Illegal Migration Bill

House of Commons, Committee of the whole House (Day 1)

27 March 2023

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

2. This briefing focuses on amendments to Clauses 37 to 51 of the Bill, and the Government's amendments to be considered on the first day by Committee of the whole House. It includes:

Clause 1 - Introduction

3. Unusually, **Clause 1(1)-(3)** set 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. If Clause 1 of the Bill remains in its current form, any attempts to add clauses to the Bill, including to protect the rights of children, may be read in light of its damaging purposive aims.

4. **Clause 1(5)** 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. The Bill, therefore, accepts, recognises, and provides that such rights may have to be ignored, because the Bill acts in breach of them.

5. The Bill starts with a statement under section 19(1)(b) of the Human Rights Act 1998, by the Home Secretary Suella Braverman. This is an express admission that the Bill is more than 50% likely to lead the UK to be in breach of its international obligations under the European Convention on Human Rights ('ECHR').

6. **Amendment 131**, tabled by Danny Kruger MP, proposes that provisions made by or by virtue of the Bill must be read and given effect to notwithstanding any judgement, interim measure or other decision, of the European Court of Human Rights, or other international court or tribunal; and notwithstanding any international law obligation. However, under Article 46 of the ECHR, the UK has undertaken to abide by the final judgment of the European Court of Human Rights in any case to which it is a party.

7. **Amendment 132**, tabled by Mr Simon Clarke MP, proposes to disapply section 4 (declaration of incompatibility), section 6 (acts of public authorities) and section 10 (power to take remedial action) of the Human Rights Act 1998 in relation to provision made by or by virtue of this Bill. It thus proposes to further undermine our domestic human rights framework.

8. **Clause 1(5) and Amendments 131 and 132** place the Government on a direct collision course with the European Court of Human Rights, the Council of Europe, and other international bodies. It is reckless and careless of the UK's need to act in line with the international treaties it has signed. Clause 1(5) should be removed, and Amendments 131 and 132 opposed.

Legal Proceedings (Clauses 37 to 49)

9. Most provisions in this Bill would apply with retrospective effect 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.

10. 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.

11. Clause 2 provides for a duty to remove such persons, and Clause 8 extends aims to make sure that family members (including unborn children) – 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 Clause 2 duty to remove are caught by equivalent restrictions and can be removed.

12. **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.

13. These clauses introduce unreasonably short timeframes for the making and disposal of 'serious harm suspensive claims' and 'factual suspensive claims', with limited lights of review and appeal:

    a. Once a person receives a notice that they are to be removed, they have seven days to claim that removal should be suspended on the basis of *'serious irreversible harm'* that would arise before their human rights claim or judicial review would be concluded, or a 'factual' mistake. 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. 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.

    b. 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 against the Upper Tribunal's decision (given the ouster in Clause 48).

    c. In a notice of appeal, a person must provide '*compelling*' evidence, in a form and manner yet to be prescribed, containing information yet to be prescribed.

    d. The Secretary of State must then make a decision 'within 3 days following receipt of the claim', unless the decision period is extended. This is likely to lead to hurried and low-quality decision making, rubber-stamping rejections.

    e. The person can bring an appeal but only to the Upper Tribunal, within six working days. A decision must then be made by the Upper Tribunal within 22 working days. Onward appeal is to the Court of Appeal or Court of Sessions.

f. If the Home Secretary certifies a suspensive claim as '*clearly unfounded',* there is no automatic right of appeal. Permission to appeal must first be sought from the Upper Tribunal, and that can 'only' be granted in a serious harm case if a person provides *'compelling'* evidence they would face an '*obvious and real risk*' of '*serious and irreversible harm'* (and the Home Secretary define the meaning of such harm in regulations). 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. There is no right of onward appeal, and very limited scope for judicial review given the ouster in Clause 48.

g. 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. 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.

14. 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.

15. **Amendment 133**, tabled by Sir William Cash, proposes to add to Clause 37 that '[a] suspensive claim, or an appeal in relation to a suspensive claim (only as permitted by or by virtue of this Act), shall be the only means through which a removal notice may be challenged'. **Amendment 134**, also tabled by Sir William Cash, proposes that the Secretary of State must declare as inadmissible any human rights claim, protection claim, application for judicial review, or other legal claim which is not a suspensive claim or an appeal in relation to a suspensive claim, and which, if successful, would have the effect of preventing the removal of a person from the United Kingdom under this Act. It also removes the provision in Clause 39 which states a person with a serious harm claim can make another human rights claim (and subsequent judicial review) in relation to their removal from the United Kingdom to a third country under the Act.

16. Both **Amendments 133 and 134** are further attempts to insulate removal from any judicial scrutiny beyond the narrow confines of suspensive claims and appeals. They should be opposed.

Clause 48 - Ouster Clause

17. **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 against suspensive claims declared 'clearly unfounded' by the Home Secretary; (2) applications for a declaration that there were *'compelling reasons'* a person made a suspensive claim out of time; (3) applications for a declaration that there were 'compelling reasons' for a person who has raised a new matter in the course of an appeal or application not to have raised them before the end of the seven-day claim period.

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

19. As a result, these decisions can only be challenged in extremely limited circumstances set out in Clause 48(4) (in relation to whether the Upper Tribunal has/had a valid application before it, is/was properly constituted, is/has acted in bad faith or in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice). Therefore, the ouster would make entire categories of decision unchallengeable.

20. As stated by the Supreme Court in *'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'*.[1]

21. 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.

22. Ouster clause 48 must be removed. **Amendment 162** proposes to do so.

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

23. Clause 49 is a placeholder clause to allow the Home Secretary to make, by regulations rather than an on the face of this Bill, provision about interim measures indicated by the European

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

Court of Human Rights ('ECtHR') as they relate to the removal of persons from the United Kingdom. The commencement of the Clause 2 removal provision in this Bill, is dependent on the commencement of Clause 49.

24. The test for the ECtHR to indicate a Rule 39 interim measure is one of exceptionality: only where there is an imminent risk of irreparable damage,[2] 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.[3]

25. A Contracting State's failure to give effect to a Rule 39 measure will occasion a breach of the right to individual petition under 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.*'

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

27. **Clause 49** is an unnecessary and unwarranted intrusion into the role of the courts as a distinct branch of government in the constitutional order:

    a. **It is unnecessary as there is no evidence the supervisory system of the ECtHR is being exploited.** No evidence of any abuse has been advanced.

    b. **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

[2] 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.'*

[3] 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.

relief must be granted by a court merely because another person in a superficially similar situation obtained an interim measure from the ECtHR.

c. **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.

Clause 50 - Inadmissibility of certain asylum and human rights claims

28. 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.

29. There are two key problems with this Clause.

30. First, 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. There is binding country guidance case law[4] confirming that there can be a risk of persecution in Albania. 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[5] and the percentage of successful appeals by Albanian nationals in asylum appeals determined in each quarter of 2022 ranging between 41% and 68%[6]).

[4] 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)).
[5] 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.
[6] 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.

31. Second, 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.

32. 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.

33. For example, if a Swiss or an EU 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 Home Secretary 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.

Clause 51 - Cap on annual number of entrants using safe and legal routes

34. Clause 51 requires the Home Secretary to make, by regulations,[7] 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,[8] 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.

35. The Home Secretary has a duty to consult with local authorities and other relevant bodies, as she 'considers appropriate', before setting the cap.[9] 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',[10] although this is not stated on the face of the Bill.

[7] The regulations are subject to the affirmative procedure, per Clause 54(4)(l).
[8] EN, para 220.
[9] Clause 51(2).
[10] EN, para 220.

36. ‘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’.[11] Although the Explanatory Notes state that it ‘will not include those on work, family or study routes’,[12] this is not stated on the face of the Bill.

37. There is nothing in the Bill or Explanatory Notes that would prevent Regulations including the bespoke resettlement schemes. Therefore, if an annual cap was set at, for example, 50,000 people, it could be exceeded by ‘safe and legal’ routes, for example, for Ukraine (which had more than 210,000 visa grants in 2022), 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).

38. 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.[13] 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)’.*[14]

39. 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.

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[11] EN, para 221.
[12] EN, para 220.
[13] 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.
[14] ibid.

Government Amendments

40. **Gov NC12 (Special Immigration Appeals Commission)** provides that appeals under section 42 or applications for permission to appeal under section 43 against refusals of suspensive claims cannot be brought or continued if the Secretary of State acting in person certifies that the decision was made wholly or partly in reliance on information which, in the opinion of the Secretary of State, should not be made public—

    (a) in the interests of national security,

    (b) in the interests of the relationship between the United Kingdom and another country, or

    (c) otherwise in the public interest.

41. If a certificate is issued, any pending appeal or application for permission to appeal, in relation to the decision lapses. The new clause also inserts a section **2AA** in the Special Immigration Appeals Commission Act 1997, amending jurisdiction in that Act, to allow appeals to instead be appeals to the Special Immigration Appeals Commission (SIAC). In addition, the new clause inserts a section **2AB** in the Special Immigration Appeals Commission Act 1997, which seeks to make SIAC decisions to grant or refuse an application for a declaration that there were compelling reasons for the person not to have provided details of the new matter in the claim period (under section 46(6) of the Illegal Migration Act 2023) final and not liable to be questioned or set aside in any other court.

42. **Gov 67,** which works with **NC12**, amends Clause 45(2)(b) to insert "or section 2AA of the Special Immigration Appeals Commission Act 1997 (appeals in relation to the Illegal Migration Act 2023)" to make these successful SIAC appeals against refusal of a suspensive claim mean a person cannot be removed to the country specified in the removal notice.

43. **Gov 68** makes an amendment to Clause 45(4) that is consequential on NC12 (to include SIAC in the list of appeals).

44. **Gov 69** inserts a subclause 3A to Clause 45 to make the reference to a 'change of circumstances' in Clause 45(3) include where a human rights claim or judicial review against removal was unsuccessful. This would then permit the Home Secretary to remake her decision accepting the suspensive claim and instead refuse it, or in the case of a successful appeal, allow a new removal notice to be issued (under Clause 45(3)).

45. **NC11 (Judges of First-tier Tribunal and Upper Tribunal)** amends section 5(1) of the Tribunals, Courts and Enforcement Act 2007 to provide for judges of the First-tier Tribunal (including Employment Judges) to be judges of the Upper Tribunal. There has been no public consultation on such a fundamental change to the judiciary or the 2007 statutory framework for tribunals. Under the 2007 Act, the Upper Tribunal was to primarily be an appellate tribunal for the First-tier Tribunal. This amendment must be seen alongside the provisions in Clauses 37 to 48, which propose for suspensive claim appeals, applications, and declarations to skip over the First-tier Tribunal and be brought and heard in the Upper Tribunal. This amendment would propose to revert to a system akin to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, which contained a single tribunal of immigration judges, without distinction between First-tier Tribunal and Upper Tribunal judges.

46. **Gov 66** amends the commencement provisions in Clause 57 of the Bill to add that the new clause inserted by NC11 (Judges of First-tier Tribunal and Upper Tribunal) comes into force on the day on which the Act is passed.

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 37-49 – Legal Proceedings

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'[15]
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[16]
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

[15] EN, para 173.
[16] 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

Contact us

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If you have any further questions please contact Zoe Bantleman, Legal Director, at: info@ilpa.org.uk.

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