

Illegal Migration Bill: Briefing on the Removal of the Interim Remedies Clause for Consideration of Lords Amendments in the House of Commons

This briefing makes the case for keeping the Interim Remedies clause (Clause 52 in the Bill as brought forward from the Commons¹ or Clause 53 in the Bill as amended in Committee in the Lords²) out of the Illegal Migration Bill.

1. The following Interim Remedies clause was omitted from the Illegal Migration Bill in a vote³ on an amendment⁴ in the House of Lords at Report stage:

53 Interim remedies

(1) This section applies to any court proceedings relating to a decision to remove a person from the United Kingdom under this Act (whether the proceedings involve consideration of Convention rights or otherwise).

(2) Any power of the court or tribunal to grant an interim remedy (whether on an application of the person or otherwise) is restricted as follows.

(3) The court or tribunal may not grant an interim remedy that prevents or delays, or that has the effect of preventing or delaying, the removal of the person from the United Kingdom in pursuance of the decision.

(4) In this section—

“Convention rights” has the same meaning as in the Human Rights Act 1998 (see section 1(1) of that Act);

“court proceedings” means proceedings in any court or tribunal (including, in particular, proceedings on an application for judicial review);

¹ Illegal Migration Bill [as brought from the Commons] (HL Bill 133) <<https://bills.parliament.uk/publications/50885/documents/3348>> accessed 11 July 2023.

² Illegal Migration Bill [as amended in Committee] (HL Bill 148) <<https://bills.parliament.uk/publications/51629/documents/3583>> accessed 11 July 2023. Clause 52 of the Bill as brought from the Commons was amended in Committee in the Lords to supplement references to the ‘court’ with ‘or tribunal’.

³ HL Deb 3 July 2023, vol 831, cols 1088 - 1089 <<https://hansard.parliament.uk/Lords/2023-07-03/debates/8A80CE96-4C16-4978-A7B9-E8389D71F2AB/IllegalMigrationBill>> accessed 11 July 2023; UK Parliament, ‘Baroness Chakrabarti’s amendment, Clause 53’ <<https://bills.parliament.uk/bills/3429/stages/17763/amendments/10008050>> accessed 11 July 2023.

⁴ Amendment 152: Illegal Migration Bill Second Marshalled List Of Amendments to be moved on Report (HL Bill 148—II) <<https://bills.parliament.uk/publications/51989/documents/3735>> accessed 11 July 2023.

“decision” includes any purported decision;

“interim remedy” means any interim remedy or relief however described (including, in particular, an interim injunction or interdict).

2. The Secretary of State for the Home Department has set out a motion⁵ to move that the House of Commons disagrees with the Lords in their amendment⁶ to leave out the Interim Remedies clause. The clause ought to remain outside of the Bill and ought not to be restored during ‘ping pong’.
3. The issue is not whether the Government gets its way on an issue of substantive policy for which it may have a democratic mandate (e.g. the imposition of a duty to remove asylum claimants to a third country); instead it is about whether Parliament ought to strike out a key role of judges in ensuring that the Government acts within the law made by Parliament when it provides for that very substantive policy in legislation.
4. In effect, by the Interim Remedies clause, the Government seeks to say *not only* do we want Parliament to enact provisions to give effect to our policy, *we also* want to remove judges from supervising the lawfulness of our conduct when we operate that policy. It is the latter ambition that offends the principle of the rule of law.
5. In no other area of legislative policy-making where duties are imposed on Ministers does the Government maintain baldly that it would be more convenient if it did not have to deal with judicial supervision of whether its subsequent conduct is lawful.
6. Putting Human Rights Act 1998 considerations to one side for a moment, speaking generally, the common law of England and Wales operates *by providing remedies for wrongs suffered*. It does so through the courts by prosecutions for criminal offences, by facilitating civil actions and, when the exercise of public power is in issue, additionally through the use of prerogative orders (e.g. quashing orders).
7. Injunctions (including interim injunctions) are private law equitable remedies that are also available against public authorities to restrain them from acting unlawfully. They are a cornerstone in ensuring that the Government acts within the law prescribed by Parliament

⁵ House of Commons, ‘Lords Amendments: Tuesday 11 July 2023 Illegal Migration Bill (Motions relating to Lords Amendments)’

<https://publications.parliament.uk/pa/bills/cbill/58-03/0347/amend/illegal_migration_day_ccla_0711.pdf> accessed 11 July 2023.

⁶ Lords Amendment 90: Illegal Migration Bill Lords Amendments (Bill 347)

<<https://publications.parliament.uk/pa/bills/cbill/58-03/0347/220347.pdf>> accessed 11 July 2023.

in legislation. As a remedy they function in particular to prevent intended and/or anticipated unlawful conduct.

8. It is a fundamental aspect of the rule of law that such judge-granted remedies are available to all and against all. There is no theory of English Constitutional Law where they can be withdrawn from a class of persons or from a broad area of policy.
9. The most orthodox statement of the nature of Parliamentary sovereignty and legislative supremacy, A.V. Dicey's *Introduction to the Study of the Law of the Constitution*, nonetheless still states:

“We mean...when we speak of the “rule of law” as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.” (8th edition, 1915, Chapter IV, p. 114).

10. There is no warrant for the Home Secretary to escape being subject to the possibility of interim injunctions to restrain her intended and/or anticipated unlawful conduct.
11. A modern restatement of that principle of the rule of law can be found in John Laws' (Lord Justice Laws when he was in the Court of Appeal) *The Constitutional Balance*:

“...judges must ensure, and have the power to ensure, that State action falls within the terms of the relevant published law.” (2021, p. 16).

12. The House of Lords may respect the will of the House of Commons on matters of substantive policy (and especially were the governing party to be seeking to implement a manifesto commitment) but the House of Lords has a larger role, consistent with its expertise and its revising role, in shaping legislation so that it respects constitutional principles and the rule of law in particular. What the Government seeks to achieve with the Interim Remedies clause is inimical to the rule of law. It should be resisted with confidence.

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