Rebuttal to Government claims on Illegal Migration Bill: International conventions, July 2023

This document responds to claims made in relation to the Lords international interpretation amendments during the passage of the Illegal Migration Bill. Our organisations support Lords Amendment 1B and urge Parliamentarians to support it. In our view, concerns raised regarding Lords Amendment 1 were not made out, and in any case, would no longer be relevant following the Lords agreement with Amendment 1B in lieu.

Lords Amendment 1B accords with the rule of law

1. Lords Amendment 1B provides that in interpreting the Illegal Migration Act, regard shall be given to the intention that its provisions, and any acts and omissions made as a result, are intended to comply with the UK's international obligations under key human rights treaties.[1] It is a modest amendment that reaffirms the key principle that the rule of law requires compliance by the state with its obligations in international law.

2. During the debate on 12 July, the Government Minister Lord Murray spoke in opposition to Lords Amendment 1B. He said: "The Government are often criticised for rushing legislation and not allowing adequate scrutiny. Here, the tables are turned. [The Lords' substitute clause] has profound and wide-ranging implications. It should not be shoehorned into this Bill without proper consideration of its consequences and an opportunity for Parliament properly to scrutinise the significance of such a step."[2]

3. Lord Murray's response is a misreading of Lords Amendment 1B that fails to address its interpretative nature. It also ignores the wider context, which is that the Government in passing this Bill denied the Commons the opportunity to receive evidence or scrutinise the Bill line-by-line in Public Bill Committee. It tabled a mass of amendments immediately before Report in that House, and throughout the passage of the Bill up to Report Stage in the House of Lords. It provided no impact assessments before the Bill left the Commons. The impact assessment provided to the Lords were themselves threadbare and significantly late or very late in proceedings.[3] This is all in the context of a Bill that Ministers expressly state to be novel, ambitious and untested.[4] It is not Peers who are being incautious in proposing Amendment 1B but Ministers in demanding this Bill without even such a modest safeguard.

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[1] The European Convention on Human Rights (ECHR), UN Refugee Convention, UN Conventions on Statelessness, UN Convention on the Rights of the Child, and Council of Europe Convention on Action against Trafficking Human Beings.

[2] Hansard HL, 12 July 2023 : Col 1811.

[3] The Bill was introduced to the House of Commons on 7 March 2023, but the Equality Impact Assessment was not published until 11 May 2023 (after Second Reading in the House of Lords), the Impact Assessment until 26 June 2023 (days before Report Stage in the House of Lords), and the Child's Right Impact Assessment until 5 July 2023 (the last day of Report Stage in the House of Lords).

[4] Hansard HC, Second Reading, 13 March 2023 : Col 580 (Braverman); Hansard HL, Second Reading, 10 May 2023 : Col 1921 (Murray).

4. There is significant support for Lords Amendment 1B, which passed in the House of Lords on 12 July by a wider margin than Lords Amendment 1 passed.[5] Our organisations urge Parliamentarians to support Lords Amendment 1B to protect the rule of law.

Addressing criticisms of Lords Amendment 1 and 1B

5. Lords Amendment 1B was proposed in lieu of Lords Amendment 1 after the latter was rejected by the House of Commons. Lords Amendment 1 would have removed existing clause 1 and replaced it with a clause stating "[n]othing in this Act shall require any act or omission that conflicts with the obligations of the United Kingdom" under various human rights treaties.[6] We address two criticisms of Lords Amendment 1 below.

No interference with the UK's dualist system and no constitutional impropriety

6. At Report Stage, Lord Wolfson argued that Amendment 1 "is not a matter of normal interpretation; it goes further, and it has the substantive effect, I suggest, of incorporating those treaties into our domestic law."[7] The Government Minister Lord Murray concurred with this position and said that Lords Amendment 1 would take a "wrecking ball to our long-established constitutional arrangements, with uncertain consequences."[8]

7. In fact, similar provisions exist in law.[9] Notably, section 2 of the Asylum and Immigration Appeals Act 1993 states: "Nothing in the immigration rules (within the meaning of the 1971 Act) shall lay down any practice which would be contrary to the Convention." The Convention referred to in this case is the UN Refugee Convention. However, this similar provision did not incorporate the Convention into our domestic law. In *EB (Serbia)* the Court of Appeal found that 'the Convention does not have the force of statute under our law'.[10]

8. Furthermore, as Lady Hale noted in *ZH (Tanzania),* Article 3(1) of the UN Convention on the Rights of the Child, 'is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law', referencing section 11 of the Children Act 2004 and section 55 of the Borders, Citizenship and Immigration Act 2009, the latter of which provides that the Secretary of State must

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[5] Lords Amendment 1B was agreed 217 Content to 151 Not Content, and Lords Amendment 1 was agreed 222 Content to 179 Not Content.

[6] Leave out Clause 1 and insert the following new clause— "Introduction Nothing in this Act shall require any act or omission that conflicts with the obligations of the United Kingdom under— 5 (a) the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms; (b) the 1951 UN Convention relating to the Status of Refugees including the Protocol to that Convention; (c) the 1954 and 1961 UN Conventions on the Reduction of Statelessness; 10 (d) the 1989 UN Convention on the Rights of the Child; (e) the 2005 Council of Europe Convention on Action against Trafficking Human Beings."

[7] Hansard HL Deb. vol. 831, col. 708, 28 June 2023.

[8] Hansard HL Deb. vol. 831, col. 710, 28 June 2023.

[9] See sections 55 of the Borders, Citizenship and Immigration Act 2009 and 71 of the Immigration Act 2014, section 2 of the Asylum and Immigration Appeals Act 1993, and sections 3(2) and 36 of the British Nationality Act 1981.

[10] *EN (Serbia) v Secretary of State for the Home Department Respondent; Secretary of State for the Home Department v KC (South Africa)* [2009] EWCA Civ 630 at [59].

make arrangements for ensuring that immigration, asylum or nationality functions 'are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'.[11]

9. At Report Stage, Lord Wolfson also argued that Amendment 1B meant "that if the Act requires a Minister to do X but a court later holds that X is contrary to honouring these treaties, the Minister is prohibited from doing it. If the Act says that a Minister cannot do something but a court later says that the treaty means that the Minister has to, then the Minister has to." However, his interpretation went beyond the text of Amendment 1. There is a clear difference between an amendment actively requiring or prohibiting a Minister from doing X, and an 'Act *not requiring* any act or omission'.

10. In any case, Amendment 1B is beyond any doubt interpretative.

11. As stated by Lord Etherton, who succeeded Lord Dyson as Master of the Rolls:

> *"The point was made on Report that the noble Baroness's previous wording had no reference to interpretation. It seems to me quite clear now that the emphasis has been put on having regard to the provisions in these international treaties which bind this country for the purposes of interpreting this Act. I consider that this falls plainly on the right side of the line."*[12]

12. Lord Hope of Craighead, who served as Lord President of the Court of Session and Lord Justice General, Scotland's most senior judge, and later as first Deputy President of the Supreme Court of the United Kingdom, confirmed the new Amendment 1B is an "entirely orthodox" "pure interpretation provision":

> *"I have the misfortune to disagree with the noble Lord, Lord Wolfson. I support entirely what the noble and learned Lord, Lord Etherton, said. The key words in this reformulated amendment are "In interpreting this Act" and "regard". It would not write these conventions into our law, as the previous amendment was in danger of doing. This a pure interpretation provision, and it is entirely consistent with the way the courts approach these various conventions. The assumption is that the United Kingdom, having signed up to the conventions, will respect them in the formulation of its provisions in our domestic law. The court applies that principle in finding a meaning of the words before it in statutory instruments and in primary legislation. This is entirely in accordance with the way the courts approach the matter. The key words are, "In interpreting this Act", and "regard". It is not binding; it is just that regard will be had. That is the way the provision should read. I support the amendment because it is entirely orthodox and consistent with principle."*[13]

This amendment is necessary

13. At Commons Consideration of Lords Amendments on 12 July, Robert Jenrick said in relation to Lords Amendment 1: "The Government take[s] our international law obligations extremely seriously. We believe that all the matters outlined in the Bill are

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[11] *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 at [12].
[12] HL Deb 12 July 2023, Vol 831, Col 1814.
[13] HL Deb 12 July 2023, Vol 831, Col 1817.

within our international legal obligations, and should the Bill or any aspect of it be legally challenged, we will contest that vigorously to defend the position we have set out."

14. This claim is belied by the Government's own admission, via multiple section 19(1)(b) Human Rights Act 1998 (HRA) statements, that it cannot confirm if the Bill is compatible with the European Convention on Human Rights - not to mention criticisms made by the UNHCR, Council of Europe, UN Special Rapporteurs, legal experts, eminent jurists, and cross-party parliamentary committees.

15. Lord Wolfson has argued that Amendment 1B is "unnecessary" because, "the law of this country has always been that, in the absence of express words to the contrary, all statutes are presumed to be in accordance with our international obligations".[14] However, Amendment 1B takes us beyond a mere presumption, and expresses on the face of the Bill the Minister's stated intention that this Bill complies with our international legal obligations. Moreover, as explained above, the circumstances in which the Government is seeking to force what it describes as novel, ambitious and untested onto the statute book emphasise the need for this amendment or something very similar.

16. Given it is the Minister's stated belief that provisions in the Bill do indeed comply with international law, no harm can come from regard to this being Parliament's stated intention on the face of the Bill.

Criticisms no longer relevant given Lords Amendment 1B

17. In any case, the criticisms levied against Lords Amendment 1 are no longer relevant. This is because Lords Amendment 1B is clearly no more than an interpretive provision - it merely reaffirms the UK's intention to uphold a key tenet of the rule of law.

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[14] HL Deb 13 July 2023, Vol 813, Col 1816.