Illegal Migration Bill

House of Commons – Committee Stage

Monday 27 March 2023

Introduction

1. The Equality and Human Rights Commission (the Commission) has been given powers by Parliament to advise Government on the equality and human rights implications of laws and proposed laws and to publish information or provide advice, including to Parliament, on any matter related to equality, diversity and human rights.
2. It is vital that effective, rights-compliant action is taken to ensure that more lives are not lost on dangerous Channel crossings. The Commission welcomes the Government’s commitment to increase safe, regular routes to Britain for those in need of asylum. We note that no detailed plans have yet been made public, and we recommend that proposals are brought forward alongside the legislation.
3. We welcome the Government’s intention to remain within the European Convention on Human Rights (ECHR), which plays an essential role in the protection of human rights in the UK. However, we are concerned that the Bill risks breaching the UK’s legal obligations under the ECHR, as acknowledged by the Government in the section 19(1)(b) statement accompanying the Bill. This briefing further outlines our concerns about compliance with the UN Convention Relating to the Status of Refugees (the Refugee Convention).

Summary

1. Some of the Bill’s provisions risk placing the UK in breach of its legal obligations and individuals at increased risk of harm. Our concerns fall into six categories:
2. Undermining the principle of the universality of human rights (including Clauses 1(5), 2 and 4);
3. Removal of protections for victims of trafficking (Clauses 21-28);
4. Restriction of the right to asylum and penalising refugees (Clauses 4, 11-14 and 29-36);
5. Risk of breaching the ECHR and the principle of non-refoulement under the Refugee Convention (in particular Clauses 37-48);
6. Concerns about detention, particularly of children (Clauses 3, and 11-15); and
7. Insufficient consideration of the impact on equality for different groups.
8. The Commission is further concerned by the speed at which the legislation is progressing. Given the equality and human rights implications of the Bill, sufficient time should be allocated for thorough parliamentary scrutiny.

Universality of protection (Clauses 1-4)

1. The Bill’s provisions apply to those who require leave to enter or remain in the UK, who arrived without such leave on or after 7 March 2023 and had passed through a third country considered safe (Clause 2).[[1]](#footnote-2) The Bill prevents them from claiming asylum or humanitarian protection in the UK (Clause 4) and places a duty on the Secretary of State to remove them (though, in relation to unaccompanied children, this is a power rather than a duty).
2. Clause 1(5) of the Bill disapplies section 3 of the Human Rights Act 1999 (HRA) in respect of the Bill’s provisions, including secondary legislation made under the Bill. Section 3 HRA requires courts to interpret legislation compatibly with Convention rights where it is possible to do so. Where courts can currently apply a rights compatible interpretation of a provision, if Clause 1(5) becomes law, the only avenue available in affected cases would be a declaration of incompatibility under section 4 of the HRA. A declaration of incompatibility does not provide an individual with a remedy, leaving them only able to pursue redress at the European Court of Human Rights (ECtHR).[[2]](#footnote-3) The incompatible provision remains in place, leaving the UK in breach of its obligations and exposing others to potential violations.
3. International and domestic human rights law obliges the UK to protect the rights of everyone in its territory or under its control.[[3]](#footnote-4) It is possible to place lawful and proportionate limits on certain rights, such as the right to family life, to achieve legitimate aims, including in relation to immigration control. However, we are concerned at proposals for the blanket removal of redress for those who meet the Clause 2 conditions.

Victims of trafficking (Clauses 21-28)

1. The duty of removal described above applies regardless of whether a person has made a claim as a victim of slavery or human trafficking (Clause 4(1)(c)). Clauses 21-28 further remove almost all protections for victims of human trafficking and modern slavery with very limited exceptions.
2. Given the high percentage of victims of trafficking identified through the National Referral Mechanism,[[4]](#footnote-5) it is likely that, under the provisions of the Bill, large numbers of victims, including girls and women trafficked for sexual exploitation, may be removed from the UK without further investigation. The Commission’s view is that these provisions are likely to be incompatible with the UK’s obligations under Article 4 ECHR (prohibition of slavery and forced labour).[[5]](#footnote-6) The exceptions to deportation set out under Clause 21(3) depend on a public authority having commenced an investigation. An authority’s failure to do so could result in automatic deportation, contrary to Article 4 which requires protection from removal while trafficking cases are investigated or where removal would prevent an investigation.[[6]](#footnote-7) The proposed ‘offshoring’ of the UK’s obligations under Article 4 is untested and could breach Article 13 ECHR (effective domestic remedy).
3. The UK is also obliged to provide protections to potential victims of trafficking under the Convention on Action against Trafficking in Human Beings (ECAT). This was given domestic effect through the Modern Slavery Act 2015 (and equivalent provisions in Scotland and Northern Ireland). The Government relies on a public order exception to justify the apparent incompatibility (Article 13(3) ECAT). This exception was previously applied to ‘Foreign National Offenders’ and those convicted or suspected of terrorist offences under the Nationality and Borders Act 2022. We question whether the public order exception can be properly applied here, as the factors set out by the Government – including 'pressure placed on public services, the large number of irregular arrivals and the loss of life caused by ... illegal and dangerous journeys’[[7]](#footnote-8) – may not prevent the application of protections for victims of trafficking.

Penalising refugees (Clauses 4, 11-14 and 29-36)

1. The Commission is concerned that the Bill risks placing the UK in breach of the Refugee Convention, particularly with regard to Article 31, which prohibits contracting states from imposing penalties on refugees on account of their illegal entry or presence. Preventing claims from, and indefinitely detaining, those who arrive irregularly (Clause 4 and Clauses 11-14) amounts to a penalty on the basis of mode of arrival. The same applies to provisions in Clauses 29-36, which prevent those who have arrived irregularly, and their family members, from ever re-entering the UK, being given leave to remain or obtaining British citizenship.
2. Penalties would apply to those who did not come ‘directly’, defined in Clause 2(5) as not passing through or stopping in another country. We acknowledge the Government’s concern that people claiming asylum in the UK may have had the opportunity to seek protection in another country. However, the proposed definition of ‘directly’ is narrower than the one applied in UK case law or international standards, which allow some flexibility for refugees who have passed through intermediary countries before claiming asylum.[[8]](#footnote-9) The Bill’s definition is likely to apply to the vast majority of refugees coming to the UK given that, due to reasons of geography, there are rarely ‘direct’ routes, by the Bill’s definition, available.

Adequacy of legal protections (Clauses 37-48)

1. Clauses 37-48 provide that a person’s removal from the UK may be suspended if they face a ‘real risk of serious and irreversible harm’. The Bill does not define ‘serious and irreversible harm’, instead delegating responsibility to the Secretary of State to do so (Clause 38). Parliament may wish to seek additional assurances from Government during the passage of the Bill to ensure that this safeguard will in practice be adequate to prevent breaches of the human rights of people subject to removal.
2. A claim for suspension of removal must be made within seven days of a notice of removal, which may present challenges for people who are traumatised or otherwise in vulnerable situations, do not speak English, or lack adequate legal advice. A claimant must (Clause 40(5)(a)) present compelling evidence that they would face a real risk of serious and irreversible harm. This is an unusually high test, given the risk that removal may breach their ECHR and Refugee Convention rights.
3. The Bill places significant restrictions on the ability to appeal against removal, including preventing the Upper Tribunal from hearing new matters as part of a case without the permission of the minister (Clause 46). Clause 48 creates an ‘ouster clause’ which makes certain decisions of the Upper Tribunal final and not subject to review by any other court.

Detention, including of children (Clauses 11-14)

1. The Bill creates broad powers to detain people, including children and pregnant women, and removes safeguards and legal rights to challenge detention (Clauses 11-14).[[9]](#footnote-10) Clause 12 provides that a person may be detained for as long as is ‘reasonably necessary’ in the opinion of the Secretary of State. This overturns the established common law position that it is for the court to decide for itself whether the detention of a person is reasonable, taking into account the likelihood of removal.[[10]](#footnote-11) Clause 13 removes the ability to challenge detention for the first 28 days, except by applying for a writ of habeas corpus (or the equivalent in Scotland) which is limited to a challenge to the lawfulness of detention.
2. The Bill does not exclude the detention of children with family members or guardians. The detention of children was banned in the UK in most circumstances in 2014,[[11]](#footnote-12) in light of evidence of serious harm to their physical and mental health.[[12]](#footnote-13) We consider that the UK Government should end the use of immigration detention for children, in line with international human rights standards.

**Unaccompanied children (Clauses 3 & 15)**

1. Under Clause 3, the Secretary of State does not have a duty to remove unaccompanied children but would have the power to do so.[[13]](#footnote-14) Where a child remains, they would be deported on reaching 18. This provision, combined with the Clause 4(2) duty, means that any child arriving in the UK via an irregular route, whether alone or accompanied, is unable to seek protection and is subject to removal, whether immediately or at a later date, engaging Article 8 EHCR (right to respect for private and family life) and provisions of the UN Convention on the Rights of the Child.
2. Clause 15 permits the Secretary of State to provide or arrange for the provision of accommodation (in England) for unaccompanied children indefinitely. In the long term, such accommodation is likely to be inappropriate and undermine local authorities' legal duties to safeguard and promote the welfare of children in their area.[[14]](#footnote-15) 200 children are currently missing from Home Office accommodation, suggesting a lack of sufficient safeguards for their safety and wellbeing.[[15]](#footnote-16)

Insufficient consideration of equality duties

1. We are concerned about the treatment under the Bill of people with certain protected characteristics, such as children, women (including pregnant women) and disabled people, as well as other groups who are particularly vulnerable, including torture survivors and people who have been trafficked. The Clause 2 ‘removal duty’ does not allow for consideration of individual circumstances and the Government has not produced an Equality Impact Assessment covering the proposals. In January, in relation to the Government’s Memorandum of Understanding on migration with Rwanda, the Commission raised concerns about the risks of removing people from certain groups, including pregnant and disabled people, people with mental health conditions or experiencing trauma, and LGBT people under the Government’s Rwanda policy.[[16]](#footnote-17)
2. We consider that the Government should engage further with the equality implications of this Bill, including the Public Sector Equality Duty in relation to implementation if the Bill becomes law. The Home Office has a legally binding agreement in place with the Commission to address its compliance with equality law in developing and implementing its immigration enforcement policies. We continue to monitor the effectiveness of the Home Office’s actions in this regard.

Further information

The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. Find out more about the Commission’s work on our [website](http://www.equalityhumanrights.com)**.**

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1. Including those with leave obtained by deception and those arriving without valid entry clearance or electronic travel authorisation. [↑](#footnote-ref-2)
2. See JCHR, [Evidence of the Equality and Human Rights Commission to inform legislative scrutiny by the Joint Committee on Human Rights of the Bill of Rights Bill](https://committees.parliament.uk/writtenevidence/115379/pdf/), 12 January 2023 [↑](#footnote-ref-3)
3. See Smith v Ministry of Defence [2013] UKSC 41; [2014] AC 52; also Al-Skeini v United Kingdom (2011) 53 EHRR 589 [↑](#footnote-ref-4)
4. In 2022 around 9 in 10 positive reasonable grounds decisions were made in relation to those referred to the mechanism, and the proportion of positive conclusive grounds decisions was 87% for adult and 92% for child potential victims. See UK Government, [Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK](https://www.gov.uk/government/statistics/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2022/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2022), end of year summary 2022, 2 March 2022. [↑](#footnote-ref-5)
5. The Government acknowledges that it is unable to confirm the compatibility of these provisions with Convention rights in its Human Rights Memorandum: UK Government, Illegal Migration Bill - European Convention on Human Rights Memorandum, 7 March 2023, para 47. The Home Secretary has reportedly confirmed that there is a more than 50% chance that the provisions are incompatible with Convention rights. See <https://www.huffingtonpost.co.uk/entry/exclusive-suella-braverman-admits-immigration-crackdown-may-not-be-legal_uk_64072e62e4b0586db70fd939> [↑](#footnote-ref-6)
6. In the case of *MS (Pakistan) v Secretary of State for the Home Department* [2020] UKSC 9, the Supreme Court held that Article 4 includes an obligation to investigate potential trafficking, which did not depend upon there being a complaint. It also held that it would be unlawful to remove MS from the UK where this would prevent an effective investigation. [↑](#footnote-ref-7)
7. UK Government, Illegal Migration Bill Explanatory Notes, 7 March 2023 para 119. [↑](#footnote-ref-8)
8. See R v Asfaw (On Appeal from the Court of Appeal (Criminal Division)) House of Lords SESSION 2007-08 [2008] UKHL 31, which confirms that unless the refugee has ‘stopped running’ he or she is still ‘coming directly’; and Dr Paul Weis [*The Refugee Convention 1951: The Travaux Préparatoires,*](https://www.unhcr.org/uk/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html) p 310. [↑](#footnote-ref-9)
9. Clause 11 (2) provides that a person may be detained if the immigration officer suspects that the person meets the 4 conditions in Clause 2, pending a decision as to whether the conditions are met. [↑](#footnote-ref-10)
10. *Hardial Singh* principles (*Lumba* [2011] UKSC 12). [↑](#footnote-ref-11)
11. Immigration Act 2014 [↑](#footnote-ref-12)
12. See Royal College of General Practitioners, Royal College of Paediatrics and Child Health, Royal College of Psychiatrists and the UK Faculty of Public Health, [Intercollegiate Briefing Paper: Significant Harm - the effects of administrative detention on the health of children, young people and their families](https://www.bbc.co.uk/blogs/thereporters/markeaston/images/intercollegiate_statement_dec09.pdf), December 2009. The UN body charged with overseeing implementation of the UNCRC has called for all child immigration detention to be ‘forbidden by law and such prohibition should be fully implemented in practice’. See EHRC [Submission to the UN Committee on the Rights of the Child: Children’s rights in Great Britain](https://www.equalityhumanrights.com/en/publication-download/children%E2%80%99s-rights-great-britain-submission-un-2023), December 2022. [↑](#footnote-ref-13)
13. The Explanatory Notes to the Bill state (at para 17) that: ‘As a matter of current policy this power will only be exercised in limited circumstances ahead of them reaching adulthood, such as for the purposes of family reunion or where removal is to a safe country of origin.’ [↑](#footnote-ref-14)
14. S.17 of the Children Act 1989 places a legal duty on local authorities in England to safeguard and promote the welfare of children in their area. The Children’s Commissioner has stated that she is ‘deeply worried about formalising the role of the Home Office as the provider of accommodation for these children’ and that ‘hotel accommodation, run by the Home Office, is not appropriate for children on a long-term basis’. See Children’s Commissioner, [Letter to the Home Secretary on the Illegal Migration Bill](https://www.childrenscommissioner.gov.uk/news/letter-to-the-home-secretary-on-the-illegal-migration-bill/), 13 March 2023, accessed 21 March 2023; and Children’s Commissioner, [Letter to the Joint Committee on Human Rights (JCHR)](https://www.childrenscommissioner.gov.uk/blog/letter-to-the-joint-committee-on-human-rights-jchr/), 23 February 2023, accessed 21 March 2023. [↑](#footnote-ref-15)
15. This was the case as of 23 January 2023, as confirmed by Lord Murray of Blidworth. See comments in Hansard at <https://hansard.parliament.uk/Lords/2023-01-23/debates/2BEF91B6-389B-46E4-86EF-C93331267E9C/ChildrenSeekingAsylumSafeguarding?highlight=children%20missing#contribution-1AAD0305-EAFF-4D71-8CD6-90AB2B7953DA>. [↑](#footnote-ref-16)
16. EHRC, [Response following High Court judgment on AAA and others -v- Secretary of State for the Home Department](https://www.equalityhumanrights.com/en/our-work/news/ehrc-response-following-high-court-judgment-aaa-and-others-v-secretary-state-home), 19 January 2023. [↑](#footnote-ref-17)