Illegal Migration Bill

House of Lords

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.

2. JUSTICE continues to be opposed to this legislation because: (i) there are strong arguments that it breaches our international law obligations; (ii) it threatens the rule of law; (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.

3. We are incredibly concerned by the speed in which this Bill is progressing through Parliament and would urge Peers to consider carefully both the consequences of this legislation and the wider message which Parliament endorsing its provisions would send.

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 European Convention on Human Rights ('**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 ECHR and the Council of Europe Convention on Action against Trafficking in Human Beings ('**ECAT**').

Compatibility with ECHR

Section 19(1)(b) Statement

5. The Government have issued a Section 19(1)(b) statement under the Human Rights Act 1998 ('**HRA'**) 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.[1] 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.[2] The explanation for the Section 19(1)(b) statement is that the legislation is 'new and ambitious' and involves 'radical solutions'.[3]

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.[4] However, the Government have been sending considerable mixed messages on this point. The Secretary of State for the Home Department ('**SSHD**') 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.[5] At Second Reading, it was again stated that the SSHD is 'confident' that it is within the parameters of our international law obligations.[6] If this is so, based on the legal advice she has received from 'some of the nation's finest legal minds',[7] then it is unclear why the Section 19(1)(b) statement has been made. Pushing the Bill through 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. We note that the comparisons made with the Communications Act 2003 and House of Lords Reform Bill 2012 are misplaced. Whilst a Section 19(1)(b) was made during the passage of the Communications Bill, this was in relation to one specific aspect of the Bill namely the proposed ban on political advertising across all broadcast media. The Communications Bill was subject to *'intensive pre-legislative and legislative scrutiny'*, unlike this Bill.[8] The House of Lords Reform Bill 2012 was withdrawn before Third Reading.[9]

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[1] Cabinet Office, *Guide to Making Legislation* (2022), para. 3.9

[2] Home Office, *Illegal Migration Bill* (7 March 2023).

[3] *Ibid,* para 47.

[4] The Joint Committee on Human Rights, *Scrutiny of Bills: Progress Report, First report of Session 2002 – 2003*, para 15.

[5] Hansard, 'Illegal Migration Bill' (debated 7th March 2023)

[6] Hansard, 'Illegal Migration Bill' (debated 13th March 2023).

[7] *Ibid*.

[8] Aileen Kavanagh, '*Is the Illegal Migration Act itself illegal? The meaning and methods of Section 19 HRA'* (UK Constitutional Law Association, 10 March 2023)

[9] House of Lords Reform Bill 2012.

Section 3 Human Rights Act

8. Clause 1(5) of the Bill sets out that Section 3 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'*.[10] The courts cannot *'alter substantially the meaning of primary legislation'* or undermine a *'fundamental feature of the legislation'*.[11] However, if a possible 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.

   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.

Articles 2 and 3 ECHR

9. Clause 38 would narrow the definition of a serious harm suspensive claim further. It amends the test from there being a 'real risk' to there being a 'real, imminent and foreseeable' risk of 'serious and irreversible harm'. This significantly tightens the legal test in Article 2 and Article 3 claims beyond that presently required in a humanitarian protection case.[12] No explanation has been provided for why a new requirement of imminence is set out. We would stress that, if an individual is likely to face a real risk of torture for example, it should not matter whether that risk is imminent.

10. Sections 5(c) and 7 of Clause 38 appear to be aimed at limiting Article 3 ECHR claims around medical treatment in light of the 2020 Supreme Court decision of *AM (Zimbabwe).*[13] To be clear, for an individual to succeed in an Article 3 claim based on

[10] Human Rights Act 1998, Section 3.

[11] *Ghaidan v Godin-Mendoza* [2004] UKHL 30 (21 June 2004).

[12] Home Office, *Humanitarian protection in asylum claims lodged on or after 28 June 2022,* 28 June 2022, p10.

[13] *AM (Zimbabwe} v SSHD* [2020] UKSC 17. Which considered the ECtHR decision in *Paposhvili v Belgium* Application No 41738/10.

their medical condition, they must *'demonstrate "substantial" grounds for believing that there is a "very exceptional" case of a "real" risk of subjection to "inhuman" treatment'*.[14] For example, in *Paposhvili v Belgium,* it was held that the individual suffering from chronic leukaemia would have a life expectancy of less than six months if treatment was discontinued.[15] Under section 5(c), the Article 3 threshold will not be met when there is an issue about a different standard of healthcare available in the relevant country (including a less favourable medical diagnosis). Under section 7, any pain or distress resulting from medical treatment not being available in the relevant country is 'unlikely' to constitute serious and irreversible harm. JUSTICE are concerned this clause may not be compatible with Article 3 ECHR given the case-law in this area.

Concerns the legislation is in breach of the Refugee Convention

11. 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 circumstances'.*[16] 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'.*[17] We share these concerns.

12. As the former Prime Minister and SSHD Theresa May MP set out in the Second Reading debate, *'the UK has always welcomed those who are fleeing persecution, regardless of whether they came through a safe and legal route. By definition, someone fleeing for their life will, more often than not, be unable to access a legal route. I do not think it is enough to say that we will meet our requirements by sending people to claim asylum in Rwanda. That matters because of our reputation of the UK on the world stage, and because the UK's ability to play a role internationally is based on our reputation – not because we are British, but because of what we stand for and what we do'*.[18]

[14] *AM (Zimbabwe) v SSHD* [2020] UKSC 17, para 32.

[15] *Paposhvili v Belgium* [2017] Application No 41738/10, para 195

[16] *UNHCR*, 'Statement on UK Asylum Bill' (7th March 2023)

[17] *Ibid*.

[18] Hansard, 'Illegal Migration Bill' (debated 13th March 2023).

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

13. 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.[19] 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. This is because the 'public order' threshold (until now largely only applied to those suspected of terrorism, a national security threat or a serious criminal offence) would extend to anyone who arrived through irregular means.[20]

14. We note that the Government believes it can rely on this extension of the 'public order' exemption to meet 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.[21] 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.[22]

15. Clause 28 significantly lowers the threshold for the 'public order exemption' to anyone not a British citizen who has been sentenced to *any* period of imprisonment. No evidence has been provided for why this threshold has been lowered again from 12 months when the Nationality and Borders Act 2022 was passed last year, especially as it was done by a late-stage amendment in the Commons limiting parliamentary scrutiny. The arguments of the JCHR and Independent Anti-Slavery Commissioner set out above apply even more so to this clause.

16. 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, even these limited protections have been watered-down

[19] See, for example, Articles 13 and 14 ECAT.

[20] Home Office, 'ECHR Memorandum' (8 March 2023), para 45

[21] Joint Committee on Human Rights, 'Legislative Scrutiny: Nationality and Borders Bill (Part 5 – Modern Slavery)' (21st December 2021).

[22] Modern Slavery Act 2015, Section 45.

in late-stage government amendments in the Commons. Clauses 21(5) and 28 require the SSHD to assume that an individual can cooperate with criminal proceedings from abroad unless there are '*compelling circumstances'*. This is troubling as individuals with vulnerabilities are likely to struggle to cooperate with criminal proceedings from abroad and places a further presumption in favour of deporting potential victims of trafficking and modern slavery.

17. Second, 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'.*[23] 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 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.[24]

18. We would also observe how unsatisfactory it is that, at present, there is no Independent Anti-Slavery Commissioner in post (despite it being a legal requirement) which means they cannot comment on the potential impact of this legislation on victims of trafficking and modern slavery.[25] This is an important independent voice which was critical in raising issues during the passage of the Nationality and Borders Act 2022.

19. The SSHD's case to Parliament is that our modern slavery laws are being *'abused'*, due to last-minute claims of those convicted of murder and rape to thwart their deportation and the large proportion of those detained for removal who make a modern slavery claim.[26] However, first, it is for Home Office approved First Responders to refer individuals to the Competent Authority if there are suspicions someone is a victim of trafficking/ modern slavery. Second, Section 63 Nationality and Borders Act 2022 already permits the deportation of modern slavery victims with a reasonable grounds decision if they have

[23] Independent Anti-Slavery Commissioner, 'Letter to Rt Hon Priti Patel MP' (7th September 2021)

[24] Home Office, 'Illegal Migration Bill: Explanatory Notes' (7th March 2023).

[25] Emily Dugan, 'Home Office accused of deliberately leaving anti-slavery post unfilled.' (*The Guardian*, August 2022).

[26] Hansard, 'Illegal Migration Bill' (debated 13th March 2023).

been convicted of a sentence of at least 12 months.[27] The Government proposes to lower this threshold *again,* with no explanation, scrutiny or evidence.

20. Finally, 90% of the Competent Authority's decisions last year were positive decisions (that there *were* reasonable grounds someone was a victim of trafficking/ modern slavery) and 91% of conclusive grounds decisions were also positive.[28] We would also highlight a clear majority of referred potential exploitation took place in the United Kingdom.[29] There is no evidence that the system is being abused; the Home Office's data highlights the overwhelming majority are credible victims of trafficking/ modern slavery. As the former Prime Minister and SSHD Theresa May MP made clear in the Second Reading debate, *'the Home Office knows that the Bill means that genuine victims of modern slavery will be denied support'*.[30]

21. 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.[31] We are not convinced that the minimal safeguards proposed by the SSHD in the Bill, and watered down by the more recent amendments, are adequate to meet our obligations under Article 4 ECHR, for similar reasons to those set out above in relation to ECAT.

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

Threats to the Rule of Law

23. At a late stage in the House of Commons, the Government published incredibly concerning amendments which went *even further* in threatening the rule of law and our international legal obligations.

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[27] Nationality and Borders Act 2022, Section 63(3)(f).

[28] Home Office, *Modern Slavery: National referral mechanism and duty to notify statistics UK, end of year summary 2021* (3rd March 2022).

[29] 58% of potential victims claimed exploitation in the UK only. *Ibid*, para 2.2.

[30] Hansard, 'Illegal Migration Bill' (debated 13th March 2023).

[31] *V.C.L and A.N v The United Kingdom* (Application Nos 77587/12 and 74603/12).

Preventing domestic courts issuing interim relief in a Judicial Review claim

24. Clause 52 of the Bill would apply to any domestic court proceedings about a decision to remove an individual under the Bill. No domestic court would be allowed to 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'.* The only route to challenge would be the limited fast-track suspensive claim procedure (see below). This would prevent any individual from seeking interim relief in a judicial review claim to prevent their deportation (even temporarily, whilst their claim is fully heard) and is a fundamental attack on the rights of individuals to access the courts.

25. This is a clear breach of the common law right of access to justice. As Lord Reed set out clearly in the Supreme Court case of *UNISON,* in order to ensure that the courts uphold the rule of law, individuals must *'in principle have unimpeded access'* to the courts.[32] Lord Reed set out how this right goes back to Magna Carta and refers to Sir Edward Coke's *Institutes of the Laws of England* (published in 1642) on the 1297 version of Magna Carta;

    'And therefore, every Subject of this Realme, for injury done to him in bonis, terries, vel persona [in goods, in lands, or in person] by any other Subject…may take his remedy by the course of the Law, and have justice and right for the inquiry done to him, freely without sale, fully without any denial, and speedily without delay'.[33]

26. As the then Lord Justice Hickinbottom said in the Court of Appeal case of *FB (Afghanistan),* the common law requires that *'where the Secretary of State makes a decision in respect of an irregular migrant that is material to his or her removal, then he or she must have access to an independent court or tribunal which must consider whether removal should be stayed prior to removal in fact taking place'.* This must not be *'access to a court that is merely theoretical, but access that is available in practice in the real world'.*[34] Reliance on out of country legal challenges is not satisfactory in two regards; first, the inevitable practical difficulty of pursuing a judicial review claim from a third

[32] *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51, para 68

[33] *R (on the application of UNISON) v Lord Chancellor* [2017] UKSC 51, para 75

[34] *R (on the application of FB (Afghanistan) and Medical Justice) v SSHD,* [2020] EWCA Civ 1338, para 111

country such as Rwanda and, second, that if there is a serious risk of ill-treatment on return, such a claim may be too late to prevent that harm occurring.[35]

27. This right is especially important when fundamental human rights are at stake, such as Articles 2, 3 and 4 ECHR. We would highlight that, if an individual has new and pertinent evidence about the impact of their deportation which it was not possible to raise during their suspensive claim procedure, it is likely that a judicial review claim will be their only route to redress. This could be, for example, new medical evidence (which was unable to be provided during their appeal given the extremely tight timeframes, see below, or a change in circumstances) or evidence about the situation in the proposed third country. There is no discretion here however, even if there is good reason for that information not having been available previously.

Interim measures of the European Court of Human Rights

28. Clause 53 would give the SSHD the ability to breach international law. It sets out that, where the European Court of Human Rights ('**ECtHR**') has granted interim measures in an individual's claim, the Minister can personally decide if that should be followed. Whilst interim measures are already not binding on domestic courts in domestic law, (s2 HRA requires that they are taken into account), they are binding on the UK Government and its ministers as a signatory to the ECHR under international law. This clause would effectively introduce a presumption that the UK Government will breach international law when interim measures are handed down *unless* the Minister decides proactively not to deport the individual.

29. For context, interim measures are used rarely and only in circumstances where there is an *'imminent risk of irreparable damage'.*[36] A recent example would be the interim measure granted against Russia following an application by Ukraine in relation to human rights violations against civilians in the ongoing conflict.[37] In the immigration deportation context, this is most likely to occur when Article 2 (right to life) and Article 3 (prohibition

[35] For example, the United States State Department reported that *'NGOs reported many LGBTQI+ individuals were afraid to report abuses to authorities, either believing authorities would not take action or were complicit in their abuses'.* US State Department, *2022 Country Reports on Human Rights Practices: Rwanda*, 2022

[36] 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.

[37] European Court of Human Rights, *The European Court grants urgent interim measures in application concerning Russian military operations on Ukrainian territory*, 1 March 2022.

on torture and ill-treatment) ECHR are engaged. Notwithstanding the Government's purported concerns with the interim measures procedure, it is clearly inappropriate to unilaterally attempt to repudiate its international obligations. Indeed, as Sir Bob Neill MP, Chair of the Justice Select Committee says, *'judicial dialogue'* is the way to seek reform and the UK should do *'the sensible reform, rather than get into a confrontation'.*[38]

30. We would highlight one of the interim measure decision last year as an example of the importance of this process. N.S.K was an Iraqi asylum-seeker who claimed to be a victim of torture facing deportation to Rwanda. The High Court subsequently found that the Home Office decision *'simply did not consider the evidence put forward'* and therefore the decision refusing the human rights claim and certifying the claim was quashed.[39] Were it not for the decision of the ECtHR, that individual would have been removed to Rwanda where they alleged they would face serious harm. This shows the importance of the interim measures procedure as a remedy of last resort in exceptional cases. This clause is a further, fundamental assault on the rule of law and our international law obligations. Our reputation would be considerably undermined by this clause becoming domestic law.

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

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

(i) **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 have passed since they arrived in the UK.[40] 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

[38] Joshua Rozenberg, *Interim measures*, 24 April 2023

[39] *R (on the application of AAA (Syria) and Ors) v SSHD* [2022] EWHC 3230 (Admin), para 312

[40] Home Office, *Immigration Bail* (27th January 2023).

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'*.[41]

(ii) **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.[42] However, Clause 12(4) prevents any individual from 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.[43] *Habeas corpus* is a historic and little-used legal route within this area given the more predominant use of judicial review 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.[44] Since Article 5 ECHR also has a procedural aspect, JUSTICE

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

[42] 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'.'*

[43] Home Office, 'Illegal Migration Bill: ECHR memorandum' (7th March 2023), paras 33 and 34.

[44] Finnian Clarke, 'Habeas Corpus and the Nature of "Nullity" in UK Public Law' (*UK Constitutional Law Association*, 8th October 2019)

is concerned that this will limit grounds in which someone can challenge immigration detention.

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

Clause 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'.*[45] This clause gives the SSHD carte blanche to make error-strewn detention decisions, safe in the knowledge that they cannot be adequately challenged and the individual will struggle to seek their release. This is compounded by the lack of judicial review protections for detention decisions set out above.

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

The main 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 41 or a 'factual suspensive claim' under Clause 42. We are particularly concerned about the requirement under Clause 41(5) and 41(5) for an individual to have to provide *'compelling evidence'.* 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 proposed suspensive claim procedure including the availability of free legal advice within detention, the quality

[45] *R (on the application of Lumba) v SSHD* [2011] UKSC 12, para 88.

of decisions that will be made within a short time period and the limited timeframes for appeal to the Upper Tribunal. We would also highlight that medical evidence is likely to be required for a 'serious harm suspensive claim' which will be practically very difficult (if not impossible) in such a tight timeframe. This is particularly concerning when, under Clause 47, there are severe restrictions on raising 'new matters' (which could potentially include a medical diagnosis revealed by a medical report) and making claims out of time under Clause 45. Clause 47(7) only permits an extension of time up to 3 working days if a new matter is raised during an appeal.

We also have concerns that Clause 50 allows First tier Tribunal judges to act as judges of the Upper Tribunal in such claims, including, according to the Government, employment judges.[46] This is a complex area of immigration law, involving vulnerable individuals, and since individuals are potentially restricted to one, fast-tracked hearing, it is even more important that there is proper oversight from experienced judges with expert knowledge in this legal area.

As the Law Society have said, *'it is a fundamental principle of British justice that cases are given a fair hearing; central to this is allowing enough time for individuals to access the advice they need and to prepare their case properly'.*[47] We note Clause 54 on legal aid**,** though we would highlight that it only appears to provide legal aid funding for judicial review claims that raise Articles 2 and 3 ECHR. We would highlight that excluding other Convention grounds would prevent challenge including when rights under Article 4 (freedom from slavery and forced/ compulsory labour) and Article 6 (right to a fair trial) are at stake.

Finally, given these claims will affect an individual's risk of 'serious and irreversible harm', we are very concerned about the limited appeal rights in Clause 43 if permission to appeal is refused in claims the Home Office certify as clearly unfounded. Unlike so-called Cart Judicial Reviews, which were abolished by Section 2 of the Judicial Review and Courts Act 2022, only one judge will have made a decision on whether the claim was clearly unfounded under Clause 44 and, in light of Clause 49, this may have just been a First-tier Tribunal judge (including

[46] Robert Jenrick MP in the Committee debate stated that it *'enables the Senior President of Tribunals to request first-tier tribunal judges, including employment tribunal judges, to sit as judges of the upper tribunal'.* Hansard, *Illegal Migration Bill: Volume 730* (27 March 2023)

[47] The Law Society, *Parliamentary briefing: Illegal Migration Bill, Second reading House of Commons* (10 March 2023).

someone who is not a specialist immigration/ asylum judge). This is an insufficient safeguard, when there is a high risk of potential harm and when individuals may struggle to meet the requirement for 'compelling evidence' in the limited timeframe.

(v) **Restrictions on challenges to age assessments**

Clause 55 would prevent an individual from bringing an appeal against an age assessment under the relevant provision in the Nationality and Borders Act 2022. If an individual seeks to challenge their age assessment by judicial review, this does not prevent them from being deported and the court can only quash the decision if there was a legal error (and is explicitly restricted from quashing the decision if there was a factual error). This drastically reduces the accountability of the SSHD for complex decisions about the age of an asylum-seeker and permits their deportation when they are still pursuing a legal claim that they are a child.

The Bill hands extensive powers to the executive

32. 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) **That the SSHD is given a wide discretion to detain individuals and define what would constitute a reasonable period of detention**

Clause 11 of the Bill 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. This raises serious questions about the Bill's compatibility with Article 5 ECHR. As Lord Thomas said in *Fardous v SSHD,* '*in determining the lawfulness of the decision made by the Secretary of State, the court examines the decision on the basis of the evidence known to the Secretary of State when she made the decision…**it is this objective approach of the courts which reviews the evidence available at the time that removes any question that the period of detention can be***

viewed as arbitrary in terms of Article 5 of the European Convention on Human Rights' (emphasis added).[48]

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

The SSHD, under Clause 39 of the Bill, would be given the power to amend Clause 38 and 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 serious and irreversible is the only route for an individual to make arguments that their deportation would breach Article 3 ECHR (prevention of torture and ill-treatment). Parliament should not vote to give the SSHD such broad discretion to determine whether the UK would breach its absolute legal obligations under Article 3 ECHR.

(iii) **The SSHD is given the power to define the circumstances and time limits for the detention of unaccompanied children**

Clause 10(2) would give the SSHD the power by regulations to specify when they can detain unaccompanied children and the time-limits for such detention. Whilst the Explanatory Statement states that this is a limit to the SSHD's power, such regulations would face much more limited scrutiny by Parliament. Parliament should note vote to give the SSHD the authority to determine when unaccompanied children should be detained.

(iv) **The SSHD is given the power to unilaterally amend primary and secondary devolved legislation**

Clauses 3(10), 19(4) and 62(3) would give the SSHD the power to pass regulations amending both primary and secondary legislation of the Scottish Parliament, Welsh Senedd and Northern Ireland Assembly on topics including the treatment

[48] *Fardous v. Secretary of State for the Home Department* [2015] EWCA Civ 931.

unaccompanied children. This sets a dangerous precedent and undermines the devolved settlement.[49] Enacting such legislation would drive a "coach and horses" through the principles of the Sewel Convention and we invite the Government to confirm that they will require legislative consent for this power.

(v) The SSHD can pass regulations on the consequences of refusing to consent to an age assessment

Clause 56 would give the SSHD wide power to pass regulations that, if an individual does not consent to a "scientific" age assessment method, they can be automatically treated as an adult. This would go even further than the Nationality and Borders Act 2022 which required the decision-maker to take into account the failure to provide consent as damaging to their credibility, but retained some discretion. This is no way to legislate in such a complex area, where fundamental rights of children are potentially at stake.

(vi) **The SSHD has the power to make regulations about the deportation of unaccompanied asylum-seeking children**

Clause 3(3) prescribes some of these circumstances where it would be legally permitted to deport an unaccompanied child (for example, family reunion). However, it then adds that the SSHD can pass regulations to set out any '*other circumstances'* at a later date. The SSHD therefore continues to have a large discretion to deport unaccompanied children in circumstances which would not be approved directly by Parliament.

The Bill has retrospective application

33. Legal certainty requires that individuals know what their rights how and how they can be enforced. Lord Bingham said, in his book 'The Rule of Law', that a key element of the rule of law was that the law should be *'accessible and so far as possible intelligible, clear and practicable'.*[50] Lord Mance, in a 2011 lecture, said that *'the principle of certainty also precludes retrospective changes in the law. The law must be certain at the time when the subject has to act by reference to it'.*[51] This is especially important when the UK's

[49] Devolved legislation sets out that the UK will 'not normally legislate with regard to devolved matters without the consent' of the devolved parliament, see Section 28 Scotland Act 1998 and Section 2 Wales Act 2017

[50] The Bingham Centre for the Rule of Law, *'Our vision'*

[51] Lord Mance, 'Should the law be certain? The Oxford Shrieval lecture' (11 October 2011)

international legal obligations are at stake and when extremely vulnerable individuals will be affected.

34. We would highlight the following provisions which will apply retrospectively (i.e. to people who arrived in the UK before this law is passed by Parliament):

(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 without leave is potentially subject to the powers in this legislation (even though it has not been passed into law). Clause 5(12) states that the legislation applies to any asylum/ human rights claim made on/ after 7 March 2023 by an individual who entered without leave and that has not been decided by the SSHD. Given the considerable asylum caseload backlog, it is likely that this will apply to a significant number of people. It is a recipe for legal chaos, uncertainty, distress and will further compound the unacceptable delays in the asylum system.

(ii) **Reversing protections for victims of modern slavery/ human trafficking**

Clause 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.

JUSTICE
4 May 2023