



Government Immigration Bill 262
House of Commons Committee
27 & 28 March 2023
Access to Justice, Human Rights and Legality

The Home Secretary has confirmed that she cannot declare the compatibility of this Bill with human rights obligations, that this is because this Bill is more likely than not incompatible and that she is nonetheless confident of the Bill's compatibility.¹ And the absence of care for legal or constitutional principle that underpins it is not limited to the matter of human rights compliance – it is simply that it is only on human rights compatibility that the Home Secretary is required by Act of Parliament to make some formal statement.

The reality is this Bill is derisive of both constitutional international law – not merely the European Convention on Human Rights – and of domestic and legal principle. At its worst, it appears to purposefully seek conflict with the European Court of Human Rights; exclusion of the higher courts in England and Wales, Scotland and Northern Ireland; improper executive control or influence over judicial functions; and arbitrary deprivation of British people's citizenship rights.

Long before the Human Rights Act 1998, the constitutional settlement in the United Kingdom was restated by Lord Hoffmann in the Appeal Committee of the House of Lords – then the highest court of the UK (now replaced by the Supreme Court). While Parliament (not His Majesty's Government) is the sovereign legislative body and may, therefore, legislate contrary to fundamental rights:

“...the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.”²

But what if Parliament fails or is obstructed from recognising and confronting the full implications of Government legislation to remove the basic rights of the individual? Regrettably, this Bill and the way Government has chosen to present and pursue it raises precisely that question.

¹ By email of 7 March 2023 to members of both Houses, Ministers confirmed their assessment that it was more likely than not the Bill was not compatible. On the same day, the Home Secretary informed the House from the despatch box that she was “confident” the Bill “is compatible with international law” (*Hansard* HC, 7 March 2023 : Col 152).

² *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131

The context for all provisions of this Bill

As clause 1 makes singularly clear, this Bill is totalitarian in nature. Every single word is designed to pursue one aim – the deterrence of what the Bill refers to as “unlawful migration” by requiring the expulsion of anyone falling within its scope.³ The people who do fall within that scope include refugees and victims of human trafficking. That the former may have no alternative means to secure asylum in the UK is irrelevant, no matter the strength of their connection to this country or need to seek asylum here.⁴ That the latter have been forced to come to this country by extremely exploitative and controlling people is irrelevant too.⁵ Also falling within the Bill’s scope are partners, children and other family members of these people, regardless that these family members may never have breached immigration rules (and may even have been born here and be identified by UK nationality laws as British and so entitled to that citizenship).⁶

Citizenship rights exclusion

A stark example of the degree to which the Bill rides roughshod over constitutional principle is its treatment of citizenship rights. British people – identified by Parliament in passing the British Nationality Act 1981 – are to be excluded from their citizenship.⁷

The people most clearly excluded are to be people born overseas to parents, one or both of whom are British citizens;⁸ people born in the UK with, during their childhood, a parent who becomes a British citizen or permitted to make the UK their permanent whom;⁹ and people born in the UK whose life continues in the UK for such a long period that their connection to this country is clearly established.¹⁰ These are all people whose citizenship is required to be registered by statutory entitlement. But this Bill intends to override that and permanently exclude that because either these British people were brought, or even trafficked, to the UK as children or because a parent of theirs (whether before or after their birth) came to the UK without the permission of the Home Secretary.

Parliament claims its democratic legitimacy on the strength of its answerability to the British people. Excluding British people from their citizenship, as this Bill seeks to do, is an affront to citizenship and parliamentary legitimacy. It is also a fundamental violation of a kind that gives licence to the arbitrary deprivation of citizenship from other people’s – such as that done to the Rohingya in Myanmar or to many Indian Muslims.¹¹

³ Clause 1(1); and clause 1(3) requires that purpose to be read into every word of this Bill.

⁴ See the joint Amnesty International and Migrant Voice [briefing for House of Commons Committee on Asylum](#) (link embedded)

⁵ See the joint Amnesty International and Migrant Voice [briefing for House of Commons Committee on Modern Slavery](#) (link embedded)

⁶ Clause 8

⁷ See the joint Amnesty International, Project for the Registration of Children as British Citizens (PRCBC) and Coram Children’s Legal Centre (CCLC) [briefing for House of Commons Committee on British Citizenship](#) (link embedded)

⁸ Clause 30(3) and clause 31(1)(b) combined as this relates to either section 3(2) or (5), British Nationality Act 1981

⁹ Clause 30(4) and clause 31(1)(a) combined as this relates to section 1(3), British Nationality Act 1981

¹⁰ Clause 30(4) and clause 31(1)(a) combined as this relates to section 1(4), British Nationality Act 1981

¹¹ See Myanmar’s Citizenship Act 1982 and India’s Citizenship (Amendment) Act 2019

Access to justice exclusion

The Home Secretary has repeatedly suggested that legal rights, due process and the decisions of independent courts are in some sense an illegitimate impediment to government attempts to respond to irregular migration.¹² The effective exclusion of the UK courts is a particular theme running through the Bill. It is supplemented by interference with judicial functions where the Bill provides limited scope for some small oversight by the Upper Tribunal.

Judicial scrutiny is even to be excluded for the first 28 days of a person's detention (including where that person is a child).¹³ Thereafter, judicial scrutiny is constrained to assessing the reasonableness of the Secretary of State's assessment of the propriety of detention rather than an objective test determined by a judge.¹⁴ These are measures that not only conflict with human rights standards. They row back on centuries of common law recognition of the right to liberty.

Even clauses that do not expressly touch on the judicial process create judicial exclusion. Judicial exclusion is the primary purpose of clause 2. The clause may be entitled as a "duty", giving the false impression that some true moral or legal responsibility is to be secured – such as the duty to have regard to children's best interests that is to be found in the Borders, Citizenship and Immigration Act 2009 (which duty is effectively overridden by this Bill with no consideration to children's best interests).¹⁵ Clause 2 is not really a duty. It simply makes expulsion a requirement. The effect of that is to give the ultimate parliamentary licence to the Home Secretary in pursuing something she appears in any event hell-bent upon. This is to relieve her of any legal constraint she would otherwise have or face that would ordinarily require her to consider the propriety of what she seeks to do against the true circumstances of the person to whom she seeks to do it.

The approach is replicated in clause 4 to require her not to consider asylum and human rights claims. The clause equally requires her to disregard for the purpose of expelling someone any application the person may make for judicial review or that the person may be a victim of slavery or human trafficking.

The combined effect of clauses 2 and 4 is an arbitrary licence that is offensive to any true notion of justice and legality. By requiring the Home Secretary to expel someone, no matter what their true circumstances may be, Parliament is invited to shield her actions from legal constraint and judicial scrutiny. Her response to any legal complaint is to be 'but Parliament has made me do it'.

<p>Question to Ministers: If this legislation is permitted to pass, what next will a government seek similar parliamentary licence for the avoidance of legality and justice; and who will be the targets for that?</p>
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¹² This was explicit, e.g., in the Home Secretary's speech to Conservative Party Conference 2022.

¹³ Clause 13(4)

¹⁴ This is the effect of various provisions concerning detention including the words "in the opinion of the Secretary of State".

¹⁵ Section 55, Borders, Citizenship and Immigration Act 2009

The Bill includes some extremely feeble provision for restraining the Home Secretary by what are called ‘suspensive claims’ with a highly limited right of appeal to the Upper Tribunal.¹⁶ However, Government amendments are to permit First-tier Tribunal judges to sit as Upper Tribunal judges.¹⁷ Even before this device was introduced, we have had profound concerns at efforts to isolate this tribunal from judicial scrutiny of the higher courts.¹⁸ It is not the same as the High Court of England and Wales (nor its equivalent in either Scotland or Northern Ireland). These Government amendments make that difference even more stark.

Question for Ministers: How does the Home Secretary justify the attempt by this Bill to exclude courts throughout the United Kingdom from scrutinising and restraining unlawful exercise of her powers of expulsion? How does she justify making herself the final arbiter of the meaning, extent and exercise of her own powers? How is this compatible with basic constitutional principle?

Suspensive claims permit only two types of challenge to the requirement to expel the person. The first is simply that the Home Secretary has mistakenly decided the person falls within the scope of the Bill when in fact they do not.¹⁹ The second is that the consequences of expelling the person to a particular place identified by the Home Secretary would be so catastrophic that the person would suffer harm that is both serious and irreversible before any human rights consideration (whether by the Home Secretary or a court) could be concluded.²⁰ The legal process established for these considerations is itself extremely limited and, in significant ways, controlled by the Home Secretary – who is empowered to tighten the limitations in the Bill still further. This is more fully discussed in our separate briefing on “[Legal Proceedings](#)”. Moreover, the Bill provides no clear outcome of this legal process for anyone who is able to succeed with their claim – the Home Secretary is largely permitted to continue to regard the person as to be expelled and simply leave the person in perpetual limbo, while she either continues to cast around for an alternative destination for that person’s expulsion or largely ignores their existence.

Question for Ministers: How is creating perpetual limbo thought to be even a human response, let alone one compatible with any human rights standard?

The Bill must also be considered for its impact upon the legal aid system. It is unclear at this time what would be the impact of this legislation upon the legal aid scheme established under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. There is, on its face, a considerable risk that this scheme would be decimated by the Bill since the provision of immigration legal aid is largely retained for the purposes of claims (for asylum and/or leave to enter/remain as a victim of human trafficking) that the Bill sets out to largely prohibit. If that is the legal aid impact of this Bill, it will effectively shut down access to justice because it is almost inconceivable that any

¹⁶ See the Amnesty International [briefing for House of Commons Committee on Legal Proceedings](#) (link embedded)

¹⁷ Amendment Gov NC11

¹⁸ See e.g. Amnesty International UK written evidence to the Judicial Review and Courts Public Bill Committee (2021-22): <https://publications.parliament.uk/pa/cm5802/cmpublic/JudicialReviewCourts/memo/JRCB07.htm>

¹⁹ Clause 37(4)

²⁰ Clause 37(3)

significant number of people to whom this Bill was applied would be able to secure legal advice and representation to assist them.

Question for Ministers: Given the vital significance of these claims and appeals to those who may make them, is legal aid to be available for representation in relation to them?

Human rights exclusion

Over and above the exclusion of access to justice, there is a wider exclusion of the ordinary requirement under section 3 of the Human Rights Act 1998 that legislation is to be interpreted, so far as is possible, in accordance with the UK's human rights obligations (under the European Convention as domestically incorporated). Whether this Bill could be so interpreted is highly questionable, but clause 1(5) excludes any attempt to do so. This, together with clause 49, constitutes the most direct attack on compliance with the Convention. Clause 49 empowers the Home Secretary to make regulations by which she may excuse herself from any interim measure of the European Court of Human Rights to defer someone's expulsion pending judicial consideration of human rights compliance. Given the general exclusion of the UK's higher courts that is sought by this Bill, it is hard to discount that the purpose of it is to both produce conflict with the European Court and to do so quickly.

Question for Ministers: Is it the Government's intention to create conflict with the European Court by requiring that court to address questions that UK courts are to be excluded from?

Clause 29 includes the introduction of new section 8AA to the Immigration Act 1971. This is effectively a permanent bar on anyone falling within the scope of the Bill ever securing leave to enter or remain in the UK. There is the pretence of human rights compliance contained in provisions which state that where it is "*necessary*" to secure compliance with human rights or another international agreement, the Home Secretary "*may*" grant leave. The hubris here is extraordinary. Where the UK's international human rights obligations *necessitate* something, the Home Secretary *may* choose to do it. Of course, even making that "*may*" into a "*must*" would not ensure that anyone is able to secure that to which they are entitled. Nonetheless, anyone with any notion of legality, justice or general principle ought to be shocked at the different uses of the words "*must*" and "*may*" in this Bill – which are carefully chosen to effectively permit the Home Secretary to ignore the real human rights consequences of her actions and the true circumstances of the people affected by her actions while offering the pretence of some, residual care for human rights respect. It is wholly unsurprising that she cannot declare the compatibility of this Bill even if she persists in her contrary pretence that it is compatible.

Along with the European Convention on Human Rights, any genuine commitment to the Convention relating to the Status of Refugees, the Convention on Action against Trafficking in Human Beings and the Convention on the Rights of the Child is to be sacrificed to the purpose and content of this Bill. The Government may say there is some form of 'national emergency'. But the truth – as everyone must know – is that the UK is significantly less affected by numbers of people seeking asylum than its

neighbours, still less many poorer countries elsewhere.²¹ And the rising crossings of the Channel by boat have arisen by a switch from less visible routes to the UK.²² The UK's asylum system has collapsed – but that has been as a result (about which Amnesty and others warned) of the foolhardy decision of Ministers to delay and attempt to simply not deal with the asylum claims that are received in the UK.²³ There is an enormous backlog, it is harming thousands of people and it is costing huge sums of taxpayers' money – and all because Ministers have elected to create that backlog and encourage its growth by effectively refusing to operate a fair and efficient decision-making system.

To summarise what is happening here: Parliament is being presented with a Bill justified on the basis of a 'crisis' which is of the Government's own making. That Bill seeks to strip basic human rights and protections from people especially vulnerable to exploitative political rhetoric and divisive policy and law-making.²⁴ These are precisely the circumstances that the concept of universal human rights was created to ward against.

There are wider implications of this baleful approach to policy, legislation and international obligations. It risks licensing and encouraging similar abuses here and elsewhere – whether of people, including refugees, by governments of other countries; or by this or future governments of people in the UK who are in any way socially, economically or politically disadvantaged. The Home Secretary has cruelly excoriated victims of torture, trafficking, slavery, conflict and other forms of persecution.²⁵ She has encouraged these people's public demonisation and victimisation. It cannot be ignored that the people targeted by all of this are manifestly among the least empowered people in our society and the cruelty with which their vulnerability is being politically exploited is extraordinary.

²¹ See the joint Amnesty International and Migrant Voice [briefing for House of Commons Committee on Asylum](#) (link embedded)

²² As Rt Hon Theresa May MP highlighted at Second Reading, *Hansard* HC, 13 March 2023 : Col 592

²³ Amnesty International, e.g., warned about this by [letter to Ministers in December 2020](#) (link embedded)

²⁴ The Home Secretary has recklessly labelled refugees seeking asylum in the UK as an 'invasion' (*Hansard* HC, 31 October : Col 641); and made the equally false and incendiary assertion that 100 million people are "coming here" (*Hansard* HC, 7 March 2023 : Col 152)

²⁵ The misrepresentation of victims of human trafficking is, e.g. addressed in the joint Amnesty International and Migrant Voice [briefing for House of Commons Committee on Modern Slavery](#) (link embedded)