Public Law Project

Public Law Project briefing for House of Commons committee stage:

Illegal Migration Bill

March 2023

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Summary and recommendations

The Illegal Migration Bill: Banning refugees, harming victims of modern slavery, punishing children

1. The Illegal Migration Bill is one of the most damaging Bills pursued by a British government in living memory.

2. For most refugees, this Bill is a ban on seeking safety in the UK. To a North Korean defector, a victim of government torture in Eritrea, a gay man in Rwanda, a child from Vietnam who has been trafficked through the UK, this Bill is a locked door.

3. For victims of modern slavery, this Bill is a cruel choice: go to the authorities and be removed from the UK or stay with your trafficker and let the abuse continue. This should never be a choice presented to a human being, let alone be one required by the law. Contrary to the Government's claims, the Bill will strengthen the hand of traffickers over their victims. Traffickers will coerce people with the threat that, if they escape and contact the authorities, they will be removed from the UK.

4. For refugee children, this Bill is a punishment. Children find little compassion or empathy in this Bill, which undermines their ability to secure much-needed safety.

5. The Illegal Migration Bill is fundamentally wrong. The Government concedes as much when it is unable to make the usual declaration that the Bill is compatible with the European Convention on Human Rights (ECHR). Despite unconvincing assurances, it is difficult not to see this Bill as part of a strategy to weaken the UK's commitment to the ECHR, which, if successful, would undermine human rights protection in this country.[1] Refugees, victims of modern slavery, and the UK's humanitarian traditions and reputation deserve better.

6. If this were not enough, the Government is adopting a poor approach to legislating. Against the usual convention, and with no objective justification, the Bill's second reading was rushed only a few days after its introduction into the House of Commons and, instead of the usual detailed consideration and evidence-gathering at committee stage, it is having only two days on the floor of the House. The Government has also failed to publish an official impact assessment explaining its view of the real-world implications of this Bill. This scuppers meaningful scrutiny by parliamentarians, civil society organisations, and expert commentators.

7. Further, 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 to some family members who arrived before that, making its effects truly draconian.

[1] Lee Marsons, 'Why the UK should not leave the ECHR' (23 February 2023, 1828). Available at https://www.1828.org.uk/2023/02/23/why-the-uk-should-not-leave-the-echr/ and Lee Marsons, 'Why the European Convention on Human Rights matters to LGBTQ+ people' (21 February 2023, Openly). Available at https://www.openlynews.com/i/?id=857d1ba3-a88d-41c2-b0c0-b6fb80437e8a

8. More than this, the Bill will pile even more problems onto the UK's already crumbling asylum system. Given the arbitrary powers of detention that it grants to the Home Secretary, the Bill would require a major and expensive increase – on one estimate between 400-500% - in the detention estate, along with a massive increase in immigration officials needed to supervise detained refugees.[2] It is estimated that in the first three years of this Bill's operation, between £8.7bn to £9.6bn will be spent on locking people up.[3]

9. Finally, for all the Government's talk of safe and legal routes, this Bill does nothing to increase those routes or even protect existing ones. In fact, it actively undermines them by giving the Home Secretary the power to cap the number of people using safe routes.

10. **Public Law Project, therefore, calls on the House of Commons to oppose this Bill in full and vote to:**

    - Leave out Clauses 2, 4, 5 and 50, which are a ban on refugees
    - Leave out Clauses 21 to 28, which harm victims of modern slavery
    - Leave out Clauses 3, 8 and 14 and Clauses 29 to 36, which punish children and expose them to being trafficked by criminals
    - Leave out Clauses 11 to 13, which lock up children, refugees, and victims of modern slavery with minimum safeguards
    - Leave out Clauses 37 to 48, which create an appeal system for children, refugees, and modern slavery victims with blatantly unfair procedures
    - Leave out Clause 1, which is a stealth attack on the Human Rights Act, and
    - Leave out Clauses 6, 38, 49 and 51, which let the Home Secretary make laws rather than Parliament.

11. **Where this briefing does not expressly support the removal of a clause, that does not imply endorsement. PLP opposes this Bill in full but for this briefing we focus on the aspects within our legal expertise.**

Refugees and victims of modern slavery: How their stories would be different with the Illegal Migration Bill

12. The following are three real stories from refugees who have obtained safety in the UK. We use their experiences to highlight how their stories would have been different had this Bill been in place at the time.

[2] https://verfassungsblog.de/what-is-the-point-of-the-uks-illegal-migration-bill/
[3] https://www.refugeecouncil.org.uk/information/resources/illegal-migration-bill-impact-assessment/

Yasmin's story

Yasmin is a refugee from Eritrea. In her home country, she is a human rights defender, covertly documenting testimonies of survivors of torture at the hands of the Eritrean Government. Yasmin was arrested by the Eritrean internal security forces. She was held in a windowless cell and was raped and tortured for five months. Against the odds, Yasmin's father managed to secure her bail and arranged for her to be smuggled to the UK. Now, Yasmin has been granted asylum and she continues her work on advancing human rights in Eritrea.[4]

Yasmin's story would have ended very differently had she arrived with the Illegal Migration Bill in force. Given that she was smuggled to the UK, it is very likely that she passed through other safe countries. But in practice she would not have been free to claim asylum in these places as she was under the control of her smuggler. Nevertheless, under this Bill, the Home Secretary will still be obliged to remove Yasmin, disregarding any claims she might make for protection.

Sadly, Yasmin would find it very difficult to successfully challenge her removal given that she would only have eight days to do so and because the onus would be on her to provide compelling evidence that she would suffer serious harm. Due to her rapid escape from Eritrea, she is unlikely to have brought evidence to that standard with her.

Yasmin would also struggle to obtain independent legal advice to challenge the Home Secretary's attempts to remove her, given the small number of immigration and asylum providers in the UK.

Worse, the Home Secretary would have the power to detain Yasmin indefinitely pending her removal. Given her horrific experiences as a victim of torture in prison, this will be a profound trauma for Yasmin.

Linh's story

Linh was trafficked into the UK at the age of 15. She was discovered by police in the back of a lorry. Social services placed her with a foster family, where it was discovered that Linh was five months pregnant, having been raped by her traffickers. Linh thought that if her real age was discovered, her baby would be taken away. She therefore lied and said she was 19. Linh was placed in adult accommodation but with support she was able to request an age assessment and challenge the decision that she was 19. This challenge succeeded and Linh was able to move in with a foster family and give birth to her son.[5]

Under the Illegal Migration Bill, Linh will not be able to use her status as a victim of human trafficking to challenge her removal. And even if Linh had passed through a safe country, she could not have claimed asylum there because she was held prisoner by her trafficker. Under this Bill, Linh would not be able to make a new life in the UK for her and her son.

The hand of Linh's captor would also have been strengthened because of this Bill. They would have threatened that if she tried to escape and contact the authorities, she would be removed from the UK rather than be provided with safety. The Illegal Migration Bill would serve the interests of Linh's captors rather than secure her rights.

[4] https://www.refugeecouncil.org.uk/latest/case-studies/yasmins-story/
[5] https://www.refugeecouncil.org.uk/latest/case-studies/linhs-story/

Faisal's story

Faisal's family had lived in Kuwait for generations. But the Government refused to recognise his family's citizenship and he was therefore unable to access basic services for his disabled daughter. He, his wife and four children undertook a long and arduous journey through Iraq, Turkey and Greece.

In the latter two countries, Faisal and his family were kept in detention camps, and for a while in Turkey, had to sleep on the streets. Eventually, Faisal and his family found smugglers who were able to bring them to the UK. Faisal had so far been unable to access care for his disabled daughter, carrying her in his arms throughout their journey. When arriving in the UK, Faisal's daughter was finally able to access care and for the first time had her own wheelchair.[6]

Under the Illegal Migration Bill, because of the way that Faisal arrived in the UK, the Home Secretary will be obliged to remove him and his family, including his disabled daughter.

Like with Yasmin, Faisal will find it difficult to successfully challenge his and his family's removal given that he has just over a week to do so and because the onus is on him to prove that they would suffer serious harm.

Faisal faces additional personal difficulties challenging his and his family's removal. All this must be done while caring for a disabled daughter.

How the Bill bans refugees

13. The UN High Commissioner for Refugees has labelled this Bill a clear breach of the 1951 Refugee Convention,7 which states that governments should not penalise refugees based on how they arrive in a country (Article 31).[8] This is because a person escaping persecution cannot be expected to obtain permission to enter another country before fleeing. Their life and safety take priority.

14. This Bill directly contradicts that. Clause 2 imposes a duty on the Home Secretary to remove people who arrive in the UK without permission after 7 March 2023 and who did not come here directly from a country where their life and liberty were threatened because of their race, religion, nationality, social group, or political opinion. Likewise, Clause 4 requires the Home Secretary to disregard any asylum, human rights, modern slavery, or judicial review claim made by the same people. It is estimated that between 225,347 and 257,101 people will have their applications rendered inadmissible in just the first three years of this Bill's operation.[9]

15. But international law imposes no obligation to claim asylum in the first safe country a refugee passes through. This makes sense. In some cases, refugees will have no control over the countries they pass through, notably where a smuggler arranges someone's escape from persecution. In other cases where there is choice, a refugee may have family in the UK who can aid their recovery, and they may speak English but not, for example, Spanish, Greek or Italian. Being surrounded by

[6] https://www.refugeecouncil.org.uk/latest/case-studies/faisals-story/
[7] 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
[8] https://www.unhcr.org/uk/3b66c2aa10
[9] https://www.refugeecouncil.org.uk/information/resources/illegal-migration-bill-impact-assessment/

family would significantly increase a refugee's ability to recover from trauma. In sum, passing through another safe country is either not a choice at all or a rational choice to be expected of people who want stability and safety after escaping danger.[10]

16. **This Bill ignores all that. It requires the removal of refugees literally incapable of claiming asylum in another safe country because they were being held captive. And when there is choice, it penalises rational decisions by people escaping danger.**

17. These plans are a near carbon copy of Australia's "stop the boats" policy, which in 2013 was hardened to deny resettlement visas to any refugees arriving by boat. Australia's approach was condemned nationally and internationally for violating international law. The Australian Human Rights Commission, for example, concluded that Australia's treatment of asylum-seekers breached Article 31 of the Refugee Convention.[11] The UN High Commissioner for Refugees supported this conclusion.[12] This Bill sets the UK on an equally discreditable and callous path.

18. The provisions in this Bill will undermine protection for people who need it. On the Government's own figures, between 2018 and 2022, 61% of refugees who arrived on small boats and who had received a decision had been granted asylum or another form of humanitarian protection.[13] The success rate is even higher following appeals. As of June 2022, just over half of appeals succeeded (51%).[14] This makes the total number of successful applications well over two-thirds.

19. The Government is banning almost all refugees even though the UK receives a fairly low number of asylum applications. In 2021, for example, there were nine asylum applications for every ten thousand people living in the UK. Across the EU, by contrast, there were fourteen asylum applications for every ten thousand people.[15]

20. Where a person is a national of an EEA country or Albanian (Clause 50(3)), Clause 5(3) lets the Home Secretary remove them to any country where they are a citizen or have a passport, the place where they embarked for the UK, or any other country where there is reason to believe they

[10] https://www.unhcr.org/uk/60950ed64.pdf
[11] 'Human Rights Issues Raised by the Transfer of Asylum Seekers to Third Countries' (Australian Human Rights Commission 2012) < https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/human-rights-issues-raised-transfer-asylum>
[12] 'Submission of the Office of the United Nations High Commissioner for Refugees to the Senate Legal and Constitutional Legislation Committee Inquiry into the Provisions of the Migration Amendment (Designated Unauthorised Arrivals) Bill 2004'.
[13] House of Commons, *Research Briefing: Asylum statistics* (1 March 2023), https://commonslibrary.parliament.uk/research-briefings/sn01403/#:~:text=The%20annual%20number%20of%20asylum,highest%20annual%20number%20since%202002; Home Office, Official Statistics, 'Irregular migration to the UK, year ending December 2022' (23 February 2023), https://www.gov.uk/government/statistics/irregular-migration-to-the-uk-year-ending-december-2022/irregular-migration-to-the-uk-year-ending-december-2022.
[14] Home Office National Statistics, 'How many people do we grant asylum or protection to?' (23 September 2022), https://www.gov.uk/government/statistics/immigration-statistics-year-ending-june-2022/how-many-people-do-we-grant-asylum-or-protection-to#asylum-applications.
[15] https://commonslibrary.parliament.uk/research-briefings/sn01403/

will be admitted. A person who is not an EEA national or Albanian who has made an asylum or protection claim cannot be returned to their own country (Clause 5(8)-(9)).

21. But for either group of people, the Bill's Schedule lists supposedly safe countries to which they can be removed. This includes countries with specific and sometimes notorious human rights concerns such as Rwanda, Sierra Leone (for men), Mali (for men), and Liberia (for men). That the Bill even places gendered conditions on removal indicates that the Government is well-aware of the human rights concerns in those places, yet chooses to list them anyway.

22. On top of this, there is no evidence that the UK even has agreements with most of the countries listed. The proposition that the Home Secretary could arrange a removal to some of these countries – let alone a safe removal – is fiction. Even where the UK does have agreements in place, these schemes are extremely expensive. British taxpayers have already paid the Rwandan government £140 million for a scheme with a 0% success rate, given justifiable concerns about Rwanda's human rights record.[16] If the Government wants similar schemes even for a small number of the countries listed, British taxpayers can expect that bill to climb even further.

23. It may seem uncontroversial that EEA nationals and Albanians are not in need of asylum in the UK and that people should be returned to those countries. But while these countries may not generally be unsafe, there is cause for concern for those with specific characteristics, such as LGBT people or people at risk of being trafficked. Take Albania as an example. Despite listing it as a safe country, at 3.1.1 of its Country Policy and Information Note the Home Office, concedes that Albania is a significant source country for trafficking women, men and children to other European countries, including the UK. The Home Office estimates that victims are in the thousands.[17]

24. The result is that, as of June 2022, 90% of claims made by Albanian women are successful, often due to being trafficked for sexual exploitation. Given corruption and limited policing skills and resources in Albania, even basic standards of protection are not available for victims.18 Clauses 5 and 50 deny these victims protection.

25. Some government MPs drew attention to the statistic that the majority – around 76% - of people claiming asylum are adult males.19 The claim was that this made granting asylum to these men unfair because others, such as children, the elderly, and women, were less likely to obtain protection. But this is because it is often male adults who are capable of making the gruelling journey to safety. If entire families could escape together, they would of course do so. Adult men at risk of persecution should not be denied protection just because everyone cannot be protected.

[16] https://www.bbc.co.uk/news/explainers-61782866

[17] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1135644/ALB_CPIN_Human_trafficking.pdf

[18] https://migrationobservatory.ox.ac.uk/resources/commentaries/albanian-asylum-seekers-in-the-uk-and-eu-a-look-at-recent-data/

[19] https://www.gov.uk/government/statistics/irregular-migration-to-the-uk-year-ending-december-2022/irregular-migration-to-the-uk-year-ending-december-2022

Moreover, in some instances it will be men who face the most serious risks of violence. A persecutory regime may actively target adult men.

26. **Pursuing this Bill would undermine the UK's hard-won reputation as a nation that upholds international law. Worse, this Bill denies protection in the UK for some of the world's most persecuted people. The Bill is wrong and dangerous.**

We, therefore, call on the House of Commons to leave out Clauses 2, 4, 5 and 50 of the Bill.

How the Bill harms victims of modern slavery

27. Clauses 21-28 of the Bill ban victims of modern slavery from using the Modern Slavery Act 2015 to resist removal from the UK if the Home Secretary is obliged to remove them under Clause 2. This ban applies for two years. The Government is doing this even though, to receive protection as a victim of modern slavery, people must provide tangible evidence that they have been trafficked.[20] Therefore, even where there is evidence, the Government's Bill still denies victims protection.

28. **Worse, contrary to the Government's assertions that this Bill will tackle criminal gangs, it will strengthen the armoury of criminals. A trafficker could now threaten their victims: go to the police, try to escape and you will be removed from the UK. The Bill serves the interests of criminals more than the victims of modern slavery.**

29. Furthermore, it is absurd to suggest that victims of modern slavery should or even could claim sanctuary in other safe countries that they pass through. They will often have been held captive by their traffickers and will have no opportunity to contact the authorities before they escape. The Government should be applauding the strength and courage of victims of trafficking, rather than denying them protection.

30. The removal of victims of modern slavery, even to apparently safe countries, could have dire and even fatal consequences. As para. 3 of the Council of Europe's Guidance Note on victims of trafficking and international protection states, a victim of modern slavery may be at grave risk in their own country should they be compelled to return. This could include being re-trafficked, revenge attacks by the traffickers if the victim had escaped, and rejection by the victim's family or community, especially where there has been sexual exploitation.[21]

31. Clauses 21-28 also breach Article 13 of the European Convention on Action against Trafficking (ECAT), which requires nations to provide a "reflection and recovery period" of at least thirty days where a victim is not removed. Nations are not required to observe this if "grounds of public order prevent it". In an unconvincing, all-encompassing way, the Government has tried to invoke this, arguing that it:

[20] https://www.gov.uk/government/publications/human-trafficking-victims-referral-and-assessment-forms/guidance-on-the-national-referral-mechanism-for-potential-adult-victims-of-modern-slavery-england-and-wales
[21] https://rm.coe.int/guidance-note-on-the-entitlement-of-victims-of-trafficking-and-persons/16809ebf44

"is in the interests of the protection of public order in the UK including to prevent persons from evading immigration controls in this country, to reduce or remove incentives for unsafe practices or irregular entry, and to reduce the pressure on public services caused in particular by illegal entry into the UK."[22]

32. Beyond these generic assertions, the Government has provided no evidence that refugees are a threat to public order to an extent that would require even the removal of victims of modern slavery. It is no wonder that Conservative backbenchers, including former Prime Minister, Theresa May,[23] and former Cabinet Minister, Sir Iain Duncan-Smith,[24] have expressed concerns.

33. Even if, as the Government argues, Clauses 21-28 are to address alleged misuse of the Modern Slavery Act 2015, Parliament already recently changed the law through Part 5 of the Nationality and Borders Act 2022. This weakened the duty on the Home Secretary to identify victims of human trafficking from people who "may be" victims to those who "are" victims, significantly reducing the number of people protected (section 60-61). Importantly, the 2022 Act also prevents people who argue in bad faith that they are victims of modern slavery from resisting removal (section 63).

34. Therefore, the Government already has the tools it needs to tackle any misuse, for which there is little evidence anyway. Between 2018 and 2022, only 7% of people who arrived via small boats were referred through the National Referral Mechanism as potential victims of trafficking. Of that 7%, 85% successfully made a claim that they were victims.[25] This Bill will hurt people who the Home Secretary accepts are victims of modern slavery.

35. At para. 47 of its Human Rights Memorandum, the Government claims that it is "satisfied that these provisions are capable of being applied compatibly with Article 4 ECHR," which prohibits slavery and forced labour. At para. 46, this is claimed to be because of:

- the right to make a "suspensive claim" challenging removal where the person would suffer serious harm (Clause 37);
- the fact that a victim of trafficking will not be removed if they are cooperating with a criminal investigation about the exploitation and their presence is needed for that cooperation (Clause 21(3)); and
- the assertion that the Home Office will support receiving countries to investigate trafficking.[26]

36. However, suspensive claims – about which we provide further detail below – do not protect victims of modern slavery per se. That is the whole point of Clauses 21-28, which disapplies those

[22] https://publications.parliament.uk/pa/bills/cbill/58-03/0262/en/220262en.pdf para.135.
[23] House of Commons Hansard, Vol.729, 13 March 2023, Illegal Migration Bill: Second Reading, Cols 592-94.
[24] House of Commons Hansard, Vol. 729, 13 March 2023, Illegal Migration Bill: Second Reading, Cols. 610-11.
[25] Home Office Official Statistics, 'Irregular migration to the UK, year ending December 2022' (23 February 2023), https://www.gov.uk/government/statistics/irregular-migration-to-the-uk-year-ending-december-2022/irregular-migration-to-the-uk-year-ending-december-2022.
[26] https://publications.parliament.uk/pa/bills/cbill/58-03/0262/ECHR%20memo%20Illegal%20Migration%20Bill%20FINAL.pdf

protections. A person can use a suspensive claim to avoid removal if they would suffer serious and irreversible harm, but this cannot be claimed just by virtue of being a victim of modern slavery. On top of this, as we develop later, suspensive claims will be very difficult in practice to bring and win.

37. In addition, not removing a victim only when they cooperate with an investigation will place undue pressure on vulnerable and traumatised people to interact with authorities and give evidence in legal proceedings, potentially exacerbating their trauma and vulnerability. Moreover, victims of trafficking have no control over whether the police and prosecutorial agencies open and pursue a criminal investigation into their exploitation.

38. The Home Office has also outlined no overt plan to support receiving countries to investigate trafficking. It is mere assertion with no evidence of practical effect. Victims of modern slavery deserve practical help, not vague promises.

39. **There is little evidence that the UK's modern slavery system is being abused but a great deal of evidence that this Bill will put victims of modern slavery in harm's way by denying them recovery, risking their return to traffickers, and forcing on them cruel choices – stay with your trafficker or be removed from the UK.**

We, therefore, call on the House of Commons to leave out Clauses 21-28 of the Bill.

How the Bill punishes children

40. Given the difficult and arduous journey that persecuted people face even reaching the UK, sadly many children will reach our shores without a parent, guardian, or any adult at all. Under Clause 3(1) of the Bill, the Home Secretary's duty to remove people does not apply to these unaccompanied children. But even then, Clause 3(2) says that she "may" remove them if she wants to.

41. Removal of unaccompanied children would expose them to significant risk of being trafficked by criminal gangs. The UK's Anti-Slavery Commissioner has concluded that unaccompanied children are at significant risk of being trafficked, even in a safe country.[27] See, for example, the scores of unaccompanied children missing or kidnapped from Home Office hotels in the UK.[28]

42. **Contrary to the Government's claims that these plans tackle criminal gangs, this Bill exposes the most vulnerable and traumatised children to the risk of kidnapping and exploitation by criminals.**

43. Children who are accompanied by their parents face equally grim prospects. Clause 8(1) states that where a person has been given a removal direction, the same direction can be given to their family. This includes children (Clause 3(2)). There is no duty on the Home Secretary to assess the

[27] https://www.antislaverycommissioner.co.uk/media/1255/heading-back-to-harm.pdf
[28] https://www.theguardian.com/uk-news/2023/jan/21/they-just-vanish-whistleblowers-met-by-wall-of-complacency-over-missing-migrant-children

unique vulnerability of children, nor the emotional and psychological harms that they may suffer from being forced to leave yet another country.

44. On top of this, Clause 29(3) prevents a child from being granted leave to remain in the UK if their parents ever satisfied the conditions for removal, apart from in very limited circumstances. Worse, Clause 30(4) in conjunction with Clauses 31-34 make children ineligible to receive British citizenship, be registered as a British subject, or receive citizenship of a British overseas territory, if their parents ever satisfied the conditions for removal.

45. The result is that every child who arrives in the UK with their parents (Clause 30(3)) and even if a child is born after their parents' arrival (Clause 30(4)), their right to become a British citizen is removed. **The Government is punishing children and taking away their rights.**

46. Given that these plans do not protect children, it is very likely that they violate Article 3 of the UN Convention on the Rights of the Child, which requires that the best interests of children are a primary consideration in all decisions.[29] This duty is reflected in the UK's own section 55 of the Borders, Citizenship and Immigration Act 2009, which requires the Home Secretary to exercise her immigration and asylum functions so that the best interests of children are a primary consideration. The Home Secretary has made no attempt to demonstrate how she has satisfied this duty.

47. Finally, Clause 14 removes the duty on the Home Secretary to consult the Independent Family Returns Panel when removing families. The Panel is a group of experts who provide advice to the Home Secretary on how best to safeguard the interests of children during a forcible removal from the UK.

48. The Home Secretary is not only able to remove vulnerable refugee children, this Bill also gets rid of her obligation to take advice on how to do this humanely. The Bill punishes children just for being refugees and puts unaccompanied children at risk of being trafficked by criminals.

We, therefore, call on the House of Commons to leave out Clauses 3, 8 and 14 and Clauses 29 to 36 of the Bill.

[29] https://www.savethechildren.org.uk/content/dam/gb/reports/humanitarian/uncrc19-summary2.pdf

How the Bill locks up children, refugees, and victims of modern slavery with minimum safeguards

49. Clause 11 of the Bill grants the Home Secretary a very broad power to detain people – including children – on suspicion that they are liable for removal. This has no time limit and can be for as long as is necessary to remove the person in the opinion of the Home Secretary (Clause 12(1)).

50. Put simply, the Home Secretary's power of indefinite detention is based on her subjective point of view of what is necessary. This makes the detention much more difficult to challenge because the law will prioritise the Home Secretary's subjective opinion over objective reasonableness.

51. Worse, the Bill contains an ouster clause which restricts the ability of a judge to scrutinise this subjective power. Clause 13(4) makes the Home Secretary's decision final and not liable to be overturned in court for 28 days. 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); and (b) a writ of habeas corpus, which is where a court examines the lawfulness of a person's detention.

52. 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.30 There would be no basis for a person to argue that they were being unlawfully detained, because the Bill authorises it. A court would have to imply or read in conditions that are not on the face of the Bill and, given that the senior judiciary currently strongly prioritises the literal language of legislation,[31] this would be an extremely difficult legal argument.

53. After 28 days, the First-tier Tribunal has a power to grant immigration bail (Clause 13(3)) but given the rushed time limits imposed on the Home Secretary and the appeals process – as we explain in the next section – in many cases a person would already have been removed from the UK before 28 days have passed. In any event, immigration bail is not granted automatically and people are subject to strict conditions, including being electronically tagged (Schedule 10, Immigration Act 2016). PLP's research has shown the serious psychological and emotional consequences of constant 24/7 government intrusion and monitoring.[32]

54. In practice, refugees, victims of modern slavery and children will be locked up for a month – and in some cases, longer - with no real opportunity to challenge the need for their detention.

We, therefore, call on the House of Commons to leave out Clauses 11 to 13 of the Bill.

[30] https://freemovement.org.uk/what-is-in-the-illegal-migration-bill/
[31] See, for example, R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department [2022] UKSC 3.
[32] https://publiclawproject.org.uk/content/uploads/2022/10/GPS_Tagging_Report_Final.pdf

How the Bill creates blatantly unfair appeals for children, refugees, and victims of modern slavery

55. The Government concedes that this Bill gives the Home Secretary "radical" powers over people.[33] **Despite this, the Bill does not even provide fair mechanisms for challenging her decisions. On the contrary, the Bill creates blatantly unfair new procedures which, in practice, provide fictional accountability weighted in favour of the Government.**

56. The principal way to challenge removal will be through Clause 37's new suspensive claims, where a person can challenge the decision where they will suffer serious and irreversible harm from being removed or because the Home Secretary has made factual errors.

57. But Clause 40 forces people to jump through 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.

58. It is unlikely that someone who has just fled persecution could provide this evidence. Compelling evidence is also a very 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.

59. Worse, a person has only eight days to make a suspensive claim and the Minister has only four days to consider it (Clause 40(7)). Once again, it is unlikely that a refugee has the resources to prepare evidence and a formal claim in little over a week. It is also unlikely that a busy government department – particularly with the current backlog of asylum cases – can seriously consider that evidence in only a few days.

60. 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 "legal advice deserts".34 Even if refugees do obtain a legal adviser, practical contact with that adviser may also be a challenge. For people detained in Derwentshire Immigration Removal Centre, for example, PLP has heard experiences of very poor mobile phone reception, no access to a landline or computers, and solicitors having difficulty physically accessing the Centre due to its remote location. Further, because of the strict time limits for suspensive claims, the legal advice would have to be so rushed as to render it superficial and incomplete.

61. Nor are people who manage to jump through these hurdles 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 seven days and the Upper Tribunal must normally reach a decision within 23 days from the date when the person gives notice to appeal. The idea that this is enough time for a detained person to organise their case, for the Home Secretary to look at the evidence and adequately consider it and

[33] https://publications.parliament.uk/pa/bills/cbill/58-03/0262/ECHR%20memo%20Illegal%20Migration%20Bill%20FINAL.pdf, para. 47.
[34] https://www.refugee-action.org.uk/no-access-to-justice-how-legal-advice-deserts-fail-refugees-migrants-and-our-communities/

respond, and for judges to decide the case is absurd. The Bill requires yet another rushed procedure.

62. Importantly, these numbers appear to have been plucked out of thin air. The Government has provided no analysis based on evidence explaining why it thinks these timeframes are realistic or achievable. Not only does the Government want a rushed procedure, it wants one based on arbitrary numbers too.

63. The Home Secretary can make the appeal 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 harm. This is a new evidential standard created by this Bill, which will take time for the courts to define and apply consistently.

64. More than this, Clause 48 creates another ouster clause which makes decisions of the Upper Tribunal final. **A court decision that has been rushed which follows a Home Office process which was also rushed will be the final decision on a person's life and safety.**

65. Finally, the Bill undermines judicial independence with Clause 46, which states that the Upper Tribunal can only hear "new matters" as part of a case with the permission of the Home Secretary. The only way to overcome this ban – providing compelling evidence of compelling reasons why the issue was not raised before – is so narrow that it will hardly ever happen. And 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 - by the order of the Government of the day - from hearing connected matters which they may have wanted to hear. **This is blatant interference with judicial independence over the administration of court hearings for the benefit of the executive.**

We, therefore, call on the House of Commons to leave out Clauses 37 to 48 of the Bill.

How the Bill is a stealth attack on the Human Rights Act

66. Clause 1(1) declares that the purpose of the Bill is to prevent and deter unlawful migration by requiring the removal from the UK of people who arrive in breach of immigration control.

67. To guarantee that this purpose takes priority even above the human rights of refugees, children, and victims of modern slavery, Clause 1(5) excludes the application of section 3 of the Human Rights Act 1998 (HRA) to the Bill. Section 3 of the HRA 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 crucial defender of human rights.[35]

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

68. 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.36 By excluding section 3, the courts will be unable to offer similar protection to refugees, children, and victims of modern slavery trapped in the Government's policies.

69. Clause 1(5) prevents judges from using section 3 for any provision "made by or by virtue of this Act." In other words, the ban on section 3 applies not just to the Bill itself, but also to any regulations the Home Secretary produces using the powers she has given herself in this Bill.

70. 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. 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.

71. Finally, section 3 has reduced the number of people pursuing litigation in the European Court of Human Rights because they have been able to secure justice domestically.37 Clause 1(5) will, therefore, cause more people to challenge decisions in Strasbourg, increasing costs for British taxpayers.

72. **Clause 1 is a stealth attack on the Human Rights Act, removing one of the most effective means for protecting human rights from a group of people who need the protection most.**

We, therefore, call on the House of Commons to leave out Clause 1 of the Bill.

How the Bill lets the Home Secretary make laws and not Parliament

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

74. For example, Clause 6 gives the Home Secretary the power to include new countries which she is satisfied are safe to return asylum seekers to. Again, there is no requirement for advance parliamentary scrutiny of the countries that the Minister chooses to list as safe. The Minister could make questionable – even blatantly wrong – choices but this Bill gives Parliament no effective mechanisms for scrutinising those troubling choices.

75. While Clause 37 allows suspensive claims to challenge removal where there would be serious harm, Clause 38 gives the Home Secretary the power to define serious harm in regulations. The

[36] [2021] EWHC 3415 (Admin).
[37] https://www.gov.uk/guidance/independent-human-rights-act-review

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, putting vulnerable people at risk.

76. Moreover, Clause 49 of the Bill gives the Home Secretary 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.

77. 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.

78. These Clauses may be the Government's reaction to the Strasbourg Court issuing an interim measure preventing the deportation of asylum seekers to Rwanda until their domestic legal challenge is resolved.38 But 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.39 It is also essential for the UK's commitment to the international rule of law and the ECHR that interim measures are adhered to.40

79. 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. 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 expensive for British taxpayers.

80. Finally, Clause 51 empowers the Home Secretary to set an annual cap on the number of refugees entering the UK through approved schemes. There is no requirement for advance parliamentary approval, nor even any duty to set up such schemes. Even where the Government could have done good in this Bill by increasing safe and legal routes, it has chosen not to. This undermines the seriousness of the Government's commitment to this effort.

We, therefore, call on the House of Commons to leave out Clauses 6, 38, 49 and 51 of the Bill.

[38] https://www.lawgazette.co.uk/download?ac=104566

[39] https://www.echrcaselaw.com/en/echr-decisions/war-prisoners-were-sentenced-to-death-by-a-court-of-the-russian-occupying-forces-provisional-measures-for-non-execution-of-the-death-penalty/

[40] Samuel Willis and Ariane Adam, 'From Dundee to Donetsk: Rule 39 and why it matters' (14 March 2023, Law Society Gazette). Available at https://www.lawgazette.co.uk/commentary-and-opinion/from-dundee-to-donetsk-rule-39-and-why-it-matters/5115428.article

Conclusion

81. The Illegal Migration Bill is one of the most damaging Bills pursued by a British government in living memory. Damaging to the rights of some of the most persecuted people in the world. Damaging to the freedom of victims of modern slavery and human trafficking. Damaging to the safety and best interests of 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. Damaging to Parliament's right to scrutinise the Home Secretary's decisions. It is a fundamentally bad Bill and PLP calls on the House of Commons to oppose it in full.

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