Illegal Migration Bill

Careful consideration of the structure, purpose and interrelation of its various provisions is vital to understanding the Bill. However, the truncated procedure adopted in the Commons[1] has seriously undermined capacity for scrutiny. This Bill is now nearing completion of its parliamentary passage without clear and wide recognition in and beyond Parliament of how its provisions are devised and will operate.

To aid understanding, the analysis presented here breaks the Bill down into three key constituent parts. There is a fiction in breaking things down like this because the Bill is constructed as a singular device. Its many provisions work together to achieve a single aim. Nonetheless, so long as this totalising nature of the Bill is kept firmly in mind, it is possible to identify the following three key features.

This briefing is intended to do no more than help explain how the Bill is to work. Commentary is, therefore, kept to a minimum. The Bill's human rights implications are dreadful, but this is not the place for elaborating on that assessment.

FIRST KEY FEATURE: Clause 1 – a statutory purpose that governs the entire Bill

Clause 1(1) states this Bill's purpose. It is vital to recognise that the purpose is to require removal. This is expressly stated. Subsection (1) identifies deterrence and prevention of journeys that are described as "*unsafe*" or "*illegal*". However, it is explicit that the Bill's purpose is to achieve this deterrence and prevention:

> "*…by requiring the removal from the United Kingdom of certain persons…*"

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[1] This was not simply the result of the decision to take the Bill in a Committee of the whole House over two days, which allowed for no evidence sessions in public bill committee and, more importantly, no line-by-line scrutiny with Ministers compelled to answer focused probing on the Bill and its content. It was also the result of Ministers tabling a mass of amendments at the last minute at Report.

Clause 1(3) takes that purpose and drives it through the entire Bill. It does this by making that purpose govern the interpretation of every provision in the Bill and every provision made by or by virtue of the Bill. All of this, as subsection (3) states:

> "*…must be read and given effect so as to achieve the purpose mentioned in subsection (1).*"

So, if Clause 1 remains unamended, all the Bill (including any amendment made to it) must be read to give effect to its purpose of requiring removal of "*certain persons*"[2] – at least insofar as this is possible. This has important implications for any amendments to the Bill. If these are intended to protect anyone, one necessary consideration is whether an amendment will withstand the obligation to read it to give effect to the Bill's purpose of requiring removal.[3]

Clause 1(5) is one of the Bill's 'belt and braces' provisions. It excludes section 3 of the Human Rights Act 1998 – the statutory provision that ordinarily requires all legislation to be read, so far as is possible, compatibly with the UK's obligations under the European Convention on Human Rights. Subsection (5) makes emphatic what subsections (1) and (3) may, in any event, achieve – i.e. that everything in the Bill (and every regulation made under powers granted by it) must be read so as to advance and enable the requirement upon the Secretary of State to remove from the United Kingdom anybody who falls within the scope of the Bill (regardless of the human rights implications of that). It seems, at least, difficult to envisage how even the removal of subsection (5) can adequately secure human rights compatibility in the face of the Bill's own express statutory purpose,[4] governing interpretative provision[5] and the mandatory nature of its primary working parts (see 'second key feature' below).

[2] There is no statutory definition of the "*certain people*", but the clear implication of the Bill is that the people are those within the four conditions in Clause 2.
[3] This is far from the only consideration necessary when drafting or considering any amendment. The discussion below concerning the 'second key feature' may also be of especial importance.
[4] Clause 1(1)
[5] Clause 1(3)

SECOND KEY FEATURE: Clauses 2, 4 and 29 – the primary working parts that give effect to this Bill's purpose

These three clauses are each mandatory. They require the Secretary of State to act or not act in certain ways. Their effect is to exclude any other legal or judicial constraint upon the Secretary of State in doing or not doing the thing that each clause requires of her.[6] These three primary working parts are:

- Clause 2 requires the Secretary of State to make arrangements to remove from the United Kingdom everyone to whom its four conditions apply.
- Clause 4 prohibits the Secretary of State from considering any asylum or human rights claim[7] that may be made by the person caught by the four conditions in Clause 2. It also excludes such claims (and any claim to be a victim of slavery or human trafficking and any application for judicial review of the person's removal) from affecting, let alone in any way impeding, the obligation created by Clause 2.
- Clause 29 prohibits the Secretary of State from granting leave to enter or remain to anyone caught by the four conditions in Clause 2.

Note also that Clause 4 excludes claims from affecting or impeding the power preserved by Clause 3(2) to remove an unaccompanied child from the UK during such time that they remain both unaccompanied and under the age of 18.[8]

Clauses 2, 4 and 29, therefore, together give effect to the purpose of requiring removal of "*certain persons*".[9] Those persons are the people caught by the four conditions in

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[6] By requiring the Secretary of State to act or not act, Parliament will have removed any discretion for her to do otherwise and any court will be constrained by an expression of parliamentary will to affirm the legality of her abiding by the statutory requirement upon her.
[7] Clause 4(1)(a) refers to a "*protection claim*", defined by Clause 3(11) as a claim that removal would breach the UK's obligations under the Refugee Convention or obligations that relate to humanitarian protection. Clause 4(1)(b) refers to a "*human rights claim*" as a claim that the person's removal to their country of nationality (or passport/ID) would be unlawful under section 6 of the Human Rights Act 1998. But Clause 40(4) – to which Clause 4(2) makes express reference – ensures that human rights claims concerning removal to a third country can only be considered through the Bill's suspensive process (see 'the third key feature' in this briefing).
[8] The 'exception' for unaccompanied children is only an exception, while the person is unaccompanied and a child, from the requirement to arrange removal (Clause 2(1)). The power to remove remains. Similarly, the power to make other 'exceptions' (Clause 3(7)) is only for exceptions to that same requirement. The Bill's purpose in requiring removal (Clause 1), its bars on asylum and other claims (Clause 4) and on granting leave (Clause 29) remain. These could be expected to remain for any exception the Secretary of State may make.
[9] Clause 1(1)

Clause 2.[10] These three clauses operate in a 'belt and braces' way. Clause 2 requires arrangements for removal to be made. Clause 4 excludes any claim getting in the way of that. Clause 29 excludes the only escape from it – a grant of leave to enter or remain. A grant of leave would take the person out of the reach of the fourth condition in Clause 2 (but only for so long as that leave does not expire or is not withdrawn).[11]

The interrelation of these clauses has implications for attempting to amend them. There is little if any purpose to excluding the operation of any one of these clauses unless the other two are also excluded. This is because each clause is expressed in terms of a statutory requirement upon the Secretary of State. She is to have no choice in the matter. Even without Clause 1, therefore, these clauses would work together to mutually bolster the effect of each other. By making the Bill's statutory purpose govern interpretation of every provision in it (and made under it), Clause 1 cements the lock created by these three primary working parts (Clauses 2, 4 and 29).

THIRD KEY FEATURE: The suspensive process created by this Bill and its extremely limited purpose and effect

The Bill creates a new suspensive process. This arises on the making of either a 'factual suspensive claim' or a 'serious harm suspensive claim'. These claims are to be the sole means for anyone caught – or treated as caught – by this Bill (i.e. falling within the four conditions in Clause 2) to challenge the Secretary of State in making arrangements and attempting to remove them from the UK.

Ministers' stated confidence in the Bill's human rights compatibility – notwithstanding their statements that they cannot formally declare this – rests largely on these suspensive claims and the process created around them. However, the suspensive claims only allow for two types of challenge:

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[10] Clause 2(2) to (6)

[11] Clause 2(6) establishes the only condition that is not fixed in time. It contrasts to subsections (2) to (5), in that the first, second and third conditions these create are incapable of change. Clause 29, however, bars the change that could affect the fourth condition; and if the extremely limited scope for a grant of leave were ever permitted to apply, the Bill's purpose may still demand a highly restrictive approach from the Secretary of State to any question of how long she might grant leave for, whether she would every extend it on its expiry or indeed in what circumstances she would curtail it before its expiry.

- One permits a challenge to the Secretary of State's conclusion that the person is indeed caught by the Bill (i.e. within the four conditions stipulated in Clause 2).[12] This is the factual suspensive claim.
- The other permits a challenge to the safety of removing someone to a "*third country*" – i.e. a country other than the person's country of nationality (or passport/identity document).[13] This is the serious harm suspensive claim.

There is no express provision in this Bill for these suspensive claims to ever allow a person to escape the Bill. A successful factual suspensive claim (or appeal) might show the person is simply not within the Bill's purpose (Clause 1) and primary[14] scope (Clause 2).[15] However, a successful serious harm suspensive claim (or appeal) can only ever leave the person still caught by the Bill, its three primary working parts (Clauses 2, 4 and 29, see 'second key feature' above) and governing purpose to require removal (Clause 1, see 'first key feature').

It is a striking feature that a person wrongly treated by the Secretary of State as caught by the Bill (its purpose and scope) is nonetheless constrained by the Bill as to how to attempt to correct this and avoid its impact upon them. It may be that the Bill will prove unsuccessful in restricting such a person to the factual suspensive claim, but the creation of this suspensive claim together with Clauses 4(1)(d), 53 and 54 appear to be an attempt to oust any other judicial remedy (including for this person).[16] If so, this is especially remarkable because no suspensive claim can even be made until the

[12] Clause 37(3) defines a factual suspensive claim as a claim of a mistake of fact by the Secretary of State or an immigration officer "*in deciding that the person met the removal conditions*" and Clause 37(7) defines "*removal conditions*" to be the four conditions in Clause 2.

[13] The factual suspensive claim is permitted in response to any removal notice under Clause 7(2)(a); but the serious harm suspensive claim is only permitted in response to a "*third country removal notice*": see Clause 38(2). Clause 37(3) and (4) defines 'third country removal notice' to exclude removal to a person's country of nationality (or passport/ID).

[14] There are aspects of this Bill that are beyond its stated purpose, and which apply to persons who are clearly not within its primary scope, because they have either arrived or entered before 7 March 2023 or have not arrived or entered within the conditions in Clause 2. This is itself a profound anomaly given the construction of this Bill around a purpose that is intended and stated to govern the entire Bill.

[15] It might show this. However, it might do no more than satisfy the Secretary of State that she must reconsider whether the person as within the scope of the Bill; and on reconsideration she might conclude the person is (even though she had been wrong in how she had reached that conclusion previously).

[16] Clause 54 does this by leaving entirely to Ministers whether to abide by any interim measure of the European Court of Human Rights. The Bill cannot alter the jurisdiction of that court (only withdrawal from the Convention could do so), so what is done here is to exclude UK courts from any role in relation to such an interim measure: Clause 54(6).

Secretary of State gives notice under Clause 7(2)(a) of removal with a specified destination.[17] Yet, from the moment she decides a person is within the Bill's scope (i.e. within the four conditions in Clause 2) she must not consider their asylum, human rights or modern slavery claim (Clause 4); and may detain them without prospect of any recourse to an immigration tribunal for bail or to judicial review (Clause 12).[18]

As for the serious harm suspensive claim, it is necessary to keep firmly in mind that this provides no escape from the Bill. It can only perpetuate a limbo in which a person, whom the Secretary of State cannot remove, remains excluded from any determination of their refugee status (or consideration of any asylum, human rights or modern slavery claim) and excluded from leave to remain. The person will either be indefinitely dependent on housing and support from the Secretary of State or detained.

It does not matter how many times the person may face attempts to remove them to one destination or another. Indeed, it does not matter if the person is removed but required to be allowed back because of the human rights implications of that removal (this is discussed further below). The person remains caught by the Bill's three primary working provisions (Clause 2, 4 and 29) and governed by its purpose (Clause 1).

To succeed, a serious harm suspensive claim (or appeal) must prove an especially high harm threshold. That threshold is high both in terms of the required level of harm[19] and in terms of the relative immediacy of that harm.[20] Ministers have acknowledged this but failed to fully spell out the basis for it. With respect, it is not simply a matter of avoiding responsibility for harm that may arise long into the future.[21] This is clear from the definition of the serious harm condition that must be met to make out the claim.[22]

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[17] Clauses 41(7) and 42(7) each establish the "*claim period*" within which a suspensive claim may be made as beginning the person being given the removal notice.

[18] Clause 12 establishes a 28 days period in which detention is without any recourse to an immigration tribunal for bail or to judicial review. The 'bad faith', 'natural justice' and 'habeas corpus' exceptions are the sole, minimal and insufficient judicial safeguards. The 28 days applies each time the person is detained.

[19] Clause 38(3) stipulates that the harm must be "*serious and irreversible*". Subsections (4) to (7) add further constraint on what may be regarded as sufficiently serious.

[20] Clause 38(3) stipulates that the harm must be "*real, imminent and foreseeable*".

[21] *Hansard* HL, 12 June 2023 : Col 1773 *per* Lord Murray of Blidworth

[22] Clause 38(3)

That definition is express that the harm, to which the claim refers, is one that would, if the person were removed, arise "*before the end of the relevant period*".[23] That relevant period is defined as the period of time it would take to make a human rights claim and bring a judicial review of refusal of that claim to a conclusion[24] – i.e. to pursue a remedy from the place to which the person is removed.[25] Among the inadequacies of this regime[26] is that, whether or not the harm arises in that timeframe, the Secretary of State will have placed the person, by their removal, in circumstances outside her jurisdiction. If the person's judicial review succeeds, it may no longer be within the Secretary of State's power to act to protect the person against the harm.

The Bill provides no remedy for a person caught by it, whom the Secretary of State intends to remove to their country of nationality. A person facing removal to harm in their country of nationality is reliant upon the limited conditions stipulated in Clause 5 for protecting against *refoulement* and the Secretary of State's application of these. Judicial review is not ousted, but an application for it cannot affect or defer the person's removal (Clause 4(1)(d)) and no interim ruling of the court can do so (Clause 53).

Conclusion

The remainder of the Bill serves its purpose of requiring removal (Clause 1) along with the other key constituent parts identified in this analysis. These include expanded detention powers and various judicial ousters: some explicit, others implicit in the Bill.[27]

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[23] Clause 38(3) creates a strange gap into which someone may fall if the harm, which may reach the extreme severity level ('serious and irreversible') but be insufficiently 'real, imminent and foreseeable' even though arising before the end of this period.

[24] Clause 38(9)

[25] The judicial review application cannot itself affect or defer removal: Clause 4(1)(d). Nor can the court achieve this by any interim measure: Clause 53.

[26] The constraints of tight deadlines, the obligation for 'compelling evidence' and to meet other prescriptions for a claim even to be made (without which no appeal can be made), the Secretary of State's control or influence of the entire process (including appeal), the constraints upon the Upper Tribunal, the constitution of that tribunal for suspensive appeals, and the further judicial ousters are among a suite of measures that may, for example, render this process inadequate.

[27] An example of an explicit ouster is that created by Clause 12(4). An example of an implicit ouster is that created by Clause 2(1). The former includes an express statement of the ouster, e.g. "*the decision is final and is not liable to be questioned or set aside by any court or tribunal.*" The latter makes no express statement but statutorily requires the Secretary of State to do something and thereby seeks to oust the court from any role save for affirming the legality of the Secretary of State doing what Parliament has instructed her to do.

If enacted, this Bill is, therefore, to do precisely what is stated as its purpose in Clause 1 – i.e. to require, by Act of Parliament, the Secretary of State to remove certain people from the United Kingdom. There is to be no effective legal, moral or practical constraint upon that, not even any self-constraint on the part of the Secretary of State. Of course, practical constraints cannot be simply eliminated by force of parliamentary will so these may remain. However, legal and moral constraints can – or at least that is the constitutional and legal orthodoxy underpinning this Bill – be overridden by such will. Parliament is the supreme lawmaker. By this Bill, that supreme power is to be directed to require removal free of any other legal or moral consideration; and for this to be pursued indefinitely even in the face of any practical consideration.

This is the 'novelty' to which Ministers have repeatedly made somewhat vague reference in supposed mitigation of their professed inability to declare the human rights compatibility of this Bill.[28] It is striking that the novelty is to direct parliamentary power to require the Secretary of State to act and not act in certain ways because it means that any error of judgment in Ministers' assessment that the Bill will nonetheless prove compatible cannot be put right – save by primary legislation. The Bill contains no mechanism to make a correction.[29]

It is all the more remarkable, therefore, that Ministers have embarked upon this high risk strategy – assuming their stated belief in the Bill's human rights compatibility is creditable – by a process that has quite deliberately deprived the Commons of any real opportunity to scrutinise the Bill and, thereby, significantly undercut the capacity in the Lords to undertake that. The Lords are left with having to do the scrutinising work of both Houses with no additional time to do that because the Bill has been passed to them before Ministers have faced any serious demand to bring clarity to what they are proposing and how they understand it will work.[30]

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[28] e.g. *Hansard* HL, Second Reading, 10 May 2023 : Col 1921 *per* Lord Murray of Blidworth describing the design of "*a scheme that is novel and ambitious*".

[29] Moreover, the judicial ousters limit the opportunity for legal proceedings to ever come before a higher court that will be permitted to even make a declaration of incompatibility under section 4 of the Human Rights Act 1998, by which the remedial action (section 10 of, and Schedule 2 to, that Act) might (not must) be triggered. The only other trigger that could permit this is a ruling of the European Court of Human Rights.

[30] See further fn.1.

But there is a further profound doubt as to what Ministers mean by their continued assertions that the Bill is – notwithstanding the absence of a positive declaration – human rights compatible. The clear implication of creating a sole remedy (the suspensive process, see ‘third key feature’ above) that does not allow anyone caught by the conditions in Clause 2 to ever escape the Bill is that Ministers mean *only* that the Bill will not result in *refoulement* – i.e. it will do nothing more than protect against the prospect that someone is removed to a place where their life or liberty is at risk or some other serious harm may come to them.

If that is what Ministers’ mean, two questions arise:

- Will the Bill protect against even this much? The suspensive claims process is profoundly constrained. The judicial ousters are substantial. Moreover, the impact of indefinite limbo may so demoralise a person that they can and will no longer resist removal to a place of persecution, torture or other serious harm.
- Even if this much were achieved, is it sufficient to constitute human rights compatibility? This is doubtful. For example, the Refugee Convention clearly envisages sharing of responsibility; and it equally does not envisage prolonged exclusion from refugee status recognition and/or refugee rights by a state of enforced and indefinite limbo. Moreover, such a limbo as this Bill may impose seems itself insufficient to respect basic human dignity, let alone avert such moral, mental and physical deterioration as may seriously degrade a person.

However, the purpose here is not to interrogate these questions. It is rather to aid understanding of the Bill – its structure, purpose and how it is to work. Only from this is it possible to evaluate its human rights impact; or to assess whether and how it may be amended to achieve any particular mitigation that may be desired.

Finally (as stated in footnote 14), certain of this Bill’s provisions and powers do affect people, who are not within its stated purpose or primary scope. Given the singular nature and construction of this Bill, this is itself a significant irregularity; and one which adds complexity and difficulty to any understanding of the Bill’s impact.

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