Illegal Migration Bill
House of Commons Second Reading
Briefing
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Introduction

1. JUSTICE is a cross-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

Lack of scrutiny

2. JUSTICE is concerned that a Bill of such importance, with significant implications for the UK's asylum system, the UK's commitment to its obligations under the European Convention on Human Rights ('**ECHR**') and other international legal obligations (such as the Refugee Convention), is having its second reading a mere six days after it was introduced. By contrast, before the last significant immigration legislation, the Nationality and Borders Act 2022, was introduced to Parliament, it had a six-week public consultation[1] and was not introduced to Parliament for two months after the end of that consultation.[2]

3. The Illegal Migration Bill ('**the Bill')** would result in a significant overhaul of the UK's asylum and immigration system, less than a year after the last significant changes under the Nationality and Borders Act 2022, yet there has been no public consultation or pre-legislative scrutiny. Parliamentarians have now been given a matter of days before they are expected to vote on this legislation.

Breaches of the UK's international legal obligations

4. This is a perilous moment for human rights protections in continental Europe, as the war in Ukraine continues and Russia is expelled from the Council of Europe (the leading human rights organisation on the continent). The UK's reputation is strengthened not only by being a party to the ECHR but an active, leading member of the Council of Europe. Now is the moment for the UK to lead on the world stage, reinforcing basic human rights norms and international law, including the European Convention on Human Rights ('**ECHR')** and the Council of Europe Convention on Action against Trafficking in Human Beings ('**ECAT**').

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[1] Home Office, 'New Plan for Immigration' (24 March 2021)
[2] Nationality and Borders Act 2022

Compatibility with ECHR

5. The Government have issued a Section 19(1)(b) statement under the Human Rights Act that they are unable to confirm that the provisions of this legislation are compatible with our international legal obligations under the ECHR. In practice, this will have involved the Home Office seeking written advice from its departmental legal advisers on the legislation's compatibility with the ECHR.[3] However, the ECHR memorandum published by the Home Office states throughout that the Government is satisfied that the legislation's provisions are compatible with our ECHR obligations.[4] The only explanation for the Section 19(1)(b) statement is that the legislation is 'new and ambitious' and involves 'radical solutions'.[5]

6. The Joint Committee on Human Rights ('JCHR') have said that a section 19(1)(b) statement requires *'strong justification as a matter of principle'* – we agree.[6] However, the Government have been sending considerable mixed messages on this point. The Home Secretary stated in the Parliamentary debate at First Reading that she was *'confident',* and indeed *'certain',* that the Bill's measures are compatible with our international obligations.[7] If this is so, based on the legal advice she has received, then it is unclear why the Section 19(1)(b) statement has been made. Pushing the Bill to a vote where the Department in question cannot confirm that, in their view, multiple provisions are compatible with the ECHR threatens our reputation as a country that upholds international law.

7. Section 1(5) of the Bill sets out that Section 3 of the Human Rights Act ('HRA') does not apply to this Bill. First, JUSTICE is opposed to dis-applying key aspects of domestic human rights law to individual legislation. Section 3 HRA requires the courts to *'read and give effect'* to legislation *'in a way which is compatible'* with ECHR rights '*so far as it is possible to do so'*.[8] The courts cannot *'alter substantially the meaning of primary legislation'* or undermine a *'fundamental feature of the legislation'*.[9] However, if a possible

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[3] Cabinet Office, 'Guide to Making Legislation' (2022), para. 3.9
[4] Home Office, 'Illegal Migration Bill' (7 March 2023),
[5] Ibid., para 47
[6] The Joint Committee on Human Rights, 'Scrutiny of Bills: Progress Report, First report of Session 2002 – 2003', para 15
[7] Hansard, 'Illegal Migration Bill' (7 March 2023)
[8] Section 3 Human Rights Act 1998
[9] *Ghaidan v Godin-Mendoza* [2004] UKHL 30 2 A.C. 557

ECHR-complaint interpretation is available, the courts should use that interpretation. Removing the scope of Section 3 HRA suggests that the Government is in fact worried about the provisions of this Bill being incompatible with our international law obligations under the ECHR.

8. It is also worth emphasising this does not prevent the courts from being able to issue a Section 4 HRA declaration of incompatibility with the ECHR. However, given the Section 19(1)(b) statement issued, we have legitimate concerns as to how the Government would respond to such a declaration and, in any event, remedying legislation is often significantly delayed by the limited Parliamentary time.

The duty to deport potential victims of torture

9. The Bill gives the Secretary of State for the Home Department ("**SSHD**") the duty to deport potential victims of torture (Article 3 ECHR) who arrive in the United Kingdom through irregular means. We would observe that an Article 3 human rights claim can only be made at present if an individual would face torture or a *'serious, rapid and irreversible decline in their state of health resulting in intense suffering or a significant (substantial) reduction in life expectancy as a result of either the absence of treatment or lack of access to such treatment'.*[10] This is an incredibly high bar. Whilst we note that the legislation states they would not be deported to their country of origin, and there are limited protections for deportation to other countries (see our concerns below), the UK would be withdrawing its protections from a number of incredibly vulnerable individuals without properly assessing their claim. There would also be no provision for such individuals to obtain any form of humanitarian protection leave, even if they are too vulnerable be deported and their claims are meritorious.

Concerns the legislation is in breach of the Refugee Convention

10. The United Nations High Commissioner for Refugees ('UNHCR') has said the legislation would *'amount to an asylum ban – extinguishing the right to seek refugee protection in the United Kingdom for those who arrive irregularly, no matter how genuine and compelling their claim may be, and with no consideration of their individual*

[10] Home Office, 'Medical claims under Articles 3 and 8 of the European Convention on Human Rights' (19 October 2020)

circumstances'.[11] They go on to say this would be a *'clear breach of the Refugee Convention and would undermine a longstanding, humanitarian tradition of which the British people are rightly proud'.*[12] We share these concerns.

Concerns the legislation is in breach of international obligations regarding modern slavery and human trafficking

11. We also have significant concerns that proposals to deport potential victims of modern slavery/ human trafficking, without properly considering their claim, are incompatible with Article 4 ECHR and ECAT.[13] The SSHD would have a legal duty to deport a potential victim of trafficking, who has not been convicted of a serious criminal offence, in situations where they have a positive reasonable grounds decision from the National Referral Mechanism.

12. We note that the Government believes it can rely on the 'public order' exemption to its obligations under ECAT . However, we note the significant legal concerns raised during the passage of the Nationality and Borders Act 2022 by the Joint Committee on Human Rights and the Independent Anti-Slavery Commissioner around a significant lowering of the threshold for what constitutes 'public order grounds.[14] These concerns would also apply to this legislation, especially when many will not have been convicted of a criminal offence and may in any event have a defence under Section 45 Modern Slavery Act 2015.[15]

13. The Government's legal justification appears to be that the situation in the Channel necessitates it and there will be protections for those supporting criminal investigations and proceedings. However, first, as the previous Independent Anti-Slavery Commissioner said during the Nationality and Borders Act 2022 debate, providing a sufficient recovery and reflection period is often essential to enable potential witnesses to co-operate with criminal proceedings and therefore limiting such support *'will severely limit our ability to convict perpetrators and dismantle organised groups'.*[16] This will especially be the case when the allegation has only recently been disclosed and the individual in question is in detention. Second, the situation in the Channel was a large part of the justification for the

[11] UNHCR, 'Statement on UK Asylum Bill' (07 March 2023)
[12] Ibid.
[13] See, for example, Articles 13 and 14 ECAT
[14] Joint Committee on Human Rights, 'Legislative Scrutiny: Nationality and Borders Bill (Part 5 – Modern Slavery)' (21 December 2021)
[15] Section 45 Modern Slavery Act 2015
[16] Independent Anti-Slavery Commissioner, 'Letter to Rt Hon Priti Patel MP' (7 September 2021)

Nationality and Borders Act 2022, which was only passed last year. However, this Bill is now proposing to disapply or dilute several provisions in the Nationality and Borders Act 2022 which placed ECAT requirements into domestic law.[17]

14. In relation to Article 4 ECHR, the European Court of Human Rights has found that member states have a duty to take operational measures to protect victims (or potential victims) of trafficking and a procedural obligation to investigate situations of potential trafficking.[18] We are not convinced that the minimal safeguards proposed by the SSHD in the Bill's accompanying ECHR memorandum are adequate to meet our obligations under Article 4 ECHR, for similar reasons to those set out above in relation to ECAT.

15. JUSTICE has serious concerns therefore that the Bill is in breach of our international legal obligations under Article 4 ECHR and ECAT.

The Bill permits the deportation of unaccompanied asylum-seeking children

16. Whilst there is no duty to deport, Clause 3(2) permits the SSHD to deport unaccompanied asylum-seeking children. This is despite Robert Jenrick MP, Minister for Immigration, confirming to the Women and Equalities Committee that it was not the Government's *'intention'* to remove unaccompanied minors to Rwanda.[19]

Lack of accountability and ability of individuals to challenge the unlawful use of state power

17. The Bill contains the following powers which will prevent individuals from holding the Government accountable for decisions it makes and challenging unlawful acts by the state:

    (i) **The Bill prevents a judge making an order in a judicial review claim to prevent a potentially unlawful deportation**

    A person due to be removed under the Bill would not be able to obtain an order to prevent their deportation under Clause 4(1)(d) of the Bill, even if they have made

[17] Home Office, 'Illegal Migration Bill: Explanatory Notes' (7 March 2023)
[18] *V.C.L and A.N v The United Kingdom* (Application Nos 77587/12 and 74603/12).
[19] Women and Equalities Committee, 'Oral evidence: Equality and the UK asylum process' (25 January 2023), Q263

a judicial review application challenging their removal from the UK under the Act and a judge considered it has merit. This is an extraordinary attack on the rule of law and the ability of the judiciary to legitimately scrutinise Home Office decision-making and prevent unlawful exercise of state powers. As the Government's own response to the Independent Review of Administrative Law said in March 2021, *'Judicial Review helps to ensure [those holding public office] are held accountable and use the powers according to the boundaries and the manner in which they should be exercised, as set down and intended by Parliament'.*[20]

(ii) **Individuals will not be allowed to apply for immigration bail until after 28 days of detention**

At present, individuals can make an immigration bail application for release to the First tier Tribunal once 8 days has passed since they *arrived in the UK*.[21] It should be noted that one of the central benefits of immigration bail applications are that they are free, require limited paperwork and lead to a quick oral hearing (and decision) in front of an immigration judge. No justification has been provided for the significant extension of this timeframe. If the Home Office are confident about the lawful basis for detaining individuals, then they should confidently defend immigration bail applications. It should also be noted that, at present, if individuals are refused immigration bail, they cannot apply for another 28 days without a *'material change of circumstances'*.[22]

(iii) **Individuals will be unable to apply for judicial review of an immigration detention decision**

At present, judicial review claims are a vital safeguard for individuals who are seeking to challenge their ongoing immigration detention and to enforce the *Hardial Singh* principles.[23] However, Section 13(4) prevents any individual from

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[20] Ministry of Justice, 'Judicial Review Reform: The Government Response to the Independent Review of Administrative Law' (March 2021), para 18

[21] Home Office, 'Immigration Bail' (27 January 2023)

[22] First tier Tribunal (Immigration and Asylum Chamber), 'Application to be released on First tier Tribunal bail: Form B1'

[23] The legality of immigration detention is primarily set out by the common-law case of *R (Hardial Singh) v Governor of Durham Prison [1983] EWHC 1 (QB),* often referred to as the Hardial Singh principles. These are summarised in the Supreme Court case of *R (Lumba) v SSHD [2011] UKSC 12* as: *'(i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose; (ii) the deportee may only be detained for a period that is reasonable in all the circumstances; (iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not able to effect deportation within a reasonable period, he should not seek to exercise the power of detention; and (iv) the Secretary of State should act with reasonable diligence and expedition to effect removal'.'*

challenging their immigration detention by judicial review. As noted above, the Government have acknowledged that judicial review is a vital safeguard against unlawful state decision-making, and this is especially important for those deprived of their liberty.

We note that the Government's relies on the fact that individuals will be able to apply for a writ of *habeas corpus* at any time in their detention and rely on grounds under Article 5 ECHR.[24] *Habeas corpus* is a historic and little-used legal route within this area given the more predominant use of judicial rreview proceedings. It is unclear why the Government is seeking to change this. If, as the Government claim, individuals will still be able challenge their detention using the *Hardial Singh* principles and ECHR grounds, then it is unclear why the procedure for challenging detention needs to be upended. However, there is legal commentary that suggests *habeas corpus* only applies if there is a legal question surrounding the authority of an individual's detention whereas judicial review claims can also consider procedural errors, failure to consider relevant matters and fundamental unreasonableness.[25] Since Article 5 ECHR also has a procedural aspect, JUSTICE is concerned that this will limit grounds in which someone can challenge immigration detention.

(iv) **The Bill prevents challenge of procedural errors in immigration detention decisions unless they are a 'fundamental breach of natural justice'**

Section 13(4) sets out that the powers of the immigration officer should not be held to have been exceeded *'by reason of any error made'* in the decision to detain unless that decision was made in bad faith or *'in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice'*. This appears to significantly alter the position set out by Lord Dyson in the Supreme Court case of *Lumba* which found that it was for the SSHD to prove detention was lawful and that *'she cannot do this by showing that, although the decision to detain was tainted by public law error in the sense that I have described, a decision to detain free from error could and would have been made'.*[26] This clause gives the SSHD carte blanche to make error-strewn detention decisions, safe in the

[24] Home Office, 'Illegal Migration Bill: ECHR memorandum' (7 March 2023), paras 33 and 34
[25] Finnian Clarke, 'Habeas Corpus and the Nature of "Nullity" in UK Public Law' (UK Constitutional Law Association, 8 October 2019)
[26] *R (on the application of Lumba) v SSHD* [2011] UKSC 12, para 88

knowledge that they cannot be adequately challenged and the individual will struggle to seek their release.

(v) **Serious concerns around the proposed suspensive claim procedure**

The only way in which an individual can challenge their proposed deportation to a third country listed in the Schedule (as far as we are aware, for non-nationals, the only agreement presently in place is with Rwanda) is a 'serious harm suspensive claim' under Clause 40 or a 'factual suspensive claim' under Clause 41. We are particularly concerned about the requirement under Clause 40(5) for an individual to have to provide *'compelling evidence'* of a *'real risk of serious and irreversible harm'.* This burden is likely to significantly impact victims of torture and those with mental health problems, who may struggle to comment on highly traumatic personal events, especially as these claims are likely to be made when they are adults at risk in an immigration detention centre. We also have very serious practical concerns about the availability of legal advice within detention, the quality of decisions that will be made within a 4-day time period and the potential timeframes for the onward appeal to the Upper Tribunal.

The Bill hands extensive powers to the executive

18. The way in which the Bill limits accountability is also particularly concerning in light of the powers and discretion the Bill provides to the SSHD, without proper oversight from Parliament:

(i) **The SSHD is given power to make regulations which could breach our international law obligations**

Clause 49 gives the SSHD the power to pass *'regulations'* ignoring interim measures of the European Court of Human Rights in relation to immigration removal cases. First, it is noticeable that such a power is given to the SSHD without the oversight of Parliament. Whilst interim measures are already not binding on domestic courts in domestic law, though they are required to take them into account under s2 HRA, they are binding on the UK Government as a signatory to the ECHR in international law. The explanatory notes describe this as a '*placeholder'* and it is

unclear what (if any) amendments will come in due course.[27] As drafted, the Bill would give the SSHD the power to pass regulations to breach international law. This is plainly unacceptable.

It is also worth noting that interim measures are used rarely and only in circumstances where there is an *'imminent risk of irreparable damage'*.[28] In the immigration deportation context, this is most likely to occur when Articles 2 (right to life) and Article 3 (prohibition on torture and ill-treatment) of the ECHR are engaged. If the Government has legitimate concerns with the interim measures procedure in relation to the recent Rwanda decision, the correct way to seek reform would be through our influence in the Council of Europe. This influence would be fatally undermined by unilaterally reneging on our international legal obligations.

(ii) **That the SSHD is given a wide discretion to detain individuals and define what a reasonable period of detention would be**

Under Section 11(2) of the Bill, the SSHD is permitted to detain individuals if an immigration officer *'suspects'* that they have met the four conditions that they are liable for removal. Their family members are also permitted to be detained (even if they themselves don't meet the conditions in section 2 of the Bill) pending a decision as to whether their relative meets the criteria for removal and whether they are liable for removal. Section 12 of the Bill also repeatedly emphasises the importance of the opinion of the SSHD in what a reasonable period of detention or time to make a removal decision is. At present, in a judicial review claim, it is for the courts to assess what is a reasonable period of detention applying the *Hardial Singh* principles.

(iii) **The SSHD has the power to define "serious and irreversible harm" by regulations**

The SSHD, under Clause 38 of the Bill, would be given the power to make regulations which define *'any aspect of serious and irreversible harm'* and *'give examples of what is and is not to be treated as serious and irreversible harm'*. This is particularly concerning given the reduced ability of individuals to challenge decisions, and the limits placed on judicial oversight. A suspensive claim to the Upper Tribunal that an individual will face 'a real risk of serious and irreversible

[27] Home Office, 'Illegal Migration Bill: Explanatory Notes' (7 March 2023), para 216

[28] See European Court of Human Rights, 'Practice direction: Requests of interim measures (Rule 39 of the Rules of Court)'; and Mamatkulov and Askarov v. Turkey, Application Nos. 46827/99 and 46951/99, 4 February 2005.

harm', under Clause 37, is the only route for an individual to make arguments that their deportation would breach Article 3 ECHR (prevention of torture and ill-treatment). This protection is seriously undermined if the SSHD can simply define what is, and is not, serious and irreversible harm. We note that this the Government also says this is a 'placeholder' clause, but this is no way to introduce legislation and avoid full Parliamentary scrutiny on such a fundamental area of human rights protection.

The Bill has retrospective application

19. Legal certainty requires that individuals know what their rights how and how they can be enforced. This is especially important when the UK's international legal obligations are at stake and when extremely vulnerable individuals will be affected. We would highlight the following provisions which will apply retrospectively (i.e. to people who arrived in the UK before this law is passed):

    (i) **The Bill gives the SSHD retrospective power to deport those that arrive in the UK on/ after 7 March 2023.**

    The legislation will cause huge amounts of legal uncertainty as any individual who arrives in the UK on or after 7 March 2023 is potentially subject to the powers in this legislation (even though it has not been passed into law). Section 5(12) states that the legislation applies to any asylum/ human rights claim made on/ after 7 March 2023 that has not been decided by the SSHD. Given the considerable asylum caseload backlog, it is likely that this will apply to a large number of people. It is a recipe for legal chaos, uncertainty, distress and will further compound the unacceptable delays in the asylum system.

    (ii) **The Bill permits the forced deportation of family members, including children, who came to the UK before this Bill was introduced.**

    Section 8 of the Bill permits the removal of family members in the United Kingdom whose asylum/ human rights claims have not been determined but who arrived before this Bill was introduced. This applies if they meet the following conditions: (i) they are a partner, child, parent or adult dependent relative of an individual subject to removal under this Bill; (ii) they do not have leave to enter or remain in the UK; and (iii) they are not a British/ Irish citizen and do not have the right of abode under s2 Immigration Act 1971. They will also face the same restrictions on legal claims and the disapplication of modern slavery protections. Many of these

individuals should have had their protection/ human rights claims determined by now, under previous immigration laws, but will retrospectively face deportation without consideration because of the considerable delays.

(iii) **Reversing protections for victims of modern slavery/ human trafficking**
Section 21 of the Bill seeks to remove protections for individuals in the Nationality and Borders Act 2022 to not be removed during their recovery period and to grant individuals limited leave to remain in certain circumstances. It gives the SSHD broad powers to retrospectively revoke leave granted legitimately under legislation approved by Parliament last year (see Section 21(8) of the Bill). This is no way to legislate in an area that involves how we as a country protect victims of human trafficking and modern slavery.

Conclusion

20. In conclusion, JUSTICE is opposed to this legislation proceeding in Parliament because: (i) it has not been given proper consultation given its significant consequences on UK immigration policy; (ii) there are strong arguments that it breaches our international law obligations; (iii) it seeks to prevent individuals holding the Government accountable for its decisions; (iv) it hands significant powers to the executive; and (v) it would apply retrospectively, which is both deeply unfair and undermines legal certainty.

21. JUSTICE would urge all Members of Parliament to vote against the Bill at Second Reading and asks the Government to think again.