Illegal Migration Bill

House of Commons, Committee of the whole House (Day 2)

28 March 2023

1. The Illegal Migration Bill represents an assault on the rights of migrants and on the rule of law. ILPA opposes the Bill in its entirety.

2. The result of the Bill will be to create a large class of people, present in the UK, but without any hope of securing lawful status. In reality, it will create a permanent population of people present in the UK, whose asylum and human rights claims will be inadmissible and undecided, who will be indefinitely detained and supported, who will be unremovable indefinitely, and who will have no access to procedures for regularising their status. This denizen sub-class, and their UK-born children, will be condemned to being deprived of 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 narrow exceptions or saving provisions come nowhere near rescuing those affected from breaches of their fundamental rights.

3. The Bill seeks to undermine the Refugee Convention, the UN Convention on the Rights of the Child, the European Convention on Action against Trafficking, the European Convention on Human Rights, the Human Rights Act 1998, and the Children Act 1989.

4. This briefing focuses on amendments to Clauses 1 to 36 of the Bill. It includes:

Duty to make arrangements for removal

5. At the outset, we highlight the observation of UNHCR, the agency charged with supervising the application of the Refugee Convention, that '[t]his Bill is inconsistent with the UK's obligations under the Refugee Convention as it effectively extinguishes the right of refugees to be recognized and protected in the UK, for all but a few.'[1]

6. However, the Bill also fails to achieve its aim. Permanent inadmissibility makes nearly all illegal entrants and arrivals (from outside the EEA, Switzerland, and Albania) unremovable in reality. Without an uncapped and operational 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, Rwanda's reported ability to 'take thousands of people eligible for relocation'[2] (at high per capita expense), is not on a sufficient scale to enable the Home Secretary to comply with the duty in **Clause 2**.

7. Nevertheless, **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. The solution is not to legislate permanent inadmissibility; the solution is fair and efficient decision-making.

8. It is likely that most 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 and children (including those as yet unborn) (Clause 8). 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 those who are self-sufficient cannot support themselves indefinitely without income.

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[1] UNHCR, 'UNHCR LEGAL OBSERVATIONS ON THE ILLEGAL MIGRATION BILL' (22 March 2023) [8] <https://www.unhcr.org/publications/legal/641c7cfea/unhcr-legal-observations-on-the-illegal-migration-bill.html> accessed 28 March 2023.

[2] UK Visas and Immigration and The Rt Hon Suella Braverman KC MP, 'UK and Rwanda strengthen agreement to deal with global migration issues' (18 March 2023) <https://www.gov.uk/government/news/uk-and-rwanda-strengthen-agreement-to-deal-with-global-migration-issues?utm_medium=email&utm_campaign=govuk-notifications-topic&utm_source=8f48852b-310d-415c-925b-d0a28e1247c7&utm_content=immediately> accessed 27 March 2023.

9. The Bill will exponentially increase the asylum housing bill and extend the asylum accommodation estate. Individuals who have not claimed asylum 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.[3]

10. ILPA supports amendments to remove and mitigate the **Clause 2** duty to remove.

Detention and bail

11. The courts have long held that the UK's broad statutory powers to detain migrants 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.[4]

12. 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[5] and families[6]. 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.

13. 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.

Tim Loughton, Amendment 143
Clause 11, page 14, line 36, leave out lines 36 to 38 and insert—
"(2G) Detention under sub-paragraph (2C) or (2D) is to be treated as detention under sub-paragraph 16 (2) for the purposes of the limitations in paragraph 18B (limitation on detention of unaccompanied children)."

Tim Loughton, Amendment 145

[3] ECHR Memorandum [30].
[4] *R (Hardial Singh) v Governor of Durham Prison* [1983] EWHC 1 (QB).
[5] 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.
[6] 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, page 14, line 41, leave out subsection (4)

Tim Loughton, Amendment 144
Clause 11, page 16, line 40, leave out lines 40 and 41 and insert—
"(2E) Detention under subsection (2A) or (2B) is to be treated as detention under sub-paragraph 16(2) of Schedule 2 to the Immigration Act 1971 (limitation on detention of unaccompanied children)."

14. ILPA supports **Amendments 143 to 145**, tabled by Tim Loughton MP, to maintain the *existing* safeguards, so that unaccompanied children may only be detained up to 24 hours in short-term holding facilities. Children within families may only be detained for up to 72 hours (or seven days in cases where the longer period of detention is authorised personally by a Minister of the Crown) in pre-departure accommodation.

Stephen Kinnock, Amendment 21
Clause 11, page 17, line 9, leave out subsection (11)

15. ILPA supports **Amendment 21,** tabled by Stephen Kinnock MP, to maintain the *existing* safeguard, and remove provisions which would disapply existing statutory limits on detention of pregnant women of a maximum of 72 hours (or seven days when the longer period of detention is personally authorised by a Minister of the Crown).

Alison Thewliss, Amendment 225
☆Page 17, line 12, leave out Clause 12

16. ILPA supports **Amendment 225,** tabled by Alison Thewliss MP, to leave out Clause 12.

17. **Clause 12** is intended to overturn the long-established common law principle in *Hardial Singh* 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.[7] 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. These changes apply to all forms of detention, not only of those who have arrived illegally.

18. Clause 12 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

[7] EN, para 88.

reasonably and for the prescribed purpose of facilitating deportation'.[8] 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'.[9]

19. 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.

Joanna Cherry, Amendment 124
Clause 13, page 21, line 3, leave out from beginning to end of line 11 on page 22.

Alison Thewliss, Amendment 235
Clause 13, page 21, line 12, leave out subsection (4)

20. **Clause 13(3)(b)** would remove the ability of the First-tier Tribunal 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.

21. **Clause 13(4)** 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)).

22. Only the right to apply for a writ of *habeas corpus* (under the Habeas Corpus Act 1679) is preserved (or any other prerogative remedy[10]). However, it is difficult to see how a writ of *habeas corpus* can assist – *habeas corpus* is traditionally a remedy for situations where 'someone is detained without any authority or the purported authority is beyond the powers of the person authorising the detention and so is unlawful'.[11] However, the remedy of judicial review is 'available where the decision or action sought to be impugned is within

[8] *R (Lumba) v SSHD* [2011] UKSC 12 at [30].
[9] *SSHD v Fardous* [2015] EWCA Civ 931 at [43].
[10] EN, para 94 refers to this as 'or the equivalent procedure in Scotland'.
[11] *R v Secretary of State for the Home Department ex p. Cheblak* [1991] 1 WLR 890 at 894C-E.

the powers of the person taking it but, due to procedural error, a misappreciation of the law, a failure to take account of relevant matters, a taking account of irrelevant matters or the fundamental unreasonableness of the decision or action, it should never have been taken'.[12] Clause 13(4) proposes to reduce the ambit of challenges against detention.[13]

23. ILPA, therefore, supports **Amendments 124 and 235.**

Dame Diana Johnson, Amendment 183
☆ Page 22, line 12, leave out Clause 14

24. **Clause 14** removes the duty to consult with the Independent Family Returns Panel on safeguarding and promoting the welfare of children in relation to decisions to return or detain families with children covered by Clauses 2 and 8.[14] 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.

25. Accordingly, ILPA supports **Amendment 183**, to leave out Clause 14.

Unaccompanied Children

Alison Thewliss, Amendment 237
☆ Page 22, line 28, leave out Clause 15
Dame Diana Johnson, Amendment 303
☆ Page 23, line 1, leave out Clause 16
Alison Thewliss, Amendment 243
☆ Page 23, line 37, leave out Clause 17
Alison Thewliss, Amendment 244
☆ Page 24, line 12, leave out Clause 18
Alison Thewliss, Amendment 245
☆ Page 24, line 25, leave out Clause 19

26. **Clauses 15-20** fundamentally undermine the legal protections in the Children Act 1989 for unaccompanied migrant children.

27. **Clause 15** fundamentally undermines the Children Act 1989 by permitting the Home Secretary to provide, or arrange for the provision of accommodation in England for

[12] ibid.
[13] *R v Secretary of State of State for the Home Department, ex p. Muboyayi* [1992] 1 QB 244, per Lord Donaldson MR.
[14] Clause 14 incorrectly cross-refers to 'section 7' rather than 'section 8' of the Illegal Migration Act 2023.

unaccompanied children in England, and sets no standards, safeguards, or protective obligations for the Home Office provided accommodation for children.[15] Clause 15 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.

28. **Clause 16** 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. 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. A 'looked after' decision is outside the Home Secretary's competence and knowledge base, and is a decision the Children Act 1989 reserved to local authorities. 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.*[16]

29. **Clauses 17-18** require a local authority to provide information to the Home Secretary that could undermine the child protection functions of local authorities. 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'. 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.

30. **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 overreach and interference 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. This is a broad delegated power that allows the Home

[15] As the law stands, accommodation provided for children under section 20 CA 1989 must be 'suitable', and accommodation provided to children aged 15 and younger accommodated under section 20 CA 1989 must be regulated.

[16] *R* (*Medway Council) v Secretary of State for the Home Department* [2023] EWHC 377 (Admin) at [39].

Secretary to amend 'any enactment', including this Bill and other primary legislation such as important constitutional statutes governing devolution, by way of regulations and represents minimal Parliamentary scrutiny.

31. Accordingly, ILPA supports **Amendments 237, 303, 243, 244 and 245** to leave out Clauses 15 to 19.

Modern slavery

Mr Alistair Carmichael, Amendments 51 to 58
☆ Page 25, line 15, leave out Clause 21
☆ Page 27, line 10, leave out Clause 22
☆ Page 27, line 23, leave out Clause 23
☆ Page 29, line 5, leave out Clause 24
☆ Page 30, line 31, leave out Clause 25
☆ Page 31, line 25, leave out Clause 26
☆ Page 32, line 6, leave out Clause 27
☆ Page 33, line 7, leave out Clause 28

32. ILPA supports the stand part **Amendments 51-58**, tabled by Alistair Carmichael, to leave out Clauses 21 to 28.

33. 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'). 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.

34. Article 4 ECHR is not a right from which the UK can derogate in times of emergency.[17] Compliance with ECAT in this Bill is *'premised'* on deeming all victims of trafficking who fall within these measures as a '*threat to public order*',[18] which they are not. There is no basis in law for such a wide use of that provision. 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.

[17] Article 15(2) ECHR.
[18] ECHR Memorandum, [45].

35. The Bill provisions will deprive victims of their rights to recovery, remove the obligation to grant such potential victims leave to remain, remove them from the UK before a conclusive grounds decision is made, expose them to a substantial risk of re-exploitation, and facilitate the work of trafficking gangs. In particular, victims will not be given time in a place of safety to recover from their experiences and they will 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.

36. 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'.[19] 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.[20]

Citizenship

Alison Thewliss, Amendments 266 to 277
Clause 30, page 35, line 34, leave out subsection (4)
Clause 30, page 36, line 24, leave out subsection (8)
Clause 31, page 36, line 31, leave out paragraphs (a) to (d)
Clause 31, page 37, line 3, leave out sub-paragraphs (i) and (ii)
Clause 32, page 37, line 17, leave out paragraphs (a) and (b)
Clause 32, page 37, line 29, leave out sub-paragraph (i)
☆ Page 37, line 39, leave out Clause 33
☆ Page 38, line 1, leave out Clause 34
Clause 35, page 38, line 8, leave out "may" and insert "must"
Clause 36, page 38, line 17, leave out subsections (2) to (4)
Clause 36, page 39, line 12, leave out subsections (10) and (11)
Clause 36, page 39, line 35, leave out subsections (15) and (16)

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

[20] 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.

Sir Jeremy Wright, Amendment 182
Clause 35, page 38, line 14, at end insert—
"(3) The Secretary of State may determine that the person is not to be an "ineligible person" for the purposes of sections 31 to 34 if the Secretary of State considers that there are compelling circumstances which apply in relation to the person which mean that it is appropriate to do so."

37. ILPA supports **Amendments 266 to 277** tabled by Alison Thewliss MP and **Amendment 182** tabled by Sir Jeremy Wright.

38. The proposed measures in **Clauses 30-36** exclude certain people from access to four classes of British nationality: British citizenship, British overseas territories citizenship, British Overseas citizenship, and British subject status. The proposed measures apply to all 'ineligible' people, who have *ever met* the four conditions **Clause 2**, as well as to children born in the UK on or after 7 March 2023 who have such a parent.

39. 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,[21] for children who have been UK born and thereafter raised in the UK for 10 years,[22] 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.[23]

40. 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.[24]

41. 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.

[21] British Nationality Act 1981, s 1(3).
[22] ibid, s 1(4).
[23] ibid s 3(2) and 3(5).
[24] ibid s 3(1) and s 6.

42. The amendments would seek to make sure that children born on or after 7 March 2023 to a parent caught by the four **Clause 2** conditions would not be prevented from obtaining British citizenship. Moreover, they would maintain the ability of 'ineligible persons' to register their British citizenship *by entitlement* under sections 1(3), 1(4), 3(2), 3(5), 4(2), or 5 of the British Nationality Act 1981, and *at discretion* under sections 3(1) and 4A of the same Act. It would also maintain the ability of relevant persons to register as a British overseas territories citizen under sections 15(3) or (4) and 17(2) or (5) of the British Nationality Act 1981, as a British overseas citizen under section 27(1) of the 1981 Act, and as a British subject under section 32 of the 1981 Act.

43. **Amendment 274** would also make the duty in Clause 35 to determine that a person is not an 'ineligible person' mandatory (rather than discretionary), if such a determination is necessary to comply with the UK's international obligations. **Amendment 182** would allow the Home Secretary discretion to determine that the person is not to be an "ineligible person" if she considers that there are compelling circumstances which apply in relation to the person which mean that it is appropriate to do so.

44. Accordingly, ILPA supports the Amendments above, which would mitigate the deleterious impact of **Clauses 30-36,** which seek to exclude persons from routes to British citizenship.

Clause 1

45. 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.

46. ILPA supports **Amendment 184**, tabled by Alison Thewliss MP, to remove Clause 1(3).

47. ILPA also supports the consequential **Amendment 62** leave out Clause 1(2)(d), tabled by Alistair Carmichael MP.

48. **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.

49. 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').

50. **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.

51. **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.

52. 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 should be opposed.

53. ILPA supports **Amendments 1 and 185** to remove Clause 1(5).

Contact us

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

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

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