



Law Society
of Scotland

Second reading briefing

Illegal Migration Bill

March 2023



General comments

We are very concerned about a number of aspects of this bill. In view of the shortness of time between introduction of the bill and the date of the Second Reading debate we have not had sufficient time to comment on the entire bill. Our comments are therefore restricted to matters of a general nature in particular the Ministerial Statement under The Human Rights Act 1998 (HRA) section 19(1), the terms of the introductory clause 1 and aspects of other clauses in the bill.

The Ministerial Statement under The Human Rights Act 1998 (HRA) section 19(1)

The HRA section 19(1) provides that a Minister of the Crown “in charge of a Bill...must, before Second Reading of the Bill—

(a) make a statement to the effect that in the Minister’s view the provisions of the Bill are compatible with the Convention rights (“a statement of compatibility”); or

(b) make a statement to the effect that although the Minister is unable to make a statement of compatibility the Government nevertheless wishes the House to proceed with the Bill.

(2) The statement must be in writing and be published in such manner as the Minister making it considers appropriate”.

The Home Secretary has chosen to make the following statement:

“I am unable to make a statement that, in my view, the provisions of the Illegal Migration Bill are compatible with the Convention rights, but the Government nevertheless wishes the House to proceed with the Bill”.

This provision has been in force since 24 November 1998. It is the first time that immigration law has been proposed which is subject to such a statement. The Daily Telegraph reported in an article published on 8 March, *The key points in Rishi Sunak’s illegal immigration bill* that:

“Mrs Braverman has acknowledged that the “robust and novel” illegal immigration Bill [might not comply with the European Convention on Human Rights](#) (ECHR), setting up the prospect of a legal battle with Strasbourg judges.

In a letter to MPs, the Home Secretary said this acknowledgement in the Bill - known as a section 19 (1)(b) of the Human Rights Act 1998 - did not mean it was incompatible with the convention but that there was more than a 50 per cent chance that it may not be.

This means government lawyers have assessed its chances of withstanding a legal challenge as more likely to fail than succeed. It is the first time an immigration law has been qualified in this way.

However, Mrs Braverman said: “We are testing the limits but remain confident that this Bill is compatible with international law.”

The Home Secretary’s last statement that the “Bill is compatible with international law” is distinguishable from the statement under section 19(1)(b) that the Home Secretary cannot state that the Bill is compatible with Convention rights. As Professor Aileen Kavanagh states in A. Kavanagh, 'Is the Illegal Migration Act itself illegal? The Meaning and Methods of Section 19 HRA', U.K. Const. L. Blog (10th March 2023) (available at <https://ukconstitutionallaw.org/>) “a negative Statement under section 19(1)(b) embodies a conclusion that the courts are more likely than not to find a violation with rights, but that the government nevertheless wishes to proceed with the Bill.”.

We ask why the Government is pursuing legislation which it acknowledges may not be compatible with Convention rights and which will therefore invite challenge by those affected by the terms of the legislation?

We accept that a Minister of the Crown may choose to issue a statement under section 19(1)(b). However, bringing forward a bill which is not stated to be compatible with Convention rights risks non-compliance with the Convention. The UK is obliged to comply with its international obligations – to do otherwise is to act contrary to the rule of law – one of Lord Bingham’s eight principles of the rule of law.

The Human Rights Memorandum [ECHR Memo Illegal Migration Bill-07323 \(parliament.uk\)](#) which was published by the Home Office to accompany the Bill specifically highlights provisions of the Bill which engage Convention rights and identifies some potential infringements see paragraphs:

18. which considers Article 8 potential infringement “P’s family members may be removed along with P (clause 8) and so there is an argument that P’s Article 8 rights in relation to family life may not be infringed” and,

23. which states “Article 8 is likely to be infringed but it is the Government’s view that the interference is justified under Article 8(2) for being in accordance with the law and necessary in a democratic society.”

The memorandum also details the clauses in the bill which may engage the Convention rights including clauses 3,4,5,6,13,15-20 and the legal process provisions in clause 45.

Commentators have already made the point that the bill is potentially in breach of the 1951 UN Refugee Convention. Does the Government have a specific response to that issue?

Clause 1. Introduction

This clause is declaratory in nature.

It states the statutory purpose of the Bill and clause 1(3) requires the Bill and subordinate legislation made under it to be interpreted in accordance with that statutory purpose.

Indeed, comparing clause 1 which purports to set out the purpose of the bill with the purpose of the bill set out in paragraph 1 of the Explanatory Notes [Illegal Migration \(parliament.uk\)](#) there are a number of differences between them. According to the Explanatory Notes:

“The purpose of the Bill is to:

- *deter illegal entry into the UK;*
- *break the business model of the people smugglers and save lives;*
- *promptly remove those with no legal right to remain in the UK; and*
- *make provision for setting an annual cap on the number of people to be admitted to the UK for resettlement through safe and legal asylum routes”.*

Furthermore, the Human Rights Memorandum paragraph 2 states that the purpose of the Bill is:

“to deter illegal entry into the United Kingdom; break the business model of the people smugglers and save lives; and promptly remove those with no legal right to remain in the UK.

The Bill on the other hand states:

The purpose of this Act is to prevent and deter unlawful migration, and in particular migration by unsafe and illegal routes, by requiring the removal from the United Kingdom of certain persons who enter or arrive in the United Kingdom in breach of immigration control.

These different descriptions of the purpose of the Bill are inconsistent. Obviously the statutory provision will prevail but should all these documents which are produced by the Government not have the same components? This is important because clause 1(3) provides that *“so far as it is possible to do so, provision made by or by virtue of this Act must be read and given effect so as to achieve the purpose mentioned in*

subsection (1)”.

That purpose does not refer to the proposal to “*break the business model of the people smugglers and save lives*” nor “*setting an annual cap on the number of people to be admitted to the UK for resettlement through safe and legal asylum routes*”. What is the status of these “purposes” as referred to in the ancillary documents?

We disagree with clause 1(5) which provides that: Section 3 of the Human Rights Act 1998 (interpretation of legislation) does not apply in relation to provision made by or by virtue of this Act. This means that the obligation that “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights” will not apply to the bill. This provision should be removed from the Bill and would go some way to resolving anxieties about the impact of the Ministerial statement under section 19 HRA. We take the view that retaining the application of section 3 will uphold the UK’s reputation as a jurisdiction which upholds the rule of law.

Other Aspects of the Bill

Clause 2 (Duty to make arrangements for removal) obliges the Home Secretary to deny access to the UK asylum system to those who arrive irregularly. The Home secretary is obliged to remove to their home country or a safe third country those who have entered or arrived in the UK illegally, and the conditions under which this duty will apply.

UN High Commissioner for Refugees has stated that “The legislation, if passed, 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... 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”.

We urge the Government to respect the Commissioner’s opinion and comply with the UK’s obligations under the 1951 UN Convention relating to the Status of Refugees: [Microsoft Word - 1951Convention relating to the Status of Refugees.doc \(unhcr.org\)](#).

For further information, please contact:

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