Illegal Migration Bill

House of Commons, Second Reading

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Executive Summary

The Illegal Migration Bill represents an assault on the rights of migrants and on the rule of law.

The Bill starts with a statement under section 19(1)(b) of the Human Rights Act 1998 that the Home Secretary Suella Braverman is unable to say that its provisions are compatible with the rights to be found in the European Convention on Human Rights ('ECHR'). The Home Secretary's admission on the face of the bill of potential incompatibility with the European Convention on Human Rights ('ECHR') is an express acknowledgment that the Bill is likely to lead the UK to be in breach of its international obligations under the ECHR.

The ***Introduction*** ***(Clause 1)*** disapplies section 3 of the Human Rights Act, which requires primary and subordinate legislation to be read and given effect in a way which is compatible with Convention rights so far as it is possible to do so, from provisions made by or by virtue of this Bill. Unusually, it sets out the purpose the Bill is intended to achieve and stipulates that so far as it is possible to do so, provision made by or by virtue of this Bill must be read and given effect so as to achieve that purpose, which is likely to give rise to considerable uncertainty and extensive litigation for years to come.

A vast number of provisions in this Bill have **retrospective effect**, and apply to persons who entered or arrived in the UK, on or after 7 March 2023 (the day this Bill was introduced). No justification or exceptional circumstances have been provided. Retrospective law-making undermines the rule of law.

Most provisions in this Bill would apply to all those people (with very narrow exceptions) requiring permission to enter or remain in the UK, including individuals seeking asylum, who on or after 7 March 2023: (i) arrive in the UK without any required prior permission, (ii) arrive without a required electronic travel authorisation (ETA) (iii) enter the UK without permission, (iii) enter using deception; or (iv) enter in breach of a deportation order.

For all of the above, the proposed measures apply where individuals have not come directly to the UK from a country in which their life and liberty were threatened by reason of their race, religion, nationality, membership of a particular social group or political opinion. Further, in the proposed measures, they will not have come directly if they stopped in or passed through a country where their life or liberty were not threatened. This formulation suggests a focus on individuals who seek Refugee Convention protection. However, the measures would apply to all people caught by the definitions.

Clauses 2-10 (*Duty to make arrangements for removal)* propose to place a duty, that is discretionary for unaccompanied children and mandatory for adults, on the Home Secretary to swiftly remove people and their family members, if they meet certain conditions. These clauses block people from making admissible human rights and asylum claims. The Bill fails to achieve what it sets out to do because permanent inadmissibility makes nearly all illegal entrants and arrivals (from outside the EEA, Switzerland, and Albania) unremovable in reality, and the Bill creates a large and permanent population of people, including children in families and unaccompanied children, living in limbo at public expense for the rest of their lives. The Bill is an abrogation of the UK's responsibilities under the Refugee Convention, and these provisions undermine children's rights and will cause considerable damage to the welfare of children. These clauses are beset by further serious problems, including that Clause 4(1)(d) would cause a constitutional crisis and undermine the rule of law, if it means that the Home Secretary must disregard court orders made under judicial review procedures; the absence of safeguarding provision in the Schedule of safe third countries to allow the Home Secretary not to remove people to those countries if she is unsatisfied they would be safe in the particular circumstances risks people being removed to an unsafe third country; the legal obligations an immigration officer may place on private actors and companies are far-reaching and unrealistic; and there is a lack of clarity.

Existing legislation provides very broad statutory powers to detain migrants. **Clauses 11-14 (*Detention and bail)*** expand the existing statutory immigration detention powers still further and make it harder for people to challenge their use in court. The effect of Clause 11 is to provide the Home Secretary with wide new discretionary powers as to where people are detained and for how long they are detained, which would place the indefinite detention of children and pregnant women in camps such as Manston on a statutory basis. Clause 12 is intended to overturn the long-established common law principle that it is for the court to decide for itself whether the detention of a person for the purposes of removal is for a period that is reasonable, and also creates specific statutory powers to detain where the Home Secretary considers that removal is no longer possible within a reasonable period of time 'for such further period as, in the opinion of the Secretary of State, is reasonably necessary to enable such arrangements to be made for the person's release as the Secretary of State considers appropriate'. Clause 13 would mean that the First-tier Tribunal is unable to grant bail to a person detained under the new powers in Clause 11 for the first 28 days they are detained, a further example of the Home Office attempting to insulate decisions from judicial scrutiny. Clause 14 provides that the duty to consult with the Independent Family Returns Panel on safeguarding and promoting the welfare of children does not apply in relation to decisions to return or detain families with children covered by Clauses 2 and 8, increasing the risk of decisions being made without adequate regard to the best interests of children.

Protective arrangements intended for all children will effectively be withdrawn for children arriving or entering the UK after 7 March 2023 'in breach of immigration control'. The children affected may have entered with their families, or are unaccompanied, or are born in the UK to

parents in breach of immigration control as defined in the Bill, and are to be denied the right to seek refugee and human rights protection and protection as victims of trafficking; can be held in immigration detention; placed in unregulated (and, therefore, unsafe) accommodation; will be removed from the UK at age 18, or earlier if with their family; denied access to British citizenship registration arrangements open to other children; and denied appeal rights concerning their protection and human rights claims.

Clauses 15-20 (*Unaccompanied children*) fundamentally undermine the legal protections in the Children Act 1989 for unaccompanied migrant children. Clause 15 permits the Secretary of State to provide, or arrange for the provision of accommodation in England for unaccompanied children in England, and sets no standards, safeguards, or protective obligations for the Home Office provided accommodation for children. The Clause seeks to validate and extend the unlawful Home Office practice over past years of accommodating children – including very young unaccompanied children in hotels – some for extended periods, with no time limit on the face of the Bill. Clause 16(5)-(6) creates a power for the Home Secretary to decide a 'looked after' child is to cease being 'looked after' by the local authority in England, and the Home Secretary 'must direct' the local authority to cease looking after the child on the transfer date on making that decision, which is outside the Home Secretary's competence and knowledge base. The provisions in relation to the duty of a local authority to provide information to the Secretary of State in Clauses 17-18 could undermine the child protection functions of local authorities. Clause 19 appears to empower the Home Secretary to extend the provisions of the Bill regarding unaccompanied migrant children to all nations in the United Kingdom, which would require interfering with devolved matters.

It is unarguably clear that **Clauses 21-28 *(Modern slavery and trafficking)*** breach the UK's obligations to victims of trafficking under Article 4 ECHR and the European Convention on Action against Trafficking ('ECAT'). These provisions will deprive victims of their rights to recovery, expose them to re-exploitation, and facilitate the work of trafficking gangs. The Bill removes almost all protections for victims of modern slavery and trafficking who are targeted for removal. For a person targeted for removal under Clause 2, who the Home Office decides to be a potential victim of trafficking, Clause 21 would make it so that there is no obligation to grant such potential victims leave to remain; and they may be removed from the UK before a conclusive grounds decision is made (with a narrow exception for some individuals who are cooperating with investigations or criminal proceedings relating to their exploitation, if the Home Secretary considers it 'necessary for the person to be present in the United Kingdom to provide that cooperation', which is likely to benefit a very small number of individuals).

The proposed measures in respect of ***Entry, settlement and citizenship*** **(Clauses 29-36)** lock out certain people, including children, present in the UK, from securing lawful re-entry, residence, and/or citizenship. They dovetail with the proposed duty on the Home Secretary to remove certain people from the UK. The narrow exceptions or saving provisions come nowhere near

rescuing those affected from breaches of their fundamental rights. In practice, the people affected will be locked out by legislation, which will be likely applied in a blanket fashion by Home Office decision-makers. Thereafter, the people affected will have to scramble to secure advice and representation and make submissions to relieve themselves from being placed outside the law regulating lawful residence. The result will be to create a large class of people, present in the UK, but without any hope of securing lawful status.

Clauses 37 to 48 ***(Legal Proceedings)*** seek to define and limit the circumstances in which legal proceedings will have the effect of suspending removal of a person falling within Clause 2 or Clause 8. All other legal proceedings not addressed in Clauses 37 to 48 will be non-suspensive. They introduce short timeframes for the making and disposal of 'serious harm suspensive claims' and 'factual suspensive claims', with limited lights of review and appeal. The proposed timescales, and tests, combined with the lack of judicial oversight, build in unfairness. The provisions will impose a huge burden on the resources of legal representatives, the Home Secretary, the Upper Tribunal, and Court of Appeal while removing all appeals to the specialist First-tier Tribunal. Clause 48 sets out an 'ouster clause' which limits the grounds on which certain decisions of the Upper Tribunal can be challenged in the High Court or Court of Session. The consequences of such an ouster of jurisdiction are extremely serious: one can have full respect for the institutional expertise of the Upper Tribunal and still admit the possibility that it may lapse into error in a given case.

The inclusion of the 'placeholder' provision in **Clause 49** ***(Interim measures of the European Court of Human Rights)*** of the Bill stipulating that the Secretary of State 'may by regulations make provision about interim measures indicated by the European Court of Human Rights as they relate to the removal of persons from the United Kingdom under this Act' is an unnecessary and unwarranted intrusion into the role of the courts as a distinct branch of government in the constitutional order.

Clause 50 ***(Inadmissibility of certain asylum and human rights claims)*** intends to extend the current inadmissibility process for asylum claims from EU nationals, in section 80A Nationality, Immigration and Asylum Act 2002, to cover other nationalities (Albania, Iceland, Liechtenstein, Norway and Switzerland) and to also make human rights claims inadmissible, stripping from EEA and Swiss nationals the possibility of making admissible human rights applications (including on the basis of their family and private life in the UK) and removing their right of appeal.

Clause 51 ***(Annual number of entrants using safe and legal routes)*** requires the Home Secretary to make, by regulations, an annual cap on the number of persons who can enter the UK using 'safe and legal' routes. The Government will effectively have *carte blanche*, through regulations, to determine which nationalities have the right to come to the UK.

Table of Clauses

Clause 1 - Introduction

Clause 1	Aims to place a duty to interpret provisions in line with the purpose in Clause 1(1) and disapplies the section 3 HRA duty to interpret provisions of the Bill compatibly with human rights obligations 'so far as it is possible to do so'

Clauses 2-10 – Duty to make arrangements for removal

Clause 2	Aims to place a blanket duty with limited exceptions on the Home Secretary to remove people who have 'entered or arrived in the UK illegally'[1] since 7 March 2023, without having travelled from a country in which their life or liberty was threatened for a Refugee Convention reason.
Clause 3	Aims to make the duty to remove *discretionary* for unaccompanied children until they turn 18 and to give the Home Secretary power to make other exceptions to the duty.
Clause 4	Aims to declare inadmissible any protection or human rights claim a person targeted by the duty to remove might make, where this relates to a claim that removal would be unlawful under s 6 HRA 1998. This aims to be a permanent status, whereby the person's claim will never be considered in the UK, and there is no right of appeal against a declaration of inadmissibility.
Clause 5	Aims to ensure that where the duty to remove applies, people will be removed as soon as reasonably practicable from the UK (or for unaccompanied children this would be once they turn 18). People can be removed to Clause 50 countries (EEA, Switzerland, and Albania) unless exceptional circumstances apply or to a designated safe third country listed in the Schedule to the Bill.
Clause 6	Explains how the list of safe third countries in the Schedule can be amended and the test to be applied. A country can be designated as safe for only specific groups and only part of a country can be designated safe.
Clause 7	Requires a removal notice to be given explaining the planned country/territory of removal, time limits, and the process to challenge removal (which is set out in Clauses 40-41). Provisions are added to allow the Home Secretary to force private individuals and companies to make removal arrangements and help enforce removal, including by detaining people.
Clause 8	Aims to make sure that family members – who are not Irish, British, or otherwise have the right of abode or permission to be in the UK – of a person caught by the duty to remove are caught by equivalent restrictions and can be removed.

[1] Illegal Migration Bill Explanatory Notes (7 March 2023) <https://publications.parliament.uk/pa/bills/cbill/58-03/0262/en/220262en.pdf> accessed 12 March 2023 (hereinafter 'EN') para 40.

Clause 9	Provides access to asylum support on the basis that 'individuals who fall within the duty to remove who are not detained will need access to support if they would otherwise be destitute'.
Clause 10	Aims to amend existing removals legislation in line with the Bill.

Clauses 11-14 – Detention and Bail

Clause 11	Introduces wide new powers for detaining persons the Home Secretary has or may have a duty to remove (under Clause 2), together with their family members, new powers for detaining unaccompanied children and pregnant women, and widens the list of places where people can be detained to 'any place that the Secretary of State considers appropriate'.
Clause 12	Aims to restrict the role of the courts in providing oversight of the exercise of the statutory immigration detention powers, by overturning a well-established common law principle, and provides more discretion for the Home Secretary to detain 'for such further period' as she thinks 'reasonably necessary' to make arrangements for release.
Clause 13	Aims to make it very difficult for people targeted by this Bill to secure their release on bail for the first 28 days of their detention, and to restrict the jurisdiction of the courts to review the lawfulness of a decision to detain or to refuse bail.
Clause 14	Disapplies the Home Secretary's duty[2] to consult the Independent Family Returns Panel on how best to safeguard and promote the welfare of the children in relation to return and detention of families.

Clauses 15-20 – Unaccompanied children

Clauses 15-20 purport to '*make provision for the care of unaccompanied migrant children in scope of the duty pending their removal as adults or if it is decided to use the power to remove as a child*'.[3] The clauses will confer broad retrospective powers on the Home Secretary to provide accommodation for 'looked after'/unaccompanied children as well as the projected power to terminate a child's 'looked after' care status and the key legal protections provided by local authorities to these migrant children:

Clause 15	Confers a power on the Home Secretary to directly provide accommodation to unaccompanied migrant children or to ask a third party to do so (without any limit for the period a child can spend in Home Office accommodation)
Clause 16	Purports to facilitate *'the transfer of an unaccompanied migrant child from accommodation, which the Secretary of State has the power to provide or*

[2] Borders, Citizenship and Immigration Act 2009, s 54A(2).

[3] EN, para 97.

	arrange to provide under Clause 15, to a local authority in England' and vice versa within 5 working days[4]
Clause 17	Imposes a duty on local authorities to provide information to the Home Secretary for the purpose of allowing '*the sensible flow of information that would be relevant to a child transferring into local authority care or out of their care'*[5] akin to the National Transfer Scheme ('NTS')
Clause 18	Provides for an enforcement mechanism to ensure compliance by local authorities with information requests
Clause 19	Creates a broad delegated power for the Home Secretary to amend 'any enactment' to extend the provisions in Clauses 15-18 to Wales, Scotland and Northern Ireland
Clause 20	Amends section 69 of the Immigration Act 2016 to facilitate the transfer of responsibility for caring for particular categories of unaccompanied migrant children from one local authority to another

Clauses 21-28 – Modern Slavery

The Bill removes almost all protections for victims of modern slavery and trafficking who are targeted for removal.

Clause 21	Extends the public order disqualification to potential victims of modern slavery, to a person targeted for removal under Clause 2, unless they are cooperating with an investigation or criminal proceeding
Clause 22	Disapplies the duties on the Secretary of State under section 50A of the Modern Slavery Act 2015 to provide necessary assistance and support to potential victims of modern slavery during the recovery period
Clause 23	Disapplies equivalent mandatory and discretionary powers[6] in Scotland to support potential victims of modern slavery
Clause 24	Disapplies equivalent mandatory and discretionary powers[7] in Northern Ireland to support potential victims of modern slavery
Clause 25	Automatically suspends provisions in Clauses 21 to 24 two years after commencement, and allow provisions to be suspended before that and to be revived by Regulations made by the Home Secretary

[4] EN para 102.

[5] EN para 106.

[6] Human Trafficking and Exploitation (Scotland) Act 2015, ss 9(1), (3) and 10(1).

[7] Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, any duty under s 18, and powers under ss 18(8) and 18(9), to provide assistance and support.

Clause 26	If the provisions suspend, they can be revived by regulations subject to the affirmative procedure, or the made affirmative procedure in cases of urgency.
Clause 27	Aims to make support and assistance, the recovery period, any additional recovery period, temporary leave for potential victims of slavery, and revocation of leave, subject to the public order disqualification
Clause 28	Adds persons liable to deportation as categories of persons who are considered to be a threat to public order and disqualified from protection

Clauses 29-36 – Entry, Settlement and Citizenship

These clauses place a permanent bar on those who fall within the scheme from lawfully re-entering the UK or from securing settlement or British citizenship through naturalisation or registration, subject only to exceptions to comply with international agreements where there are compelling circumstances.

Clause 29	Bars persons targeted for removal under Clause 2, and their family members, from settlement and from lawful re-entry to the UK following their removal, subject to certain exceptions
Clause 30	Sets out which people will not be eligible for British citizenship, British overseas territories citizenship, British overseas citizenship and British subject status
Clause 31	Provides that ineligible persons will not be able to register or naturalise as a British citizen under the specified provisions
Clause 32	Prevents ineligible persons from acquiring British overseas territories citizenship under routes which mirror the routes for British citizenship.
Clause 33	Prevents ineligible persons from acquiring British overseas citizenship under section 27(1) of the British Nationality Act 1981
Clause 34	Prevents ineligible persons from registering as a British subject under section 32 of the British Nationality Act 1981
Clause 35	Allows the Home Secretary to determine that a person is not 'ineligible' for registration or naturalisation, if she considers it necessary in order to comply with the UK's obligations under the ECHR or an international agreement to which the UK is a party
Clause 36	Amends the relevant provisions of the 1981 Act to make them subject to the Bill

Clauses 37-49 – Legal Proceedings

Persons subject to removal will have a limited time in which to bring a claim based on a real risk of serious and irreversible harm arising from their removal to a specified third country or a claim that they do not fall within the cohort subject to the duty to remove.

All other challenges are non-suspensive, and can only be made out of country.

Clause 37	Defines the interpretation of terms for the purposes of clauses 37 to 48
Clause 38	Is 'a placeholder to allow the Secretary of State to amend the meaning of "serious and irreversible harm'[8]
Clause 39	Provides that a serious harm suspensive claim is not a human rights claim, and will not attract a right of appeal, but a person can seek a judicial review
Clause 40	Sets out the process for the submission and determination of valid serious harm suspensive claims, and provides for restrictive time limits
Clause 41	Sets out the process for the submission and determination of valid factual suspensive claims, and provides for restrictive time limits
Clause 42	Provides for an appeal, on limited grounds, to the Upper Tribunal where the Home Secretary has refused a suspensive claim and has not certified the claim as clearly unfounded, which can be further appealed to the Court of Appeal or Court of Session
Clause 43	Makes provision for permission to appeal against a decision by the Home Secretary to certify a suspensive claim as clearly unfounded (as there is no automatic right of appeal), and sets a high threshold for permission
Clause 44	Makes provision for out-of-time suspensive claims made before a person's removal from the UK
Clause 45	Details the consequences for removal of a person making a suspensive claim[9]
Clause 46	Makes provision for the Upper Tribunal to consider new matters that were not available to the Home Secretary, if there are 'compelling reasons'
Clause 47	Requires the Tribunal Procedure Committee to introduce procedure rules setting very short time limits for the appeals process, with extensions if that is the 'only way' to secure justice is done in a particular case
Clause 48	Ousts supervisory jurisdiction of the High Court and Court of Session to consider judicial review challenges of certain decisions of the Upper Tribunal, even if the Upper Tribunal has acted beyond its powers
Clause 49	Confers a power for the Secretary of State to make regulations about interim measures of the European Court of Human Rights relating to removal of people under this Bill

[8] EN, para 173.
[9] EN, para 200.

Clause 50 – Inadmissibility of certain asylum and human rights claims

Clause 50	Intends to extend the current inadmissibility process for asylum claims from people from the EU, in section 80A Nationality, Immigration and Asylum Act 2002, to cover other nationalities (Albania, Iceland, Liechtenstein, Norway and Switzerland) and to also make human rights claims inadmissible

Clause 51 – Annual number of entrants using safe and legal routes

Clause 51	Requires the Secretary of State, by regulations, to determine an annual cap (determined following consultation with local authorities and other relevant bodies) on the resettlement of refugees admitted to the UK via safe and legal routes

Human Rights Obligations

Section 19(1)(b) HRA 1998

The recently published Illegal Migration Bill starts with a statement that the Home Secretary Suella Braverman is unable to say that its provisions are compatible with the rights to be found in the European Convention on Human Rights. Such a statement has been required of all legislation since enactment of the Human Rights Act 1998 and of course it is used to state that this or that proposed measure is compatible with the Convention. It is unusual, to put it mildly, for a British government to declare itself in advance to be open to breaching international law. Yet, this is in effect what the Home Secretary is asking Parliament to do.[10]

The Home Secretary's admission on the face of the bill of potential incompatibility with the European Convention on Human Rights ('ECHR') is an express acknowledgment that the Bill is likely to lead the UK to be in breach of its international obligations under both the ECHR and also other international human rights treaties which it has signed (and which the European Court of Human Rights would examine when deciding, in some cases, if a government has acted in breach of the Convention).

It is the Government's reported position that there is a more than 50% chance that the provisions of this Bill are not compatible with the UK's human rights obligations.[11] The purpose of section 19 of the Human Rights Act 1998 ('HRA') is to ensure (a) that before a Bill is presented to Parliament the minister had taken account of and examined potential human rights issues, and (b) that where such a statement could not be made, to encourage 'intense' scrutiny by Parliament.[12]

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[10] The Home Secretary said in her oral statement to Parliament that 'Our approach is robust and novel, which is why we can't make a definitive statement of compatibility under section 19(1)(a) of the Human Rights Act. Of course the UK will always seek to uphold international law and I am confident that this bill is compatible with international law.' Home Office and The Rt Hon Suella Braverman KC MP, 'Oral statement to Parliament: Home Secretary statement on the Illegal Immigration Bill' (7 March 2023) <https://www.gov.uk/government/speeches/home-secretary-statement-on-the-illegal-immigration-bill> accessed 11 March 2023.

[11] It has been reported that the Home Secretary, Minister for Immigration, and Lords Minister wrote to MPs and Peers in a letter dated 7 March 2023 that 'Our approach is robust and novel, which is why I've made a statement under section 19(1)(b) of the Human Rights Act 1998. This does not mean that the provisions in the Bill are incompatible with the Convention rights, only that there is a more 50% chance that they may not be. We are testing the limits but remain confident that this Bill is compatible with international law.'
Sophia Sleigh, 'Exclusive: Suella Braverman Admits Immigration Crackdown May Not Be Legal' (7 March 2023) <https://www.huffingtonpost.co.uk/entry/exclusive-suella-braverman-admits-immigration-crackdown-may-not-be-legal_uk_64072e62e4b0586db70fd939> acccessed 11 March 2023.

[12] Lord Irvine of Lairg (Lord Chancellor who introduced the Bill in the House of Lords – HL Deb 3 November 1997, vol 582, col 1233. It was designed, according to the Lord Chancellor during committee stage, to ensure Ministers

It is *unusual* for a Bill to be presented with a section 19(1)(b) statement. The Local Government Bill 2000, which sought to reaffirm the 'section 28'[13] ban on promotion of lesbian, gay, and bisexual relationships in schools,[14] was introduced with such a statement, as was the House of Lords Reform Bill, which was withdrawn on 3 September 2012.[15] The ban on political advertising in the Communications Bill 2003[16] was also subject to such a statement – because of a lack of clarity in the law at the time in question – but it was found by the House of Lords (as it then was) that there was no such breach of the Convention.

Where Parliament has passed legislation knowing that it may be in breach of the Convention, the courts will consider that it has chosen to do so. As Parliament is sovereign, it will give that due respect. However, that will not stop the courts finding the Act to be incompatible with the Convention.

It is for Parliament to consider, analyse, debate, and think about the human rights issues raised by the Bill, and the implications this has, including for the UK's standing internationally, very carefully. The human rights memorandum[17] which accompanies the Bill shows starkly the many ways in which the Bill interferes with rights enshrined under the HRA 1998.

thought about human rights when making decisions, and '[w]here such a statement cannot be made, parliamentary scrutiny of the Bill would be intense.'

[13] Local Government Act 1988.

[14] HC Deb 23 March 2000 vol 346 c623W.

[15] UK Parliament, 'House of Lords Reform Bill' <https://bills.parliament.uk/bills/1067> accessed 10 March 2023.

[16] *R (Animal Defenders) v SSHD* [2008] 1 AC 1315.

[17] Home Office, 'Illegal Migration Bill: European Convention on Human Rights Memorandum' (7 March 2023) <https://publications.parliament.uk/pa/bills/cbill/58-03/0262/ECHR%20memo%20Illegal%20Migration%20Bill%20FINAL.pdf> accessed 10 March 2023.

Section 3 HRA 1998 (Clause 1)

Clause 1(5):

> *Section 3 of the Human Rights Act 1998 (interpretation of legislation) does not apply in relation to provision made by or by virtue of this Act.*

The Bill further seeks to protect itself from human rights by undoing a central feature of the 1998 Human Rights Act, namely that all subsequent measures be interpreted subject to it where this is possible. If enacted, it will be possible to go about the brutal business of the Illegal Migration Act without even having to stop and think about interpreting it compatibly with the rights of those whose lives are being damaged as a result. This is another, and on this occasion entirely unprecedented, effort to truncate the operation of a central provision of the Human Rights Act.

Section 3 of the HRA provides,

> *'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'.*

Clause 1(5) of the Bill proposes that the legislation should not be sought to be read compatibly with section 3 of the HRA. The Bill, therefore, accepts, recognises, and provides that such rights may have to be ignored, because the Bill acts in breach of them.

To have an Act of Parliament which seeks to ask the courts, the executive, and administrators to ignore someone's human rights is a grave step and is exceptionally unusual – other than in situations to counter terrorism or national security where the government may be seeking to balance the right to life of its citizens against the rights of an individual who may pose a risk to life. This is not such a situation.

It puts the Government on a direct collision course with the domestic courts, the European Court of Human Rights, the Council of Europe, and other international bodies. It is reckless and careless of its need to act in line with the international treaties it has signed. It is a direct provocation.

Interpretation (Clause 1)

Clause 1(1)-(3):

> *(1) The purpose of this Act is to prevent and deter unlawful migration, and in particular migration by unsafe and illegal routes, by requiring the removal from the United Kingdom of certain persons who enter or arrive in the United Kingdom in breach of immigration control.*
>
> *(2) To advance that purpose, this Act—*
>
> *[...]*
>
> *(3) Accordingly, and so far as it is possible to do so, provision made by or by virtue of this Act must be read and given effect so as to achieve the purpose mentioned in subsection (1).*

Clause 1 is an unusual clause. It merely sets out at (1) the purpose the Act is intended to achieve, and at (2) a summary of the substantive provisions which will be included later in the Act to advance that purpose. Acts of Parliament have not traditionally set out their purpose(s) in a legislative provision (though very recently other draft legislation has sought to do so, for example the Bill of Rights Bill). There is no obvious reason why legislation should include within its substantive provisions a statement of purpose and a summary of the subsequent provisions. If anything, this is apt to cause confusion, given that our laws have an established and highly developed approach to interpretation of statutes without provisions of this kind. It is likely that the courts will have to adapt this approach in response to such provisions.

Clause 1(1) is not merely ornamental. Clause 1(3) imposes a duty on the court to interpret other sections so as to give effect to the stated purpose. A similar interpretative duty may be found in section 3 HRA, which the Government wishes to preclude from applying to the Bill.

It is not clear how the principles of statutory interpretation developed by the courts in the context of section 3 HRA might be applied in the quite different context of Clause 1(3) of the Bill. For example, in human rights contexts the courts have held that there is no requirement for 'ambiguity or absurdity' as a condition for the application of the interpretative duty: *'Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning'*.[18] It is possible that in using language very close to that of section 3 Human Rights Act 1998 ('*so far as it is possible to do so'*) the Government intends Clause 1(3) to have a similar effect. It can be safely predicted that Clause 1(3) of the Illegal Migration Bill is likely to give rise to considerable uncertainty and extensive litigation for years to come.

[18] *Ghaidan v Godin-Mendoza* [2004] UKHL 30 at [29].

Duty to make arrangements for removal (Clauses 2-10)

These clauses propose to place a duty, that is discretionary for unaccompanied children and mandatory for adults, on the Home Secretary to swiftly remove people and their family members.

It applies to all people (with very narrow exceptions) requiring permission to enter or remain in the UK, including individuals seeking asylum, who on or after 7 March 2023: (i) arrive in the UK without any required prior permission, (ii) arrive without a required electronic travel authorisation (ETA) (iii) enter the UK without permission, (iii) enter using deception; or (iv) enter in breach of a deportation order. These individuals must have not come directly to the UK from a country in which their life and liberty were threatened by reason of their race, religion, nationality, membership of a particular social group or political opinion.

These clauses block people from making admissible human rights and asylum claims.

Two Fundamental Problems

In two fundamental and spectacular ways this Bill fails to achieve what it sets out to do:

1. **Permanent inadmissibility makes nearly all illegal entrants and arrivals (from outside the EEA, Switzerland, and Albania) unremovable in reality.**

   Clause 5(8)-(9) effectively deem these people to be unreturnable to their country of origin if they have made a protection or human rights claim. This is because their asylum and protection claims will never be decided and are instead sidelined as permanently inadmissible, so the UK has no idea how much danger the person would face on return. This is the case even if they have close relatives in the UK, such as British children in education here. It is likely almost everyone caught by these provisions will be unremovable, given the lack of uncapped third country removal arrangements.

   Between 1 January 2021 to 30 June 2022, 17,222 asylum claims were considered for inadmissibility under existing laws, but only 21 of these people were eventually removed (all to EEA countries and Switzerland).[19] Inadmissibility procedures decrease rather than increase the total number of removals. Without an uncapped third country removals agreement, there is no prospect of a swift, or indeed any, removal for the high number of people who would be caught by these provisions. Even if removals under the Migration and Economic Development Partnership with Rwanda deal went ahead, that deal made

[19] Home Office, 'National statistics How many people do we grant asylum or protection to?' (Updated 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#inadmissibility> accessed 11 March 2023.

provision for hundreds[20] – not thousands – of third country removals at high per capita expense, so is not on a scale to be significant for the Home Secretary to comply with the duty in Clause 2.

If payments have to be made per capita for third country removal agreements then this will be extraordinarily expensive compared with deciding cases and removing those refused to their own countries.

Where illegal entrants under the current system are determined not to have a claim that entitles them to protection or leave then they can be returned to their own country. This will change under the Bill. The effect of this is that for people with nationalities where the asylum grant rate is very low, this Bill would ensure many who would have been refused instead spend much longer in the UK without legal status.

The duty to remove in Clause 2 will potentially cover almost all asylum claimants, including those taking safe journeys to the UK with no involvement from people smugglers. Only people with asylum claims arising while they are already in the UK or who are able to take a direct flight to the UK, will not systematically be covered by this Bill. The number of people covered by this provision – and who would need to be covered by third country removal agreements – is higher than those arriving by small boats.

2. **The Bill creates a large and permanent population of people, including children in families and unaccompanied children, living in limbo at public expense for the rest of their lives**.

   It is likely that almost all non-EEA/Swiss/Albanian cases will be unremovable, creating a permanently unlawfully present population who will be financially dependent on asylum support for the rest of their lives (Clause 9), alongside their partners, other family members

[20] The Immigration Minister stated on 6 December 2022 that 'The number of individuals who can be relocated to Rwanda under the Migration and Economic Development Partnership is uncapped. Rwanda has made initial provision to receive 200 people and has plans to scale up capacity once flights begin.'
'Asylum: Rwanda Question for Home Office' (tabled on 28 November 2022, answered on 6 December 2022) <https://questions-statements.parliament.uk/written-questions/detail/2022-11-28/97762> accessed 12 March 2023. The MOU states at [3.3] that 'The Participants will make arrangements for the process of request and approval of individuals for relocation by Rwanda, taking into account Rwanda's capacity to receive them, and in relation to all administrative needs associated with their transfer.' Home Office, 'Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement' (14 April 2022) <https://www.gov.uk/government/publications/memorandum-of-understanding-mou-between-the-uk-and-rwanda/memorandum-of-understanding-between-the-government-of-the-united-kingdom-of-great-britain-and-northern-ireland-and-the-government-of-the-republic-of-r#part-2--responsibilities-of-the-participants> accessed 12 March 2023.

and children (including those as yet unborn) (Clause 8). This will exponentially increase the asylum housing bill and extend the asylum accommodation estate.

Even if individuals have not claimed asylum, the ECHR Memorandum confirms they will still be entitled to housing and subsistence through immigration bail provisions, and children will be supported by local authorities under sections 17 and 20 of the Children Act 1989.[21]

These people, who would include stateless people, survivors of modern slavery and torture and children born in the UK, would never be allowed to work, rent in England or live independently, because their claims are permanently rendered inadmissible. Even individuals who are self-sufficient in the current system, who stay with friends and family, would find living permanently without any income to be unsustainable. This would further increase the burden on public funds.

The solution is not to legislate permanent inadmissibility; the solution is fair and efficient decision-making. The Home Secretary has allowed a vast decision-making backlog to accrue, but if cases were managed efficiently these decisions could be made in a small number of months, keeping public costs low, and claims from high-grant nationalities could potentially be granted in a number of days.

Other Serious Problems with Clauses 2-10

- **The Bill is an abrogation of the UK's responsibilities under the Refugee Convention**. If other countries followed suit, we would see an end to refugee protection. It also places unwell and vulnerable arrivals (including recent victims of modern slavery, rape and other extreme forms of abuse) at risk of harm by seeking to penalise rather than assess them.
- **The provisions undermine children's rights and will cause considerable damage to the welfare of children.** The definition of family member (Clause 8) is far wider than in other immigration contexts – wider even than for criminal deportation of the most serious offenders – and punish children who may not even have been born when one of their parents entered the UK. Leaving forced removal to a strange country at the age of 18 hanging over the head of a looked after child (Clause 3) is cruel and fails to recognise the roots children in care put down in the UK as they grow up here.
- **Clause 4(1)(d) would cause a constitutional crisis and undermine the rule of law**, if it means that the Home Secretary must disregard court orders made under judicial review procedures.[22]

[21] ECHR Memorandum [30].

[22] The language used in Clause 4 suggests that the lodging of a claim for judicial review in the High Court will not in and of itself 'suspend' the duty to make arrangements for removal. It is unclear if the intention is that an order of the court (including an interim order) in such a claim could not have the effect of suspending the duty.

- **Unlike other similar lists,[23] there is no safeguarding provision in the Schedule of safe third countries** to allow the Home Secretary not to remove people to those countries if she is unsatisfied they would be safe in the particular circumstances. This risks people being removed to an unsafe third country.
- **The legal obligations an immigration officer may place on private actors and companies are far-reaching and unrealistic**: for example, an immigration officer may require a pilot to detain a person or not allow them to disembark, and may thus require them to act contrary to their ethical and other legal obligations (Clause 7(4)-(10)).
- **The Bill is unclear**. There is apparently provision (in Clause 3(5)) to make exceptions from the duty to remove. This does not seem to only relate to unaccompanied children (despite this provision being placed in Clause 3). It is unclear if there is any intention for unremovable people to be covered by this or for vulnerable people or people with protected characteristics to be exempted from the removals duty in the future.
- **The Bill will retrospectively create another layer of complexity**, to the regime created by the Nationality and Borders Act 2022 (only last year), of 'legacy' claims made before 28 June 2022, 'flow' claims made on or after 28 June 2022, and now arrivals after 7 March 2023, with different inadmissibility schemes to apply to each of these three cohorts.

[23] The Schedule appears to be modelled on the list of safe countries in section 94 Nationality, Immigration and Asylum Act 2002 which allows asylum claims from designated safe countries to be certified as clearly unfounded (meaning the refusal would not have a right of appeal). However section 94 includes a safeguarding provision for cases not to be certified if the Home Secretary is 'satisfied that it is not clearly unfounded'. For example, while Jamaica is on the section 94 list, the Supreme Court found this unlawful in *R (Brown) v SSHD* [2015] UKSC 8, and these claims are not routinely certified.

Detention and bail (Clauses 11-14)

Background

Existing legislation provides very broad statutory powers to detain migrants. The courts have held that these broad powers are subject to implied limitations: in a series of cases dating back to 1983, the courts have developed the *Hardial Singh* principles, which among other things require the court to decide for itself whether a given period of detention is reasonable.[24] The courts have also held that the Home Office must comply with its detention policies, in particular its Adults at Risk policy, which has statutory force under section 59 of the Immigration Act 2016 and is designed to ensure that people who are particularly vulnerable to being harmed by immigration detention are either not detained at all or the period they are detained is minimised. The recent report of the Independent Chief Inspector of Borders an Immigration shows that there remain major problems with compliance with these policies.[25]

Subject to limited exceptions, there is no overall time limit on how long people can be detained. The Immigration Act 2014 contains limits on the time and the circumstances in which certain groups can be detained: 24 hour time-limit for unaccompanied children, and 72 hours or not more than seven days if personally authorised by a Minister for pregnant women[26] and families[27]. These provisions have very significantly reduced the detention of these groups, for whom detention is clearly inappropriate and, in many cases, will breach international human rights standards.

People in immigration detention can challenge their detention by: (a) applying for bail from the Home Office; (b) applying for bail from the First-tier Tribunal (Immigration and Asylum Chamber); (c) applying to the High Court for judicial review (because their detention breaches the *Hardial Singh* principles and/or the Home Office's detention policies); (d) applying to the High Court for a writ of *habeas corpus*. People who have been detained can bring claims for damages on the same grounds as (c) and under the Human Rights Act 1998.

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[24] *R (Hardial Singh) v Governor of Durham Prison* [1983] EWHC 1 (QB).

[25] Independent Chief Inspector of Borders and Immigration, 'Third annual inspection of 'Adults at risk in immigration detention' June – September 2022' (12 January 2023) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1128198/Third_annual_inspection_of_Adults_at_Risk_Immigration_Detention_June_to_September_2022.pdf> accessed 10 March 2023.

[26] Immigration Act 2016, s 60, imposes 72 hour time-limit or not more than seven days where a longer period of detention is authorised personally by a Minister of the Crown.

[27] Immigration Act 2014, s 6 introduced a time-limit of not more than 72 hours in pre-departure accommodation or not more than seven days in cases where the longer period of detention is authorised personally by a Minister of the Crown.

Clause 11 - Powers of detention

The effect of Clause 11 is to provide the Home Secretary with wide new discretionary powers as to where people are detained and for how long they are detained. This would place the indefinite detention of children and pregnant women in camps such as Manston on a statutory basis.

Clause 11 introduces:

- a new discretionary power exercisable by the Home Secretary to detain people who are, or who she suspects are, subject to the removal duty in Clause 2. *There are existing powers of detention that could be used for removal of individuals who have illegally entered the UK (e.g. paragraph 16(2) to Schedule 2 of the 1971 Act).*

- new powers cover the detention of unaccompanied children pending removal or pending a decision on whether to grant them leave to remain. *They would not be subject to the 7-day time limit and other protections in the 2014 Act, and, therefore, represent a significant expansion of detention powers in respect of unaccompanied minors, reversing the intention of the 2014 Act.*

- new powers to detain family members of people who are or may be subject to the Clause 2 removal duty. This includes minor children and elderly adult dependants. *This represents a very significant expansion of the powers to detain families with children, which significantly reduced following the changes made by the 2014 Act.*

- much broader discretion as to where people are detained (in Clause 11(2)). The new provision would allow detention 'in any place that the Secretary of State considers appropriate'. *Presently, the list of places where people can be detained for immigration purposes is set out in the Immigration (Places of Detention) Direction 2021. There are further restrictions in the Short-term Holding Facility Rules. This means, for example, there is a maximum seven day time limit for detention in short-term holding facilities*.

- indefinite detention of children and their families in pre-departure accommodation under the new powers. *Presently, under the 2014 Act there is a maximum of 72 hours, or seven days in cases where the longer period of detention is authorised personally by a Minister of the Crown) (Clause 11(4)).*

- powers to detain pregnant women detained under the new powers. *These would reverse the restrictions in the 2014 Act of a maximum of 72 hours (or seven days when the longer period of detention is personally authorised by a Minister of the Crown) (Clause 11(11)).*

Clause 12 - Period for which persons may be detained

Clause 12 is intended to overturn the long-established common law principle that it is for the court to decide for itself whether the detention of a person for the purposes of removal is for a period that is reasonable.[28] This is an example of the Government seeking to reverse decisions that it does not like, made by the courts, and attempting to insulate itself from judicial scrutiny. These changes would lead to an expansion of the power of administrative detention beyond anything previously seen in the state, exercisable at the whim of a civil servant, with minimal judicial oversight.

Clause 12 also creates specific statutory powers to detain where the Home Secretary considers that removal is no longer possible within a reasonable period of time 'for such further period as, in the opinion of the Secretary of State, is reasonably necessary to enable such arrangements to be made for the person's release as the Secretary of State considers appropriate'. This appears to confer more discretion than the limited 'grace period' for making such arrangements held to be lawful by the courts.

- The intention appears to be to restrict the role of the courts in providing oversight of the exercise of the statutory immigration detention powers. The Home Office already has very wide powers of detention, with no overall time limit and limited oversight by the courts. The purpose of immigration detention is to facilitate removal and there is no evidence that these changes are necessary to improve the Home Office's performance with regard to removals.

- If they achieve their intended purpose, they will mean the Home Office can continue to detain people where, for example, they are not pursuing removal diligently.

- Clause 12 also appears to be intended to breach Article 5 ECHR. The *Hardial Singh* provisions only do what Article 5 requires: 'they require that the power to detain be exercised reasonably and for the prescribed purpose of facilitating deportation'.[29] As Lord Chief Justice Thomas held, 'It is this objective approach of the court which reviews the evidence available at the time that removes any question that the period of detention can be viewed as arbitrary in terms of Article 5 of the European Convention on Human Rights'.[30]

- This applies to all forms of detention, not just those who have arrived illegally. For example, it is intended to allow a software engineer who overstayed her visa to be detained for far

[28] EN, para 88.
[29] *R (Lumba) v SSHD* [2011] UKSC 12 at [30].
[30] *SSHD v Fardous* [2015] EWCA Civ 931 at [43].

longer than a suspected terrorist with far less judicial oversight. This is particularly concerning given how extraordinarily complex[31] the Immigration Rules are.

- The combination of the attempts to weaken or remove basic common law protections at the same time as removing basic human rights protections is very troubling.

Clause 13 - Powers to grant immigration bail

Clause 13 would mean that the First-tier Tribunal is unable to grant bail to a person detained under the new powers in Clause 11 for the first 28 days they are detained. It is a further example of the Home Office attempting to insulate decisions from judicial scrutiny. These provisions will likely lead to a significant amount of litigation.

- This is an attempt to severely restrict the jurisdiction of the High Court to review the detention of people held under the new powers for the first 28 days. Presently, as set out above, an individual can challenge their detention in judicial review proceedings on the basis it breaches the *Hardial Singh* principles or the Home Office's detention policies. This Clause purports to restrict the High Court's jurisdiction in judicial review proceedings to situations where the Home Office acts in bad faith or 'in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice' (Clause 13(4)).

- Only the right to apply for a writ of *habeas corpus* is preserved (or any other prerogative remedy[32]). However, it is difficult to see how the writ of habeas corpus can assist – habeas corpus is traditionally a remedy for situations where there is no detention power; it does not generally assist where there is a power that is being used unlawfully. The purpose of this clause appears to be preventing a remedy in the form of release where detention is unlawful.

- Although the Explanatory Notes suggest there will 'be no restriction on an individual's ability to claim damages in relation to unlawful detention, including in respect of the first 28 days of detention'[33] this is not understood: either the ouster clause achieves its purpose in restricting the grounds on which detention can be challenged or it does not.

[31] *Pokhriyal v SSHD* [2013] EWCA Civ 1568 per Jackson LJ, at [4]: '*The rules governing the PBS are set out in the Immigration Rules and the appendices to those rules. These provisions have now achieved a degree of complexity which even the Byzantine Emperors would have envied.*'

[32] EN, para 94 refers to this as 'or the equivalent procedure in Scotland'.
[33] EN, para 94.

Clause 14 - Disapplication of duty to consult Independent Family Returns Panel

The removal of the safeguard of the duty to consult with the Independent Family Returns Panel increases the risk of decisions being made without adequate regard to the best interests of children and on an arbitrary basis.

Clause 14 provides that the duty to consult with the Independent Family Returns Panel on safeguarding and promoting the welfare of children does not apply in relation to decisions to return or detain families with children covered by Clauses 2 and 8.[34] The Independent Family Returns Panel is designed to ensure that the best interests of children are properly taken into account when decisions to remove and detain families with children are considered.

[34] Clause 14 incorrectly cross-refers to 'section 7' rather than 'section 8' of the Illegal Migration Act 2023.

Unaccompanied children (Clauses 15-20)

Introduction

UK law currently states that local authorities and other specified agencies providing services to children and those exercising any function of the Home Secretary in relation to immigration, asylum, or nationality to children in the UK must make arrangements for ensuring that their functions and any services are discharged having regard to their duty to safeguard and promote the welfare of children.[35] The Guidance issued to decision-makers dealing with children advised that 'Every child matters even if they are someone subject to immigration control'.[36] The substantive outcome sought to be achieved – the safeguarding and promotion of all children's welfare – is outlined as,

- *protecting children from maltreatment*
- *preventing impairment of children's mental and physical health or development*
- *ensuring that children grow up in circumstances consistent with the provision of safe and effective care*
- *taking action to enable all children to have the best outcomes*.[37]

These protective arrangements intended for all children will effectively be withdrawn for children arriving or entering the UK after 7 March 2023 'in breach of immigration control'. The children affected may have entered with their families, or are unaccompanied, or are born in the UK to parents in breach of immigration control as defined in the Bill. These children are to be:

[35] The Children Act 2004 ('CA 2004') ss10, 11. The Children Act 2004 duties are placed on a range of institutions and individuals including local authorities and district councils, NHS organisations; the police, Governors/Directors of Prisons and Young Offender Institutions; Directors of Secure Training Centres and Youth Offending Teams/Services. See also Children (Scotland) Act 1995, ss16, 17, 22; Borders, Citizenship and Immigration Act 2009, s55.

[36] Home Office UK Border Agency and Department for Children, Schools and Families, 'Every Child Matters: Change for Children' (November 2009) [2.7] <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257876/change-for-children.pd> accessed 10 March 2023.

[37] See the Children Act 2004 statutory guidance: HM Government, 'Working together to safeguard children: A guide to inter-agency working to safeguard and promote the welfare of children' (March 2015, last updated 1 July 2022) pages 6-7 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/942454/Working_together_to_safeguard_children_inter_agency_guidance.pdf> accessed 10 March 2023. This is guidance issued under (inter alia) the Local Authority Social Services Act 1970 and the Children Act 2004.

- denied the right to seek refugee and human rights protection and protection as victims of trafficking;
- can be held in immigration detention;
- placed in unregulated (and, therefore, unsafe) accommodation;
- will be removed from the UK at age 18, or earlier if with their family;
- denied access to British citizenship registration arrangements open to other children; and
- denied appeal rights concerning their protection and human rights claims.

The children affected by these discriminatory arrangements are shown to be highly vulnerable. Some are very young. In 2021, there were 4,382 asylum applications by unaccompanied children, with 30% known to be aged 15 or younger.[38] For these vulnerable children, the Bill's proposed arrangements deny refugee and human rights protection and recovery from trafficking, and prolong their fears and insecurity by denying them the reassurance that they have found safety.

Their removal at age 18 exposes them to real risk. As noted by the Court of Appeal, '*It is not easy to see that risks of the relevant kind to a person who is a child would continue until the eve of that [18th] birthday, and cease at once the next day.*'[39]

Clauses 15 - Accommodation and other support for unaccompanied migrant children

- **Undermining the Children Act:** Clause 15 permits the Secretary of State to provide, or arrange for the provision of accommodation in England for unaccompanied children in England. The Explanatory Note states that Clause 15 '*does not require the Secretary of State to provide this accommodation but provides the power to do so'*, including allowing the Secretary of State to ask a third party to provide this accommodation to children.[40] The Clause contains no time limit on how long any child spends in Home Office accommodation.

[38] Refugee Council, 'Children in the Asylum System' (November 2022) <https://www.refugeecouncil.org.uk/wp-content/uploads/2023/02/Children-in-the-Asylum-System-Nov-2022.pdf> accessed 10 March 2023. See also: Home Office, 'National Statistics: How many people do we grant asylum or protection to?' (Updated 3 March 2022) <https://www.gov.uk/government/statistics/immigration-statistics-year-ending-december-2021/how-many-people-do-we-grant-asylum-or-protection-to#asylum-applications> accessed 10 March 2023.

[39] *DS (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 305 at [54].

[40] EN, para 100.

- **Scope:** The Explanatory Note states that '*These powers do not apply to unaccompanied migrant children outside the scope of the duty to make arrangements for removal*'.[41] However, that limitation is not expressly stated on the face of the Bill. If that is the intention it should be stated.

- **Clause 15 and the following clauses fundamentally undermine the legal protections in the Children Act 1989** ('CA 1989') for unaccompanied migrant children. The legal duties in CA 1989 are critical for ensuring the safeguarding and wellbeing of unaccompanied migrant children.

- **Clause 15 sets no standards, safeguards, or protective obligations for the Home Office provided accommodation for children**. As the law stands, accommodation provided for children under section 20 CA 1989 must be 'suitable'.[42] Accommodation provided to children aged 15 and younger accommodated under section 20 CA 1989 must be regulated.[43] Home Office provided child accommodation should be held to these safety standards.

- **The Clause seeks to validate and extend the unlawful Home Office practice over past years of accommodating children – including very young unaccompanied children in hotels – some for extended periods**. Ministerial responses to Parliamentary Questions cited by ECPAT UK[44] stated that 890 unaccompanied asylum seeking children were accommodated by the Home Office without a local authority assuming responsibility for them from 14 July 2021 to 22 November 2021, 361 from 23 November 2021 to 22 February 2022,[45] and 355 from 22 February 2022 to 1 June 2022.[46] It has been reported that '116 children disappeared between July 2021 and August 2022, after temporarily being put in hotels by the Home Office' according to data 'released by the Home Office following Freedom of Information

[41] EN, para 97.

[42] Children Act 1989, s 20(1)(c).

[43] Children Act 1989, s 22C; The Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021). Children aged 15 or younger can only be placed with a relative or friend, foster parent, in a children's home or, when approved, a care home, a hospital, residential family centre, school providing accommodation or an establishment that provides care and accommodation for children as a holiday scheme for disabled children.

[44] ECPAT UK, 'Outside the frame: Unaccompanied children denied care and protection' (June 2022) 4 <https://www.ecpat.org.uk/Handlers/Download.ashx?IDMF=4c15dae8-d91a-4931-acfc-48119e4a77aa> accessed 12 March 2023.

[45] 'Asylum: Children Question for Home Office' (tabled on 18 February 2022, answered on 21 March 2022 <https://questions-statements.parliament.uk/written-questions/detail/2022-02-18/125192/> accessed 12 March 2023.

[46] 'Asylum: Children Question for Home Office' (tabled on 1 June 2022, answered on 22 June 2022) <https://members.parliament.uk/member/4277/writtenquestions?page=4#expand-1467395> accessed 12 March 2023.

requests', with 'some as young as 11'.[47] Case experience shows that traffickers monitor hotels and hostels where unsupervised children are known to be living. It is generally assumed missing children from these hotels and hostels have been taken by traffickers or when living on the street will be recruited by traffickers. There is general agreement that such missing children are at real risk of exploitation and abuse.

- **No support:** No details are provided in the Bill or the Explanatory Note about what 'other support' is required for Home Office accommodated children. The Explanatory Note in a dismissive tone suggests, '*It is for the local authority where an unaccompanied child is physically located to consider its duties under the Children Act 1989'.*[48]

- **No Time limit:** The Explanatory Note provides that '*the policy intention is that their stay is a temporary one until they transfer into local authority care'.*[49] However, there is no time limit on the face of the Bill.

Clause 16 - Termination of children's 'Looked After' care status

Clause 16(5)-(6) creates a power for the Home Secretary to decide a 'looked after' child is to cease being 'looked after' by the local authority in England, and 'must direct' the local authority to cease looking after the child on the transfer date.

- **Scope:** The Explanatory Note states that this *'power can also be used where the child has not previously been in Home Office provided accommodation, for example where they first entered a local authority care placement upon arrival to the UK'.*[50] It also states, '*These powers do not apply to unaccompanied migrant children outside of the scope of the duty to make arrangements for removal*'.[51] Again this last observation is not included in the Bill.

- Children are 'looked after' when they are within the local authority area, in need, and appear to the local authority to require accommodation as a result of there being no person who has parental responsibility, the child being 'lost or abandoned', or the person who has been caring for that child being prevented (whether or not permanently, and for whatever reason) from providing the child with suitable accommodation or care.[52] Section 20 CA 1989 imposes a duty on local authorities to provide accommodation for such children in need. A

[47] Sima Kotecha, BBC News '116 children disappeared between July 2021 and August 2022, after temporarily being put in hotels by the Home Office' 13 October 2022 <https://www.bbc.co.uk/news/uk-63231470> accessed 12 March 2023.
[48] EN, para 101.
[49] EN, para 100.
[50] EN, para 103.
[51] EN, para 102.
[52] CA 1989, s 20.

child who has been in the care of a local authority for more than 24 hours[53] becomes a 'looked after' child and the local authority assumes a range of duties to safeguard and promote the welfare of a child, including care and support planning.

- **The 'looked after' decision is outside the Home Secretary's competence and knowledge base**. The duties are well-established and local authorities have the institutional expertise to support unaccompanied migrant children. The Home Office does not. This was expressly recognised by the Divisional Court in February 2023:

  > *… unlike local authorities, the Home Office and its officials do not have the facilities, the skills, or the legal powers and duties to look after children pursuant to the Children Act 1989. It is plainly not in the best interests of [unaccompanied asylum seeking] children to be accommodated, at any rate for more than very short periods, in hotels or immigration reception centres.*[54]

- The proposed clauses cannot lawfully stand. The decision necessary for 'looked after' status is that the child is in need. This is a decision outside the competence and knowledge of the Secretary of State. It is a decision the Children Act 1989 reserved to local authorities. The proposed clause is deleterious to vulnerable children. It is also discriminatory: the loss of 'looked after' status affects children's access to the important safeguards and protections associated with that status.

Clauses 17-18 - Information gathering

- **These clauses could undermine the child protection functions of local authorities**, depending on the information sought by the Home Office. Clause 17(2) lists the Home Secretary may direct a local authority to provide: 'information about the support or accommodation provided to children who are looked after by the local authority' and 'such other information as may be specified in regulations made by the Secretary of State'. Parliament should provide parameters for the latter information – namely it should be 'such other information necessary for the provision of support or accommodation as may be specified in regulations made by the Secretary of State'.

- Social work care and protection functions require the trust of children in their care. Their protective role is undermined if children fear their confidences could be disclosed to Home Office staff.

[53] CA 1989, s 22(2).
[54] *R* (*Medway Council) v Secretary of State for the Home Department* [2023] EWHC 377 (Admin) at [39].

Clause 19 - Extension to Wales, Scotland and Northern Ireland

- **Overreach into devolved matters**: The Bill appears to empower the Home Secretary to extend the provisions of the Bill regarding unaccompanied migrant children to all nations in the United Kingdom. This would require interfering with devolved matters. For example, Part 6 of the Social Services and Well-being (Wales) Act 2014 replaced the Children Act 1989 regarding 'looked after' children in Wales.

- **Broad delegated power:** This is a broad delegated power that allows the Home Secretary to amend 'any enactment', including this Bill and other primary legislation such as important constitutional statutes governing devolution, by way of regulations. Although these regulations would be subject to the affirmative resolution procedure, this still represents minimal Parliamentary scrutiny.

Clause 20 - Extension of the National Transfer Scheme

- The National Transfer Scheme aims to ensure a more equitable sharing of responsibilities for looked after migrant children, by allowing local authorities to transfer responsibility of children to other local authorities. The Clause includes the cohort, created by the Bill, of inadmissible unaccompanied children in that arrangement.

Modern slavery (Clauses 21-28)

It is unarguably clear that the clauses of the Illegal Migration Bill dealing with modern slavery and trafficking breach the UK's obligations to victims of trafficking under Article 4 ECHR and the European Convention on Action against Trafficking ('ECAT'). These provisions will deprive victims of their rights to recovery, expose them to re-exploitation, and facilitate the work of trafficking gangs.

What is the impact of Clauses 21-28?

What protections do victims of trafficking and modern slavery currently receive?

Currently, many asylum seekers who enter the UK without leave to do so are victims of trafficking or modern slavery. They may be referred into the National Referral Mechanism ('NRM'), the UK's body for identifying and protecting victims of trafficking and modern slavery. A preliminary 'reasonable grounds' decision is made to a low standard of proof, following which most individuals are recognised as potential victims and allowed to remain in the UK, with financial support and accommodation, until they receive a final 'conclusive grounds' decision, which is made on the balance of probabilities. Home Office statistics for 2022 show the vast majority of both 'reasonable grounds' and 'conclusive' grounds decisions to be positive.[55]

Victims awaiting a conclusive grounds decision are not permitted to work or access public funds. However, they are protected from removal from the UK and are provided with accommodation, minimal financial support, and the assistance of a support worker to facilitate their recovery. After a positive conclusive grounds decision, recognised victims may be granted leave to remain in the UK, usually with a right to work and to access public funds.

[55] Home Office, 'Official Statistics: Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK, end of year summary 2022' (published 2 March 2023) <https://www.gov.uk/government/statistics/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2022/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2022#national-referral-mechanism-decisions> accessed 12 March 2023. This summary notes that: 'the competent authorities issued the highest number of reasonable and conclusive grounds decisions in 2022, with almost 17,000 reasonable grounds and just over 6,000 conclusive grounds decisions made; of these, 88% of reasonable grounds and 89% of conclusive grounds decisions were positive'; 'The proportion of positive reasonable grounds decisions was 87% for adult and 90% for child potential victims (data table 16). The proportion of positive decisions has remained relatively similar in recent years, with around 9 out of every 10 referrals receiving a positive decision.'; and 'The proportion of positive conclusive grounds decisions was 87% for adult and 92% for child potential victims (data table 19).'

What does the Bill do?

The Bill removes almost all protections for victims of modern slavery and trafficking who are targeted for removal.

For a person targeted for removal under Clause 2, who the Home Office decides to be a potential victim of trafficking, Clause 21 would make it so that:

1. There is no obligation to grant such potential victims leave to remain; and

2. They may be removed from the UK before a conclusive grounds decision is made.

There is a narrow exception for some individuals who are cooperating with investigations or criminal proceedings relating to their exploitation, if the Home Secretary considers it 'necessary for the person to be present in the United Kingdom to provide that cooperation'.[56] This is likely to benefit a very small number of individuals, especially as the Home Office's own statutory guidance recognises that many victims do not feel safe enough to do so until they have had the time to recover from their exploitation.[57]

Is this legal?

Article 4 ECHR and ECAT both prohibit slavery and trafficking and place positive obligations on the UK to protect victims of trafficking and to prevent their exploitation. Article 4 ECHR is not a right from which the UK can derogate in times of emergency.[58]

States are obliged to set up a '*spectrum of safeguards [which] must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking*'.[59] The positive 'protection' duty has *'two principal aims: to protect the victim of trafficking from further harm; and to facilitate his or her recovery'*.[60]

It is clear that the measures proposed in this Bill exclude most victims of trafficking and modern slavery from recovery and expose them to a substantial risk of re-exploitation. In particular, victims will not be given time in a place of safety to recover from their experiences and they will

[56] Illegal Migration Bill, Clause 21(3)(b).

[57] Home Office, 'Modern Slavery: statutory guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and non-statutory guidance for Scotland and Northern Ireland' (updated 3 March 2023) page 144 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139341/Modern_Slavery_Statutory_Guidance__EW__Non-Statutory_Guidance__SNI__v3.1.pdf> accessed 10 March 2023.

[58] Article 15(2) ECHR.

[59] *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 [284].

[60] *VCL and AN v UK* (App. Nos. 74603/12 and 77587/12) [159].

face return either to their countries of origin or unfamiliar third countries, where they are liable to be re-exploited. The lack of any incentive to come forward as a victim of trafficking will also prevent victims assisting in police investigations into their traffickers, thereby facilitating rather than stopping trafficking.

The ECHR Memorandum[61] published with the Bill states that the Government believes its provisions can be applied compatibly with Article 4 ECHR and ECAT. This is plainly incorrect:

1. The compliance with ECAT is *'premised'* on deeming all victims of trafficking who fall within these measures as a '*threat to public order*',[62] which they are not. There is no basis in law for such a wide use of that provision.

2. Victims targeted by Clause 2 will receive no support for their recovery or protection in the UK; conversely, they will be detained and face removal to unknown third countries.

3. The only exception to these measures for a person who falls within them is to make a claim that they would face a real risk of serious and irreversible harm on removal; this is much more restrictive than the standards to be applied under the ECHR and ECAT.

These provisions would eradicate protections for victims of trafficking and modern slavery in the UK, enabling trafficking gangs and undermining the UK's anti-slavery efforts. It is a flagrant breach of international and domestic law.

[61] Home Office, 'Illegal Migration Bill: European Convention on Human Rights Memorandum' (7 March 2023) <https://publications.parliament.uk/pa/bills/cbill/58-03/0262/ECHR%20memo%20Illegal%20Migration%20Bill%20FINAL.pdf> accessed 10 March 2023.

[62] ECHR Memorandum, [45].

Entry, settlement and citizenship (Clauses 29-36)

Introduction

The proposed measures lock out certain people, including children, present in the UK, from securing lawful re-entry, residence, and/or citizenship. They dovetail with the proposed duty on the Home Secretary to remove certain people from the UK.

The narrow exceptions or saving provisions come nowhere near rescuing those affected from breaches of their fundamental rights.

In practice, the people affected will be locked out by legislation, which will be likely applied in a blanket fashion by Home Office decision-makers. Thereafter, the people affected will have to scramble to secure advice and representation and make submissions to relieve themselves from being placed outside the law regulating lawful residence.

The result will be to create a large class of people, present in the UK, but without any hope of securing lawful status. In reality, there will be a permanent population of people present in the UK but with no access to procedures for regularising their status. This denizen sub-class, and their UK-born children, will be condemned to a life without the ability to live meaningful lives from the fruits of their own work and effort: unable to work, unable to rent, and with no route to integration and acceptance. It will be a life so arid as to be without basic dignity; it will be a life of degradation.

The exclusion from UK entry and residence

All the people to whom the proposed measures apply (noting that the Home Secretary will be under a duty to remove them), as well their family members (partners, children, adult dependent relative etc.):

1. cannot be given permission to enter or remain in the UK (subject to narrow exceptions for unaccompanied children and victims of modern slavery or human trafficking), and
2. cannot be given permission to travel to the UK by way of entry clearance or an electronic travel authorisation (ETA).

In respect of subsequent conferral of permission to travel or time-limited permission to enter or remain, there are narrow exceptions where the Home Secretary considers it necessary as the UK is bound by an international treaty such as the ECHR, or where she considers there are *'compelling circumstances'* for that person that render it appropriate to grant permission. As

regards conferral of indefinite leave, the discretion is limited to where the Home Secretary considers it necessary as the UK is bound by an international treaty such as the ECHR.

Immigration Rules will be required to provide that applications that do not engage with one of the above exceptions, will be treated as void and will not be considered. The proposed measures ignore the existing safeguards to refuse individual applications under the General Grounds of Refusal on grounds of character, conduct, or association.[63]

Exclusion from access to British nationality

The proposed measures exclude people from access to four classes of British nationality: British citizenship, British overseas territories citizenship, British Overseas citizenship, and British subject status. To understand what is proposed, it is necessary only to consider the proposals in respect of British citizenship.

The proposed measures apply to all the people to whom the proposals apply (noting that the Home Secretary will be under a duty to remove them), as well to children born in the UK on or after 7 March 2023 who have such a parent.

Those affected are excluded from a raft of existing provisions for those applying to register as British citizens *by entitlement*: including from registration provisions for children where one parent secures indefinite leave in the UK, for children who have been UK born and thereafter raised in the UK for 10 years, and for children born overseas to a British citizen parent (who has that status only by descent) who subsequently come to the UK with their parents as a family.

Those affected are also excluded from a raft of existing provisions for those applying to be British citizens *at discretion*, including from the provision to register any minor, and provisions for adults to naturalise on the basis of UK residence.

As regards UK-born children, as well as children arriving in the UK, such measures plainly contradict the requirement to consider a child's 'best interests' as a primary obligation as required by section 55 of the Borders, Citizenship, and Immigration Act 2009, and as underpinned by Article 3 of the 1989 UN Convention on the Rights of the Child.

Further, as regards adults as well as children, the proposed measures ignore the existing safeguards to refuse individual applications for citizenship either at discretion or on grounds of a failure to meet a 'good character' test.

[63] For example, Immigration Rules, Part 9.

Legal Proceedings (Clauses 37-48)

What Clauses 37 to 48 seek to achieve

Clauses 37 to 48 seek to define and limit the circumstances in which legal proceedings will have the effect of suspending removal of a person falling within Clause 2 or Clause 8. All other legal proceedings not addressed in Clauses 37 to 48 will be non-suspensive.

Clauses 40-41

Clause 40 creates '*serious harm suspensive claims*' and Clause 41 creates '*factual suspensive claims*'. Once a person receives a notice that they are to be removed, they have seven days to claim that removal should be suspended under one of these two categories.[64]

To come within Clause 40, a person must show that removal would cause '*serious irreversible harm*' and, further, that the harm would arise before the period it will take for their human rights claim to be decided,[65] including the time for judicial review[66] to be concluded. Clause 38 provides that the Secretary of State '*may*' define the term '*serious irreversible harm*' in regulations.

To come within Clause 41 a person must show that the Secretary of State or immigration officer has made a factual mistake in deciding that the person meets the removal conditions.[67]

Both Clause 40 and 41 state that '*compelling*' evidence must be provided, in a form and manner yet to be prescribed, containing information yet to be prescribed.[68]

The Secretary of State must then make a decision 'within 3 days following receipt of the claim',[69] unless the decision period is extended. The decision maker may do one of three things:

1. accept the claim, in which case the person will not be removed;
2. refuse the claim;
3. refuse the claim and also certify that it is '*clearly unfounded'.*

[64] EN, para 176.
[65] Clause 40(2)(a).
[66] See definition of 'relevant period' in Clause 37(9).
[67] Clause 41(2)(a).
[68] Clauses 40(5)(a) and 41(5)(a). These, too will be prescribed in regulations made by the Secretary of State.
[69] EN, para 178.

Clause 42 and 47 - Appeal to the Upper Tribunal

Where the Secretary of State decides that removal will not cause '*serious irreversible harm*' or that a factual error has not been made, and has not certified the claim under Clause 40(3) or Clause 41(3) as *'clearly unfounded,'* the person can bring an appeal but only to the Upper Tribunal.

Under Clause 47(1) the appeal must be brought within six working days. The only available grounds of appeal are that the person would face '*serious irreversible harm*' in the safe third country, or that a mistake of fact occurred and 'compelling' evidence must be provided in the notice of appeal.

A decision must then be made by the Upper Tribunal within 22 working days (Clause 47(1)(b)). Time limits can be extended by the Tribunal 'if it is satisfied that it is the only way to secure that justice is done in a particular case' (Clause 47(4)).

Onward appeal is to the Court of Appeal or Court of Sessions.[70]

Clause 43 - Permission to appeal against clearly unfounded certificates

Where the Secretary of State certifies a claim under Clause 40(3) or Clause 41(3) as '*clearly unfounded',* Clause 43 provides that permission to appeal must first be sought from the Upper Tribunal. There is no automatic right of appeal, and the thresholds are raised:

- For a serious harm suspensive claim, the Upper Tribunal may grant permission '*only'* if it considers there is *'compelling'* evidence that the person would face an '*obvious and real risk*' of '*serious and irreversible harm'*.[71]
- For a factual suspensive claim, the Upper Tribunal may grant permission '*only'* if it considers there is *'compelling'* evidence *'that the Secretary of State or an immigration officer made a mistake of fact in deciding that the person met the removal conditions*'.[72]

Permission hearings will be on the papers only, unless the Upper Tribunal considers an oral hearing is necessary for justice to be done in a particular case.[73] There is no right of onward appeal, and very limited scope for judicial review given the ouster in Clause 48.

[70] Clause 42(7).
[71] Clause 43(3).
[72] Clause 43(4).
[73] Clause 43(5).

Clause 44 - Suspensive claims out of time

There are only seven days to bring an in-time suspensive claim. This is an extremely short period of time for a person without a legal representative to find one, give instructions, gather evidence, and make the suspensive claim.

If a person fails to meet the seven-day timeframe, they must provide *'compelling reasons'* why they did not claim in-time. If the Home Secretary decides there were not compelling reasons, a person can apply to the Upper Tribunal for a declaration that there were such reasons.

There is no right of appeal, and limited grounds for judicial review (given the ouster in Clause 48), if the Upper Tribunal finds there were no such reasons.

Clause 45 - Suspensive claims: duty to remove

Under Clause 45 removal is suspended in the following circumstances:

- where a person has made an in-time suspensive claim, removal is suspended until the Secretary of State has made a decision on the claim;
- where a person has made an out-of-time suspensive claim, removal is suspended until the Secretary of State has made a decision on whether there were compelling reasons the claim was out-of-time;
- where a person has made an out-of-time suspensive claim and the Secretary of State considers there were no compelling reasons for an out-of-time claim, removal is suspended until either the person has applied to the Upper Tribunal for a declaration that there were compelling reasons for an out-of-time claim, or the period for making such an application has expired;
- where a person has made an out-of-time suspensive claim and the Secretary of State considers there were compelling reasons for an out-of-time claim or the Upper Tribunal grants an application under Clause 44(4) requiring the Secretary of State to consider the out-of-time claim, removal is suspended until the Secretary of State has considered the substantive claim;
- where the Secretary of State has refused a suspensive claim and has not certified the claim as clearly unfounded, removal is suspended until any appeal is determined or the time for lodging an appeal has expired.

Clause 46 - Upper Tribunal consideration of new matters

Under Clause 46(2) the Upper Tribunal can take into account any matter it considers relevant to the substance of the decision, but under Clause 46(3) the Upper Tribunal may not consider '*new matters*' without the permission of the Home Office. If the Secretary of State refuses permission to consider the '*new matters*', Clause 46 provides that the person may apply by written submissions and evidence to the Upper Tribunal for a declaration that there ***were*** compelling reasons why the details of the new matter were not provided sooner.[74] If a declaration is granted, the Home Secretary must grant consent for consideration of the new matter as part of the substantive appeal.[75] If a declaration is refused on the papers there is no oral renewal, and the decision is not subject to appeal to the Court of Appeal or Court of Sessions.[76]

Clause 48 - Finality of certain decisions by the Upper Tribunal

Clause 48 sets out an 'ouster clause' which limits the grounds on which certain decisions of the Upper Tribunal can be challenged in the High Court or Court of Session. The decisions of the Upper Tribunal that this clause would insulate from challenge relate to:

1. applications for permission to appeal (under Clause 43(2)) against the refusal of a suspensive claim which has been declared *'clearly unfounded'*;
2. applications for a declaration (under Clause 44(4)) that there were *'compelling reasons'* a person made a suspensive claim after the end of the claim period but before removal;
3. applications for a declaration (under Clause 46(6)) that there were *'compelling reasons'* for a person who has raised a new matter in the course of an appeal (under Clause 42(2)) or application (under Clause 43(2)) not to have provided details of the matter to the Secretary of State before the end of the claim period.

But for this Clause, these decisions of the Upper Tribunal would fall within the supervisory jurisdiction, exercised through the judicial review procedure.

As a result, these decisions can only be challenged in extremely limited circumstances set out in Clause 48(4), which disapplies this ousting so far as the decision involves or gives rise to any question as to whether:

- the Upper Tribunal has/had a valid application before it (under Clause 43(2), 44(4) or 46(6)) or is/was properly constituted for the purpose of dealing with the application;

[74] Clause 46(7).
[75] Clause 46(8).
[76] Clause 46(9).

- the Upper Tribunal is acting or has acted in bad faith, or in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice.

Such ouster clauses have long been subject to robust treatment in the courts.[77] Explicit, unambiguous language is required. This reflects the constitutional importance of access to judicial review: *'the scope of judicial review is an artefact of the common law whose object is to maintain the role of – that is to ensure that, within the bounds of practical possibility, decisions are taken in accordance with the law, in particular the law which Parliament has enacted, and not otherwise'*.[78] The language in Clause 48 does seem unambiguously intended to oust the jurisdiction of the High Court and Court of Session. Clause 48(3) appears intended to put this beyond doubt, confirming that the Upper Tribunal is not to be regarded as having exceeded its powers as a result of any error made in reaching the decision.

The consequences of such an ouster of jurisdiction are extremely serious. One can have full respect for the institutional expertise of the Upper Tribunal and still admit the possibility that it may lapse into error in a given case. One can also admit the possibility that the decisions of higher courts may be required to correct that error. If this ouster clause is enacted, the question will arise as to whether there is a meaningful method to challenge these Upper Tribunal decisions.

Key Problems with Clauses 37 to 48

- **Restriction of judicial oversight:** Even where appeal rights exist, these are only to the Upper Tribunal, with entire categories of decision unchallengeable due to the ouster in Clause 48.

- **Timescales are unreasonably short:** The restriction of judicial oversight is especially concerning because the timescales imposed on both the individual and the Home Secretary are unreasonably short. It is foreseeable that many people will struggle to express themselves in English let alone to make '*compelling*' written representations, meeting the form and content yet to be prescribed, while detained and without access to a lawyer only seven days after being served a notice of removal. This is a wholly unreasonable burden on a claimant. The requirement for the Secretary of State to consider those representations within just three days is likely to lead to hurried and low-quality decision making, rubber-stamping rejections. When shortened timescales in the area of asylum decision making have been attempted in the past, they have led to the higher courts finding an unacceptable risk of unfairness in the system, and the suspension of fast-track systems. The

[77] *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491.

[78] *R (Cart) v Upper Tribunal* [2011] UKSC 28 at [37].

proposed timescales, and tests, combined with the lack of judicial oversight, build in unfairness.

- **There does not appear to be any provision for making a fresh claim that removal would result in '*serious irreversible harm*'**: Any new evidence, no matter how compelling, has to meet the cumbersome requirements relating to '*new matters*' requiring permission of the Home Secretary, proof of '*compelling*' reasons for lateness, and may require a declaration of the Upper Tribunal. Where fundamental rights and a test of '*serious irreversible harm*' are in play, new evidence should simply be accepted, if credible, without having to meet additional hurdles. These unnecessary hurdles will only add to the workload of all parties and the Upper Tribunal.

- **Most cases are likely to be argued under Clause 40:** It is foreseeable that most claims for suspension of removal will be made under Clause 40, rather than under Clause 41, because it is likely to be clear whether someone entered after 7 March 2023 without leave.

- **Clause 40 creates a new test and will lead to litigation of that test:** Although the term '*serious irreversible harm*' is derived from the case law of the European Court of Human Rights and already appears in the Immigration Act 2014, that Act provides for '*serious irreversible harm*' to be an example of when removal might be unlawful, rather than setting out the sole test. The Supreme Court considered the 2014 Act in *Kiarie and Byndloss* [2017] UKSC 42 but did not have to define what '*serious irreversible harm*' meant. Setting '*serious irreversible harm*' as a new statutory test will inevitably lead to litigation on the meaning of the test and will likely conflict with ECHR protections.

- **Provision for Secretary of State to define test '*serious irreversible harm*' through Regulations:** This provision is extremely concerning, especially set against the restrictions of judicial oversight and the unreasonably tight timeframes for making a Clause 40 or Clause 41 suspensive claim. It can be anticipated that the Home Secretary will only see a need to define the test through Regulations in response to disagreement with judicial interpretation. Any definition given by the Home Secretary is very likely to be incompatible with ECHR protections and judicial interpretation in other case law. This Clause hands power to the executive to define and limit the scope of fundamental rights without any Parliamentary scrutiny.

- **Upper Tribunal workload:** The provisions will impose a huge burden on the resources of the Upper Tribunal and Court of Appeal while removing all appeals to the specialist First-tier Tribunal. Due to restricted rights of review and appeal, some individuals will only have a single bite at the cherry.

- **Absence of right to legal advice and representation**: The provisions do not set out any right to legal advice and representation. Other provisions in the Bill indicate that individuals will be attempting to make representations while detained. People are very likely to be attempting to meet these new legal tests without any advice whatsoever.

Clause 49 - Interim measures of the European Court of Human Rights

49 Interim measures of the European Court of Human Rights

(1) The Secretary of State may by regulations make provision about interim measures indicated by the European Court of Human Rights as they relate to the removal of persons from the United Kingdom under this Act.
(2) Regulations under subsection (1) may in particular make provision about the effects of such measures in relation to—

(a) the duty in section 2 to make arrangements for the removal of a person from the United Kingdom;
(b) the power in section 3 to make arrangements for the removal of a person from the United Kingdom;
(c) the removal of a member of the family of a person mentioned in paragraph (a) or (b) from the United Kingdom in accordance with section 8;
(d) any claim made by a person in relation to their removal from the United Kingdom under this Act.

(3) In this section "claim" includes any claim or application mentioned in section 4(1) (disregard of certain claims, applications etc).

Rule 39 of the European Court of Human Rights' Rules of Court[79] provides:

> *1. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.*

[79] European Court of Human Rights, *Rules of Court* (3 June 2022) <https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf> accessed 11 March 2023.

2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers.

3. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may request information from the parties on any matter connected with the implementation of any interim measure indicated.

4. The President of the Court may appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures.

The test for the Court to indicate a Rule 39 interim measure is one of exceptionality: only where there is an imminent risk of irreparable damage,[80] for example a threat to life or a risk of torture. For example, the ECtHR recently granted interim measures in the cases of *Pinner v Russia* and *Aslin v Russia and Ukraine (application nos. 31217/22 and 31233/22)* concerning British nationals who are members of the Armed Forces of Ukraine who surrendered to Russian forces and had been sentenced to death.[81]

A Contracting State's failure to give effect to a Rule 39 measure will occasion a breach of Article 34 ECHR, which provides:

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

In *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 494 the Grand Chamber of the ECtHR held:

128. The Court reiterates that by virtue of Article 34 of the Convention Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an individual applicant's right of application. A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of Article 34.

[80] In the case of Mamatkulov and Askarov v Turkey (2005) 41 EHRR 494, the Grand Chamber of the ECtHR stated at [104]: *'Although it does receive a number of requests for interim measures, in practice the Court applies Rule 39 only if there is an imminent risk of irreparable damage.'*

[81] European Court of Human Rights, 'European Court grants urgent measures in cases lodged by two British prisoners of war sentenced to death in the so-called "Donetsk People's Republic"' (30 June 2022) <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7374152-10078472&filename=Urgent%20measures%20in%20cases%20lodged%20by%20two%20British%20prisoners%20of%20war%20sentenced%20to%20death%20in%20the%20so-called%20Donetsk%20People%27s%20Republic.pdf> accessed 11 March 2023.

129. Having regard to the material before it, the Court concludes that, by failing to comply with the interim measures indicated under Rule 39 of the Rules of Court, Turkey is in breach of its obligations under Article 34 of the Convention.

Key Issues with Clause 49

The inclusion of this clause appears to be a response to the issue of such interim measures in cases in June 2022,[82] to constrain the transfer of individuals seeking asylum in the UK to Rwanda (for consideration of their asylum claims there).

The inclusion of the 'placeholder'[83] provision in Clause 49 in the Bill is an unnecessary and unwarranted intrusion into the role of the courts as a distinct branch of government in the constitutional order:

1. **It is unnecessary as there is no evidence of abuse.** The fact that interim measures are occasionally obtained from the ECtHR by persons resisting removal from the UK does not by itself demonstrate that the supervisory system of the ECtHR is being exploited. No evidence of any abuse has been advanced.

2. **Domestic courts have the necessary expertise to weigh up the factors bearing on whether to exercise discretion and grant interim relief.** It does not follow that interim relief must be granted by a court merely because another person in a superficially similar situation obtained an interim measure from the ECtHR.

3. **The provision creates the risk that matters material to consideration of Convention rights protection** (including the reasons given by the ECtHR on the evidence before it when making an interim measure in another case) **will go unconsidered** by a court that ought properly to be seized of it, if secondary regulations are made to that effect.

4. **The proposed measure displays a lack of respect for the legal order by which the UK has chosen to be bound in applying the ECHR and creates additional risk of non-compliance**, as it will create a power that can be exercised by making regulations to limit the effects of interim measures issued by the ECtHR.

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[82] *NSK v United Kingdom (application no. 28774/22, formerly KN v United Kingdom)*. The European Court of Human Rights also applied interim measures in the cases of two further individuals who were due to be removed to Rwanda on the same flight: *R.M. v. the United Kingdom (application no. 29080/22)* and *H.N. v. the United Kingdom (application no. 29084/22)*.

[83] EN [216].

Inadmissibility of certain asylum and human rights claims (Clause 50)

Clause 50 intends to extend the current inadmissibility process for asylum claims from EU nationals, in section 80A Nationality, Immigration and Asylum Act 2002, to cover other nationalities (Albania, Iceland, Liechtenstein, Norway and Switzerland) and to also make human rights claims inadmissible.

There are two key problems with this Clause:

1. More than half of Albanian asylum claims succeed and its inclusion on the list cannot magic away the country guidance case law and evidence that shows structural insecurities for some Albanian victims of domestic abuse, mistreatment related to sexual orientation and gender identity and expression, blood feuds, modern slavery, and targeted by organised criminals.

2. In attempting to prevent Albanian nationals from making human rights applications, Clause 50 strips from all EEA nationals and Swiss nationals the possibility of making admissible human rights applications (including on the basis of their family and private life in the UK) and removes their right of appeal.

Inclusion of Albania

It is fairly uncontroversial to have a presumption that citizens of European countries can live free from persecution in the majority of cases. Current inadmissibility law does have a safeguarding provision that permits asylum claims to be considered in *'exceptional circumstances'*.[84] The threshold for this is extremely high (such as if the country is derogating from any of its obligations under the ECHR), but it could plausibly be met in an unusual case.

The problem with having Albania on this list is that it is plainly the case that there are many genuine refugees from Albania.[85] There is binding country guidance case law[86] confirming that there can be a risk of persecution in Albania, and UK Visas and Immigration's published

[84] Nationality, Immigration and Asylum Act 2002, s 80A(4)-(5).

[85] Home Office statistics on 'Asylum initial decisions and resettlement' record 648 grants of 'Refugee Permission' in 2022 for Albanian nationals. 'Asylum applications, initial decisions and resettlement: Asy_D02: Outcomes of asylum applications at initial decision, and refugees resettled in the UK, by nationality, age, sex, applicant type, and UASC' <https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets#full-publication-update-history> accessed 11 March 2023.

[86] In the 2016 Country Guidance case, *TD and AD (Trafficked women)* (CG) [2016] UKUT 92 (IAC), the Upper Tribunal held the sufficiency of protection from the Albanian government 'will not be effective in every case' (headnote (d)).

guidance on Albania used in asylum decision-making includes country policy and information notes on human trafficking, blood feuds, sexual orientation and gender identity and expression, actors of protection, and domestic violence against women. Asylum grant rates for Albanian cases are not especially low (with a 55% grant rate in asylum initial decisions in the last quarter of 2022[87] and the percentage of successful appeals by Albanian nationals in asylum appeals determined in each quarter of 2022 ranging between 41% and 68%[88]). It is likely to undermine the high threshold of the *'exceptional circumstances'* criteria if it has to be applied in more than half of cases.

Inadmissibility of all Human Rights Claims

The problem with extending the EU asylum inadmissibility to cover human rights claims is that human rights claims are not necessarily based on a risk abroad. It makes no sense to extend safe country inadmissibility criteria to cover human rights claims. Human rights claims (unlike protection claims) are usually based on a person's connection to the UK, such as having a partner or children in the UK, being dependent on a person in the UK, or their lack of ties to the country of proposed return. The level of safety in the country of proposed return is usually not of direct relevance (if it were, the claim would usually be a protection not a human rights claim).

It is likely to cause breaches of individual rights to impose a near-blanket ban on their consideration due to the perceived safety of the country of return. An *'exceptional circumstances'* test due to the alleged safety of the country of proposed return is simply the wrong test for human rights claims.

For example, if a Swiss national in the United Kingdom on a Skilled Worker visa wished to make a private life application on the basis of her length of residence in the UK, or wished to make an application as a spouse of a British citizen, her human rights claim would be declared inadmissible (unless there were exceptional circumstances as a result of which the Secretary of State considers that the claim ought to be considered), could not be considered under the Immigration Rules, and there would be no right of appeal against that declaration. This is pure folly.

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[87] Rounded to the nearest percent. This includes both grants of protection and grants of other leave, and excludes withdrawn applications. See statistics in n 85 Asy_D02.

[88] Rounded to the nearest percent. This excluded withdrawn appeals. See Home Office, 'Asylum appeals lodged and determined: Asy_D07: Outcomes of asylum appeals raised at the First-Tier Tribunal, by nationality and sex' <https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets#full-publication-update-history> accessed 11 March 2023. See also The Migration Observatory, 'Albanian asylum seekers in the UK and EU: a look at recent data' (4 November 2022) <https://migrationobservatory.ox.ac.uk/resources/commentaries/albanian-asylum-seekers-in-the-uk-and-eu-a-look-at-recent-data/> accessed 11 March 2023.

Annual number of entrants using safe and legal routes (Clause 51)

Clause 51 requires the Home Secretary to make, by regulations,[89] an annual cap on the number of persons who can enter the UK using 'safe and legal' routes. This is a cap, not a target or a quota. It is a 'maximum number' of persons who can enter via these routes. This number may apply for several years,[90] until revised by subsequent regulations.

If the UK exceeds the cap, in any year, the Home Secretary has six months to set out the number of people who entered using safe and legal routes in that year, and explain why the cap was exceeded, in a statement laid before Parliament.

The Home Secretary has a duty to consult with local authorities and other relevant bodies, as she 'considers appropriate', before setting the cap.[91] The purpose of this is to take into account their resources particularly in relation to housing and capacity to provide integration services. The duty to consult falls away if the cap urgently needs to be changed. The Explanatory Notes state this will be 'in cases of humanitarian emergency',[92] although this is not stated on the face of the Bill.

But what is a 'safe and legal' route?

'Safe and legal' routes will be defined in regulations. This is a crucial aspect of the Bill, left to regulations subject only to the affirmative procedure. The Explanatory Notes have argued that defining the routes 'depends on a number of factors including local authority capacity and the resettlement routes offered at the time of the regulations'.[93]

Although the Explanatory Notes state that it 'will not include those on work, family or study routes',[94] this is not stated on the face of the Bill.

- **Bespoke Schemes:** There is nothing in the Bill or Explanatory Notes that would prevent Regulations including the bespoke resettlement schemes for Hong Kong, Afghanistan and Ukraine:

[89] The regulations are subject to the affirmative procedure, per Clause 54(4)(l).
[90] EN, para 220.
[91] Clause 51(2).
[92] EN, para 220.
[93] EN, para 221.
[94] EN, para 220.

- In 2022, 210,906 were granted under the Ukraine routes, and from 31 January 2021 to the end of 2022, there have been 129,415 grants on the Hong Kong route.[95] Therefore, if an annual cap was set at, for example, 50,000 people, it would be exceeded by these 'safe and legal' routes for Hong Kong and Ukraine, without the UK being able to resettle a single vulnerable and persecuted person from any other country (unless the Home Secretary wished to have to explain to Parliament her reasons for exceeding the cap).

- Therefore, if the Afghan Citizens Resettlement Scheme (subject to its own 5-year cap of 20,000) were included in the definition of 'safe and legal' routes, this may serve to further defer operationalisation of its third pathway for vulnerable women, girls, and minorities at risk.[96] Similarly, if the uncapped Afghan Relocations and Assistance Policy were included in the definition of 'safe and legal' routes, this may serve as a *de facto* cap on the scheme for those who worked for or with the UK Government in Afghanistan.[97]

- **Family Reunion:** In 2023, only '4,473 partners and children of refugees living in the UK were granted entry to the UK through family reunion visas'.[98] If family reunion was included as a 'safe and legal' route in regulations, as it is in paragraph 4 of the Explanatory Note, Clause 51 could cap the number of family members of refugees who may enter.

- **General Resettlement Routes:** If other general resettlement schemes, such as the UK Resettlement Scheme, Mandate Resettlement Scheme, and Community Sponsorship Scheme, which only resettled a total of 1,163 individuals in 2022,[99] were included in the definition of 'safe and legal' routes, they may be unable to resettle any persons under the cap.

'Safe and legal routes' are inaccessible to most, and bespoke routes are restricted to a very small number of countries.

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[95] Home Office, 'How many people do we grant protection to?' (23 February 2023) <https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-december-2022/how-many-people-do-we-grant-protection-to> accessed 12 March 2023.

[96] Home Office, 'Afghan citizens resettlement scheme' (updated 16 August 2022) <https://www.gov.uk/guidance/afghan-citizens-resettlement-scheme> accessed 12 March 2023. 'Pathway 3 was designed to offer a route to resettlement for those at risk who supported the UK and international community effort in Afghanistan, as well as those who are particularly vulnerable, such as women and girls at risk and members of minority groups'.

[97] Immigration Rules, Appendix Afghan Relocation and Assistance Policy (ARAP).

[98] Home Office 'Nationalt Statistics: How many people do we grant protection to?' (23 February 2023) <https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-december-2022/how-many-people-do-we-grant-protection-to> acccessed 12 March 2023.

[99] Home Office, 'Asylum and resettlement datasets: Asylum applications, initial decisions and resettlement Asy_D02' <https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets#local-authority-data> accessed 12 March 2023.

Moreover, those resettled on bespoke routes for Ukraine, Hong Kong, and Afghanistan, other than the pathway for those referred by the United Nations High Commissioner for Refugees ('UNHCR'), are not recognised as refugees and are not given refugee family reunion rights.

The general UK and Mandate Resettlement Schemes depend on UNHCR identifying refugees. This ignores the fact that if fleeing persecution or war, individuals may not have time to wait for UNHCR to process their application. It also ignores the fact that the UNHCR may not have the capacity to identify eligible refugees. Further, UNHCR will only identify individuals outside their country of persecution, for example, after they have fled Afghanistan and are in Iran or Pakistan.[100]

The inadequacy of the general resettlement schemes and the bespoke Afghan schemes is shown by the fact that Afghans were among the top nationalities using small boats to reach the UK. In 2022, 20% of small boat arrivals were from Afghanistan.[101] The Government's statistics note that, *'in October to December 2022, only 9% of small boat arrivals were Albanian (1,099). Afghans were the top nationality for small boat arrivals in these 3 months, 33% of arrivals (3,834)'.*[102] If Afghans manage to reach the UK via small boat, they are subject to all the measures that have come with the Nationality and Borders Act 2022 and that would come with the passing of this Bill.

The Government will effectively have *carte blanche*, through regulations, to determine which nationalities have the right to protection in the UK. The Government has not made any other proposals for 'safe and legal routes' for resettlement or family reunion. The fairness of this clause will entirely depend on the Government's capacity and ability to establish schemes which actually work in practice. Without such proposals, it is difficult to have confidence in the Government's commitment to resettle refugees in any meaningful non-discriminatory way. Picking and choosing who the UK is to protect is compounded by the lack of any safe and legal routes and access to territorial asylum in the UK, for the vast majority of those fleeing persecution. Imposing a cap simply compounds the existing problem.

What is missing are new proposals for 'safe and legal' routes to enter the UK to make this provision workable. In the absence of this, vulnerable refugees are dependent on local UNHCR teams and infrastructure and the goodwill of the UK government.

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[100] UNHCR, 'Information for Afghans' (2022) <https://help.unhcr.org/uk/afghanistan/> accessed 12 March 2023.
[101] Home Office, '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#irregular-arrivals> accessed 12 March 2023.
[102] ibid.

Contact us

You can follow us on Twitter **@ILPAimmigration.**

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