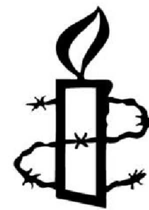
Amnesty International UK

BRIEFING



Government Immigration Bill, Bill 148 (Session 2022-23)

House of Lords Report: Suspensive Claims & Legal Proceedings (July 2023)

On Day 1 of Report, the two most crucial provisions of this Bill were considered: Clauses 1 and 2. As explained in our joint briefing with the Immigration Law Practitioners' Association (ILPA), these clauses, and the statutory purpose they establish, govern the entire Bill.

Following the Lords' acceptance of Amendment 5 in the names of Baroness Chakrabarti, Lord Etherton, Lord Paddick and Lord Kirkhope of Harrogate (which we support), that statutory purpose and governing provision (Clause 1) has been replaced with a minimal, though vital, safeguard that the Bill *does not require* the Secretary of State to act in any way that would violate specifically stated international human rights laws.

On Days 2 and 3, the Committee will consider various remaining provisions in the Bill. These include the provisions in Clauses 37 to 55, which are brought together under the heading "*Legal proceedings*". The core of these provisions is the suspensive claims procedure created by the Bill. This procedure is intended to be the sole means by which any person – rightly or wrongly treated as within the Bill's primary scope (i.e. caught by the conditions in Clause 2) – can seek to challenge the Secretary of State in carrying out the Bill's express purpose in requiring their removal from the UK.

Suspensive claims

As explained in our joint briefing with ILPA, the suspensive claims procedure is not designed to provide an escape from that purpose – unless the person is someone to whom the Bill was never intended to apply to begin with. One of the profound injustices of this extremely limited and complex procedure is that it has been devised as the only solution even for the people the Secretary of State wrongly treats as within the scope of Bill – i.e. people who arrive with permission (or who do not need it) to come to the UK but whom the Secretary of State treats otherwise.[1]

As for the other type of suspensive claim – called a serious harm suspensive claim – this can only at best require the Secretary of State to find an alternative destination for expelling someone

[1] This is the factual suspensive claim, which with Government amendments is to be re-named as the 'removal conditions suspensive claim'. The member's explanatory statement given to Government amendment 128 wrongly suggests that this (and the many consequential amendments) are to expand the scope of this type of suspensive claim "*so that it includes any claim that a person does not meet the removal conditions*". But the amendments limit the scope of this type of suspensive claim so that it only applies for the purpose of showing the person does not meet the conditions (set out in Clause 2) rather than showing that the Secretary of State has made a mistake of fact in concluding the person does not meet those conditions. It means that, whether or not the Secretary of State has made a mistake, she can bar or resist this type of suspensive claim if she says that her mistake would have made no difference to the conclusion about the four conditions in Clause 2 applying to the person.

from the UK. Anyone making this type of claim can only hope to avoid expulsion to the destination the Secretary of State has notified them of her intention to remove them to. As explained in our joint briefing with ILPA, this indicates that the most that ministers mean when they say they believe the Bill will in practice be human rights compliant is that it will not result in someone being expelled to a place where they may suffer torture, persecution or some other serious harm (generally referred to as *refoulement*). The suspensive claim procedure is insufficient to ensure even this much. Moreover, compliance with international human rights law requires much more than non-refoulement.

Of primary concern is that international human rights law depends on and requires all parties to it respecting, taking and sharing in the responsibility of giving effect to it – including receiving and providing asylum to refugees from war and persecution. This Bill expressly seeks to implement a policy of refusing to do this; and instead cast off the responsibilities that fall to the UK onto other countries. This ambition is pursued even while those other countries are expected to meet their existing responsibilities as well as receive those from the UK.

It is in these circumstances that the suspensive claims procedure – and the legal proceedings that the Bill seeks to build around that procedure – must be assessed.

There are various non-Government amendments tabled to the provisions for suspensive claims. These would each, in different ways, improve the possibility that these claims could enable someone to prevent their being expelled by the Secretary of State to a place where they would come to serious harm. None of these amendments would, however, alter the requirement in the Bill to remove that person from the UK (Clause 2), to refuse to consider their asylum or other protection claim (Clause 4) and to refuse to grant them any permission to stay in the UK (Clause 29).

These three requirements – which are the triple lock described in our joint briefing with ILPA – would remain. Any planned removal that was barred by a suspensive claim would simply result in the Secretary of State being required to find an alternative destination or a means to make the current proposed destination safe. For so long as neither of these were done or were possible, the person would remain in an indefinite limbo in the UK – almost certainly either detained or otherwise accommodated by the Home Office – unless and until the person's physical, mental and moral capacity to resist being returned even to a place where they would be harmed was eroded away.

It is in these circumstances that we consider the various non-Government amendments to the provisions for suspensive claims to be inadequate. We nonetheless acknowledge that – as these amendments (particularly numbers 130, 137, 142, 145, 147 & 151) seek to draw out or remedy – that the threshold for the serious harm suspensive claim set out in the Bill is far too high. It excludes serious harm both by requiring an excessive degree of harm and by requiring an unreasonable immediacy concerning when that harm would arise. Amendment 131 and 132 seek to protect against the power, currently included in the Bill, for the Secretary of State to raise the threshold of serious harm even higher. Of these two, amendment 132 removes that power

whereas amendment 131 merely limits it (and not necessarily in a way that would prevent the Secretary of State raising the threshold, though it would prevent some examples of this).[2]

There are no amendments, however, to mitigate the extremely constrained timeframes, formal prescriptions and procedures to which these suspensive claims are to operate.

Judicial review

The Bill also seeks to significantly oust judicial review – clauses 4(1)(d), 53 and 54, in particular, combine to this effect. The purpose is to leave the suspensive claim process (with the limited prospect of an appeal to the Upper Tribunal) as the intended solitary means by which any specific removal may be deferred or prevented. Clause 4(1)(d) is to require that judicial review proceedings, on which the High Court, Court of Session or High Court of Northern Ireland have not reached a final judgment, can have no impact on removal. Clauses 53 and 54 are respectively to prevent the UK's higher courts either deferring removal by any interim measure or doing so by acting on such a measure of the European Court of Human Rights.

We note that the impact of such measures had they applied to the Secretary of State's Rwanda policy would have resulted in people being expelled unlawfully to Rwanda – even on the ruling of the High Court in December 2022;[3] let alone the recent ruling of the Court of Appeal in June 2023.[4] This is among the reasons that we support amendments 152 and 153 to remove Clauses 53 and 54.

The legality of Government action should remain subject to the supervision of the UK's higher courts. That accords with both sound constitutional principle and international human rights law.

[2] Clause 39 is an enabling power for the Secretary of State to change, by regulations, the statutory threshold for serious harm. The threshold, set out in Clause 38, Amendment 131, includes certain examples of what serious harm includes. This amendment would prohibit the use of the Secretary of State's power to remove or diminish these examples.
[3] *R (AAA & Ors) v Secretary of State for the Home Department* [2022] EWHC 3230 (Admin)
[4] *R (AAA & Ors) v Secretary of State for the Home Department* [2023] EWCA Civ 745