Amnesty International UK

BRIEFING

Government Immigration Bill 262
House of Commons Committee
27 & 28 March 2023

Legal Proceedings – "suspensive" claims and appeals

This is the primary focus for Day 1 of Commons Committee. It concerns clauses 37 to 49 of the Bill (all grouped in the bill under the subheading "legal proceedings"). There are two further clauses to be bundled up for debate on Day 1. Clause 50 seeks to declare Albania alongside countries of the European Economic Area (and Switzerland) as "safe".[1] Clause 51 seeks to establish an annual cap on the total number of people permitted to come to the UK under all routes the Home Secretary chooses to label as "safe and legal".[2]

It is not possible to truly understand the nature of the legal proceedings to which clauses 37 to 49 relate without understanding the great mass and intention of the clauses which come before them. It is especially harmful, therefore, to parliamentary scrutiny that on top of allocating such a short period of time (two days) to debate this Bill in a Committee of the whole House, the Government has scheduled that debate to cram a host of complex and contentious matters into the second day while scheduling clauses on the first day to be debated before their proper context is considered. That is exacerbated by the fact that the Government have tabled amendments to their Bill barely a week prior to this truncated and disordered Committee stage. Ministers are showing neither respect for Parliament nor for fundamental rights of access to justice, legality, human rights and citizenship.

Content for clauses 37 to 49 (legal proceedings)

In brief, it is vital to understand that what is set out in these clauses is intended to be the limit of legal and judicial constraint on a blanket ban.[3]

That ban is to be upon the Home Secretary ever considering the rights, needs and individual circumstances of any refugee, victim of human trafficking or other person

[1] Amnesty opposes Albania's inclusion on this list. It is manifestly not generally safe, as Home Office asylum decision-making has itself made clear. Moreover, the suggestion, sometimes made by supporters of this Bill, that it is a kindness to return a survivor of human trafficking from Albania to the place from which that person was trafficked is specious. Returning someone to the place from which they have been trafficked is, at least in many circumstances, likely to constitute return of someone to not merely the conditions that led to their exploitation but potentially to the very same people who so abused them.

[2] We are producing a separate briefing on Asylum, which addresses this cap among other provisions of this Bill.

[3] The Bill does permit, in certain circumstances, a person facing expulsion to a country other than their own country to apply for judicial review on human rights grounds, but this cannot suspend the person's removal: Clause 4(1)(d)

(of whatever age), who may be brought or come to the UK without permission.[4] That ban is to apply to the person's partner, child or adult dependent relative – regardless of when the partner, child or other relative arrived, whether they had permission on arrival or indeed whether they were born in the UK.[5] All that is made to matter is that the family member does not currently possess British citizenship (even though they may be entitled to it);[6] and is without leave to enter or remain (even if that only arises by stripping them of it to enable their expulsion under this Bill).[7] The intention, beginning with clauses 2 and 4, is to require the person's expulsion, to refuse to consider anything that may be relevant to whether they should instead be permitted to stay and thereafter to permanently bar any lawful possibility of their ever returning.

What are suspensive claims and appeals under the Bill?

These are claims that will suspend the requirement, in clause 2 of the Bill, that the Home Secretary must expel someone.[8] Clause 37 identifies the only two types of suspensive claims permitted by the Bill.

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?

The first type is titled "a serious harm suspensive claim". It is defined as a claim that the person would within what is labelled "the relevant period" be exposed to "a real risk of serious and irreversible harm".[9] The relevant period is defined. It is the period of time that it would take to fully consider and finally resolve any limited human rights-based claim that the person is to be permitted to continue after being expelled from the UK.[10]

The second type is titled "a factual suspensive claim". It is also defined. It is essentially a claim that the Home Secretary has wrongly concluded the person is within the scope of the Bill[11] – that is, she has wrongly concluded the four conditions in clause 2 apply to the person (or, if the person is the partner, child or adult dependent of someone to whom clause 2 applies, wrongly concluded the three conditions in clause 8 apply to this family member).

These two suspensive claims are the feeble extent to which the Government asks Parliament to permit anyone – who may be seeking asylum, have been trafficked to the UK or otherwise have come without permission, or be such a person's family member – to question or challenge the intention to expel them.

Process to which these claims are restricted

[4] Clause 4(1) to (5) not only permanently bars the claim, it bars any appeal against this decision and prevents any judicial review that could defer or prevent the person's expulsion.
[5] Clause 8
[6] Clause 8(4) and Clauses 30 *et seq*
[7] Clause 8(2)
[8] Clause 45
[9] Clause 37(3)
[10] Clause 37(9)
[11] Clause 37(4)

The starting point for either of these claims is the Home Secretary giving written notice, under clause 7, of when the person is to be expelled and the place to which it is intended to expel them. If that expulsion is to the person's country of origin (or a place from which the person possesses a passport), then only a factual suspensive claim is permitted.[12]

A suspensive claim must be submitted within 8 days of receipt of the notice.[13] If submitted, it is to be decided within 4 days.[14] But the Home Secretary may choose to make no decision if she treats the claim as not containing "compelling evidence"; or she treats it as not in the form, made in the manner or containing any other information that she may prescribe by regulations.[15]

If the claim is made after the required 8 days period, the Home Secretary may choose to consider it if she is satisfied that there were "compelling reasons" why it was not made within that time.[16] If she decides not, an application can be made to the Upper Tribunal (and no further) for a declaration that there were such reasons.[17] It is significant that none of this is concerned with whether the claim the person wishes to make is well-founded. That vital question is simply to be ignored.

If the Home Secretary decides the claim, she may either conclude the person has made out their claim or refuse it.[18]

Appeals

There is an extremely limited right of appeal to the Upper Tribunal against any refusal of a suspensive claim.[19] The Home Secretary is to be given an extraordinary degree of control over this appeal process:

- She may, by treating the claim as not containing "compelling evidence" or not being made in the way she prescribes, simply cut off the possibility of any appeal by making no decision and ignoring the claim.
- If she does decide and refuses the claim, she may bar any appeal by certifying the claim to be "clearly unfounded".[20] This is a curious power given the requirement of "compelling evidence" for her even to consider and decide the claim to begin with.

Question for Ministers: If the Home Secretary has concluded there is compelling evidence in support of the claim, what is the purpose of this additional power for the Home Secretary to certify it to be 'clearly unfounded' and so block any judicial scrutiny of her decision upon that compelling evidence?

[12] Clause 37(3) and (7)
[13] Clause 40(1) and (7); and clause 41(1) and (7)
[14] Clause 40(2) and (7); and clause 41(2) and (7)
[15] Clauses 40(5) and 41(5) set preconditions for a claim to be made
[16] Clause 44
[17] Clause 44(4)
[18] Clauses 40(2) and 41(2)
[19] Clause 42
[20] Clauses 40(3) and 41(3)

- The person may make an application to the Upper Tribunal to remove the Home Secretary's bar to the appeal.[21] If so, the tribunal is to consider such an application without any oral hearing (unless it decides such a hearing is necessary to secure justice).[22] It may grant the application and so remove the bar to an appeal only if it considers there to be "compelling evidence"[23] – i.e. if it reaches the same conclusion the Home Secretary had reached when she concluded she should make any decision on the person's claim.
- If the appeal is against refusal of "a serious harm suspensive appeal", the Home Secretary is given power by regulations to amend the statutory test of "serious and irreversible harm" if she decides the interpretation and application of that test by the Upper Tribunal is intolerable to her.[24] In constitutional terms, this is a plain interference with the judicial function and usurpation of parliamentary sovereignty by the executive.
- If she considers that details of a matter raised on the appeal were not provided to her within the 8 days following her written notice of when and to where she proposes to expel the person, she may refuse consent for the Upper Tribunal to consider that matter.[25] There is only limited scope for the tribunal to assert its judicial authority if, on the application of the appellant, it concludes there were "compelling reasons" for the person not to have provided the details within that time period.[26]
- While permission to appeal to the Court of Appeal may be sought if the Upper Tribunal dismisses an appeal against the refusal of a suspensive claim,[27] there is no possibility to challenge any decision that tribunal may make to decline to consider an appeal against such a claim.[28]

By clauses 43(7) and 48, the Bill seeks to exclude higher court scrutiny of the Upper Tribunal's decision-making. The starkness of this constraint is made all the greater by Government New Clause 11 to permit less senior members of the immigration tribunal judiciary to sit as if Upper Tribunal judges. In any event, the overall intention is clear. There is to be barely any judicial scrutiny of the extremely limited scope for any check on the Home Secretary's intention to expel someone. This is a profound attack on principles of access to justice, legality and the proper functioning of an independent judiciary.

What can this process lead to?

The legal proceedings to which clauses 37 to 49 of the Bill relate are the only means provided by which a person is to be permitted to defer their expulsion.

Clause 49 gives power to the Home Secretary to make regulations concerning interim measures of the European Court of Human rights. This appears designed solely to enable her to breach the UK's international obligations by refusing to implement an

[21] Clause 43
[22] Clause 43(5)
[23] Clause 43(3) and (4)
[24] Clause 38
[25] Clause 46(3)ff
[26] Clause 46(6)
[27] Clause 42(7)
[28] There is no appeal and judicial review is excluded: Clause 48

interim measure which would otherwise defer someone's expulsion; and similarly to prevent the UK courts from respecting such a measure.

Question for Ministers: Is the power to make regulations concerning interim measures intended to allow the Home Secretary to ignore these measures and, if so, is it the Government's intention to create conflict with the European Court?

But the Bill contains no real escape clause from its singular objective of expelling the person somewhere, anywhere but the UK.

Question for Ministers: Will a successful suspensive claim ever lead to a person having their asylum, human rights or other claim to stay in the UK being considered? If so, by what provision is the requirement to expel the person in Clause 2 and the bar on considering their claim in Clause 4 to be lifted?

Question for Ministers: The Home Secretary has claimed she is creating a "new global model".[29] If everyone were to adopt her model, where would any refugee from war, torture or terror; or any survivor of slavery and human trafficking ever find safety?

The process provided by clauses 37 to 49 contains no express outcome that removes the requirement for the person's expulsion or the bar to the person having their true circumstances considered, any asylum claim dealt with or ever being permitted to stay. It does not even do so in the situation where the Home Secretary has wrongly identified the person as within the scope of the Bill – which is the subject matter of "a factual suspensive claim" and any appeal against a refusal of it.

The design is to achieve permanent limbo in the UK. The human and financial costs of that can be expected to be huge. Of course, the asylum backlog will go down – simply because the Bill will mean the people who remain in this limbo are no longer formally counted.[30]

[29] https://www.infomigrants.net/en/post/47622/uk-minister-visits-rwanda-to-reinforce-migration-outsourcing-plans

[30] The Government created the existing huge backlog by attempting to avoid ever deciding the claims of thousands of people. Inevitably, this policy led quickly to that backlog. Ministers now attempts to reduce the backlog by simply refusing to admit any new claims. The people will be here. Responsibility for them will remain with the Home Office. But the asylum system will not count them.