Joint Committee on Human Rights

Illegal Migration Bill

Immigration Law Practitioners' Association Response

Introduction

1. The Immigration Law Practitioners' Association ('ILPA') is a professional association and registered charity, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official inquiries.

2. ILPA opposes the Illegal Migration Bill ('the Bill') in its entirety. Our briefing[1] produced for the Second Reading of the Bill in the House of Commons addresses our concerns across the Bill, not all of which have been detailed in this response. This evidence focuses on the Human Rights Act 1998, judicial scrutiny of detention powers, modern slavery provisions, inadmissibility of human rights claims, and interim measures.

Section 19 HRA

3. The Illegal Migration Bill starts with a statement that the Home Secretary is unable to say that its provisions are compatible with the rights to be found in the European Convention on Human Rights ('ECHR'). Where a statement of compatibility under section 19 of the Human Rights Act 1998 ('HRA') cannot be made, parliamentary scrutiny of the Bill should be intense.[2] As this Bill has been rushed through the House of Commons, with Second Reading taking place only days after the Bill's introduction, contrary to the two weekend

[1] ILPA, 'Illegal Migration Bill: House of Commons, Second Reading' (12 March 2023) <https://ilpa.org.uk/wp-content/uploads/2023/03/ILPA-HC-Second-Reading-Briefing-Illegal-Migration-Bill.pdf> accessed 6 April 2023.
[2] HL Deb 3 November 1997, vol 582, col 1233, per Lord Irvine.

convention, and without the possibility of any evidence being taken in its 12 hours in Committee, intense scrutiny[3] has not been possible.

Section 3 HRA

4. Clause 1(5) is another[4] effort to truncate the operation of a central feature of the HRA. Section 3 is a key part of the HRA's architecture used by our courts to provide a primary domestic remedy for victims, to avoid finding domestic law breaches international law and needing to issue declarations of incompatibility. Courts only interpret laws with the grain of the legislation,[5] which helps realise Parliament's overarching intention and rectify drafting errors or address factual circumstances not foreseen by legislators. Courts are required to do no more than what is 'necessary'[6] to ensure compliance with human rights standards.

5. Clause 1(5) seems bound to result in increased declarations of incompatibility, remedial regulations, and challenges brought against, and lost by, the UK in Strasbourg for breach of Convention rights. The UK will remain responsible for any breaches and will have to face the damage to its human rights record and international reputation. It puts the UK on a direct collision course with the domestic courts, the European Court of Human Rights (ECtHR), the Council of Europe, and other international bodies.

Detention

6. The provisions in Clause 12 of this Bill 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. The Home Secretary proposes to take this decision herself, based on her 'opinion'. However, the *Hardial Singh* principles only do what Article 5 ECHR requires: 'they require that the power to detain be exercised reasonably and for the prescribed purpose of facilitating deportation'.[7] As Lord Chief Justice Thomas held, '[i]t is this objective approach of the court which reviews the evidence available at the time that removes any question that the

[3] By comparison, the Institute for Government notes, 'the Criminal Justice and Immigration Act 2008 underwent detailed scrutiny in 24 committee sittings, the immigration Act 2014 had 11 committee sittings and received 66 pieces of written evidence and the Immigration Act 2016 had 15 committee sessions and received 55 written pieces of evidence'. Hannah White, 'Illegal Migration Bill highlights how expectations of legislative scrutiny have plummeted' (13 March 2023) *Institute for Government* <https://www.instituteforgovernment.org.uk/comment/illegal-migration-bill-legislative-scrutiny> accessed 3 April 2023.

[4] In addition to attempts in the Bill of Rights Bill to repeal s.3 HRA (see Clauses 1 and 40), and to disapply section 3 in Clauses 42 to 45 of the Victims and Prisoners Bill (as introduced).

[5] Section 3 cannot be used where it would lead to a departure from 'a clear and prominent feature' of legislation (*Re Z* [2015] EWFC 73 at [35]-[36]).

[6] *R (Aviva Insurance) v Secretary of State for Work and Pensions* [2021] EWHC (Admin) at [28] and [36].

[7] *R (Lumba) v SSHD* [2011] UKSC 12 at [30].

period of detention can be viewed as arbitrary in terms of Article 5 of the European Convention on Human Rights'.[8]

7. Article 5(1) ECHR contains an exhaustive list of cases in which a person may be deprived of their liberty, which include detention '(f)... of a person against whom action is being taken with a view to deportation or extradition'. However, Clause 12 permits, if the Home Secretary does not consider that removal will be carried out within a reasonable period of time, detention beyond this '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'.

8. Article 5(4) ECHR states that '[e]veryone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.' Clause 13 proposes to reduce the ambit of challenges against detention, to inhibit a remedy in the form of release when the first 28 days of detention are unlawful. Clause 13 purports to restrict the High Court's jurisdiction (or that of the Court of Session, in Scotland) in judicial review proceedings to where the immigration officer or Home Secretary acts in bad faith or 'in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice'. Only the right to apply for a writ of *habeas corpus* is preserved,[9] but that 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'.[10] In contrast to a writ of *habeas corpus*, the remedy of judicial review is wider and 'available where the decision or action sought to be impugned is within 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'.[11]

Modern Slavery

9. The Bill is liable to place the UK in breach of its non-derogable obligations under Article 4 ECHR, including positive and systemic obligations to have in place 'a legislative and administrative framework to prohibit and punish trafficking'[12] and to create a 'spectrum of

[8] *SSHD v Fardous* [2015] EWCA Civ 931 at [43].
[9] The Bill as introduced stated 'or any other prerogative remedy', which was amended by the Home Secretary during Committee Stage in the House of Commons to 'or (b) in Scotland, apply to the Court of Session for suspension and liberation'.
[10] *R v Secretary of State for the Home Department ex p. Cheblak* [1991] 1 WLR 890 at 894C-E.
[11] ibid. See also, *R v Secretary of State of State for the Home Department, ex p. Muboyayi* [1992] 1 QB 244.
[12] *Rantsev v Cyprus and Russia* (C- 25965/04) [285]; *VCL and AN v the United Kingdom* (C- 77587/12 and C-74603/12) [151]. See also, *CN v France* (C-67724/09) and *CN v UK* (C-4239/08).

safeguards [which] must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking'.[13]

10. The Home Office's own statutory guidance recognises that many victims do not feel safe enough to cooperate with authorities until they have had the time to recover from their exploitation.[14] Nevertheless, the Bill denies identification, support and protection to the vast majority of victims of trafficking, with very narrow exceptions,[15] and exposes them to a substantial risk of re-exploitation by denying them a place of safety to recover and instead proposing to detain and return them to their countries of origin or unfamiliar third countries, where they are liable to be re-exploited.

11. Compliance with the Council of Europe Convention on Action against Trafficking in Human Beings ('ECAT') is 'premised' on deeming all victims of trafficking who fall within these measures as a 'threat to public order',[16] which they are not. There is no basis for such a wide blanket use of the exception in Article 13 ECAT, and, in any case, Article 4 ECHR is non-derogable under Article 15 ECHR.

12. The ability to make a suspensive claim is an insufficient safeguard, not least because it only applies to a person being removed to a third country. Therefore, if, for example, an Albanian woman who is a victim of trafficking were to be:

    a. removed to Albania, unless 'exceptional circumstances'[17] apply, she would have no right of appeal and the intention of the Bill is for her to have no ability to make a suspensive claim (including a judicial review claim).[18] This is deeply concerning as there is binding country guidance case law confirming that some trafficked girls and women are at risk of re-trafficking on return to Albania and the sufficiency of

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

[14] 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.

[15] See Clause 21(3) for individuals whose presence the Home Secretary is satisfied is necessary for cooperation in the investigation or criminal proceedings in respect of their exploitation, and exemptions for certain children being cared for by a person who is cooperating with the authorities, in Clause 21(6), and unaccompanied children in Clause 3 in respect of whom the Home Secretary is not under a mandatory duty to make arrangements for removal until such children turn 18.

[16] Home Office, 'Illegal Migration Bill: European Convention on Human Rights Memorandum' (7 March 2023) [45] <https://publications.parliament.uk/pa/bills/cbill/58-03/0262/ECHR%20memo%20Illegal%20Migration%20Bill%20FINAL.pdf> accessed 6 April 2023.

[17] 'Exceptional circumstances' are narrowly defined in Clause 5(5) with reference to Article 15 ECHR and Article 7(1) of the Treaty on European Union.

[18] Clause 4(1)(d), read with Clause 1(2)(h), appears to mean the Home Secretary must disregard court orders (including those suspending removal) made under judicial review procedures.

protection from the Albanian government 'will not be effective in every case'.[19] The Home Office's latest February 2023 Country Policy Information Note even accepts that such cases cannot be certified as clearly unfounded.[20]

b. removed to Rwanda, the suspensive claim, on the limited basis of serious and irreversible harm or factual error, will not ensure she receives the identification, support, and protection she requires. Rwanda is outside the ECHR's jurisdiction and is not a signatory to ECAT. Moreover, the effect of Clause 52, by amending section 80A of the Nationality, Immigration and Asylum Act 2002, would be to declare inadmissible any human rights claim[21] unless narrow section 80A 'exceptional circumstances' apply. She would have no right of appeal against an inadmissibility declaration. Unlike other similar lists,[22] 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.

Entry, settlement, and citizenship

13. In respect of subsequent conferral of permission to travel or time-limited permission to enter or remain, there are narrow *discretionary* exceptions from the Clause 29 exclusion where the Home Secretary considers it necessary as the UK is bound by an international agreement such as the ECHR, or where she considers there are 'compelling circumstances' for that person which render it appropriate to grant permission. As regards conferral of indefinite leave in Clause 29 or citizenship in Clause 35, the *discretion* is limited to where the Home Secretary considers it necessary as the UK is bound by an international agreement such as the ECHR.

[19] 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)). See also *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC).

[20] UKVI, 'Country policy and information note: human trafficking, Albania' (version 14.0, February 2023) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1135644/ALB_CPIN_Human_trafficking.pdf> accessed 4 April 2023.

[21] A human rights claim is defined for the purposes of Clause 52 in section 113(1) of the Nationality, Immigration and Asylum Act 2002, per Clause 57 read with Clause 4(6) of the Bill. Clause 39(4) envisages such a human rights claim can be made, but Clause 52 would appear to render such a claim inadmissible unless 'exceptional circumstances' apply.

[22] 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.

14. It is unclear why the Home Secretary wishes to retain, or in what circumstances she would use, a discretion to act in breach of the UK's international obligations by refusing to grant entry, settlement, or citizenship.

Clause 52 Inadmissibility

15. As above, Clause 52 extends the current inadmissibility process for protection claims from EU nationals, in section 80A of the 2002 Act, to cover other nationalities (Albania, Iceland, Liechtenstein, Norway and Switzerland) and to also make their human rights claims inadmissible. This would cover *all* human rights claims, made by a person to the Home Secretary at a designated place, that to remove from, require to leave, or refuse entry to the UK would be unlawful under section 6 HRA. The human rights claim would be inadmissible, even if the individual entered or arrived in the UK lawfully or was applying from outside the UK for lawful entry and did not meet the four conditions in Clause 2. If a claim is declared inadmissible, it cannot be considered under the Immigration Rules, and a declaration does not give rise to a right of appeal under section 82(1)(a)-(b) of the 2002 Act.

16. It is senseless to extend safe country inadmissibility criteria to cover all human rights claims. Many human rights claims (unlike protection claims) are 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 lack of ties to the country of proposed return.

17. Under this provision, a family or private life application (within or outwith the Immigration Rules reliant on Article 8 ECHR, arguing that refusal would be unlawful under section 6 HRA 1998), brought by an EEA, Swiss or Albanian national inside or outside the UK, would not be considered under the Rules, and would be declared inadmissible unless exceptional circumstances apply, with no right of appeal.

Rule 39 Interim Measures

18. A Contracting State's failure to give effect to a Rule 39 interim measure will occasion a violation of the right to individual petition under Article 34 ECHR, as confirmed by the Grand Chamber of the ECtHR.[23] The Clause 51 placeholder displays a lack of respect for the legal order by which the UK has chosen to be bound. It creates additional risk of non-compliance, by creating a power that can be exercised by making regulations to limit the effects of interim measures issued by the ECtHR as they relate to the removal of persons from the UK.

6 April 2023

[23] *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 494.