home Office.

What does the Marrakesh Compact say?

<u>Objective 7: Address and reduce vulnerabilities in migration</u>

(g) Ensure migrants have access to public or affordable independent legal assistance and representation in legal proceedings that affect them, including during any related judicial or administrative hearing, in order to safeguard that all migrants, everywhere, are recognized as persons before the law and that the delivery of justice is impartial and non-discriminatory.

Commentary:

In accordance with Article 14 ICCPR, regarding fair trial and access to legal aid, Objective 7(g) makes it clear that for migrants to be protected from vulnerability, they must have access to affordable and timely legal aid and assistance, regardless of the reasons the individual is in need of representation.

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[52] See also Article 6 European Convention on Human Rights (ECHR) states that:

(1) 'Everyone has the general right is 'to a fair hearing' in the determination of civil rights and obligations or of any criminal charge.'

(3)(c) 'Everyone has the right 'to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'. However, this provision applies only to civil and criminal matters, not administrative ones like immigration.

[53] Understood by the OHCHR to include due process rights including a right to legal representation and amount to a customary right beyond criminal proceedings. See Human Rights Committee, General Comment 32 (Article 14: Right to equality before courts and tribunals and to a fair trial) (hereafter General Comment 32) para 16 and Al Rawi and others v. Security Service and Others [2011] UKSC 34, para. 12

This enables migrants to engage in the legal system without fear of discrimination based upon their immigration status which is central to preservation of their legal personhood (Article 16 ICCPR) and the fundamental protection of their rights. It also guarantees the migrant understands the purpose of legal hearings and the legal procedures they may find themselves in. Lack of access to assistance and representation risks placing the migrant in a position of vulnerability where fair treatment cannot be assured. Seeing a migrant as a person before the law is essential for the protection of the full gamut of human rights.

Objective 12: Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral

28. We commit to increase legal certainty and predictability of migration procedures by developing and strengthening effective and human rights-based mechanisms for the adequate and timely screening and individual assessment of all migrants for the purpose of identifying and facilitating access to the appropriate referral procedures, in accordance with international law.

Commentary:
Objective 12 aims to strengthen certainty and predictability in migration procedures via appropriate screening, assessment and referral. "Migration procedures" should entail appropriate and relevant information being communicated to all migrants. Victims of trafficking and "migrants in situations of vulnerability", especially children, should be identified early on in that procedure and get adequate attention and assistance, including referral to the competent, specialised institutions. These procedures should include proper access to legal assistance and advice. As with all other objectives, this one on screening, assessment and referral ought to be read in the context of the whole Compact, as a procedural guarantee which is relevant at the border, at other entry points or whenever a migration procedure is started.

Example*:*

From 1 April 2013, Part 1 of Schedule 1 of the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) 2012 took the following matters out of scope of legal aid: most private family cases (apart from where there was evidence to suggest that there was domestic violence, or child abuse or abduction), welfare benefits, clinical negligence, employment, housing disputes (apart from serious disrepair, homelessness or anti-social behaviour), debt, immigration and education (apart from special needs cases) and had the effect of removing aid from around 650,000 people.[54] As a result, areas relating to family migration, which includes family reunion work, deportation where a non-British resident has committed a criminal offence in the UK or breached their conditions of stay, Article 8 of the European Convention of Human Rights which deals with the right to a private and family life and unaccompanied migrant children (non-asylum) were taken out of scope.[55] This means that many individuals no longer have access to legal aid and cannot afford access to legal representation. This places them in a dangerous position of vulnerability.

[54] Baksi C, 'Civil Legal Aid: Access Denied' (2014), Law Society Gazette, available at: https://www.lawgazette.co.uk/law/civil-legal-aid-access-denied/5040722.article date accessed 13 July 2020

[55] Meyler F and Woodhouse S, 'Changing the Immigration Rules and Withdrawing the 'Currency' of Legal Aid: The Impact of LASPO 2012 on Migrants and Their Families' (2013), 35:1, Journal of Social Welfare and Family Law', pp.55-78, p.58

The Marrakesh Compact in Objective 7 and 12 makes clear that the government has committed to provision of legal assistance and representation to migrants, in all circumstances, in-line with their rights under the ICCPR and ECHR rights to fair trial and representation. If you have a client without access to legal aid relating to family matters, then including reference to these Objectives, can strengthen claims.

Detention

Overarching legal obligation:
Article 9 International Covenant on Civil and Political Rights

(1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Article 5 European Convention on Human Rights

(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

Cases where this has been an issue:
In *R v Governor of Pentonville Prison ex p Hardial* Singh [1984] 1 WLR 704 Lord Woolf found that the power to detain migrants under the Immigration Act 1971 is subject to limitations imposed by the common law. It is the source of the so-called *Hardial Singh* principles which limit the use of detention in the UK. These are:

1) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
2) the deportee may only be detained for a period that is reasonable in all the circumstances;
3) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, he should not seek to exercise the power of detention;
4) the Secretary of State should act with reasonable diligence and expedition to effect removal.[56]

The case of *R (Saadi) v Secretary of State for the Home Department [2002] UKHL 41* allowed use of immigration detention for the processing of asylum claims (administrative convenience), both at common law and under ECHR Article 5(1)(f). There is no requirement of 'necessity' of detention for this purpose, but an indication that the reasonableness of the length of detention is required, plus good faith application of policy and appropriate conditions of detention.

In *R (on the application of Refugee Legal Centre) v. Secretary of State for the Home Department [2004] EWCA Civ 1481* the Court allowed for the inclusion of an appeals system within detention for purpose

[56] The Hardial Singh principles were confirmed in *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97.

of administrative convenience, but also sets out the requirements for procedural fairness which have been applied since.

A (FC) and others (FC) (Appellants) v Secretary of State for the Home Department [2004] UKHL 56 challenged section 23 of the Anti-terrorism, Crime and Security Act 2001 which permitted indefinite detention of foreign nationals suspected of terrorism. The House of Lords pronounced that the indefinite detention of foreign nationals breached Article 5(1)(f) ECHR. The measures were disproportionate by nature and discriminatory in effect. National terrorist suspects were not affected, while foreign suspects could be detained indefinitely – unless they voluntarily left the country. This case is important for firmly stating that asylum seekers have the same constitutional and rule of law rights as citizens.

Lumba v Secretary of State for the Home Department [2011] UKSC 12 involved an unpublished policy to continue detention of foreign criminals after the end of their sentences. This was held to be unlawful and led to a restatement of the *Hardial Singh* principles by Lord Dyson, following his own position in *R (I) v Secretary of State for the Home Department* [2003] INLR 196.

In the Detention Action cases *(circa 2014) (*the last of these was *R (TN (Vietnam)) v Secretary of State for the Home Department* [2017] EWHC 59 (Admin)[57], It was held that (1) the UK Detained Fast Track detention system was unlawful as vulnerable applicants could be wrongfully entered into it, that (2) the policy for maintaining detention for appeals was not sufficiently clear; and (3) the Tribunal Rules governing appeals whilst in detention were ultra vires.[58] Essentially, there are insufficient safeguards in place in the detention system to protection vulnerable migrants. However, the principle that detention could be used for administrative convenience (following *Saadi*) was not overturned.

Despite these cases and the abandonment of the detained fast track system, immigration detention has continued without sufficient safeguards. For example, in *Regina (O) v Secretary of State for the Home Department* (Bail for Immigration Detainees and another intervening) [2016] 1 WLR 1717 use of immigration detention and illness of the detainee was explored. The individual was held in detention for 3 years after prison sentence, on basis of an absconding risk and risk of harm. In *Hossain and Ors v Secretary of State for the Home Department* [2016] EWHC 1331 (Admin) the Court allowed the current detention regime which enables processing of asylum claims whilst in detention, even though the regime relies on the same (lack of) safeguards criticised in the Detention Action series of cases. In *R (AC (Algeria)) v SSHD* [2020] EWCA Civ 36 the Court of Appeal explored how to apply Hardial Singh principles. The Court of Appeal held that if the second, third or fourth Hardial Singh principles are breached, the question then arises as to the lawfulness of continued detention. Further detention is only lawful for a reasonable period to put in place conditions for release.

What does the Marrakesh Compact say?

<u>Objective 13: Use immigration detention only as a measure of last resort and work towards alternatives</u>

[57] See here for the latest on the pending Supreme Court decision: https://www.supremecourt.uk/cases/uksc-2020-0031.html

[58] See for more information on these cases: https://detentionaction.org.uk/dft-legal-challenge/

29. We commit to ensure that any detention in the context of international migration follows due process, is non-arbitrary, based on law, necessity, proportionality and individual assessments, is carried out by authorized officials, and for the shortest possible period of time, irrespective of whether detention occurs at the moment of entry, in transit, or proceedings of return, and regardless of the type of place where the detention occurs. We further commit to prioritize noncustodial alternatives to detention that are in line with international law, and to take a human rights-based approach to any detention of migrants, using detention as a measure of last resort only.

To realise this commitment, we will draw from the following actions:

a) Use existing relevant human rights mechanisms to improve independent monitoring of migrant detention, ensuring that it is a measure of last resort, that human rights violations do not occur, and that States promote, implement and expand alternatives to detention, favouring non-custodial measures and community-based care arrangements, especially in the case of families and children

c) Review and revise relevant legislation, policies and practices related to immigration detention to ensure that migrants are not detained arbitrarily, that decisions to detain are based on law, are proportionate, have a legitimate purpose, and are taken on an individual basis, in full compliance with due process and procedural safeguards, and that immigration detention is not promoted as a deterrent or used as a form of cruel, inhumane or degrading treatment to migrants, in accordance with international human rights law

d) Provide access to justice for all migrants in countries of transit and destination that are or may be subject to detention, including by facilitating access to free or affordable legal advice and assistance of a qualified and independent lawyer, as well as access to information and the right to regular review of a detention order

e) Ensure that all migrants in detention are informed about the reasons for their detention, in a language they understand, and facilitate the exercise of their rights, including to communicate with the respective consular or diplomatic missions without delay, legal representatives and family members, in accordance with international law and due process guarantees

f) Reduce the negative and potentially lasting effects of detention on migrants by guaranteeing due process and proportionality, that it is for the shortest period of time, safeguards physical and mental integrity, and that, as a minimum, access to food, basic healthcare, legal orientation and assistance, information and communication, as well as adequate accommodation is granted, in accordance with international human rights law.

g) Ensure that all governmental authorities and private actors duly charged with administering immigration detention do so in a way consistent with human rights and are trained on non-discrimination, the prevention of arbitrary arrest and detention in the context of international migration, and are held accountable for violations or abuses of human rights

h) Protect and respect the rights and best interests of the child at all times, regardless of their migration status, by ensuring availability and accessibility of a viable range of alternatives to

detention in non-custodial contexts, favouring community-based care arrangements, that ensure access to education and healthcare, and respect their right to family life and family unity, and by working to end the practice of child detention in the context of international migration

Commentary:
Objective 13 makes clear that the use of immigration detention permitted by Article 5(1)(f) is only lawful within strict parameters and with clear procedural safeguards. It addresses the use of immigration detention and aims to ensure that detention is used only as a last resort when alternative measures are unavailable. Paragraph 29 sets out the key aims of Objective 13, each of which is to be achieved in line with due process and international human rights law. A number of key points can be made in relation to the commitments in paragraph 29. First, detention must abide by the rule of law. It must have a legal basis, and it must be necessary, proportionate and ordered on an individual basis. These safeguards help to ensure that detention is not arbitrary, and to prevent the automatic detention of whole classes of individuals, such as foreign national offenders or asylum seekers. Second, the protections afforded by Objective 13 apply to all types of immigration detention, whether it be at a state's borders upon arrival, or within the interior in the context of removal or deportation. Third, there is a strong commitment to the prioritisation of noncustodial alternatives to detention with a view toward using detention only as a last resort.

Detention is frequently not being used as a last resort or for the shortest possible period of time, in cases of deportation of foreign national offenders. Typically the decision to deport a foreign national offender is taken after the prison sentence has been completed, even though it would be an easy matter to make the deportation decision during the sentence (see *R (JS Sudan) v SSHD* [2013] EWCA Civ 1378. The Home Office, instead, waits until the individual has completed their sentence and is in immigration detention before considering the mechanics of removal. As such, people are detained in prisons with less access to lawyers than if the decision to deport was made earlier.

If you have a case in these circumstances, it may be worth adding Objective 13, paragraph 29, to your arguments – in particular, the commitment for detention to be 'for the shortest possible time'.

Example: Friday evening detention

It is not uncommon for the Home Office to detain a migrant on a Friday evening, when their solicitor is about to finish or has just finished work. This creates an issue of access to legal advice, particularly where removal is imminent.

The migrant's solicitor may not be in a position to provide him or her with swift legal advice as to appropriate next steps, such as advancing further human rights submissions, lodging a claim for judicial review and/or an injunction against removal, or alternatively departing voluntarily (thereby reducing the length of their re-entry ban). This issue seems to engage Objective 13(d) of the Marrakesh Compact, which concerns the facilitation of access to free or affordable legal advice and assistance of a qualified and independent lawyer.

Example: lack of communication from Home Office

When migrants' solicitors attempt to make contact with the Home Office following the detention of a client, there is frequently no one able to assist with the matter and the solicitor is directed on to administrative staff at National Removal Command unfamiliar with the case, rather than to the actual Home Office caseworker handling the matter.

The result of this is that it is very difficult to have an effective dialogue with the Home Office, which failure can prolong detention in circumstances where a legal challenge to removal is being mounted. It also leads to distress to the client and their family, as the solicitor is unable to provide them with an accurate update on the situation. This issue engages Objective 13(e) which relates to ensuring that all migrants in detention are informed in a language they understand about the reasons for their detention.

An immigration solicitor may wish to argue that any failure by the Home Office to facilitate contact with the caseworker handling the matter runs counter to Objective 13(e) of the Marrakesh Compact as well as basic principles of effective resolution of cases.

Example: no smartphones in detention centres

Migrants are not permitted to use smartphones when in detention.[59] This means that in the context of an application for an emergency injunction against removal, it is difficult for the migrants' solicitors to obtain relevant documents which may affect the case. For example, if the migrant is served with a particular document, or has an old document which they had not disclosed to their solicitor (because they were unaware of its significance), it cannot easily be provided. If smart phones were permitted, it would be easy to take a photo of the document and send it to the solicitor.

As such, it may be argued by a lawyer on behalf of their client that the ban engages Objective 15(e), because the rule impedes migrants in detention communicating with legal representatives and family members.

Example: the Home Office Adults at Risk Policy

ILPA has provided evidence to the Parliamentary Joint Committee on Human Rights regarding the Adults at Risk policy.[60] Detention in particular cases of vulnerability is likely to engage Objective 13(f) where the policy or the Home Office's enactment of the policy fails to safeguard mental or physical integrity. This part of the Marrakesh Compact therefore would be of use when preparing submissions concerning whether the policy is being applied adequately in practice, both in an individual case and in general.

[59] See Government Guidelines: https://www.gov.uk/government/publications/mobile-phones-and-cameras-in-immigration-removal-centres/mobile-phones-and-cameras-in-immigration-removal-centres-accessible-version Last Accessed 3 March 2021

[60] ILPA, ILPA's response to the ICIBI's Call for Evidence: Second Annual Inspection of 'Adults at Risk' in immigration detention (October 2020); Available at: https://ilpa.org.uk/wp-content/uploads/2020/10/20.10.02-ILPA-Response-to-ICIBI-Adults-at-Risk.pdf

Human Smuggling

Overarching legal obligation:
Article 31 of the 1951 Refugee Convention:

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

Article 3 Smuggling Protocol defines migrant smuggling as:

The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.

Article 5 Smuggling Protocol states:

(1) Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.

Article 6 Smuggling Protocol:

(1) Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

(a) The smuggling of migrants;
(b) When committed for the purpose of enabling the smuggling of migrants:
(i) Producing a fraudulent travel or identity document;
(ii) Procuring, providing or possessing such a document;
(c) Enabling a person who is not a national or a permanent resident to remain in the State concerned without complying with the necessary requirements for legally remaining in the State by the means mentioned in subparagraph (b) of this paragraph or any other illegal means.

Article 5, read in conjunction with article 6(1)(a)–(c), states that migrants shall not be liable to prosecution under the Protocol because they have been smuggled, used fraudulent travel or identity documents and/or have been assisted by a smuggler to remain in a country

Cases where this has been an issue:
R. v Uxbridge Magistrates Court Ex p. Adimi [2001] Q.B. 667; provides compelling case law against criminalising those who arrive in the UK seeking protection. Adimi considered the meaning of the words 'coming directly' which must be fulfilled in order to fall under the protection of Article 31(1) of the Refugee Convention. The High Court highlighted three considerations in the context of 'coming directly'. These were the length of stay in the transit country, the reasons for delaying there and whether or not the refugee was protected there from the persecution they were fleeing. Refugees may exercise choice over where to seek asylum due to the differing responses of states to requests for asylum. If asylum-seekers are trying to find the means to get to another country, if they are under the control of an agent who demands more money before the next leg of the journey or if they have

to work for a trafficker before being allowed to continue the journey, they remain in transit. They would therefore fall within the 'coming directly …' provision when they reached their preferred country of asylum.[61] The case discussed the criminalisation of using false documents to enter or apply for asylum and… "in the course of argument, Newman J suggested the following formulation: where the illegal entry or use of false documents or delay can be attributed to a bona fide desire to seek asylum whether here or elsewhere, that conduct should be covered by article 31.[62]"

As a result of the decision in *Adimi* an amendment was tabled on behalf of the government to provide a statutory defence (subsequently section 31 of the 1999 Act) which was put forward and discussed in the House of Lords on 2 November 1999 it being noted by Lord Williams of Mostyn on behalf of the government that "As I told your Lordships on an earlier occasion, we have already put in place administrative procedures to identify at an early stage Article 31(1) issues. Ideally, therefore, in relevant cases the matter would never come to court. Sometimes these arrangements will fail. They will fail to identify someone who comes within Article 31(1) and this amendment is therefore a further safeguard."

In *R v Weng and Wang* [2006] 1 Cr App R (S) 97 the Court discussed the purpose behind the criminalisation holding that "…the Parliamentary decision to create this offence was not in order to deal generally with those who arrived here seeking asylum without documentation, or who presented false documentation but to deal with the problem that that created by destabilising the authorities from establishing precisely where they came from. …. Thus, it is the destruction of the documentation which is the matter which Parliament decided needed to be dealt with and that is what lay behind this offence. Indeed, it would be a possible breach of Art.31(1) of the Refugee Convention if proceedings were brought purely on the basis that false documentation was used to seek to reach this country in order to claim asylum." (Para 7-8)

Two other important cases are *Asfaw [2008] UKHL 31* and *Soe Thet* 2006 EWHC 2702 Admin. In the UK, cases relying on Adimi are mainly either false passport cases (as in Asfaw) or no passport cases (as in Soe Thet). In both the refugees are smuggled and without the required documentation. The Criminal Cases Review Commission ("CCRC") noted in their annual report published in July 2012 "the Commission believes that relevant prosecution offices (service airports, ports and immigration offices) may have been prosecuting offences of this kind without any regard to Article 31, Refugee Convention or the defences in domestic legislation for several years. We therefore believe that there is likely to be a significant number of people who have been wrongly convicted in a similar manner." This continues to be an ongoing issue as demonstrated by recent case law.[63]

What does the Marrakesh Compact say?

Objective 9: Strengthen the transnational response to smuggling of migrants

25. We commit to intensify joint efforts to prevent and counter smuggling of migrants by strengthening capacities and international cooperation to prevent, investigate, prosecute and penalize the smuggling of migrants in order to end the impunity of smuggling networks. We further commit to ensure that migrants shall not become liable to criminal prosecution for the fact of having

[61] Extract taken from Holiday Y, Legal perspectives on migration crime pp197. See for further discussion.
[62] *R. v Uxbridge Magistrates Court Ex p. Adimi [2001] Q.B. 667* (Simon Brown LJ, at 677G-H)
[63] See *GB* [2020] EWCA Crim 2, a false document case but involves trafficking; and *Idahose* [2019] EWCA 376 Crim 195

been the object of smuggling, notwithstanding potential prosecution for other violations of national law. We also commit to identify smuggled migrants to protect their human rights, taking into consideration the special needs of women and children, and assisting in particular those migrants subject to smuggling under aggravating circumstances, in accordance with international law.

Commentary:
Objective 9 of the UN Marrakesh Compact addresses the issue of migrant smuggling in line with the protection afforded under Article 31(1) of the Refugee Convention and the Smuggling Protocols. The new objective highlights some important issues, including the need to differentiate between trafficking[64] and smuggling,[65] the need to protect smuggled migrants (including from criminalisation for being subject to smuggling) and the critical role of cooperation in preventing, prosecuting and punishing smuggling.

Whilst, in line with the Protocol, smuggled migrants should not be criminalised for the very fact of being smuggled, the issue of penalisation for irregular entry remains a critical concern. Critically, Article 31 of the Refugee Convention makes provision for non-penalisation of refugees 'on account of their illegal entry or presence'. The Marrakesh Compact, set out to address this issue. States commit to ensuring that migrants do not become liable to criminal prosecution for having been the object of smuggling (Objective 9, art.25) but this 'notwithstanding potential prosecution for other violations of national law'.

In particular it commits to: *'Develop gender-responsive and child-sensitive cooperation protocols along migration routes that outline step-by-step measures to adequately identify and assist smuggled migrants, in accordance with international law.'* This provision merits some unpacking. First, the idea of developing gender and child sensitive protocols is an important one. It reflects a human rights discourse that is often side-lined when discussing smuggling. Second, the commitment to 'identify and assist' smuggled migrants is also relatively new (although it does receive a mention in the UNODC Model Law on smuggling).[66] This is certainly a positive thing – smuggled migrants might require assistance and need to be identified in order to access such assistance. The risk is that such identification is pursued not for the purpose of assisting smuggled migrants and respecting their human rights, but rather for the purpose of ensuring punishment for 'irregular entry' and/or return as soon as possible. The commitment to ensure that 'counter-smuggling measures are in full respect for human rights' must necessarily include effective access to an asylum system or an opportunity to seek regularisation.

There is a nuance to the distinction between smuggling and trafficking which is often missed. There has always been recognition in law of the duty to protect undocumented migrants who seek safety in the UK. People who pay smugglers to allow them to enter the UK may nonetheless end up exploited and trafficked. Often the term 'smuggling' is used to avoid obligations which would apply for trafficked persons. The UK law on smuggling reflects this: criminal offences surrounding smuggling are phrased as aiding and abetting illegal entry.

[64] Where the migrant is forced to work for the benefit of the trafficker who arranged the cross-border movement.
[65] Where the migrant pays the 'unauthorised' travel agent to arrange passage to a destination country.
[66] See UNODC Model Law on smuggling, available at https://www.unodc.org/documents/human-trafficking/Model_Law_Smuggling_of_Migrants_10-52715_Ebook.pdf

The Marrakesh Compact restates the international law obligations from the Palermo Protocol as well as elements of EU and Council of Europe instruments against trafficking, which are much more specific than the Marrakesh Compact. Nonetheless, it is useful that the Marrakesh Compact endorses and reaffirms these obligations, with an emphasis of strengthening migration processes and making them more cohesive. Reference to the Marrakesh Compact can be made in submissions to highlight the diverse range of State commitments.

Example: criminal defence lawyer

Under Immigration Act s24(1) it is a criminal offence to knowingly enter the United Kingdom without leave; and under Immigration Act s26(1) it is a criminal offence to possess a passport, certificate of entitlement, entry clearance, work permit or other document which the defendant knows or has reasonable cause to believe to be false. However, these offences cannot be applied to someone seeking international protection (Article 31(1) Refugee Convention).

The Adimi judgment demonstrates that there is recognition by the Courts that the UK cannot criminalise those who arrive in the UK seeking protection. Objective 9 of the Marrakesh Compact states, "We further commit to ensure that migrants shall not become liable to criminal prosecution for the fact of having been the object of smuggling". It could therefore be argued that the will of the Government in signing up to the Global Compact reaffirms the intention of the Government not to take punitive action against those who are smuggled into the UK and seek asylum.

Any argument that the current situation is different to that in Adimi because of the passage of time could be countered as the commitment remains unchanged, the Government has signed up to a soft law instrument, confirming its intention not to take a punitive approach to those smuggled into the UK.

Often criminal defence lawyers advise their clients to plead guilty if charged with possession of a document they know is false, as this is a strict liability offence. A criminal defence lawyer ought to go beyond this, and argue that it is not in the public interest to prosecute where the defendant has come to the UK to seek protection. Such an argument would primarily be made under Article 31 of the Refugee Convention but additionally reference could usefully be made to the reaffirmation in relation to smuggling by the Marrakesh Compact.

Human Trafficking

Overarching legal obligation:
Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2237 UNTS 319

Article 2:
The purposes of this Protocol are:

(a) To prevent and combat trafficking in persons, paying particular attention to women and children;
(b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
(c) To promote cooperation among States Parties in order to meet those objectives.

Article 8 International Covenant on Civil and Political Rights 1966 (ICCPR):

(1) No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
(2) No one shall be held in servitude. No one shall be required to perform forced or compulsory labour.

Article 4 European Convention on Human Rights - Prohibition of slavery and forced labour

(1) No one shall be held in slavery or servitude.
(2) No one shall be required to perform forced or compulsory labour

Cases where this has been an issue:
There have been a number of trafficking-based asylum claims, which focus on the risk of re-trafficking and/or reprisals from traffickers. In *SK (prostitution) Albania [2003] UKIAT 00023* a woman who had been sold into prostitution in Albania was granted asylum based upon the real risk of being persecuted by the traffickers and her family upon her return. This was further supported by the lack of sufficient protection from the Albanian State from such persecution.[67]

SB (PSG - Protection Regulations – Reg 6) Moldova CG [2008] UKAIT 00002 was the first application of Article 10 of the Qualification Directive in the UK to a case involving human trafficking. The applicant was a female victim of trafficking for sexual exploitation. The Tribunal found that trafficking victims are capable of being members of a 'Particular Social Group' such that they are in need of protection from persecution and that both sub paragraphs of Article 10(d) must be satisfied. The application of the EUQD has been overturned by Brexit, however, the understanding of what constitutes membership of a social group for protection from persecution remains useful regarding asylum claims of trafficking victims.

[67] See also *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC); *AZ (Trafficked women) Thailand CG [2010] UKUT 118 (IAC); TD and AD (trafficked women) CG [2016] UKUT 92; HD (Trafficked women) Nigeria CG [2016] UKUT 454 (IAC); ES (s82 NIA 2002, Negative NRM) [2018] UKUT 335 (IAC)*

There are also appeals against removal which exist outside the asylum system. These involve an interplay between the ECHR and the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT). They draw on Strasbourg reasoning on positive obligations under the ECAT creating rights under Article 4 ECHR. The two most important cases are: *EK (Article 4 ECHR- Anti-Trafficking Convention) Tanzania [2013] UKUT 00313 (IAC)* and *MS (Pakistan) [2020] UKSC 9.* Further, *R (on the application of PK (Ghana)) v SSHD [2018] EWCA Civ 98* revolves around the question under what circumstances granting trafficked persons a residence permit owing to their personal situation is necessary.

The case of *EOG v SSHD* [2020] EWHC 3310 (Admin) successfully challenged the Home Office policy which failed to provide any route to leave to remain or a right to work for potential victims of trafficking who are referred into the National Referral Mechanism (NRM). The judgment is also interesting for its comments on the role of the European Convention against Trafficking as an unincorporated treaty in domestic law. Mostyn J built on *PK (Ghana*), *MS (Pakistan)* and other cases in concluding that the Convention is "as close to being incorporated in our domestic law, without actually being so, as it is possible to be."

What does the Marrakesh Compact say?

<u>Objective 10: Prevent, combat and eradicate trafficking in persons in the context of international migration</u>

h) Provide migrants that have become victims of trafficking in persons with protection and assistance, such as measures for physical, psychological and social recovery, as well as measures that permit them to remain in the country of destination, temporarily or permanently, in appropriate cases, facilitating victims' access to justice, including redress and compensation, in accordance with international law

Commentary:
The Marrakesh Compact contained three main commitments concerning trafficking in human beings. The first one has a criminal law approach, i.e. investigation, prosecution and penalisation of the offence of trafficking in human beings. This is clearly reflected in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons that imposes an international law obligation upon its State Parties to criminalise human trafficking. The second commitment is 'discouraging the demand that fosters exploitation leading to trafficking.' The third commitment is enhancing identification, assistance of and protection of migrants who have become victims of trafficking. As opposed to the first commitment, the last one is not reflected in binding legal norms incorporated in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons. The latter contains only recommendations to this effect. Therefore, identification, protection and assistance of migrants who have become victims of trafficking in human beings is still a weakness and states at a global level are yet to endorse binding commitments.

Example: credibility in asylum decisions where the individual has been trafficked

At the point of a substantive asylum interview, clients may be asked questions about how they entered the UK. There could be concerns on the part of the Home Office owing to the client's travel history, potentially leading to an adverse credibility finding. A lawyer might wish to make representations

that the Home Office should not make an issue of credibility against the client even though they have a poor travel history.

The Marrakesh Compact may come in useful here, since Objective 9 states, "We also commit to identify smuggled migrants to protect their human rights, taking into consideration the special needs of women and children". A lawyer may argue that the executive's commitment to identify smuggled migrants to protect their human rights entails not making adverse credibility findings against their trafficked client merely because the individual may have entered the country irregularly. The same argument would additionally run on appeal.

Children

Overarching legal obligation:

Article 3 UNCRC:

(1) 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.

(2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

(3) States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 8 UNCRC

(1) States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

Article 9 UNCRC

(1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

Cases where this has been an issue:

The following cases demonstrate how often new Government schemes and policies place children in a particular position of precarity and vulnerability. For example, *R (The Children's Society) v The Lord Chancellor* concerned access to legal aid and discusses the vulnerability of children in the context of legal assistance. There is no judgment because the case settled, however, it was argued that unaccompanied and separated children are extremely vulnerable, and their vulnerabilities are exacerbated by insecure immigration status. The potential immigration processes and proceedings they face in an attempt to regularise their status in the UK are extremely complex, such that children cannot be expected to navigate them alone. However, the legal aid Exceptional Case Funding scheme is an inadequate safeguard for this defined and narrow cohort. As a result, the government agreed to reinstate legal aid for separated and unaccompanied children in immigration cases.[68]

[68] See MICLU press release (13 July 2018) Available here: https://miclu.org/blog/press-release-legal-aid-to-be-reinstated-for-separated-unaccompanied-children-in-immigration-cases

In *Manchester City Council (19 005 254)* it was held that there were faults in the way Manchester City Council looked after the complainant, who was a child in their care, when in its care and since leaving care.[69] In particular, the Council failed to ensure the complainant obtained a passport so that he could continue into further education and secure his legal status. This has had significant consequences for him.[70]

What does the Marrakesh Compact say?

Objective 7: Address and reduce vulnerabilities in migration

(e) Account for migrant children in national child protection systems by establishing robust procedures for the protection of migrant children in relevant legislative, administrative and judicial proceedings and decisions, as well as in all migration policies and programmes that impact children, including consular protection policies and services, as well as cross-border cooperation frameworks, in order to ensure the best interests of the child are appropriately integrated, consistently interpreted and applied in coordination and cooperation with child protection authorities.

(f) Protect unaccompanied and separated children at all stages of migration through the establishment of specialized procedures for their identification, referral, care and family reunification, and provide access to health care services, including mental health, education, legal assistance and the right to be heard in administrative and judicial proceedings, including by swiftly appointing a competent and impartial legal guardian, as essential means to address their particular vulnerabilities and discrimination, protect them from all forms of violence, and provide access to sustainable solutions that are in their best interests.

Commentary:
Objective 7 of the Marrakesh Compact demonstrates the importance of protection for migrant children at all stages of their movement through the immigration system and for protection upon arrival. It applies the specific and numerous protections provided under the UNCRC which has been applied in various cases by the UK courts.[71] The best interests of the child must be central to all actions taken by public services and these services must be fully informed of the child's human and migratory rights. Specialist procedures for children must be developed with coordination and cooperation across services. There must be access to health care services and protection as soon as is possible. Children must be assisted through the legal and judicial system to ensure sustainable protection is provided within minimal disruption to the child's fulfilment and development.

Example: facilitation of British citizenship for children

[69] See for full details: https://www.lgo.org.uk/decisions/children-s-care-services/looked-after-children/19-005-254#point1

[70] *See Section 1 on vulnerability for further case discussion.*

[71] *Nzolameso v City of Westminster* [2015] UKSC 22 para 29; see also see *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166, *H(H) v Deputy Prosecutor of the Italian Republic Genoa (Official Solicitor intervening)* [2012] UKSC 25, [2013] 1 AC 33

The Secretary of State has discretion to register any child as British, although there is guidance regarding which applications will normally be granted. The Secretary of State tends to, at least initially, refuse applications which do not meet the guidance.

In any discretionary application where a child does not meet the Home Office guidance, it may be useful to point out objective 7(f), highlighting how British citizenship for a child whose future lies in the UK is the most sustainable solution to ensure their long-term protection in line with Article 8 UNCRC.

This may be especially relevant following the recent success of PRCBC in persuading the Court of Appeal that the £1,012 citizenship fee for a child to register as a British citizen is unlawful, having been set without consideration of the best interests of children. If your client is, or was, a 'looked-after child', please see the comment in the 'Proper communication of rights and obligations, particularly in cases of vulnerability' section of this handbook.

Objective 11: Manage borders in an integrated, secure and coordinated manner

e) Ensure that child protection authorities are promptly informed and assigned to participate in procedures for the determination of the best interests of the child once an unaccompanied or separated child crosses an international border, in accordance with international law, including by training border officials in the rights of the child and child-sensitive procedures, such as those that prevent family separation and reunite families when family separation occurs.

Commentary:
Objective 11(e) focusses on the rights of the child at the border, highlighting the need to ensure specialised protection and procedures are accessible to them. The best interests of the child must be central to these procedures. Border authorities must be fully informed of the child's right and child protection authorities must be brought into take care of the child as soon as they are made aware there is an unaccompanied child. Family reunification is a priority to ensure long-term protection of the child in accordance with Article 9 UNCRC.

Example: applying outside the rules to allow an unaccompanied minor to sponsor their parents to join them in the UK

Currently family reunion rules do not allow unaccompanied minors to sponsor their parents to join them in the UK. It is possible, however, to make an application outside of the Rules, and set out why the Secretary of State should grant a child's parents leave to enter the UK. Quoting Objective 11(e) as an elucidation of Article 9 UNCRC in the migration context, and the need to reunite families when family separation occurs, could strengthen arguments made in those applications.

Access to public services

Overarching legal obligation:

Article 11, International Covenant on Economic, Social and Cultural Rights (ICSECR)

(1) The States Parties to the present Covenant recognize the right of everyone to an ***adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.*** *The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.*

Article 12, ICSECR

(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

(2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13, ICSECR

(1) The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

(2) The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.

Cases where this has been an issue:

An important case is representative of the UK government's approach to access to public services under the hostile environment. In *R (W) v The Secretary of State for the Home Department and Project 17* [2020] EWHC 1299 (Admin) the court held that the application of the 'no recourse to public

funds' (NRPF) policy for a boy and his migrant mother had forced them into a lifetime of poverty and was unlawful. Under the policy, introduced in 2012 by then Home Secretary, W's mother was blocked from receiving the same state support that helps other low-earning parents to survive, including child and housing benefits, or tax credits. The reason is that the rules deny people who are 'subject to immigration control' access to social housing and most welfare benefits. The judges ruled that the NRPF policy breaches Article 3 of the ECHR, which prohibits inhuman and degrading treatment.

In *R (On the Application Of) Refugee Action v The Secretary of State for the Home Department* [2014] EWHC 1033 (Admin) the found that the decision of the Home Secretary to freeze the rate of benefit (asylum support) paid to asylum seekers, without any increase for inflation for the second year running, was irrational. The single adult rate is only £36 per week. The Court has held that the Home Secretary failed to take reasonable steps to gather sufficient information to enable her to make a rational judgment in setting asylum support rates. However, following a review of asylum support rates on the order of the High Court after the ruling in Refugee Action, they have reported that these will remain unchanged.

Furthermore, the National Health Service (Charges to Overseas Visitors) (Amendment) Regulations 2017 compel hospitals in England to check overseas visitors' eligibility for free NHS care and seek payment upfront from those deemed ineligible, such as asylum seekers/undocumented migrants.[72] This has resulted in lack of access to basic services and death of some individuals.[73] Maternity Action attempted unsuccessfully to challenge the concept of unlawful charging.[74] Many undocumented migrants have been charged unfairly, but they have not (or not yet) appealed the NHS decision.

Kelemua Mulat, who had metastatic breast cancer in her abdomen and bone cancer in her spine, was refused urgent hospital treatment after a Home Office official decided her asylum claim did not meet strict criteria. She was denied potentially life-saving chemotherapy for nearly six weeks after the Home Office deemed her ineligible.[75]

What does the Marrakesh Compact say?

Objective 15: Provide access to basic services for migrants

31. We commit to ensure that all migrants, regardless of their migration status, can exercise their human rights through safe access to basic services. We further commit to strengthen migrant-

[72] See also: National Health Service (Charges to Overseas Visitors) Regulations 2015 available at: https://www.legislation.gov.uk/uksi/2015/238/contents/made; See also https://www.theguardian.com/society/2019/jun/25/scrap-upfront-nhs-charges-for-migrants-says-bma

[73] See for discussion https://www.theguardian.com/society/2019/dec/07/cancer-treatment-delayed-150000-pound-charge-nhs; See also https://www.duncanlewis.co.uk/news/Duncan_Lewis_Solicitors_client_promised_lifesaving_cancer_treatment_in_highprofile_case_(25_April_2018).html

[74] See Maternity Action, What Price for Motherhood (September 2018) Available at: https://www.maternityaction.org.uk/wp-content/uploads/WhatPriceSafeMotherhoodFINAL.October.pdf See report of High Court Judicial Review Hearing (2020) https://www.rcm.org.uk/news-views/news/2020/court-rejects-maternity-action-legal-challenge-to-nhs-charging/

[75] See for discussion: https://www.duncanlewis.co.uk/news/Ethiopian_asylum_seeker_dies_after_being_denied_cancer_treatment_by_the_Hme_Office_(26_September_2019).html

inclusive service delivery systems, notwithstanding that nationals and regular migrants may be entitled to more comprehensive service provision, while ensuring that any differential treatment must be based on law, proportionate, pursue a legitimate aim, in accordance with international human rights law.

a) Enact laws and take measures to ensure that service delivery does not amount to discrimination against migrants on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other grounds irrespective of cases where differential provision of services based on migration status might apply.

b) Ensure that cooperation between service providers and immigration authorities does not exacerbate vulnerabilities of irregular migrants by compromising their safe access to basic services or unlawfully infringing upon the human rights to privacy, liberty and security of person at places of basic service delivery.

Commentary:
The Marrakesh Compact elucidates the content of rights for migrants under the ICESCR to have access to basic services including healthcare. The cases demonstrate the importance of access to healthcare to ensure expectant mothers can deliver children in safety and individuals with life-threatening illnesses can access treatment. Whilst it highlights that some differential treatment between migrants and nationals is permissible it makes clear that basic services must be provided. Any differential treatment must not be arbitrary and should not undermine basic human rights or exacerbate vulnerabilities. It should be kept in mind that the principles of non-regression and non-discrimination are fundamental to the Marrakesh Compact and the commitments made by the UK. As such, any future policies must not rescind basic provisions being provided.

Furthermore, access to healthcare must not be provided at the expense of rights to privacy especially at places of delivery. This speaks directly to the requirement of healthcare professionals to be making immigration status checks under the National Health Service Regulation (2015) and sharing information with the Home Office.

Example:

There are a number of situations where a lawyer may use the Marrakesh Compact in their challenge to Government decisions refusing a migrant access to basic services. In particular, in the application of the NHS Regulation and the checks on immigration status undertaken to access basic healthcare is in direct conflict with Objective 15.

Objective 15 may be used to strengthen future cases and judicial review proceedings regarding access to basic services for migrant mothers, for the treatment of life-threatening illnesses and in providing access to treatment in response to global pandemics.

Furthermore:

- Families refused or kept waiting for housing support from local authorities because their immigration route results from a condition of No Recourse to Public Funds;

- Failure to provide interpreters for those requiring medical care or social care. The phrase ‘migrant-inclusive service delivery systems’ is pertinent in this example;
- A school refusing to enrol an asylum seeker child on the pretext that they need to see a passport or proof of address;
- A refusal of leave for breach of conditions of No Recourse to Public Funds, in relation to a migrant who was included on a housing benefit claim;
- A refusal to lift the No Recourse to Public Funds condition.

Employment and labour migration

Overarching legal obligation:

Article 6 of the International Covenant on Economic, Social, and Cultural Rights:

(1) The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain [her or his] living by work which [she or he] freely chooses or accepts, and will take appropriate steps to safeguard this right.

Article 7 of the International Covenant on Economic, Social, and Cultural Rights

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work.

Article 8 of the International Covenant on Civil and Political Rights 1966 (ICCPR):

No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited. No one shall be held in servitude. No one shall be required to perform forced or compulsory labour.

Cases where this has been an issue:

Access to work in the UK for many migrants depends on the issue of a work visa/authorisation that will be granted based upon the new points-based system for skilled workers so long as the individual is sponsored by their employer.[76] It is intended to put on an equal footing EU and non-EU individuals who wish to apply to live and work in the UK based upon their skill level. In the positive, the minimum skill level and minimum salary has been lowered. This was intended to abolish the resident labour market test[77], however, the sponsor guidance demonstrates this may not be the case in practise.[78] There have been claims it will ensure that migrant workers' rights will be protected once a visa is granted and oversight of working conditions ensured.[79] However, it reduces legal pathways for workers who are in lower-skilled areas. The UK report to the European Regional review clearly outlines that this is intended to 'reduce overall levels of migration and give top priority to those with the highest skills and the greatest talents.[80]' Junior office jobs do not qualify for a Skilled Worker visa: receptionists, administrative assistants and cashiers for instance. Waiting staff, hairdressers and retail assistants also do not qualify. In many cases the boundary between the jobs which do and don't qualify for a Skilled Worker visa appears arbitrary.[81] Thus, it appears that lower skilled workers are

[76] See https://www.gov.uk/government/publications/uk-points-based-immigration-system-employer-information/becoming-a-sponsor-of-skilled-migrant-workers-accessible-version; This is not withstanding right to work being granted under family unification or asylum routes. The UK outlines its new points based system in its report on the implementation of the Marrakesh Compact in '*The Global Compact for Migration European Regional Review, Submission by the United Kingdom*' (2020) p1, 3-4. Available at: https://migrationnetwork.un.org/sites/default/files/docs/uk_submission_-_gcm_european_regional_review_.pdf

[77] See New Government Guidance: https://www.gov.uk/government/collections/sponsorship-information-for-employers-and-educators

[78] See Home Office, Workers, Temporary Workers and Students: guidance for sponsors, Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/946067/2020-12-18_Sponsor-guidance-Appendix-D-12-20_v2.0__002_.pdf

[79] *The Global Compact for Migration European Regional Review, Submission by the United Kingdom*' (2020) p2, 9-10

[80] *Ibid,* 3

[81] See Guidance from Kingsely Napley on the application of the Immigration Points System: https://www.kingsleynapley.co.uk/services/department/immigration/the-uks-new-immigration-system-what-you-need-to-know

going to be placed into great positions of precarity. It will be important to monitor the implementation of the visa system, their fairness and ability to uphold workers' rights.

Questions remain for irregular migrant workers and domestic workers. In 2012 the UK Government reintroduced a restrictive visa regime for domestic workers, which does not permit them to change employer. This regime will continue under the points-based system. Under the domestic workers rules, when migrant domestic workers arrive lawfully in the country accompanying an employer, their visa status ties them to this employer.[82] Their residency status is lawful for as long as the employer with whom they entered employs them, to a maximum of 6 months. As a result, the employer gains means to control them.[83] This system creates vulnerability in terms of access to rights, protection from exploitation and inability to regularise status.[84]

The case of *Tirkey v Chandock*[85] is an example where overseas domestic workers have used domestic channels to seek redress from their employers. Such an approach forms part of the Government's aim of forcing employers' respect for overseas domestic workers' fundamental rights by providing employees with a means of redress. However, it also highlights the position of vulnerability that domestic workers are in and highlights that such avenues are often not available to workers who are trapped by employers. There is a lack of practical avenues for redress or challenging exploitation and of safeguards for vulnerable domestic workers as evidenced in the case of Folashade Taiwo.[86]

The visa is granted for a maximum of six months with no right to renewal beyond this time. The only exception that allows for workers to be granted an extension of their leave and right to work applies to those workers identified as potential victims of trafficking or modern slavery. The UK framework for identifying and supporting victims of trafficking and modern slavery in the UK is called the National Referral Mechanism (NRM) which works closely with organisations to protect those identified as victims of trafficking and ensure their protection once recognised, including seeking redress.[87]

What does the Marrakesh Compact say?

Objective 5: Enhance availability and flexibility of pathways for regular migration

21. We commit to adapt options and pathways for regular migration in a manner that facilitates labour mobility and decent work reflecting demographic and labour market realities, optimizes education opportunities, upholds the right to family life, and responds to the needs of migrants in a

[82] See Immigration Rules, 159A-159H, available at http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part5/

[83] B Anderson, 'Migration, Immigration Controls and the Fashioning of Precarious Workers', (2010) 24 Work, Employment and Society 300 at 310.

[84] James Ewins, Independent Review of the Overseas Domestic Worker Visa, 16 December 2015 (Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/486532/ODWV_Review_-_Final_Report__6_11_15_.pdf) See also Kalayaan Report, Dignity, Not Destitution (October 2019) http://www.kalayaan.org.uk/wp-content/uploads/2019/10/Kalayaan_report_October2019.pdf

[85] ET/3400174/2013, judgment dated 17.9.15

[86] *Taiwo v Olaigbe* [2014] EWCA Civ 27932

[87] See Kalyaan reports (n67)

situation of vulnerability, with a view to expanding and diversifying availability of pathways for safe, orderly and regular migration.

d) Develop flexible, rights-based and gender-responsive labour mobility schemes for migrants, in accordance with local and national labour market needs and skills supply at all skills levels, including temporary, seasonal, circular, and fast-track programmes in areas of labour shortages, by providing flexible, convertible and non-discriminatory visa and permit options, such as for permanent and temporary work, multiple-entry study, business, visit, investment and entrepreneurship

Commentary:
Objective 5 outlines that States should provide pathways for regular migration by facilitating labour mobility and decent work opportunities. The right to work is a foundation for the realization of other human rights and for life with dignity. It includes the opportunity to earn a livelihood by work freely chosen or accepted. In progressively realising this right, States are obliged to ensure the availability of technical and vocational guidance and take appropriate measures to develop an enabling environment for productive employment opportunities.

The Objectives in the Marrakesh Compact relating to employment and labour migration are unlikely to be used by commercial immigration firms working on business immigration in their day-to-day work. Rather, they are more suited to be cited in order to encourage beneficial change in immigration policy at Government level, and in strategic litigation. The Government ought to be held to account and justify when what they are proposing is not in line with the Marrakesh Compact, which represents international consensus on good practice.

Example:
Visa regimes historically have been marred with inflexibility. There was a mandatory one-year cooling-off period for those who have held the Tier 2 (Intra-Company Transfer) visa for five years and wished to make another immigration application under Tier 2 (Intra-Company Transfer) visa. Similarly, the six-month domestic worker visa, which cannot be extended beyond six months, can hardly be said to be flexible or convertible. The one-year short-term worker visa which the 2018 Immigration White Paper proposed, which would require the recipient to undergo a one-year cooling-off process after each year, suffered from the same defect.

Lawyers may be able to draw upon the commitments made under Objective 5 and Articles 6-8 of the ICCPR to ensure the implementation of visa schemes is in line with existing international commitments. Should the present system prove unable to ensure fair and equal access to employment for migrants, then practitioners may draw upon the commitments made in Objective 5 as representative of right to work obligations under the ICCPR. For example, if access to visas is being consistently denied or requirements are prohibitively arduous, such that permanent or temporary access to work is being denied, you may consider including reference to Objective 5(d) in your representations.

Please see Objective 6(g), below, regarding allowing migrants to change employers: another relevant consideration which the Government ought to take into account when proposing immigration routes.

<u>Objective 6: Facilitate fair and ethical recruitment and safeguard conditions that ensure decent work</u>

22. We commit to review existing recruitment mechanisms to guarantee that they are fair and ethical, and to protect all migrant workers against all forms of exploitation and abuse in order to guarantee decent work and maximize the socioeconomic contributions of migrants in both their countries of origin and destination.

d) Establish partnerships with all relevant stakeholders, including employers, migrant workers organizations and trade unions, to ensure that migrant workers are provided written contracts and are made aware of the provisions therein, the regulations relating to international labour recruitment and employment in the country of destination, their rights and obligations, as well as on how to access effective complaint and redress mechanisms, in a language they understand.

Commentary: lack of information regarding redress and complaints mechanisms
There exist at least arguably effective centralised complaint and redress mechanisms, in the form of employment tribunals, and ACAS, available to migrant workers. However, there is no information given to migrant workers at the outset of their being granted a visa on their availability. The ability to rewrite the immigration rules means the Government should ensure that such information, as set out in Objective 6(d) relating to recruitment and employment standards, is provided. Clear avenues to seeking redress should be widely available to migrant workers and the accessibility of these ensured, regardless of worker status, to ensure that exploitation is avoided.

e) Enact and implement national laws that sanction human and labour rights violations, especially in cases of forced and child labour, and cooperate with the private sector, including employers, recruiters, subcontractors and suppliers, to build partnerships that promote conditions for decent work, prevent abuse and exploitation, and ensure that the roles and responsibilities within the recruitment and employment processes are clearly outlined, thereby enhancing supply chain transparency;

f) Strengthen the enforcement of fair and ethical recruitment and decent work norms and policies by enhancing the abilities of labour inspectors and other authorities to better monitor recruiters, employers and service providers in all sectors, ensuring that international human rights and labour law is observed to prevent all forms of exploitation, slavery, servitude and forced, compulsory or child labour;

g) Develop and strengthen labour migration and fair and ethical recruitment processes that allow migrants to change employers and modify the conditions or length of their stay with minimal administrative burden, while promoting greater opportunities for decent work and respect for international human rights and labour law;

i) Provide migrant workers engaged in remunerated and contractual labour with the same labour rights and protections extended to all workers in the respective sector, such as the rights to just and favourable conditions of work, to equal pay for work of equal value, to freedom of peaceful assembly and association, and to the highest attainable standard of physical and mental health, including through wage protection mechanisms, social dialogue and membership in trade unions.

Commentary:
The principle of non-discrimination should underpin recruitment processes and working conditions, regardless of immigration status. The points-based system appears to be seeking to provide a clear and transparent system for recruitment of migrant workers. However, ensuring equal treatment and protection of labour rights has been consistently problematic with discriminatory practises against migrant workers prevalent. If the new system is particularly onerous, creates inflexibility or barriers to seeking work, visa extension and if there are inadequate avenues to seek redress or challenge treatment, then this new system will risk falling into old traps.

Example:

There is an important role for immigration practitioners to take up as visa systems are rolled out to ensure practice is in line with the standards committed to in the Marrakesh Compact Objectives 5 and 6, and upheld in the human rights conventions. Challenging discriminatory practices in recruitment and treatment of migrant workers, as well as poor working conditions will be essential for ensuring the employers and the government are protecting the equal labour rights of migrant workers.

For example, if migrant workers are consistently given zero hours or short term contract whereas domestic workers are given secure contracts, this would be contrary to the commitments made in Objective 6(f) and (i). Furthermore, where conditions of work for migrant workers risk abuse or exploitation then commitments under Objective 6(e) can be included in arguments.

Family Reunification

Overarching legal obligation:

Article 17 International Covenant on Civil and Political Rights

(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Article 8 European Convention on Human Rights

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Cases where this has been an issue:

There are two lines of UK case-law dealing with family reunification-related issues: (a) Article 8 ECHR claims and (b) cases involving family members of EU citizens (or returning UK nationals) claiming residence rights under the Withdrawal Agreement. Allegations of marriages of convenience by the Home Office in respect of some marriages is problematic. In the UK approach to cases involving children judges frequently support the Home Office in designating marriages involving children as ones of convenience, making no reference to the principle of the best interests of the child. For example, in *Rehman*, the judge placed weight on the fact that the appellant, a national of Pakistan married to a Slovakian citizen, had not been truthful in relation to his studies. It was held that this was a marriage of convenience, and this "should not be displaced by the fact that the couple now had a child given his (appellant's – AJ) continued dishonesty".[88] In *Virk v SSHD*, the Home Office concluded the marriage in question was one of convenience despite the pregnancy of wife, who was subjected to intimidating and intrusive questioning.[89]

What does the Marrakesh Compact say?

<u>Objective 5: Enhance availability and flexibility of pathways for regular migration</u>

i) Facilitate access to procedures for family reunification for migrants at all skills levels through appropriate measures that promote the realization of the right to family life and the best interests of the child, including by reviewing and revising applicable requirements, such as on income, language proficiency, length of stay, work authorization, and access to social security and services.

Commentary: the 'sole responsibility' rule

It is argued that the 'sole responsibility' rule in domestic immigration law (e.g. in Immigration Rules Appendix FM and E-LTRC 1.6(b)) fails to promote the realisation of the right to family life and the best interests of the child. The 'sole responsibility' rule is applied where the sponsoring parent of a

[88] *Rehman v SSHD* IA/16713/2015

[89] *Virk v SSHD* IA/19843/2015; See also Adnan v SSHD IA/25601/2015, EA/03331/2018

child seeking leave to enter or remain for family reunion purposes must have had and must continue to have sole responsibility for the child's upbringing to the exclusion of the child's other parent. The rule does not apply where the child is seeking to join or remain with both parents. This rule has been unchanged for 40 years, while best practice in childcare has changed. Clearly it would be a step too far for a lawyer to argue that the rule is unlawful because it contradicts the Marrakesh Compact. Nonetheless, as the examples below show, the rule ought to be reviewed and revised, as Objective 5 of the Marrakesh Compact envisages, so that it fits into modern ideas of parenting.

Example: sole responsibility 1

A mother wishes to move to the UK with her daughter. The daughter lives with her but the father sees the child every weekend. However, because of the sole responsibility rule, the father's involvement is an issue. In effect, a child is being penalised for having a meaningful relationship with both parents.

Example: sole responsibility 2

A mother has come to UK intending to have her child join her in due course when possible. The child's father has no contact or involvement in the child's life. The mother put the child in the care of her family when she left for the UK. However, the fact that the family now are taking care of the child means that the Home Office may argue that other family members now have responsibility, refusing the application.

Example: sole responsibility 3

Ms AK travelled from west Africa to the UK to study, leaving her ten-year-old daughter L with AK's mother, L's grandmother, intending this to be just for the three-year degree course. She was not married to L's father and that relationship had broken down when L was four. He still lived in the same town and saw L occasionally, and sometimes gave her presents.

AK met Mr BN, a British citizen, at university. They fell in love and got married. AK applied for leave to remain as a spouse, which was granted. Meanwhile AK's mother was finding the responsibility of caring for L harder, as she grew up, and her own health was not good. AK tried to bring L to join her in the UK, but because: (a) she had not sent financial support to her mother while she was studying; and (b) L's father knew her, and sometimes gave her presents, though did not otherwise support her, L's entry clearance application was refused. The decision letter stated that AK did not have sole responsibility for her upbringing and there were no compelling reasons rendering her exclusion from the UK undesirable.

Objective 5 of the Marrakesh Compact, that signatories should 'facilitate access to procedures for family reunification' is arguably not met by the use of these rules making it very hard for children to join a lone parent in the UK, thus discouraging family reunification. These restrictions should be 'reviewed and revised' and this can be added to arguments being made in relation to sole responsibility.

Further comment: The same point may be made regarding the £18,600 minimum income requirement and the high fees payable for leave to enter and remain, and citizenship. The Supreme Court in *MM (Lebanon)* upheld in principle the minimum income requirement which requires an income of at least £18,600 (or higher where dependent children are involved) for British citizens and settled individuals to sponsor a foreign spouse.

However, the court also held that the rules and policies used by the Home Office to assess such cases would need to be amended to take proper account of the impact on children and other possible sources of income and support.[90] In applying the amended rules as a result of *MM(Lebanon)*, government officials should keep in mind the Compact requirements on family reunification as an affirmation of ICCPR laws. Practitioners can include reference to these commitments in any further arguments that may be made regarding the £18,600 minimum income requirement.

[90] *MM (Lebanon) & Others v the Secretary for the Home Department* [2017] UKSC 10. Discuss of the changes to the rules can be found here: https://www.freemovement.org.uk/home-office-makes-changes-appendix-fm-minimum-income-rule-following-mm-case/

Border controls and port procedures

Overarching legal obligation:

Article 13 ICCPR

> *An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.*

Article 14 International Covenant on Civil and Political Rights (ICCPR)

> *(1) Right to a fair and public hearing by a competent, independent and impartial tribunal established by law*[91]

Article 1 ICERD

> *(3) Nothing in this Convention may be interpreted as affecting in any way the legal provisions of State Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.*

UN Human Rights Committee General Comment 15 para 5

> *(5) The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.*

Cases where this has been an issue:

The case of *AT and another* [2016] UKUT 227 (IAC) concerned a child refugee and the ability of their family from Eritrea to join them. The Court considered rights of family reunion for children refugees. It found that a refusal to permit re-unification of family members with a child granted asylum in the United Kingdom can constitute a disproportionate breach of the right to respect for family life enjoyed by all family members despite the Immigration Rules not providing for family reunification where a child has been granted asylum in the UK.

R (JCWI) v SSHD CO/257 (2020) concerned the Home Office's use of algorithms in the processing of visa applications.[92] This case supported by Foxglove and JCWI raised the concern that the use of algorithms to process visas was discriminating on the basis of crude characteristics like nationality rather than assessing individual applicants fairly. The Home Office conceded the judicial review claim and confirmed they would stop using the visa streaming tool and conduct a "redesign of the process and the way in which visa applications are allocated for decision- making."

[91] See Section 2 for more detail. Understood by the OHCHR to include due process rights including a right to legal representation and amount to a customary right beyond criminal proceedings. See Human Rights Committee, General Comment 32 (Article 14: Right to equality before courts and tribunals and to a fair trial) (hereafter General Comment 32) para 16 and Al Rawi and others v. Security Service and Others [2011] UKSC 34, para. 12

[92] There is more information here: https://www.foxglove.org.uk/news/category/visa+streaming+algorithm

As regards pushbacks and obligations not to collectively expel people, there is an absence of UK cases, but many have been heard before the European Court of Human Rights in relation to obligations not to *refoule* and collectively expel groups of migrants. In the case of *ND and NT* the ECtHR examined whether the expulsion of N.D. and N.T. in a group of 80 persons, without identification or opportunity to explain their individual circumstances, breached human rights obligations.[93] The court held that 'group' did not distinguish based upon numbers of members but that important factor is the absence of "a reasonable and objective examination of the particular case of each individual alien of the group.[94]" The prohibition applies to aliens who are expelled without an opportunity to have their individual claims. The *Hirsi* case[95] concerned Somalian and Eritrean migrants travelling from Libya who had been intercepted at sea by the Italian authorities and sent back to Libya. The Court concluded that the prohibition on collective expulsion of aliens applies to all kinds of removals or diversions at sea.[96] With an increasing number of people arriving in the UK across the channel, these cases could become increasingly important.

What does the Marrakesh Compact say?

Objective 11: Manage borders in an integrated, secure and coordinated manner

b) Establish appropriate structures and mechanisms for effective integrated border management by ensuring comprehensive and efficient border crossing procedures, including through pre-screening of arriving persons, pre-reporting by carriers of passengers, and use of information and communication technology, while upholding the principle of non-discrimination, respecting the right to privacy and protecting personal data

c) Review and revise relevant national procedures for border screening, individual assessment and interview processes to ensure due process at international borders and that all migrants are treated in accordance with international human rights law, including through cooperation with National Human Rights Institutions and other relevant stakeholders

f) Review and revise relevant laws and regulations to determine whether sanctions are appropriate to address irregular entry or stay and, if so, to ensure that they are proportionate, equitable, non-discriminatory, and fully consistent with due process and other obligations under international law

Objective 12: Strengthen certainty and predictability in migration procedures for appropriate screening, assessment and referral

c) Establish gender-responsive and child-sensitive referral mechanisms, including improved screening measures and individual assessments at borders and places of first arrival, by applying standardized operating procedures developed in coordination with local authorities, National Human Rights Institutions, international organizations and civil society

[93] *ND and NT v Spain* [2020] ECHR Application Nos. 8675/15 and 8697/15 [26].
[94] *Georgia v Russia* (n 221) para 167; *Khlaifia and Others v Italy* [2016] ECHR (Grand Chamber) No. 16483/12 [237].
[95] [2012] ECHR 1845
[96] *Hirsi Jamaa and Others v Italy* [2012] ECHR App No 27765/09; paras 184–5.

d) Ensure that migrant children are promptly identified at places of first arrival in countries of transit and destination, and, if unaccompanied or separated, are swiftly referred to child protection authorities and other relevant services as well as appointed a competent and impartial legal guardian, that family unity is protected, and that anyone legitimately claiming to be a child is treated as such unless otherwise determined through a multi-disciplinary, independent and child-sensitive age assessment

Objective 4: Ensure that all migrants have proof of legal identity and adequate documentation

d) Facilitate access to personal documentation, such as passports and visas, and ensure that relevant regulations and criteria to obtain such documentation are non-discriminatory, by undertaking a gender-responsive and age-sensitive review in order to prevent increased risk of vulnerabilities throughout the migration cycle

Commentary:

The current family reunion rules, which do not allow children refugees to have their parents join them in the UK unless they prove there are exceptional circumstances are in stark contradiction with objective 12 (d) of the Global Compact and the requirements under General Comment 15 and rights to a private and family life.[97] Furthermore, the CCPR has stated that Article 13 ICCPR 'implicitly' contains a prohibition on collective or mass expulsions.[98] In 2014 the ILC adopted the 'Draft articles on the expulsion of aliens' with Article 9 explicitly prohibiting collective expulsion.[99] The Marrakesh Compact makes clear that non-discriminatory and individualised procedures need to be in place in order to prevent breaching non-discrimination and collective expulsion prohibitions. In addition, access to legal representation and clear information on immigration rules and procedures at points of entry is essential to ensure fair processes. As the UK sets in place new immigration rules following departure from the EU, it will be essential to ensure these are in line with the commitments made in the Marrakesh Compact and under existing human rights law.

One of the fundamental principles recognised by human rights law is non-discrimination, also an underpinning principle of the Marrakesh Compact. This implies everyone is entitled to human rights protection, regardless of national or social origin, religion, race, colour, age, sexual orientation or gender, and may only be denied for migrants in limited circumstances that pursue a legitimate aim and be proportional to the achievement of that objective.[100] In particular in relation to Objective 4d, border measures employed to address irregular migration, transnational organised crime or international terrorism shall not be discriminatory in purpose or effect. Practices at the border risk

[97] Home Office Family Reunion Casework Guidance, Version 5.0, published 31 December 2020, p18: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947066/family-reunion-guidance-v5.0ext.pdf

[98] CCPR, 'General Comment 15 (The Position of Aliens under the Covenant)' (1986) para 10.: 'article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions'. See further, Jean-Marie Henckaerts, *Mass Expulsion in Modern International Law and Practice* (Martinus Nijhoff Publishers, The Hague 1995) 8–20.

[99] Draft Articles on the Expulsion of Aliens, with commentaries (2014); The ILC included the topic 'Expulsion of aliens' in its long-term programme of work in 2000: *Official Records of the General Assembly Fifty-fifth Session, Supplement no 10* (A/55/10), para 729.

[100] ICERD Article 1(3); ICCPR Article, OHCHR Recommended Principles and Guidelines on Human Rights at International Borders, A/69/CRP.1 24 October 2014 p8; General Recommendation 30, ICERD, (2002) para 4

breaching the obligations relating to non-discrimination, in particular evidenced by the Home Office stopping the use of E-border algorithms.[101]

Example: difficulties in accessing a lawyer at the airport
A, an Australian citizen originally from Thailand, is the mother of child B who lives in the UK with A's husband C. A had been separated from her child for 3 years. Wishing to see her child, she came to the UK by aeroplane. She was detained at the airport as she did not have a visa for an extended stay or purpose. At interview with border officials she gave seeing her child as the reason why she had come. Asked if she might work while being in the UK, she stated that she might do so. The result was that she was made to wait in the airport for six hours, then was forced to get back on a plane to Australia immediately. A had during this period tried to raise a claim based on Article 8 ECHR, as her immigration lawyer in the UK had advised her to. However, the border officials refused to properly engage with this claim. The lawyer was unable to engage with border officials or A because the lawyer did not have a letter of authority from A. The reason for this is because the lawyer had been instructed on that day by A at the airport.

Although asylum and Article 3 ECHR claims are typically dealt with well, the same is not true of Article 8 claims. The Marrakesh Compact may assist a lawyer on such a case because of the requirement for due process at international borders, and that all migrants are treated in accordance with international human rights law, with regard to border screening, individual assessment and interview processes.

Example: readmitting British citizens who go abroad to join alleged terrorist organisations
In cases of British citizens who go abroad to join an alleged terrorist organisation, the Government has increasingly used deprivation of citizenship to prevent them from returning. If you are representing an individual in this position, it may be worth using this paragraph to add to your argument on the international legal context and the Government's own commitments.

Example: delays in receiving a visa which the Home Office has accepted should be granted
Mrs K has won her appeal against the refusal to grant a visa by the Home Office. The Home Office accepts, subsequent to the appeal, that the visa ought to be granted. Nonetheless, the Home Office delayed for months without processing the visa. In chasing up the visa, Mrs K and her lawyers had to call the Home Office multiple times over the telephone, costing a total of £120, none of which they will be able to get back.

In this example, the Home Office can hardly be said to be facilitating access to documents. A lawyer may wish to use the Marrakesh Compact as further backup to their main arguments in a pre-action protocol letter to a judicial review of the delay.

[101] See BBC News, Home Office drops 'racist' algorithm from visa decisions (Published 4 August 2020) Available at: https://www.bbc.co.uk/news/technology-53650758

Regularisation

Overarching legal obligations:

Article 2 ICCPR

> *(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or* ***other status.***

UNGA Protection of Migrants (25 February 2016, A/RES/70/147)

> *…Stressing the importance of all regulations and laws regarding irregular migration, at all levels of government, being in accordance with the obligations of States under international law, including international human rights law.*

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

> (para 4) *The Committee considers that in their reports States parties should give attention to the position of aliens, both under their law and in actual practice. The Covenant gives aliens all the protection regarding rights guaranteed therein, and its requirements should be observed by States parties in their legislation and in practice as appropriate*
>
> (para 5) *The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.*

Article 31(1) Convention Relating to the Status of Refugees, 28 July 1951

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

Article 16 ICCPR

> *Everyone shall have the right to recognition everywhere as a person before the law.*

Cases where this has been an issue:

Re C (A Child) [2019] EWHC 131 (Fam) considered the ability of a mother to remove her child from the UK to return to her family, taking the child from their father who resided in the UK. Part of her argument rested on the effect of staying in the UK under irregular status was having on her welfare. Without clear procedural options to regularise her status she argued the precarity of her position was having a detrimental effect on her well-being.[102]

[102] See *Re C (A Child) [2019] EWHC 131 (Fam) Available at* https://www.bailii.org/ew/cases/EWHC/Fam/2019/131.html para 22

Mansur (Immigration adviser's failings, Article 8) [2018] UKUT 274 concerned a failure by an immigration adviser to follow instructions and to give accurate advice regarding immigration proceedings. It was found that this led to the application for leave being invalid when it would otherwise have been likely to have been granted.

The 2012 introduction of the Overseas Domestic Worker Visa[103] meant that migrant workers are no longer able to have their visas renewed and ultimately regularised, as was the case under the previous system. This has increased vulnerability and precarity of migrant workers position vis-à-vis regularisation.[104]

Further, the Home Office currently refuses most applications to naturalise by individuals who have, in the 10 years prior to the application, either entered the country irregularly or overstayed. This fails to take into account the reasons behind the irregular entry or stay and fails to assess whether, at the date of application, the applicant is in fact of "good character" or not.

What does the Marrakesh Compact say?

Objective 7: Address and reduce vulnerabilities in migration

h) Develop accessible and expedient procedures that facilitate transitions from one status to another and inform migrants of their rights and obligations, so as to prevent migrants from falling into an irregular status in the country of destination, to reduce precariousness of status and related vulnerabilities, as well as to enable individual status assessments for migrants, including for those who have fallen out of regular status, without fear of arbitrary expulsion

i) Build on existing practices to facilitate access for migrants in an irregular status to an individual assessment that may lead to regular status, on a case by case basis and with clear and transparent criteria, especially in cases where children, youth and families are involved, as an option to reduce vulnerabilities, as well as for States to ascertain better knowledge of the resident population

Objective 4: Ensure that all migrants have proof of legal identity and adequate documentation

20. We commit to fulfil the right of all individuals to a legal identity by providing all our nationals with proof of nationality and relevant documentation, allowing national and local authorities to ascertain a migrant's legal identity upon entry, during stay, and for return, as well as to ensure effective migration procedures, efficient service provision, and improved public safety. We further commit to ensure, through appropriate measures, that migrants are issued adequate documentation and civil registry documents, such as birth, marriage and death certificates, at all stages of migration, as a means to empower migrants to effectively exercise their human rights.

[103] See Section on employment and labour

[104] Virginia Mantouvalou, What Is to Be Done for Migrant Domestic Workers? In B Ryan (ed), Labour Migration in Hard Times (Institute of Employment Rights, 2013)

Commentary:
As is evident from UNHRC General Comment 15, States retain sovereign authority to regulate the entry and stay of migrants and international human rights law does not contain an explicit right to regularisation of migration status. However, measures to regulate migration must conform with the legal framework which enshrines the equal enjoyment of everyone to human rights. This applies to all stages of entry and removal of migrants. Migration management risks worsening the precarity associated with irregular status as demonstrated in the case law. Further, poor immigration advice and unclear pathways to regularisation subject immigrants to increasingly high levels of vulnerability.

The Marrakesh Compact demonstrates that to reduce the vulnerabilities of migrants, clear and accessible procedures must be in place in order for migrants to be able to regularise their status. Further, the manner of their entry into the country should not affect their attempts to regularise their position through seeking asylum. In addition, the right to legal personhood must be protected through the provision of adequate documentation and legal identity.

Example: interaction between delay in considering application and right to rent checks
Ms B came to the end of her leave as a refugee. She had applied for Indefinite Leave to Remain through the refugee/humanitarian protection route. However, it was taking months for her application to be dealt with, even though as a Syrian she would be very likely to be approved. Meanwhile her tenancy ran out, and the landlord was unwilling to accept her current documents evidencing leave to remain because they showed on their face that they had expired – and he was unwilling to take the risk of being fined for renting a property to an irregularly present migrant.

In a judicial review of the delay, a lawyer may wish to reinforce their argument with a point on Objective 4, which requires that all migrants have adequate documentation.

<u>Objective 16: Empower migrants and societies to realize full inclusion and social cohesion</u>

32. We commit to foster inclusive and cohesive societies by empowering migrants to become active members of society and promoting the reciprocal engagement of receiving communities and migrants in the exercise of their rights and obligations towards each other, including observance of national laws and respect for customs of the country of destination. We further commit to strengthen the welfare of all members of societies by minimizing disparities, avoiding polarization and increasing public confidence in policies and institutions related to migration, in line with the acknowledgement that fully integrated migrants are better positioned to contribute to prosperity.

i) Promote school environments that are welcoming and safe, and support the aspirations of migrant children by enhancing relationships within the school community, incorporating evidence-based information about migration in education curricula, and dedicating targeted resources to schools with a high concentration of migrant children for integration activities in order to promote respect for diversity and inclusion, and to prevent all forms discrimination, including racism, xenophobia and intolerance

Commentary:
Here the Marrakesh Compact is seeking to ensure sustainable solutions and integration into a welcoming community are available to migrants. This includes ending 'hostile' environments and providing avenues for migrants to integrate into society enabling the strengthening of communities

as a whole. Migrants must be encouraged to take active part in their communities and racist rhetoric must be prevented. In the particular context of children, given the formative time in their lives, this is particularly important. Access to school and support to settle into education is essential. Ensuring access to school services and support for families is available will enable better integration and a smoother transition.

Example: challenges to hostile environment policies

On 1 March 2019 the High Court found the Right to Rent system was unlawful on grounds of discrimination in breach of the European Convention on Human Rights in R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department [2019] EWHC 452 (Admin). However, on 21 April 2020 the Court of Appeal ([2020] EWCA Civ 542) overturned the judgment of the High Court, concluding that the Right to Rent scheme was a proportionate means of meeting the legitimate aim of discouraging illegal immigration. An argument that aspects of the hostile environment are unlawful on grounds of discrimination may be buttressed by the commitment of the Government in signing the Marrakesh Compact not to discriminate in service provision.

Removal

Overarching legal obligation:

Article 3 Convention Against Torture

(1) No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Article 6 ICCPR

(1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 7 ICCPR

(1) No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.[105]

Cases where this has been an issue

M & Anor [2017] EWHC 949 (Fam) related to the interplay between family law and immigration issues. The case concerned a Pakistani-born child who lived with his parents in Saudi Arabia. He travelled with his mother to the UK for a holiday, with his father's consent, but the mother failed to return the child to Saudi Arabia as had been agreed. The mother later applied for asylum for herself and her child, which included allegations against the father. The High Court stated that the grant of refugee status to a child by the Home Office is an absolute bar to any order by the Family Court seeking to effect the return of a child. It demonstrated the importance of preventing refoulment of vulnerable persons.

In *Othman (aka Abu Qatada) v Secretary of State for the Home Department* [2013] EWCA Civ 277 the key issue was whether there was "a real risk of a flagrant denial of justice" so as to render Qatada's deportation a breach of the UK's obligations under the prohibition of refoulment.[106]

What does the Marrakesh Compact say?

<u>Objective 21: Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration</u>

37. We commit to facilitate and cooperate for safe and dignified return and to guarantee due process, individual assessment and effective remedy, by upholding the prohibition of collective expulsion and

[105] Human Rights Committee General Comment 31: The Nature of the General Legal Obligation Imposed on State Parties to the Covenant (2004) CCPR/C/21/Rev.1/Add 13 para 12 interprets the obligations in Article 7 to encompass forbidding returns to places where the individual might be exposed to the 'real risk of irreparable harm such as that contemplated by Article 6 and 7 of the Covenant'

[106] For further discussion of cases where removal has jeopardised the prohibition of non-refoulment see: Report from Freedom From Torture on failures made in relation to asylum decisions: https://www.freedomfromtorture.org/sites/default/files/2019-09/FFT_LessonsNotLearned_Report_A4_FINAL_LOWRES_1.pdf.

of returning migrants when there is a real and foreseeable risk of death, torture, and other cruel, inhuman, and degrading treatment or punishment, or other irreparable harm, in accordance with our obligations under international human rights law. We further commit to ensure that our nationals are duly received and readmitted, in full respect for the human right to return to one's own country and the obligation of States to readmit their own nationals. We also commit to create conducive conditions for personal safety, economic empowerment, inclusion and social cohesion in communities, in order to ensure that reintegration of migrants upon return to their countries of origin is sustainable.

a) Develop and implement bilateral, regional and multilateral cooperation frameworks and agreements, including readmission agreements, ensuring that return and readmission of migrants to their own country is safe, dignified and in full compliance with international human rights law, including the rights of the child, by determining clear and mutually agreed procedures that uphold procedural safeguards, guarantee individual assessments and legal certainty, and by ensuring they also include provisions that facilitate sustainable reintegration

e) Ensure that the return of migrants who do not have the legal right to stay on another State's territory is safe and dignified, follows an individual assessment, is carried out by competent authorities through prompt and effective cooperation between countries of origin and destination, and allows all applicable legal remedies to be exhausted, in compliance with due process guarantees, and other obligations under international human rights law

g) Ensure that return and readmission processes involving children are carried out only after a determination of the best interests of the child, take into account the right to family life, family unity, and that a parent, legal guardian or specialized official accompanies the child throughout the return process, ensuring that appropriate reception, care and reintegration arrangements for children are in place in the country of origin upon return

Example: removal without proper safeguards and reception arrangements

Mr A has a mental impairment and lacks capacity. He takes medication regularly, and no-one had monitored the impact on him of not taking medication. The evidence is that he had in previous years been removed from the UK without anyone identifying what the reception conditions were in his country of origin. He is now back in the UK, and the Government are again attempting to remove him. There will be legal arguments about whether the procedural element of Paposhvili[107] *will be complied with, and how to comply with it.*

It may be worth citing Objective 21(e) as part of the argument, to emphasise that the Marrakesh Compact has recently reinforced the importance of safe and dignified returns on the basis of individual assessments.

[107] [2014] ECHR 431

Example: dignified return – individual breaches

The Home Office outsources removals to G4S and Tascor and way they treat people can at times be brutal. If your client claims that they have been maltreated on a removal flight, in addition to your other arguments, it may be worth citing Objective 21(e) as evidence of what the UK states its treatment of those to be removed is. This may help highlight the difference between what the UK suggests should happen and what in fact happened.

Example: dignified return – challenging contracts with private contractors

It may be possible to challenge awarding contracts to private companies on the basis that they treat people in a manner incompatible with the Government's national and international legal obligations. It is one thing to give a contract to a private contractor then they turn out to treat people badly. It is another thing entirely to renew a contract with a private contractor knowing that they treat people in a manner inconsistent with human dignity and our legal obligations. It is worth citing Objective 21(e) as evidence of the Government's commitments on the international stage.

Data protection in evidence-based policymaking

Overarching legal obligations:

Article 17 International Covenant on Civil and Political Rights (ICCPR):

(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.

Article 26 ICCPR:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status

Cases where this has been issue:

R (W) v Secretary of State for Health & SSHD [2015] EWCA Civ 1034 | [2016] 1 W.L.R. 698 concerned the sharing of information concerning migrants for the purposes of NHS charging. The failure to pay the charges has immigration implications. *R (Migrant Rights Network) v SSHD and SSH* (2018) concerned a memorandum of understanding pursuant to which migrants' non-clinical data (collected in a primary care setting) was shared with the Home Office for immigration enforcement purposes. There is no judgment because the case settled when the Home Office agreed to withdraw the memorandum.[108] *R (Open Rights Group) v SSHD* [2019] EWHC 2562 (Admin) [2020] 1 W.L.R. 811 is a challenge to the immigration exemption in Data Protection Act 2018. It's not about specific instances of data use or misuse but the statutory provision which enables the Home Office and others not to comply with certain data protection rights and obligations.

R (EDC) v SSHD (2020) is a case (in which permission for judicial review has been granted) concerning the collection, retention and making available of trafficking victims' (not all of whom are migrants) data. The context is support workers recording data (which includes legally professional privileged material and private information which is not connected to trafficking-related decisions) and its being accessible by the Home Office.[109]

What does the Marrakesh Compact say?

<u>Objective 1: Collect and utilize accurate and disaggregated data as a basis for evidence-based policies</u>

17. We commit to strengthen the global evidence base on international migration by improving and investing in the collection, analysis and dissemination of accurate, reliable, comparable data,

[108] See also *R (JCWI) v SSHD* (2020); See https://www.libertyhumanrights.org.uk/issue/legal-victory-against-governments-hostile-environment/. for further details

[109] See for further information: https://www.theguardian.com/global-development/2020/jul/30/british-trafficking-victim-sues-priti-patel-alleging-abuse-of-personal-data; https://www.matrixlaw.co.uk/news/migrants-rights-network-granted-permission-legally-challenge-data-sharing-agreement-nhs-digital-home-office; https://old.parliament.uk/business/committees/committees-a-z/commons-select/health-and-social-care-committee/news/mou-data-sharing-report-publication-17-19/

disaggregated by sex, age, migration status and other characteristics relevant in national contexts, while upholding the right to privacy under international human rights law and protecting personal data. We further commit to ensure this data fosters research, guides coherent and evidence-based policy-making and well-informed public discourse, and allows for effective monitoring and evaluation of the implementation of commitments over time.

i) Enhance collaboration between State units responsible for migration data and national statistical offices to produce migration-related statistics, including by using administrative records for statistical purposes, such as border records, visa, resident permits, population registers and other relevant sources, while upholding the right to privacy and protecting personal data

Objective 4: Ensure that all migrants have proof of legal identity and adequate documentation

a) Improve civil registry systems, with a particular focus on reaching unregistered persons and our nationals residing in other countries, including by providing relevant identity and civil registry documents, strengthening capacities, and investing in information and communication technology solutions, while upholding the right to privacy and protecting personal data

Objective 21: Cooperate in facilitating safe and dignified return and readmission, as well as sustainable reintegration

c) Cooperate on identification of nationals and issuance of travel documents for safe and dignified return and readmission in cases of persons that do not have the legal right to stay on another State's territory, by establishing reliable and efficient means of identification of own nationals such as through the addition of biometric identifiers in population registries, and by digitalizing civil registry systems, with full respect to the right to privacy and protection of personal data

Commentary:
The Marrakesh Compact commits to strengthen the global evidence base on international migration by improving and investing in the collection, analysis and dissemination of accurate, reliable, comparable data, disaggregated by sex, age, migration status and other characteristics relevant in national contexts. The commitment is to be realized while upholding the right to privacy under international human rights law and protecting personal data. This clearly engages Article 17 ICCPR in all actions to implement the objective. However, we must keep in mind Article 26 ICCPR particularly to clarify the scope open to states in the disaggregation of data on the basis of other characteristics relevant in national contexts (emphasis provided). The concern here is that the reference to "national contexts" must never be instrumentalised to purport to justify the collection of sensitive personal data (race, ethnicity, religion etc) about migrants for purposes contrary to Article 26 ICCPR.

Collaboration among databases internationally can be very useful to get a better picture of migration. But it must not be used to get a better picture of migrants as this is contrary to their individual right to privacy (Article 17 ICCPR). One of the more insidious developments among some states is the introduction of interoperability among their national and regional databases with information on migrants. This makes it possible for state officials to search multiple databases around the world not

just in respect of a specific individual but on the basis of profiles. Privacy, which includes personal data, is protected in international human rights law. Any state interference is an exception to the right to privacy and must be justified on limited grounds set out in law. The call of the Marrakesh Compact for collaboration among databases needs to be implemented in a manner whereby that collaboration is limited to migration only and excludes data-sharing on individual migrants themselves.

Collaboration among state bodies responsible for aspects of migration such as border records, visas etc obviously runs the risk of violating the right to privacy of individual migrants. Implementation must be carefully monitored to ensure that all data is anonymized in a manner where that anonymization cannot be reversed when the data is shared across bodies. Lawyers may draw upon commitments made in Objective 1 to disaggregate data where a clients data has been misused by government agencies.

Example:

Migration data collection may create or re-enforce immigration status as a defining characteristic of individuals in access to goods and services. This may have the effect of diminishing access for migrants to basic services. Allowing migration status to be a defining characteristic of any population may give rise to discrimination inconsistent with Article 26 ICCPR.

The use of data regarding migrants' contributions to states is similarly ambiguous. The idea that migrants must justify their presence in their host state on the basis of their contribution to it is problematic. While an argument could be made that it is relevant to the admission (only, not residence and stay once they are already contributing to the society in the form of taxes etc) of migrant workers, this is not the case for other migrants, such as family members, refugees students etc. All members of a society, whether migrants or citizens (bearing in mind that many migrants will be, in the phrase of Motomura, citizens-in-waiting, people who will probably become citizens sooner or later) are entitled to equality of treatment. Any differences in treatment must be justified on grounds which are consistent with Article 26 ICCPR. The idea that migrants should somehow be better than citizens, more diligent, hardworking, educated etc gives the impression that the entitlement to equality does not apply to them which is wrong in international human rights law.

Access to information

Overarching legal obligation:
Article 19, International Covenant on Civil and Political Rights:

(2) Everyone shall have the right to freedom of expression; ***this right shall include freedom to seek, receive and impart information and ideas of all kinds,*** *regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice*.

Cases where this has been an issue:
The *Advocate General for Scotland (Appellant) v Romein (Respondent) (Scotland)* [2018] UKSC 6. This case concerning whether descendants of a British mother born outside the UK are entitled to British citizenship, highlights the need for clear communication of the rights of individuals. Ms. Romein had applied for citizenship for her children. She sought unsuccessfully to registered their births as she did not realise that s(5)1 of the British Nationality Act 1948 provided that a person could only become a British citizen by descent if their father was such a citizen at the time of the person's birth. Dismissing the Advocate General's appeal, the court unanimously held that the condition in s 5(1)(b) of the 1948 Act should be treated as inapplicable in applications for citizenship by descent from the mother. The case demonstrates the need for, particularly vulnerable, people to be communicated their rights and the processes concerning their applications for citizenship or settled status, as otherwise, through administrative errors their claims may fail placing them in greater precarity.

In the ECtHR case of *MSS (21 January 2011 Grand Chamber)* the facts and reasoning in this case point to the significance of information about law for asylum seekers in the EU, as well as to the barriers in accessing legal information. Issues raised include: quality and relevance of information, knowledge of police, tricks by police, vulnerability of asylum seekers, access to asylum. This case demonstrates the importance of access to clear information provision in order to be able to navigate complex immigration systems.[110]

What does the Marrakesh Compact say?

<u>Objective 3: Provide accurate and timely information at all stages of migration</u>

19. We commit to strengthen our efforts to provide, make available and disseminate accurate, timely, accessible, and transparent information on migration-related aspects for and between States, communities and migrants at all stages of migration. We further commit to use this information to develop migration policies that provide a high degree of predictability and certainty for all actors involved.

d) Provide newly arrived migrants with targeted, gender-responsive, child-sensitive, accessible and comprehensive information and legal guidance on their rights and obligations, including on compliance with national and local laws, obtaining of work and resident permits, status adjustments, registration with authorities, access to justice to file complaints about rights

[110] This was also the case in *Hirsi Jamaa and others v Italy* 23 February 2012 Grand Chamber where the Court found that the individuals had been given no information and there were substantial failings by Italian officials as a result. See para 85-205

violations, as well as on access to basic services dealing properly with migrants' vulnerabilities.

Commentary:
In the UN General Assembly's New York Declaration of 19 September 2016, States commit to 'take measures to inform migrants about the various processes relating to their arrival and stay in countries of transit, destination and return' (A/RES/71/1, para 42). In Objective 3 (para 19), States commit to strengthening their efforts to provide information 'for and between States, communities and migrants at all stages of migration'. Broad in content, the information is to cover 'migration-related aspects' and it is to be 'accurate, timely, accessible and transparent'. An additional strand of commitment is that States 'use this information to develop migration policies that provide a high degree of predictability and certainty for all actors involved'.

The Marrakesh Compact prompts the launch of 'a centralized and publicly accessible national website to make information available on regular migration options'. National websites are to include elements such as immigration laws, visa applications, qualification requirements, training opportunities, and living costs and conditions. The promise of Objective 3 lies in its potential to enhance processes of learning which can contribute to safe, orderly and regular migration. This supports people to act with regard for the legal framework and to use the resources available during migration.

Example: litigants in person

You are representing Mr A, who made an immigration application in person without legal assistance. Mr A attempted to use the information on the Home Office website relating to his application. Unfortunately, the information relating to evidence on the Home Office website was spread everywhere, and Mr A through misunderstanding omitted to tell the Home Office a key detail in his application. This led to Mr A's application being refused.

On appeal (or judicial review), you have taken a statement from Mr A regarding what information he saw, what he understood that information was saying, and have taken a witness statement. This will help Mr A challenge any adverse inference or adverse credibility finding.

You may additionally consider buttressing your argument on behalf of Mr A, noting that the Government has committed itself to providing accessible and transparent information in Objective 3, Paragraph 19, which it would have failed to do in this instance.

Appendix 1: Table of Cases

Source of Law	Judgment	Quote	Comments
Istanbul Protocol	*KV (Sri Lanka) v Secretary of State for the Home Department* [2019] UKSC 10	§ 20, 24	"In their supremely difficult and important task, exemplified by the present case, of analysing whether scars have been established to be the result of torture, decision-makers can legitimately receive assistance, often valuable, from medical experts" (§ 20) The tribunal had noted that "it is the Practice Direction, not the Istanbul Protocol, which provides the relevant authoritative guidance as to their duty, helpful though parts of the Istanbul Protocol might be as a reference resource" (§ 24), to which the Supreme Court replied that "there is no inconsistency between that Practice Direction and the protocol. Of course, the expert must comply with the Practice Direction … [b]ut the Practice Direction does not address the specific area addressed by the protocol, namely the investigation of torture. When invited to investigate an allegation of torture, the expert should therefore recognise the protocol as equally authoritative - in accordance with the Court of Appeal's decision in the SA (Somalia) case" (§ 24). It thus seems that the Istanbul Protocol, a "soft law" instrument internationally recognized and well regarded by jurists, if not in conflict with national directions as to the consideration of medical evidence by experts, can complement and supplement such directives, being equally authoritative.
UNCRC General Comments	*DA & Ors, R (on the application of) v Secretary of State for Work and Pensions* [2019] UKSC 21	§ 67–72	"A move is afoot, exemplified by Lord Kerr's judgment in the first benefit cap case at paras 247 to 257, for UK courts to treat the UNCRC, which the UK has ratified, as being, exceptionally, part of our domestic law. At present, however, it forms no part of it" (§ 67) "In the light in particular of the Mathieson case, the government cannot deny that the committee's analysis is authoritative guidance in relation to the dimensions of the concept in article 3.1. It can submit only, and correctly, that the guidance is not binding even on the international plane and that, while it may influence, it should, as mere guidance, never drive a conclusion that the article has been breached" (§ 69) "It follows that, when relevant, the content of the UNCRC can inform inquiry into the alleged violation of article 14 of the Convention, when taken with one of its substantive rights" (§ 72)
United Nations Convention on the Rights of Persons with Disabilities (the UNCRPD)	*J v K & Anor [*2019] EWCA Civ 5	§ 35–36	"Mr O'Dempsey submitted that the same or similar obligations also arose by a variety of other routes. He referred specifically to articles 6 and 14 of the European Convention on Human Rights, via section 6 of the Human Rights Act 1998; articles 21 and 47 of the EU Charter of

General Comment 6 of the Committee on the Rights of Persons with Disabilities			Fundamental Rights, taken with article 9 of Council Directive 2000/78; and articles 2, 5 and/or 13 of the United Nations Convention on the Rights of Persons with Disabilities ("the UNCRPD"), read with General Comment 6 of the Committee on the Rights of Persons with Disabilities … I am very willing to accept that in many or most cases those will indeed be alternative sources of the same or similar obligations as would arise as a matter of general law … But I am not at present persuaded that anything useful is achieved by referring in detail to these other sources, because, at least in the context of the present appeal, they appear to add nothing to the domestic jurisprudence."
United Nations Convention on the Rights of the Child	*In the matter of an application by Siobhan McLaughlin for Judicial Review (Northern Ireland)* [2018] UKSC 48	§ 40	"That view is reinforced by the international obligations to which the United Kingdom is party and which inform the interpretation of the guarantees contained in the ECHR even though they have not been directly incorporated into United Kingdom law … Principal amongst these is article 3 of the United Nations Convention on the Rights of the Child ("UNCRC"), which states that "in all actions concerning children … the best interests of the child shall be a primary consideration" (§ 40)
UNCRC	*Flintshire County Council v Jayes, R. (On the Application of)* [2018] EWCA Civ 1089	§ 16	"The interests of children likely to be affected by a planning decision are not merely a material consideration, as the Supreme Court held in ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4; [2011] 2 AC 166) ("ZH (Tanzania)"), they are a "primary" consideration. In coming to that conclusion, the Supreme Court relied upon general principles of international law, including obligations imposed on the state by international conventions (see, e.g. [21]-[23] per Baroness Hale). In this context, the most important obligations on the United Kingdom are those derived from the United National Convention on the Rights of the Child ("the UNCRC"), article 3(1) of which provides …"
General Comment No. 10 of the Committee on the Rights of the Child (CRC) Istanbul Statement at the International Psychological Trauma Symposium of 2007 General Assembly's 2015 "Mandela Rules" on minimum standards for the treatment of prisoners	*R (AB) v The Secretary of State for Justice* [2017] EWHC 1694	§ 100, 112–113	"I consider that Mr Squires' approach takes the legitimate use of UNCAT and the Convention on the Rights of the Child, CRC, far too far. These Conventions have not been incorporated wholesale into domestic law. So far as material for this case, the Conventions are no more than an interpretative aid for Article 3, and the ECtHR would use them for that purpose. But the language of those Conventions adds nothing to the language of Article 3. There is no Article in either which deals with the topic of segregation of young people. The language of Article 3 is not ambiguous either, as Mr Weisselberg submitted" (§ 112) "I do not attach any real weight to General Comment No.10 of the UN Committee on the Rights of the Child, which is not directed so much as to the meaning of the UN Convention on the Rights of the Child itself, as to its application. Giving interpretative weight to an international Convention where there is ambiguity in another Convention with which consistency is likely, or where materially similar language is used, is not the same at all as adopting the views of its Committee as to whether particular circumstances breach it. Giving weight to such

			views of the Committee is not really an exercise in interpretation at all. Doing so is still less appropriate when the relevant Convention being interpreted is a different one, the ECHR, with its own Court which decides not just its autonomous meaning, but its fact sensitive application. Whether circumstances amount to a breach of the ECHR is a matter for the judicial body tasked with deciding the issue in the case before it, and not for the UNCRC. The Committee, legitimately, may well be trying to bring about what it sees as desirable changes in policy and practice, but it is not performing a judicial function" (§ 113)
On unincorporated treaties impacting the discretion of judges or government officials United Nations Convention on Jurisdictional Immunities of States and their Property (2004).	*Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62	§ 12, 31–33, 35, 39, 62	"But I decline to treat these examples as pointing to a more general rule that the English courts should not determine points of customary international law but only the "tenability" of some particular view about them. If it is necessary to decide a point of international law in order to resolve a justiciable issue and there is an ascertainable answer, then the court is bound to supply that answer." "Like most multilateral conventions, its provisions are based partly on existing customary rules of general acceptance and partly on the resolution of points on which practice and opinion had previously been diverse. It is therefore necessary to distinguish between those provisions of the Convention which were essentially declaratory and those which were legislative in the sense that they sought to resolve differences rather than to recognise existing consensus. That exercise would inevitably require one to ascertain how customary law stood before the treaty." (§ 32)
On customary international law and its incorporation in UK common law	*R (Akarcay) v. Chief Constable of the West Yorkshire Police* [2017] EWHC 159	§ 23	"Even if it could be shown that [CIL] imposed an obligation not to recognize Northern Cyprus, in my opinion it could not form part of the common law. To treat it as such would contravene the unequivocal constitutional principle that questions of recognition are for the executive. It is not for the courts to dictate to the executive whether they can, must, or cannot recognise a state"
UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) CAT Committee General Comment	*Al-Saadoon & Ors v The Secretary of State for Defence & Ors* [2016] EWCA Civ 811	§ 188, 194–204	"Save that section 134, Criminal Justice Act 1988 creates an offence of torture in compliance with Article 4 UNCAT, the provisions of UNCAT have not been implemented into the domestic law of the United Kingdom by the UK Parliament. Nevertheless, the appellants submitted below that the provisions of UNCAT on which they seek to rely have effect in domestic law within the United Kingdom on two alternative grounds. First, they submitted that under the principle of legality UK public authorities owe a duty in domestic public law not to override fundamental rights including those contained in international human rights treaties. Secondly, they submitted that the relevant provisions of UNCAT have the status of customary international law which automatically forms part of domestic law in the United Kingdom. The judge rejected those submissions" (§ 194) "the principle [of legality] depends for its application on the fundamental rights in question already being part of

			domestic law. It does not operate by reference to rights and duties between States on the international plane, nor can it transform such rights into domestic law" (§ 199) "although international treaty obligations may sometimes guide the development of the common law, this is inappropriate where the proposed development would conflict with the principle of Parliamentary sovereignty, in particular where Parliament has decided not to implement the provision into domestic law (Re McKerr [2004] 1 WLR 807) or has already entered the field to strike the appropriate balance (Keyu v Foreign Secretary [2015] 3 WLR 1665 at [118]). In the present case Parliament has implemented Article 4 UNCAT, but must be taken to have decided not to implement its other provisions" (§ 200)
UNCRC	*The Christian Institute & Ors v The Lord Advocate (Scotland)* [2016] UKSC 51	§ 72	"As is well known, it is proper to look to international instruments, such as the UN Convention on the Rights of the Child 1989 ("UNCRC"), as aids to the interpretation of the ECHR."
UNCRC	*R (on the application of SG and others (previously JS and others)) (Appellants) v Secretary of State for Work and Pensions* [2015] UKSC 16	§ 78, 82, 90, 101, 114–116, 137, 140 Particularly see the arguments by Lady Hale (§ 211, 217, 218) and Lord Kerr (§ 235–257)	Great overview resource for how courts have dealt with UK's dual system. Discussion on whether Article 3 of UNCRC can be used in the test of whether a discriminatory policy (against women) by the UK gov can be justified with respect to ECHR art 14. "It simply cannot be the law that, provided only a public officer asserts that his decision accords with the state's international obligations, the courts will entertain a challenge to the decision based upon his arguable misunderstanding of that obligation and then itself decide the point of international law at issue." (§ 90) "The Divisional Court held that, notwithstanding the fact that the UNCRC is an international convention which has not been incorporated into our domestic law, the court should nevertheless have regard to it as a matter of Convention jurisprudence" (§ 101) "Ministerial statements of the government's "commitment" to giving "due consideration" to the UNCRC articles, may have political consequences but are no substitute for statutory incorporation" (§ 115) "Thirdly, however, the UNCRC may be relevant in English law to the extent that it falls to the court to apply the European Convention on Human Rights ("ECHR") via the Human Rights Act 1998. The European Court of Human Rights has sometimes accepted that the Convention should be interpreted, in appropriate cases, in the light of generally accepted international law in the same field, including multi-lateral treaties such as the UNCRC" (§ 137)

			"I agree that our international obligations under the UNCRC and CEDAW have the potential to illuminate our approach to both discrimination and justification. Whatever the width of the margin of appreciation in relation to the subject matter of a measure, the Strasbourg court would look with particular care at the justification put forward for any measure which places the United Kingdom in breach of its international obligations under another human rights treaty to which we are party" (§ 218) "there are three possible ways which have been considered by the courts in which such treaties may have an impact on national law – (i) as an aid to statutory interpretation; (ii) as an aid to development of the common law; and (iii) as a basis for legitimate expectation" (§ 238) "In *Re McKerr* Lord Steyn cast doubt on the applicability of the fundamental principles set out in International Tin Council so far as they governed the position in relation to human rights treaties, arguing that "the rationale of the dualist theory, which underpins the International Tin Council case, is that any inroad on it would risk abuses by the executive to the detriment of citizens. It is, however, difficult to see what relevance this has to international human rights treaties which create fundamental rights for individuals against the state and its agencies. A critical re-examination of this branch of the law may become necessary in the future" at paras 49-50 … highlighted what he termed "**growing support for the view that human rights treaties enjoy a special status**", citing the views of Murray Hunt (Using Human Rights Law in English Courts (1998)), at pp 26-28)" (§ 248)
On unincorporated treaties impacting the discretion of judges or government officials	*R v Central Criminal Court and anther* [2015] UKSC 76	§ 35–36	"a domestic decision-maker exercising a general discretion (i) is neither bound to have regard to this country's purely international obligations nor bound to give effect to them, but (ii) may have regard to the United Kingdom's international obligations, if he or she decides this to be appropriate. In relation to point (i), even the minority who have suggested that a domestic decision-maker should at least give consideration to international rights which can properly be regarded as fundamental go no further … Neither by reference to the principle of legality … nor on any other basis is it possible to limit the domestic court's general discretion by reference to unincorporated international obligations" On this topic, see also *R (Hurst) v London Northern District Coroner [2007] UKHL 13: "R v Secretary of State for the Home Department, Ex p Brind [1991] 1 AC 696* establishes that a domestic decision-maker exercising a discretion is not obliged to exercise it in compliance with this country's international obligations. But he or she may do so: *R v Lyons [2002] UKHL 44; [2003] 1 AC 976,* paragraph 13 per Lord Bingham." (§ 78) And further in *Hurst* at § 18: "As to whether or not the coroner should have been guided by the United Kingdom's

			obligations under the Convention in respect of a death to which the 1998 Act did not apply, I accept, of course, that the coroner was not bound to comply with those obligations. To hold otherwise would be to incorporate the Convention into domestic law by the back door. It may be that he would have been justified in ignoring it altogether." (Lady Hale) See also *R v. Secretary of State for the Home Department, ex parte Launder [1997] 1 WLR 839,* an example of a case in which the court held that a voluntary executive self-direction (as to the then unincorporated ECHR) was subject to judicial review. In *R (On The Application of Corner House Research and Others) V Director of The Serious Fraud Office [2008] UKHL 60*, Lord Brown said that when an executive decision maker voluntarily self-directed himself to take into account (unincorporated) international law and was challenged, then "the 'tenable view' approach is the furthest the court should go in examining the point of international law in question"—that is, the court should just ask whether the decision maker's view was a tenable one. (§ 68) Lord Brown also stated that "It simply cannot be the law that, provided only a public officer asserts that his decision accords with the state's international obligations, the courts will entertain a challenge to the decision based upon his arguable misunderstanding of that obligation and then itself decide the point of international law at issue." (§ 67) However, the Supreme Court has declined to follow this approach. It has held in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs [2017] UKSC 62* that "If it is necessary to decide a point of international law in order to resolve a justiciable issue and there is an ascertainable answer, then the court is bound to supply that answer" (§ 35)
On customary international law and its incorporation in UK common law	*Keyu and others v Secretary of State for Foreign and Commonwealth Affairs and another* [2015] UKSC 69	§ 117, 144–145	Even if this conclusion turned out to be wrong, and it is now a principle of customary international law that a state must investigate deaths such as the Killings … it would not be right to incorporate that principle into the common law. Parliament has expressly provided for investigations … In those circumstances, it appears to be quite inappropriate for the courts to take it onto themselves, through the guise of developing the common law, to impose a further duty to hold an inquiry, particularly when it would be a duty which has such potentially wide and uncertain ramifications, given that it would appear to apply to deaths which had occurred many decades – even possibly centuries – ago." (§ 117) "The recognition at common law must itself not abrogate a constitutional or common law value, such as the principle that it is Parliament alone who recognises new crimes" (§ 145)
UNCRC	*Nzolameso v City of*	§ 29	"Where Convention Rights under the Human Rights Act 1998 are engaged, it is well established that they have to be interpreted and applied consistently with international

	Westminster [2015] UKSC 22		human right standards, including the UNCRC: see ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4, [2011] 2 AC 166, H(H) v Deputy Prosecutor of the Italian Republic Genoa (Official Solicitor intervening), [2012] UKSC 25, [2013] 1 AC 338, Stevens v Secretary of State for Communities and Local Government [2013] EWHC 792 (Admin), [2013] JPL 1383, approved in Collins v Secretary of State for Communities and Local Government [2013] EWCA Civ 1193, [2013] PTSR 1594."
UNCRC General Comment on the CRC	*Re Application for Judicial Review (Northern Ireland)* [2015] UKSC 42	§ 49–56	"Moreover, as is common case, the nature and content of a child's right under article 8 must be informed by relevant international treaty provisions. Article 3(1) of UNCRC provides 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 United Nations Committee on the Rights of Children, in its comment on the significance of this provision in May 2013, said this in para 1 of its report …" (§ 49) "Taken as indicators as to how article 8 should be interpreted in this case, these provisions are reasonably unmistakable. A child's identity should be protected even (or, perhaps, especially) when he or she has been subject to criminal proceedings. The ambit of article 8 of ECHR must be seen as including within its embrace the need to protect a child from exposure as a criminal. That it should apply to the publication of a photograph of a child while, apparently, engaged in criminal activity, must follow inexorably. I consider, therefore, that there has been an interference with the appellant's article 8 right" (§ 53)
UNCRC GC by Committee on the CRC	*Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47	§ 38–43	"In this regard Mr Mathieson invites the court to approach the Secretary of State's need to justify the 84-day rule through the prism of international conventions. They are not part of our law so our courts will not ordinarily reach for them. Courts sometimes find, however, that the law which they are required to apply demands reference to them" (§ 38) "There can be no doubt that the Secretary of State's decision to suspend payment of DLA to children following their 84th day in hospital has been an action concerning "children" and "children with disabilities", undertaken by an "administrative" authority with delegated "legislative" powers, within the meaning of both conventions. On the evidence before the court, however, the Secretary of State has never conducted an evaluation of the possible impact of the decision on the children concerned, with the result that he has perpetrated a breach of the procedural rule which constitutes the third aspect of the concept of the best interests of children" (§ 41)
General Comment (no 34), Human Rights Committee, re Article 19 ICCPR	*Kennedy v Charity Commission* [2014] UKSC 20	§ 186, 189	In the UK, the domestic evaluation of freedom of expression tracks the interpretation of Article 19 ICCPR provided by the Human Rights Committee in its general comment (No 34)

			The court noted the importance of the developments in the ECtHR: "In the light of the judgments of the ECtHR delivered following this court's decision in the *Sugar* case, in particular in the *Österreichische* case, this court should now in my view confidently conclude that a right to require an unwilling public authority to disclose information can arise under article 10. In no sense does this betoken some indiscriminate exposure of sensitive information held by public authorities to general scrutiny. The jurisprudence of the ECtHR, of which this court must always take account and which in my view it should in this instance adopt, is no more than that in some circumstances article 10 requires disclosure" (§ 189)
UNCRC	*B (a Child), Re* [2013] UKSC 33		"with the coming into force of the Human Rights Act 1998 ("the 1998 Act"), the 1989 Act must now, if possible, be construed and applied so as to comply with the Convention. So too the Adoption and Children Act 2002 ("the 2002 Act") must, if possible, be construed and applied so as to comply with the Convention. It also appears to me that the 2002 Act must be construed and applied bearing in mind the provisions of the UN Convention on the Rights of the Child 1989 ("UNCRC")" (§ 73) "It appears to me that, given that the Judge concluded that the section 31(2) threshold was crossed, he should only have made a care order if he had been satisfied that it was necessary to do so in order to protect the interests of the child. By "necessary", I mean, to use Lady Hale's phrase in para 198, "where nothing else will do". I consider that this conclusion is clear under the 1989 Act, interpreted in the absence of the Convention, but it is put beyond doubt by article 8. The conclusion is also consistent with UNCRC" (§ 76) "The high threshold to be crossed before a court should make an adoption order against the natural parents' wishes is also clear from UNCRC. Thus, Hodgkin and Newell, Implementation Handbook for the Convention on the Rights of the Child, Unicef, 3rd ed (2007), p 296, state that "there is a presumption within the Convention that children's best interests are served by being with their parents wherever possible". This is reflected in UNCRC, which provides in article 7 that a child has "as far as possible, the right to know and be cared for by his or her parents", and in article 9, which requires states to ensure that …"(§ 78)
United Nations Convention on the Rights of Persons with Disabilities	*Burnip v Birmingham City Council & Anor* [2012] EWCA Civ 629	§ 19–22	"It follows that, in my judgment, the appellants fall within Article 14, subject to justification. I feel able to reach this conclusion even without resort to the United Nations Convention on the Rights of Persons with Disabilities (CRPD)" (§ 19) "The response of the Secretary of State is to seek to limit this approach by drawing fine distinctions as between different international instruments and in relation to their maturity or chronology. It seems to me, however, that such

			rearguard action is inappropriate. If the correct legal analysis of the meaning of Article 14 discrimination in the circumstances of these appeals had been elusive or uncertain (and I have held that it is not), I would have resorted to the CRDP and it would have resolved the uncertainty in favour of the appellants. It seems to me that it has the potential to illuminate our approach to both discrimination and justification" (§ 22)
International Covenant on Economic Social and Cultural Rights	*R (Hurley & Moore) v Secretary of State for Education* [2012] EWHC 201	§ 36–38, 43–44	"Moreover, the Committee on Economic, Social and Cultural Rights, the body charged with monitoring and enforcing the obligations under the Covenant, has emphasised that the obligation progressively to realise the objectives in Article 13 is not merely aspirational, and it has noted with concern that the introduction of tuition fees and student loans in the UK, which appears to be inconsistent with the obligations imposed under that Article, has tended to worsen the position of students from more disadvantaged backgrounds." (§ 38) "Nor do I think that Article 13(2)(c) materially advances the claimant's case. I accept that the Convention jurisprudence shows that the ICESCR can - indeed must - in an appropriate case be taken into consideration by the court. The Covenant is a specialised international instrument in the field of education which in principle may inform the decision of the ECHR in this field … I do not accept that this means that the ECtHR would or properly could treat as binding the specific provision in Article 13(2)(c). There is a fundamental difference between having regard to an international instrument in order to construe the terms of the Convention and directly giving effect to rights conferred in the international instrument itself. The claimants' submission seeks to effect the latter" (§ 43)
United Nations Convention on the Rights of Persons with Disabilities	*R (on the application of) v London Borough of Islington & Ors* [2012] EWHC 414	§ 98–108	"The CPRD is an unincorporated international treaty and so does not have direct effect in English law. It came into force and was ratified by the United Kingdom after the NHSCCA was enacted, so it cannot act as a potential aid to interpretation of that statute in cases of ambiguity. Ms Williams argued, however, that I should take the CPRD into account when deciding how to interpret or apply the Convention rights in Articles 5, 8 and 14 on which the Claimant seeks to rely" (§ 98) "In principle, a point might be reached when the CPRD has been ratified by sufficient European states, or when sufficient European states have brought their domestic law and practice into line with the standards set out in the CPRD, that the CPRD or the practice flowing from it could be taken to amount to a relevant European consensus to inform the interpretation and application of the Convention rights. Also, though the position is less clear, a point might be reached where the CPRD is taken to be a leading international instrument establishing an appropriate standard against which to judge the conduct of member states of the Council of Europe … What is rather unclear at present is whether the CPRD has yet acquired this

			significance for the purposes of interpretation and application of the Convention rights" (§ 102–103)
United Nations Convention on the Rights of Persons with Disabilities	*AH v West London MHT (J)* [2011] UKUT 74 (AAC)	§ 14–18	"We received a helpful report from the Mental Disability Advocacy Centre, an international human rights organisation based in Budapest. This report provided information on the attitude towards public hearings for mental patients in a number of jurisdictions, together with information on the Convention on the Rights of Persons with Disabilities ("CRPD"). From this report we learnt that there is a real diversity of approach in the provisions for public or private hearings across various jurisdictions, although we did not receive evidence on actual practice in these jurisdictions" (§ 14) "The CRPD provides the framework for Member States to address the rights of persons with disabilities. It is a legally-binding international treaty that comprehensively clarifies the human rights of persons with disabilities as well as the corresponding obligations on state parties. By ratifying a Convention a state undertakes that wherever possible its laws will conform to the norms and values that the Convention enshrines" (§ 16)
UN Convention on the Rights of the Child Hague Convention on the Civil Aspects of International Child Abduction 1980	*In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27	§ 1–2, 12–18, 26	"Although the UNCRC has not been incorporated into our domestic law, there are many examples of domestic statutes requiring courts and public authorities to have regard to the welfare of the children with whom they are concerned … The last two, in particular, are clearly inspired by our international obligations under UNCRC" (§ 12) "The most that can be said, therefore, is that both *Maumousseau* and *Neulinger* acknowledge that the guarantees in article 8 have to be interpreted and applied in the light of both the Hague Convention and the UNCRC; that all are designed with the best interests of the child as a primary consideration" (§ 26)
UN Declaration of the Rights of Disabled Persons 1975 UN Convention on the Rights of Persons with Disabilities 2007	*AM (Somalia) v Entry Clearance Officer* [2009] EWCA Civ 634	§ 15–16	"I also accept that, although there is no Strasbourg case on the point, disability discrimination may fall within the "suspect" group because of its recognition not only in our domestic law but also in numerous international instruments including the UN Declaration of the Rights of Disabled Persons 1975, the Vienna Declaration and Programme of Action 1993, the Standard Rules on the Equalization of Opportunities for Persons with Disabilities adopted by the UN General Assembly in 1993, the Employment Equality Directive 2000/78/EC/, the EU Charter on Fundamental Rights (Article 21) and the UN Convention on the Rights of Persons with Disabilities 2007. It may well be that where a state treats a disabled person differently by reason of his disability – in domestic terms, a case of direct discrimination - it may be necessary for any justification in relation to Article 14 to be supported by particularly weighty reasons"
UNCRC	*A & B, R v* [2008] NICC 37	§ 16	"I also take into account the general approach adopted in the United Nations Convention on the Rights of the Child

			("UNCRC") and the Beijing rules, each of which the European Court of Human Rights has used as a source of guidance as to the requirements imposed by the European Convention in relation to proceedings involving juvenile offenders. I adopt the approach that children accused of committing crimes should be treated in a manner which takes into account the child's age, the desirability of promoting the child's reintegration and the child's assuming a constructive role in society"
UNCRC General Comment by CRC	*AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42	§ 32	"If anything, children who arrived here without a family required more protection than those who arrived with the support of their families. International law recognises that children who are separated from their families need special protection. The United Nations Convention on the Rights of the Child (UNCRC), article 2(2) prohibits discrimination on the basis of, among other things, the birth or other status of the child or his family; the UN Committee on the Rights of the Child has emphasised that this prohibits any discrimination on the basis of the status of the child being unaccompanied or separated (General Comment No 6, 2005); UNCRC article 22 requires appropriate protection and humanitarian assistance in the enjoyment of applicable rights for all asylum-seeking children, whether or not accompanied."
United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) Recommendation made by Committee against Torture	*Jones v Saudi Arabia* [2006] UKHL 26	§ 8, 12, 15–16, 23, 46–47, 57, 63	"question is whether the claimants, who allege that they were tortured by members of the Saudi Arabian police, can sue the responsible officers and the Kingdom of Saudi Arabia itself" (§ 36) This Convention is not in force, and has not been ratified by the United Kingdom. But, as Aikens J observed in *AIG Capital Partners Inc v Republic of Kazakhstan [2005] EWHC 2239* … para 80, "its existence and adoption by the UN after the long and careful work of the International Law Commission and the UN Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, powerfully demonstrates international thinking on the point … Thus the rule laid down by section 1(1) of the 1978 Act is one of immunity, unless the proceedings against the state fall within a specified exception. This rule conforms with the terms of the international instruments already referred to." (§ 8–9) "I would not wish to question the wisdom of this recommendation, and of course I share the Committee's concern that all victims of torture should be compensated. But the Committee is not an exclusively legal and not an adjudicative body; its power under article 19 is to make general comments; the Committee did not, in making this recommendation, advance any analysis or interpretation of article 14 of the Convention; and it was no more than a recommendation. Whatever its value in influencing the trend of international thinking, the legal authority of this recommendation is slight." (§ 23) and at (§ 57) "but as an interpretation of article 14 or a statement of international law, I regard it as having no value ... The committee has no legislative powers."

			"It is not for a national court to "develop" international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states." (§ 63)
UNHCR Guidelines	*Secretary of State for the Home Department v. K* [2006] UKHL 46.		Drawing extensively on UNHCR guidelines and comments to determine the definition and scope of "membership of a particular social group" "Had this submission been at the forefront of the second appellant's case in the Court of Appeal, and had that court had the benefit of the UNHCR's very articulate argument, it might, I think, have reached the same conclusion" (§ 31) "It appears to me that the UNHCR Guidelines, clearly based on a careful reading of the international authorities, provide a very accurate and helpful distillation of their effect" (§ 15)
Istanbul Protocol	*SA (Somalia) v Secretary of State for the Home Department* [2006] EWCA Civ 1302	§ 29, 30	"In cases where the account of torture is, or is likely to be, the subject of challenge, Chapter Five of the United Nations Document, known as the Istanbul Protocol, submitted to the United Nations High Commissioner for Human Rights on 9 August 1999 (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) is particularly instructive." (§ 29)
UNHCR	*Januzi v Secretary of State for the Home Department & Ors* [2006] UKHL 5	§ 20	"It is, however, important, given the immense significance of the decisions they have to make, that decision-makers should have some guidance on the approach to reasonableness and undue harshness in this context. Valuable guidance is found in the UNHCR Guidelines on International Protection of 23 July 2003."
UNCRC	*R, R (on the application of) v. Durham Constabulary & Anor* [2005] UKHL 21	§ 26, 40	"The Beijing Rules are not binding on Member States, but the same principle is reflected in the United Nations Convention on the Rights of the Child 1989 (UNCRC), which has been ratified by all but two of the Member States of the United Nations. This is not only binding in international law; it is reflected in the interpretation and application by the European Court of Human Rights of the rights guaranteed by the European Convention: see, for example, V v United Kingdom (1999) 30 EHRR 131; to that extent at least, therefore, it must be taken into account in the interpretation and application of those rights in our national law" (§ 26) "But that does not mean that it was in breach of the child's rights under the European Convention on Human Rights. These are less extensive than his rights under UNCRC, although the European Court would undoubtedly take those rights into account when interpreting and applying articles 6 and 8 in this case" (§ 40)

UNCRC	*D (a child), Re [2006]* UKHL 51.	§ 57	A case regarding whether a mother's removal of a child from Romania was a wrongful removal for the purposes of the Hague Convention. Lady Hale made additional comments on the "growing understanding of the importance" of taking the child's view into account, a principle consistent with UK's obligations under the UNCRC
International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984	*A & Ors v. Secretary of State for the Home Department (No 2)* [2005] UKHL 71 (Belmarsh No 2)	§ 27, 51, 52, 56	"But the principles of the common law do not stand alone. Effect must be given to the European Convention, which itself takes account of the all but universal consensus embodied in the Torture Convention" (§ 52) "If SIAC is unable to conclude that there is not a real risk that the evidence has been obtained by torture, it should refuse to admit the evidence. Otherwise it should admit it. It should throughout be guided by recognition of the important obligations laid down in articles 3 and 5(4) of the European Convention and, through them, article 15 of the Torture Convention" (§ 56)
UNCRC	*R (Williamson and others) v Secretary of State for Education and Employment* [2005] UKHL 15	§ 80	"Above all, the state is entitled to give children the protection they are given by an international instrument to which the United Kingdom is a party, the United Nations Convention on the Rights of the Child (UNCRC)."
UNCRC	*Regina v. Durham Constabulary and another* [2005] UKHL 21	§ 24 and subsequent	Lady Hale drew on the UNCRC to consider the fairness of subjecting a child to formal diversion processes with mandatory legal consequences without first obtaining the child's informed consent.
ICCPR UN Human Rights Committee General Comment	*A & Ors v. Secretary of State for the Home Department* [2004] UKHL 56 (Belmarsh 9 case)	§ 19–24	Using general comments made by the UN Human Rights Committee to elaborate upon the requirement of imminence and temporariness necessary under Article 15 of the ECHR to derogate from its obligations thereunder.
UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1992) Bangkok Principles (1966) Convention on the Elimination of All Forms of Racial Discrimination (1966) International Covenant on Civil and Political Rights (1966)	*Regina v. Immigration Officer at Prague Airport* [2004] UKHL 55	§ 16, 23–27, 44–46, 98	"even if the interpretation I have put on the Refugee Convention is accepted as correct, that is by no means the end of the appellants' international law argument. For the convention was made more than half a century ago. Since then the world has changed in very many ways. The existence of the Convention is no obstacle in principle to the development of an ancillary or supplementary body of law, more generous than the Convention in its application to those seeking asylum as refugees" (§ 23) the Lords firmly invalidated a scheme which enabled British immigration rules to be operated extra-territorially through a pre-entry clearance system. "In this respect it was not only unlawful in domestic law but also contrary to our obligations under customary international law and under international treaties to which the United Kingdom is a party" (§ 98).

UNGA Resolution 57/195 Committee of Ministers of the Council of Europe recommended (resolution (67)14) UNHCR Executive Committee (in Conclusion No 6 (XXVIII) "Non-Refoulement" Report of the 28th Session: UN doc A/AC. 96/549) General Comment No 31 ("The Nature of the General Legal Obligation Imposed on States Parties to [the International Covenant on Civil and Political Rights]") of the Human Rights Committee of the United Nations			
UNCRC + GCs	*R v. Secretary of State for Home Department* [2004] EWHC 13 (Admin)	§ 88 + subsequent	Making reference to the comments made by the Committee on the Rights of the Child with respect to the reservation to the UNCRC that the UK had in place
Travaux preparatoires of ICCPR and cases decided by Human Rights Committee	*R v Secretary of State for the Home Department, ex parte Mullen* [2004] UKHL 18		A decision of the House of Lords addressing the interpretation to be given to section 133 in the light of article 14(6) of the ICCPR and the presumption of innocence in article 14(2) of the ICCPR. Various members of the House of Lords considered the *travaux préparatoires* of the ICCPR and cases decided by the Human Rights Committee.
Human Rights Committee decision *ARJ v Australia*	*R v Special Adjudicator, ex parte Ullah* [2004] UKHL 26		Lord Bingham cited with approval the decision of the Human Rights Committee in *ARJ v Australia* in relation to the issue of the obligations of the United Kingdom not to return a person to a country where he would suffer a real risk of violation of his human rights.
Committee against Torture decision *P E v France* and Human Rights Committee General Comment on art 7	*A and others v Secretary of State for the Home Department* [2004] EWCA Civ 1123		the Court of Appeal heard an appeal from the decision of the Special Immigration Appeals Commission by a number of persons detained under British anti-terrorism legislation, in which one issue was whether evidence that may have been obtained by torture committed outside the United Kingdom by persons other than British officials might be used in any way against the detainees. All members of the court refer to the decision of the Committee against Torture in *P E v France*, while two members of the court refer to the Human Rights Committee, General comment on article 7).

UNCRC	*Regina v. G and another [2003] UKHL 50*	§ 53	"Ignoring the special position of children in the criminal justice system is not acceptable in a modern civil society. In 1990 the United Kingdom ratified the Convention on the Rights of the Child which entered into force September 1990 … This provision imposes both procedural and substantive obligations on state parties to protect the special position of children in the criminal justice system … It is true that the Convention became binding on the United Kingdom after Caldwell was decided. But the House cannot ignore the norm created by the Convention. This factor on its own justified a reappraisal of Caldwell."
UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1979)	*Sivakumar, R v. Secretary of State for the Home Department* [2003] UKHL 14	§ 7, 30	"Cases involving claims for refugee status under the Convention are particularly fact-sensitive. The severity of the treatment inflicted on the applicant by the authorities in Sri Lanka has a logical bearing on the issues. Why this is so can readily be demonstrated. The important UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1979) explains…" (§ 7).
General Comment No 22 of the United Nations Human Rights Committee (30 July 1993), with reference to article 18 of the ICCPR UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1979) Joint Position adopted by the Council of the European Union on the harmonised application of the term "refugee" in article 1 of the 1951 Convention (4 March 1996). Draft directive of the Council of the European Union (15068/02) (28 November 2002) on minimum standards for the qualification of third country nationals as refugees	*Sepet v Secretary of State for the Home Department* [2003] UKHL 15.	§ 8, 10–16, 45, 46, 50	"the reach of an international human rights convention is not forever determined by the intentions of those who originally framed it. Thus, like the Court of Appeal, the House was appropriately asked to consider a mass of material illustrating the movement of international opinion among those concerned with human rights and refugees in the period, now a very significant period, since the major relevant conventions were adopted … From these materials it is plain that several respected human rights bodies have recommended and urged member states to recognise a right of conscientious objection to compulsory military service … But resolutions and recommendations of this kind, however sympathetic one may be towards their motivation and purpose, cannot themselves establish a legal rule binding in international law. I shall accordingly confine my attention to five documents which seem to me most directly relevant in ascertaining the point which international opinion has now reached." (§ 11) "This is perhaps the nearest one comes to a suggestion that a right of conscientious objection can be derived from article 18 of the ICCPR. But it is, again, a somewhat tentative suggestion, and the Committee implicitly acknowledges that there are member states in which a right of conscientious objection is not recognised by law or practice. Thus while the thrust of the Committee's thinking is plain, one finds no clear assertion of binding principle" (§ 13)
	Runa Begum v Tower Hamlets	§ 6, 29, 30	In this case the Court considers the meaning of "civil rights" within the meaning of article 6(1) of the European Convention on Human Rights, in order to determine

	LBC [2003] UKHL 5		whether Runa Begum's domestic law right is also a "civil right." It notes that the Strasbourg Jurisprudence has evolved over time and has embraced a broader interpretation of "civil rights." Note to Self: How did the Strasbourg court expand this definition? Did it draw on international law sources to do so? And if the UK court then accepts this broader definition of civil right when considering its obligations under the ECHR, the international law sources would have had an indirect effect…. Worth doing research on?
Concluding observations of the Committee on the Elimination of Racial Discrimination on the report of Lithuania	*R v Secretary of State for the Home Department, on the application of Bagdanavicius and another* [2003] EWCA Civ 1695		the Court of Appeal referred to the material put before it by counsel to establish the satisfactory state of the legal system in Lithuania, including the concluding observations of the Committee on the Elimination of Racial Discrimination on the report of Lithuania.
Committee against Torture decision *Kisoki*	*Abdurahman Hariri v Secretary of State for the Home Department* [2003] EWCA Civ 807	§ 6	the Court of Appeal referred to the case law of the Committee against Torture in *Kisoki* in considering whether appropriate test for determining whether a person who faced no direct personal risk of persecution nonetheless faced a real risk because of a gross and systematic pattern of violation of rights.
Warsaw Convention	*Deep Vein Thrombosis and Air Travel Group Litigation, Re* [2002] EWHC 2825	§ 23, 30	The crucial element for the court was that the Warsaw Convention was scheduled to the Carriage of Goods by Air Act; it was, therefore, primary legislation to which the Human Rights Act applied.
ECHR pre-Human Rights Act 1998	*R v Lyons* [2002] UKHL 44	§ 13	"It is true, as the Attorney General insisted, that rules of international law not incorporated into national law confer no rights on individuals directly enforceable in national courts. But although international and national law differ in their content and their fields of application they should be seen as complementary and not as alien or antagonistic systems. Even before the Human Rights Act 1998 the convention exerted a persuasive and pervasive influence on judicial decision-making in this country, affecting the interpretation of ambiguous statutory provisions, guiding the exercise of discretions, bearing on the development of the common law. I would further accept, as Mr Emmerson strongly contended, with reference to a number of sources, that the efficacy of the convention depends on the loyal observance by member states of the obligations they have undertaken and on the readiness of all exercising authority (whether legislative, executive or judicial) within member states to seek to act consistently with the convention so far as they are free to do so" (§ 13)

			"a convention duty, even if found to exist, cannot override an express and applicable provision of domestic statutory law. Whether the Court of Appeal was (and the House is) subject to such a constraint is in my view the central issue in this case" (§ 14)
Article 14(6) of the International Covenant on Civil and Political Rights 1966, which was given domestic effect by section 133 of the Criminal Justice Act 1988.	*R (on the application of Mullen v Secretary of State for the Home Department* [2002] EWCA Civ 1882	§ 5	
UNCRC	*SR v Nottingham Magistrates' Court* [2001] EWHC Admin 802	§ 65–66	"All the contracting states of the Council of Europe have ratified the United Nations Convention on the Rights of the Child ("UNCRC") … where children in custody are concerned the provisions of the convention are available to inform the content of ECHR Article 8. It is therefore necessary to examine the relevant provisions of the UNCRC with some care … All the states parties to the UNCRC undertook to respect and ensure the rights "set forth" in that convention to every child within their jurisdiction without discrimination (UNCRC Article 2.1). It follows that every public authority concerned with issues relating to the care and management of children in custody must take their interests as a primary consideration (UNCRC Article 3.1), and must afford them the following rights and entitlements"
UNHCR	*Horvath v. Secretary of State For The Home Department* [2000] UKHL 37	No paragraphs in the decision	"This view of what is intended by persecution in the context of the Convention seems to me to be consistent with the purpose of the Convention. In addition considerable support can be found for it. In the Handbook produced by the Office of the United Nations High Commissioner for Refugees, January 1992, which has the weight of accumulated practice behind it" (Lord Clyde)
United Nations Universal Declaration of Human Rights (1948)	*Islam v. Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah, R v.* [1999] UKHL 20	No paragraphs in the decision	In this case, the Lords use the UN Declaration of Human Rights, as well as jurisprudence from other countries, to hold that "member of a particular social group" applied to married Pakistani women fearing persecution if returned to Pakistan. Lord Steyn "The relevance of the preambles is twofold. First, they expressly show that a premise of the Convention was that all human beings shall enjoy fundamental rights and freedoms. Secondly, and more pertinently, they show that counteracting discrimination, which is referred to in the first preamble, was a fundamental purpose of the Convention. That is reinforced by the reference in the first preamble to the Universal Declaration of Human Rights, 1948, which proclaimed the principle of the equality of all human beings and specifically provided that the entitlement to equality means equality "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status … In 1951 the draftsmen of article

			1A(2) of the Convention explicitly listed the most apparent forms of discrimination then known, namely the large groups covered by race, religion, and political opinion. It would have been remarkable if the draftsmen had overlooked other forms of discrimination. After all, in 1948 the Universal Declaration had condemned discrimination on the grounds of colour and sex. Accordingly, the draftsmen of the Convention provided that membership of a particular social group would be a further category." Lord Steyn: "My Lords, Mr. Peter Duffy Q.C., counsel for the UNHCR, placed before the House all the relevant background materials and produced a valuable written review supplemented by helpful oral argument." Lord Millett: "In interpreting the expression 'membership of a particular social group' I derive assistance from article 2 of the Universal Declaration of Human Rights. This was adopted by the General Assembly of the United Nations in December 1948, was still recent when the terms of the 1951 Convention were being settled, and is mentioned in the Preamble to the Convention." Lord Hope: "I agree that the traveaux preparatiores of the Convention are uninformative. But it is more important to have regard to the evolutionary approach which must be taken to international agreements of this kind. This enables account to be taken of changes in society and of discriminatory circumstances which may not have been obvious to the delegates when the Convention was being framed."
UNCRC	*Regina v. Secretary of State for the Home Department* [1997] UKHL 25		See judgment of Lord Browne-Wilkinson "The Convention has not been incorporated into English law. But it is legitimate in considering the nature of detention during Her Majesty's pleasure (as to which your Lordships are not in agreement) to assume that Parliament has not maintained on the statute book a power capable of being exercised in a manner inconsistent with the treaty obligations of this country."
ECHR	*R v Central Independent Television* [1994] Fam 192 (CA)		"in order to enable us to meet our international obligations under the Convention … it is necessary that any exceptions should satisfy the tests laid down in article 10(2) [of the ECHR]. They must be 'necessary in a democratic society' and fall within certain permissible categories"
General Comments on ICCPR	*R v Secretary of State for the Home Department, Ex parte Bateman and Another Queen's Bench Division* (Crown Office List), The Times, 10 May		Bateman sought compensation for his detention following a conviction that was eventually reversed on appeal following a reference of the case to the Court of Appeal by the Home Secretary. Bateman relied on article 14(6) of the ICCPR, which had been given effect to in UK law by section 133 of the Criminal Justice Act. The issue was whether compensation was payable whenever a conviction was reversed or whether the phrase "on the ground that a new or newly discovered fact shows conclusively [beyond reasonable doubt] that there has been a miscarriage of justice" applied only to cases of pardon. The Divisional

	1993, CO/1170/92		Court considered the views of the Human Rights Committee in Muhonen v Finland in reaching its conclusion that the qualifying phrase applied both to cases of pardon as well as to reversal of convictions by an appellate court.
	J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry ("International Tin Council") [1990] 2 AC 418 Cited in *R v Secretary of State for Work and Pensions [2015] UKSC 16* as being the high-water case for a rigid approach to UK's dual system		"It is axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law … On the domestic plane, the power of the Crown to conclude treaties with other sovereign states is an exercise of the Royal Prerogative, the validity of which cannot be challenged in municipal law ... That is the first of the underlying principles. The second is that, as a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation."
UNHCR	*Bugdaycay v Secretary of State for the Home Department* (BAILII: [1986] UKHL 3	No paragraphs	The Office of the United Nations High Commissioner for Refugees (U.N.H.C.R.) published in 1979 a "Handbook on Procedures and Criteria for Determining Refugee Status." From paragraph 192 of that publication we learn that in 1977 the Executive Committee of the High Commissioner's Programme recommended that the procedures to be adopted by states adhering to the Convention for determination of applications for refugee status should satisfy certain basic requirements ... It is submitted that the basic requirements set out in paragraphs (vi) and (vii) can only be satisfied if an unsuccessful applicant is accorded a right of "appeal . . . according to the prevailing system," which in the United Kingdom must mean an appeal to the appellate authorities under Part II of the Act, exercisable before he is required to leave the country ... My Lords, there was some discussion in the courts below of the question whether the practice of the Home Office complied with recommendation (vi). **I express no opinion on that question, since it is, as it seems to me, neither necessary nor desirable that this House should attempt to interpret an instrument of this character which is of no binding force either in municipal or international law**.