Public Law Project

Public Law Project briefing on the **Illegal Migration Bill**

House of Commons second reading

March 2023

Contents page

Summary

1. This Public Law Project briefing supports those made by others in civil society which underline how the Bill will block huge numbers of people from accessing protection and safety, and moves our immigration system even further away from being fair or humane.

2. The Illegal Migration Bill is one of the most damaging Bills put forward by a British government in living memory. Damaging to the rights of people most at risk of serious harm and persecution across the world. Damaging to the safety and best interests of refugee children. Damaging to the UK's international reputation for compassion and sanctuary. Damaging to the international rules-based order. Damaging to the rule of law and judicial independence. It is a fundamentally bad Bill and should be abandoned.

3. The Government concedes as much when it is unable to make the usual declaration that the Bill is compatible with human rights. It is little surprise that the UN High Commissioner for Refugees and the UN Special Rapporteur on Contemporary Forms of Slavery have expressed grave concerns about the Bill.[1]

4. Ultimately, the Government's plans:

    - Threaten the UK's international obligations to protect refugees and victims of human trafficking and modern slavery
    - Eliminate vital domestic human rights protections
    - Undermine judicial independence and natural justice, and
    - Increase unaccountable ministerial power

5. If all this were not enough, the Government is adopting a demonstrably poor approach to policymaking and legislating. Against the usual convention, the Bill's second reading is being rushed only a few days after its introduction into the House of Commons. Something so rushed is unlikely to be effective. The Government has also failed to publish an official impact assessment explaining its view of the real-world implications of this Bill. This all makes impossible any meaningful scrutiny by parliamentarians, civil society organisations, and experts, who will not have adequate time to prepare detailed responses. It is difficult not to infer that this is intentional.

6. In addition to this, the Bill's net is cast far wider than the Government suggests. While the Government claims that it is designed to deal with people arriving by "small boats", the Bill applies to everyone who arrives in the UK, by whatever means, without immigration leave as of 7 March 2023, as well as some family members who arrived here before that date, making its effects truly draconian.

[1] https://www.unhcr.org/uk/news/press/2023/3/6407794e4/statement-on-uk-asylum-bill.html

7. This is an unfair, unworkable, rushed and botched Bill. The Government should abandon it and work with all interested parties and organisations so that the asylum system can be improved for all – including the government and the public – in meaningful, lawful and fair ways.

Threatening the UK's international obligations to protect refugees and victims of human trafficking and modern slavery

8. This Bill would be a clear breach of the 1951 Convention Relating to the Status of Refugees (Refugee Convention).[2] Pursuing it would undermine the UK's longstanding humanitarian tradition and reputation as a state that upholds international law, casting the UK alongside Russia and Belarus as countries who show no respect for their international obligations.

9. Clause 2 creates not just a power but a duty on the Secretary of State to remove from the UK people who meet four conditions:

    - They have arrived in the UK without leave to enter on or after 7 March 2023
    - They did not come directly from a country in which their life and liberty were threatened by reason of their race, religion, nationality, social group or political opinion, and
    - They require leave to enter or remain in the UK but do not have it

10. This provision has attracted scathing comment from the UN High Commissioner for Refugees (UNHCR), which labelled it a "clear breach" of the Refugee Convention, which "explicitly recognises that refugees may be compelled to enter a country of asylum irregularly".[3]

11. Article 31 of the Refugee Convention stipulates that, subject to specific exceptions, refugees should not be penalised for their illegal entry or stay. However, Clauses 2 and 11 directly contradict this prohibition, and provide for the removal and arbitrary detention of individuals who meet the above four criteria as penalties for the mode of entry.[4]

12. **In practice this Bill amounts to a refugee ban which excludes access to well established protection in the UK for many of those escaping persecution and conflict who desperately need it.**

13. Also striking are Clauses 21-28 of the Bill, which stop victims of modern slavery and human trafficking from relying on protections granted by a previous Conservative Government via the

[2] UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.
[3] UN High Commissioner for Refugees, Statement on UK Asylum Bill, 7 March 2023: https://www.unhcr.org/uk/news/press/2023/3/6407794e4/statement-on-uk-asylum-bill.html
[4] Article 31 does not explicitly prevent detention, but prohibits signatories from restricting the movement of refugees for purposes other than those which are necessary, and only until their status is regularised or they obtain admission to another country. Article 31 recognises that refugees may have good cause for illegal entry, even if they are not coming directly from their country of origin, and therefore affords immunity to refugees so long as their illegal presence in a given territory can be justified.

Modern Slavery Act 2015 and run contrary to the European Convention on Action against Trafficking (ECAT).

14. The Government already placed limitations on these obligations through Part 5 of the Nationality and Borders Act 2022, which tightened the duty on the Secretary of State to identify victims of human trafficking from people who "may be" victims to those who "are" victims. **Therefore, even those individuals who the Home Office accepts are victims of modern slavery and human trafficking will not be able to prevent their removal from the UK, subjecting victims to further trauma, risk and harm.**

15. As well as these individual problems, there are also cumulative problems given the interrelated nature of the UK's international obligations. Undermining one treaty will undermine others. For example, by the Government's own concession, there is a strong likelihood that this Bill does not comply with the ECHR. Because ECHR compliance is a condition of the UK and EU's police and security cooperation, there are already suggestions that the EU could repudiate this vital cooperation with the UK.[5] **This Bill intentionally undermines the UK's global reputation for adhering to its international legal commitments.**

Eliminating vital domestic human rights protections

16. In addition to threatening international human rights protection, this Bill fatally undermines several critical domestic protections. This briefing will highlight just three of the worst instances.

17. **First**, Clause 1(5) excludes the application of section 3 of the Human Rights Act 1998 (HRA) to the Bill. Section 3 gives the judiciary the duty to interpret legislation as far as possible so that it is compatible with human rights. The provision has been a critical defender of important human rights,[6] and has reduced the number of people pursuing litigation in the European Court of Human Rights in Strasbourg because they have been able to secure justice domestically.[7]

18. For example, the case of *Vanriel and Tumi v Home Secretary* enabled the courts to interpret citizenship legislation in a way that protected the right of victims of the Windrush scandal to obtain British citizenship, even where there had been Home Office errors denying that citizenship.[8] By excluding section 3 in this Bill, the courts will be unable to offer essential protection to people affected by similar government error, and to refugees and asylum seekers.

19. Without section 3, if a court believes that provisions in this Bill violate human rights, the only option will be to grant a declaration of incompatibility under section 4 of the HRA. But Parliament and the government are not obliged to change the law after a section 4 declaration.

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[5] https://www.theguardian.com/uk-news/2023/mar/08/eu-could-terminate-police-and-security-agreement-if-uk-quits-echr

[6] Lee Marsons and Alice Stevens, 'Raab's new Bill of Rights weakens remedies (9 December 2022, Law Society Gazette). Available at: https://www.lawgazette.co.uk/practice-points/raabs-new-bill-weakens-rights-remedies-/5114536.article

[7] The Independent Human Rights Act Review. Available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf

[8] [2021] EWHC 3415 (Admin).

In any event, given that the individual is likely to be detained, their ability to access the political process and lobby Parliament and government for a change in the law is virtually nil. **As such, Clause 1(5) removes one of the most effective means for protecting human rights from a group of people who need the protection most.**

20. **Second**, Clause 4 of the Bill requires the Secretary of State to disregard any refugee protection, human rights, slavery or trafficking, or judicial review claim made by an individual. Put simply, the Secretary of State will still be under a duty to remove an individual, despite legitimate legal proceedings being in progress which the Secretary of State could lose. **This is a blatant attempt to circumvent the rule of law and a denial of protection for the individuals concerned.**

21. **Third**, Clause 12 of the Bill grants the Secretary of State a very broad power to detain a person on suspicion that they are liable for removal. Clause 13 adds that this is a power to detain for as long as is reasonably necessary to remove the person "in the opinion of the Secretary of State". Put simply, the Secretary of State's power to detain for very lengthy periods of time is based on her subjective point of view of what is necessary.

22. Worse, the Bill contains an "ouster clause" which restricts the ability of a judge to scrutinise this broad, subjective power. Clause 13(4) makes the Secretary of State's decision "final" and "not liable to be questioned or set aside in any court" for 28 days.

23. The only exceptions are: (a) judicial review on very limited grounds which will almost never arise in reality ("bad faith" and "fundamental denial of natural justice" in Clause 13(4)) and (b) a writ of habeas corpus, which is where a court examines the lawfulness of a person's detention. At para. 34 of its Human Rights Memorandum, the Government claims that: "Given that individuals will be able to challenge their detention through the courts...via habeas corpus, and the courts will ensure compliance with Article 5 [ECHR] when determining applications for a writ of habeas corpus, the Government considers that these provisions are compatible with Article 5(4)."[9]

24. But given that the Bill expressly authorises a blanket power of indefinite detention, it is likely to be very difficult to succeed via habeas corpus,[10] even if the very real practical obstacles for bringing such a challenge are overcome. **The Government's assurances, in relation to a fundamental human right, should be viewed with considerable scepticism.**

Undermining judicial independence and natural justice

25. At para. 8 of its Human Rights Memorandum, the Government claims that: "The safeguards within the Bill, such as suspensive claims and judicial scrutiny will ensure that the application of the conditions of the duty are exercised properly, going no further than necessary to achieve the

[9] https://publications.parliament.uk/pa/bills/cbill/58-03/0262/ECHR%20memo%20Illegal%20Migration%20Bill%20FINAL.pdf

[10] In his analysis of the Illegal Migration Bill, Colin Yeo, an immigration law expert and editor of the Free Movement blog, argues that it is not impossible that a court will imply conditions into a broad and unlimited power of detention, but this is not obvious or guaranteed: https://freemovement.org.uk/what-is-in-the-illegal-migration-bill/

legitimate aim."[11] However, the Memorandum refers to Article 6 – the right to a fair hearing – only once and does not outline how the Bill complies with it.

26. This is not a surprise because the Bill does not provide fair mechanisms of challenge. Instead, as a replacement for the protections that the Bill gets rid of, it creates blatantly unfair new mechanisms which, in practice, will provide fictional accountability weighted in favour of the government.

27. For example, the principal way to challenge removal will be through Clause 37's new "suspensive claims" provisions, where a person can challenge the decision where they will suffer "serious harm" from being removed or because the Secretary of State has made "factual" errors. But Clause 40 forces the individual to jump through a series of difficult procedural hoops to exercise this right. Clause 40(5), for example, states that the claim must be "in a certain manner and form" and that it is for the individual to provide "compelling evidence" of the harm they would suffer.

28. How an individual who has just fled persecution could provide this evidence is not clear. This is also an extremely high threshold. A person may be able to provide "reasonable" or even "strong" evidence, but not quite enough to be "compelling". Very many refugees will not be able to surmount this evidential burden, putting them at risk of harm.

29. Moreover, a person has only 8 days to make a claim to resist removal and the Minister has only 4 days to consider it (Clause 40(7)). Once again, how a refugee has the resources to prepare evidence and a formal claim in little over a week is not made clear, nor is how a busy government department – particularly with the current backlog of asylum cases – can seriously consider that evidence in not even one week. There is also the fact that immigration legal advice is very difficult to obtain in practice, with immigration and asylum issues being referred to as a "legal advice deserts".[12] **The proposition that this is fair and robust mechanism of challenge is pure fiction.**

30. Nor is the individual who manages to jump through the hurdles of challenging their removal placed in a better situation if they appeal. Clause 47 grants a right of appeal to the Upper Tribunal, but this must be exercised within 7 days and the Upper Tribunal must reach a decision within 23 days, except in very limited circumstances. As previously, the Bill requires rushed and unfair decisions, with an attitude of remove now and - not even hope for the best later, but rather - completely ignore the consequences.

31. The Secretary of State can make the appeal procedure even more complicated by certifying the claim as manifestly unfounded under Clauses 40(3) and 41(3). In that situation, Clause 43 requires the individual to get permission from the Upper Tribunal to appeal, which it can only grant if there is compelling evidence that the person will suffer serious and irreversible harm.

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[11] https://publications.parliament.uk/pa/bills/cbill/58-03/0262/ECHR%20memo%20Illegal%20Migration%20Bill%20FINAL.pdf

[12] https://www.refugee-action.org.uk/no-access-to-justice-how-legal-advice-deserts-fail-refugees-migrants-and-our-communities/

32. On top of this, Clause 48 creates another "ouster clause" which makes decisions of the Upper Tribunal final. A court decision that in most instances has been rushed which follows a Home Office process which has also been rushed will in almost all cases be the final decision on fundamental matters about a person's life and safety.

33. Finally, the Bill undermines judicial independence with Clause 46, which states that the Upper Tribunal can only hear "additional matters" as part of a case with the permission of the Minister. In practice, we can assume that the Minister will almost never grant this permission unless it is to her benefit. A judge in the Upper Tribunal will be prevented from hearing connected matters which they may have wanted to hear by the order of a Minister. **This is blatant interference with judicial independence over the administration of court hearings for the benefit of the executive.**

Increasing unaccountable ministerial power

34. Not only does this Bill undermine critical international and domestic human rights standards and deny natural justice, it also gratuitously grants government several broad regulation-making powers which are not subject to the full rigour of parliamentary scrutiny. This matters because those regulations will give government the power to undermine human rights and stop people from seeking legitimate refugee protection in this country.

35. While Clause 37 allows an individual to resist removal if they were to suffer "serious and irreversible harm", Clause 38 gives the Secretary of State the power to define this phrase in regulations. The Minister could choose the narrowest definition possible which limits protection to very few people who need it and Parliament could not scrutinise this decision – or reverse it – in advance of it coming into effect and putting vulnerable people at risk.

36. Further, Clause 6 gives the Secretary of State the power to include new countries to which she is satisfied are safe to return asylum seekers. Again, there is no requirement for advance parliamentary scrutiny of the countries that the Secretary of State chooses to list as safe. The Minister could make questionable – even blatantly wrong – choices but this Bill gives Parliament no mechanism to prevent her from doing so.

37. Finally, Clause 49 of the Bill gives the Secretary of State the power to produce regulations about the effect of interim measures from the European Court of Human Rights on her ability to remove a person. An interim measure requires the government to temporarily do something or not do something to secure the protection of human rights. They are granted by the European Court of Human Rights only on an exceptional basis. Their effect is only temporary and for use only when individuals face a real risk of serious and irreversible harm.

38. Given that Clause 24 of the Government's Bill of Rights Bill would require British judges to ignore interim measures from Strasbourg, it is reasonable to assume that the power in Clause 49 of this Bill will similarly be used to undermine the effectiveness of interim measures.

39. These Clauses may be the Government's reaction to the European Court issuing an interim measure preventing the deportation of asylum seekers to Rwanda[13] until their domestic legal challenge is resolved.[14] It is worth noting that interim measures have also been issued in circumstances that the Government – hopefully – supports. In June 2022, for example, the European Court issued an interim measure requiring Russia to take steps to prevent British citizens from being executed by pro-Russian paramilitaries in occupied Ukraine.[15]

40. There is also the fact that under Article 41 of the ECHR, the European Court has the power to award "just satisfaction" for violations of the ECHR.[16] In circumstances where the government has knowingly and intentionally refused to adhere to interim measures, it is likely that the Court would award substantial compensation payments. Therefore, this proposal is not just wrong, it may also prove to be expensive for British taxpayers.

41. Given that interim measures are used only when people face a risk of serious and irreversible harm, the Government's plans put at risk very basic human rights. The plans also threaten the UK's commitment to the European Convention on Human Rights and may encourage countries with rule of law concerns – such as Hungary and Poland – to ignore rulings from the European Court.

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[13] https://www.lawgazette.co.uk/download?ac=104566
[14] *Memorandum of Understanding with the Government of the Republic of Rwanda for an Asylum Partnership Arrangement.* Available at: https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda
[15] https://www.courthousenews.com/europe-court-tells-russia-to-prevent-execution-in-eastern-ukraine/
[16] https://www.echr.coe.int/documents/pd_satisfaction_claims_eng.pdf