



Public Law Project



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Executive Summary

Introduction

This is an executive summary of a [joint briefing](#) from the Bonavero Institute of Human Rights, Public Law Project (PLP), Amnesty International, Liberty, and the Immigration Law Practitioners' Association (ILPA) addressing the main ways that the Government's Illegal Migration Bill threatens core constitutional principles. Our focus on the Bill's constitutional problems does not imply disagreement with the wider critiques of the Illegal Migration Bill. We focus on constitutional issues in this briefing because we believe that the House of Lords is well-placed to ensure that constitutional fundamentals take priority.

The briefing is structured around five constitutional themes and demonstrates how the Bill threatens each of them:

1. Parliamentary Sovereignty;
2. The Rule of Law;
3. The protection of human rights;
4. The devolution settlement in the UK; and
5. The separation of powers.

Parliamentary Sovereignty

Both the Government's approach to Parliamentary debate on the Bill and the powers the Bill gives to government constitute an affront to the principle of Parliamentary Sovereignty.

The Government rushed the Illegal Migration Bill through the House of Commons in a manner which undermined Parliament's sovereign role, which requires that it is able to conduct meaningful scrutiny on legislation proposed by the UK Government. The Bill's second reading was expedited only a few days after its introduction into the House of Commons. Instead of the usual detailed consideration and evidence-gathering at committee stage, the Bill had only two days on the floor of the House, during which the Bill's provisions were considered out of sequence. At report stage, the Government published more than one hundred amendments at late notice dealing with both substantive and highly technical issues, many of major constitutional importance. This process undermined the ability of Members to examine the Bill in detail, properly understand its implications and prepare effective responses.

The Bill itself grants the Government expansive powers to make important – and for the people concerned, often life-changing – decisions through secondary legislation. These new regulations will expand executive discretion, limit parliamentary scrutiny, interfere with devolved autonomy, and impinge significantly on individual human rights. Such proposals could expect to receive very significant Parliamentary scrutiny if pursued through primary legislation, but instead will be shielded from all but the most marginal parliamentary scrutiny and challenge.

Concerns have been raised regarding the Lords’ role, suggesting that it would be “unconstitutional” to reject the Bill. However, the “Salisbury Convention”, which states that the Lords ought not to vote down legislation promised in the UK Government’s election manifesto does not bind the Lords with respect to the Illegal Migration Bill. The sole reference to asylum and refugees in the 2019 Conservative manifesto was the commitment to “continue to grant asylum and support to refugees fleeing persecution”.¹ By refusing to process asylum claims and closing down the means by which the vast majority of potential applicants could seek asylum, this Bill does the exact opposite of this commitment.

Rule of Law

The Bill’s numerous Ouster Clauses, the retrospective nature of the Bill, and its likely repeated breaches of International Human Rights Law undermine the Rule of Law in the UK and on the international stage.

Clause 52, which prevents judges from granting interim relief suspending a person’s removal from the country for any reason, represents an extraordinary undermining of the Rule of Law, by attempting to remove the power of UK judges to hold the Government’s decisions to the standards required by International Human Rights Law, the Human Rights Act 1998, and the common law. The Rule of Law requires that no individual or body, including the UK Government, is above the law, but this would create such a scenario. It would also follow a series of prior steps where full judicial powers to protect individual rights will have been ousted.

There are two key Ouster Clauses in the Bill related to appeals of suspensive claims. These Ouster Clauses come gravely close to being blanket bans on meaningful judicial scrutiny. The sole exceptions to these ousters of “bad faith” and “fundamental procedural defect” are almost impossible to prove. As the Bar Council have said, the practical reality of these ousters is that “[a]ny remedy is within the sole gift of the government”,² a state of affairs that is incompatible with respect for the Rule of Law. Such Ouster Clauses may well be considered to be unlawful by the UK Supreme Court, on the basis of its previous precedent on Ouster Clauses in *Privacy International v Investigatory Powers Tribunal*.³

Clause 12 contains a further Ouster Clause which represents a drastic undermining of the protection of liberty. It ousts judicial review of unlawful detention for the first 28 days of

¹ Conservative Party Manifesto 2019, page 23.

² The Bar Council, “Illegal Migration Bill: Briefing for Peers – Second Reading”, 6 available at: [Bar-Council-Briefing-for-Peers-Illegal-Migration-Bill-Second-Reading.pdf \(barcouncil.org.uk\)](https://www.barcouncil.org.uk/wp-content/uploads/2019/06/Bar-Council-Briefing-for-Peers-Illegal-Migration-Bill-Second-Reading.pdf).

³ *R (on the application of Privacy International v Investigatory Powers Tribunal)* [2019] UKSC 22.

detention, with the only recourse during this time being an ancient writ of *habeas corpus* (or in Scotland, an application for suspension and liberation). The right to liberty and to be free of arbitrary detention is considered one of the oldest and most recognised human rights in constitutional thought.⁴ By ousting judicial review of broad detention powers, the Bill seeks to remove a key requirement of the *Hardial Singh* principles, which form the cornerstone of UK protections of the right to liberty. This is that it is for UK courts to decide on the “reasonableness” of detention, not the UK Government, including what constitutes a reasonable period of detention.⁵

The impact of these Ouster Clauses on the Rule of Law is exacerbated by the retrospective effect of the Bill’s core provisions. Applying the Bill’s clauses to persons who entered or arrived in the UK on or after 7 March 2023 (the day this Bill was introduced) but before the Bill becomes law is a breach of what Lord Pannick, has referred to as the “basic constitutional principle that people should be penalised only for contravening what was at the time of their act or omission a valid legal requirement.”⁶

Compliance with international legal obligations is a fundamental requirement of any state seeking to uphold the Rule of Law. Yet, the powers in the Illegal Migration Bill will breach many of the UK’s obligations under international law, including those deriving from the Refugee Convention, the European Convention on Human Rights (ECHR), Convention on Action against Trafficking in Human Beings (ECAT), the United Nations Convention on the Rights of the Child (CRC), the Convention on the Reduction of Statelessness and the Convention relating to the Status of Stateless Persons. It has been suggested by some that breaching international law is a legitimate action of a dualist state. However, compliance with international treaties to which a state has signed is a non-negotiable aspect of upholding the Rule of Law and participating in the international legal system generally. The Vienna Convention on the Law of Treaties 1969⁷ is clear that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith”.⁸

Human Rights

The Illegal Migration Bill narrows the scope of domestic human rights protections so as remove such protections entirely in some cases, and puts the UK further in breach of its obligations under the ECHR.

The Illegal Migration Bill carries the unusual statement on its front page that the Government is unable to confirm that its provisions are compatible with the ECHR. While this does not necessarily mean by itself that the Bill will be incompatible, it is a statement that the Government believes that the Bill is more likely than not to be incompatible and that it is explicitly willing to take this risk of breach of the UK’s international commitments in pursuit of its aims.

⁴ “Liberty and the Historic Context of Immigration Detention” in Justine N Stefanelli, *Judicial Review of Immigration Detention in the UK, US and EU* (Hart Publishing, 2020), 17 -32.

⁵ *R(A) v SSHD* [2007] EWCA Civ 804.

⁶ Job-Seekers (Back to Work Schemes) Bill 21 March 2013 col. 741

⁷ Signed by the UK in 1970 and ratified in 1971.

⁸ The Vienna Convention on the Law of Treaties 1969, Article 26.

If Clause 1 of the Bill remains in its current form, all Clauses of the Bill, including any additional Clauses, will be read in light of its damaging purposive aims. 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. That purpose is expressly “requiring the removal from the United Kingdom of certain people...”, which as purpose is given primary effect by the statutory requirement made by Clause 2. The fact that all the provisions in the Bill will have to be read in line with Clause 1 means it has profound cross-cutting, detrimental implications for human rights. At a minimum, it lays emphasis to the priority of removal, where the conditions in Clause 2 are met, above all other considerations with the clear risk that no human rights nor any other individual consideration may deflect from that purpose and requirement.

Moreover, this new damaging interpretation duty replaces a fundamental human rights protection, as clause 1(5) of the Bill disapplies Section 3 of the Human Rights Act 1998 to any provision made by the Act or any subordinate legislation made under it. The purpose of Section 3 was to secure Parliament’s intention in passing the Human Rights Act, that legislation be interpreted and applied in ways that accord with the UK’s international obligations under the European Convention.⁹ Suspending a key element of the country’s domestic human rights protection system for the state’s dealings with a particular unpopular minority is an attack on the basic principle of equality before the law and the universality of human rights. This is not an ordinary matter of interference with qualified rights being justifiable in certain contexts. This is a systemic issue about how rights are and aren’t protected in this country, and about certain groups of people being subject to lesser protection, on a discriminatory basis.

It is within the legitimate function of the House of Lords to revise legislation from the elected House when it is proposing to strip fundamental human rights protections from a group of people excluded from the democratic process. Indeed, such a role is arguably a core part of the justification for an unelected second chamber.

Devolution

The Illegal Migration Bill risks undermining the constitutional distributions of power in the UK as established by the UK’s devolution arrangements. The Government has stated that the Bill relates only to immigration and nationality, which are reserved matters in Scotland and Wales and excepted matters in Northern Ireland. As such, legislative consent has not been sought.¹⁰ However, this overlooks several important ways in which the Bill does interfere with devolved matters.

The two most obvious impacts on devolved areas relate to local authorities’ powers and duties in respect of looked after children (Clauses 15 – 20) and support for victims of trafficking (Clauses 23 and 24). Beyond these specific impositions on devolved powers, the Bill also has a more fundamental constitutional impact as it prevents the devolved governments from

⁹ Lord Irvine LC quoted in the Report of the Independent Human Rights Act Review available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/iHumanRightsAct1998r-final-report.pdf, page 181.

¹⁰ Illegal Migration Bill, Explanatory Notes, 7 March 2023 available at: <https://publications.parliament.uk/pa/bills/cbill/58-03/0262/en/220262en.pdf>, Annex B.

complying with international human rights obligations and with duties imposed on them by the devolution settlements.

This constitutional disturbances in the devolution context are even more acute with respect to the Bill's impacts in Northern Ireland. Here the Bill not only creates the same problems of breach of obligations under the devolution statues, it raises significant concerns about compliance with the Belfast/ Good Friday Agreement and the Windsor Framework/ Protocol on Ireland and Northern Ireland.

The incorporation of the ECHR into Northern Ireland law was an explicit commitment of the Belfast /Good Friday Agreement, achieved through the Human Rights Act 1998. The Bill would constitute a breach of two core elements of this commitment: the guarantee of "direct access to the courts"; and the obligation to provide "remedies for breach of the Convention" under the Rights, Safeguards and Equality of Opportunity Chapter of the Agreement, which extends to "everyone in the community".

The Bill is also inconsistent with obligations under Article 2 of the Windsor Framework, which details various equality and non-discrimination EU Directives with which Northern Ireland must "keep pace". This includes the Victims' Directive and the Trafficking Directive. The potential for the Bill to lead to failures in identifying and supporting trafficking victims, as well as detention and removal will place Northern Ireland in direct contravention of the Directive.

Separation of Powers

Examining the Illegal Migration Bill as a whole, the cumulative effect of the changes discussed above are likely to put significant strain on the Separation of Powers, both due to the substance of the Bill and the way the UK Government is attempting to pass it. In substance, power is being taken away from Parliament and the UK judiciary and given to the UK Government. Most importantly, such power relates to the constitutional roles of both branches of state. Parliament is supreme law-maker in the UK, yet the Bill hands broad law-making powers which implicate fundamental human rights to the UK Government in the form of delegated powers. Moreover, the way the Bill is being passed conforms to a recent trend of the Government rushing legislation and obfuscating and obstructing Parliamentary scrutiny in a manner which shows little respect for Parliament's constitutional role and indeed encroaches on it. Equally, the powers in the Illegal Migration Bill encroach on the constitutional role of the UK judiciary in adjudicating human rights and applying the law. In this way, while UK democracy depends on there being a clear Separation of Powers, the Illegal Migration Bill represents an attempt at a power shift which enables the UK Government to play the roles of all three branches of state – as lawmaker, adjudicator and administrator. In undermining the Separation of Powers in this way, both the UK's constitution and democracy are diminished.