



Law Society
of Scotland

Law Society of Scotland Response

Second Reading Briefing Illegal Migration Bill

May 2023



Introduction

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We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Immigration and Asylum Sub-committee welcomes the opportunity to consider and respond to the Illegal Migration Bill. The Sub-committee has the following comments to put forward for consideration.

General Comments

We are very concerned about a number of aspects of this bill. Our comments of a general nature focus on 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 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 and the Parliamentary Under Secretary of State for Migration and Borders at the Home Office, Lord Murray of Blidworth have 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 from 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 \(parliament.uk\)](https://www.parliament.uk/publications/2023/07/07323)) which was published by the Home Office to accompany the Bill on introduction in the House of Commons, 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. We note the supplementary ECHR memorandum addresses issues arising under the ECHR in relation to amendments tabled by the Government for Report stage in the House of Commons [Illegal Migration supp ECHR memo \(parliament.uk\)](#).

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 original 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.

Clause 2 (Duty to make arrangements for removal)

Clause 2 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. Our view is that the obligation to make arrangements to remove migrants who meet certain conditions will effectively remove the right to claim asylum and breach the UK’s obligations under the Refugee Convention. Article 31 of the Convention stipulates refugees should not be penalised for their illegal entry or stay; however, this bill places an obligation on the Secretary of State to penalise illegal entrants without giving consideration to whether they are genuine refugees. We note the second condition (Clause 2(3)) applies the obligation to remove to all individuals entering the UK on or after 7 March 2023 and not the date the law would come into force. We have concerns about the use of retrospective law making as it undermines the rule of law and no justification has been provided for this. The issue of retrospectivity occurs in clauses 4,5,15 and 21. Should the bill become law we suggest this clause (and the others where retrospectivity occurs) should be amended so the law applies only to those entering the UK after the law comes into force. The third condition (Clause 2(4)) is inconsistent with the Refugee Convention which does not require a claim to be made in the first safe country. In the case of people who have been trafficked to the UK, it is not uncommon for them to be under control of the people smuggler until they arrive in the UK and it is unrealistic to penalise them for not making a claim in a country where they were unable to do so.

The 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:1951 Convention relating to the Status of Refugees.doc (unhcr.org).

Clause 3 (Unaccompanied children and power to provide for exceptions)

Clause 3 relieves the Home Secretary from the duty to remove unaccompanied children from the UK. Although there is no obligation to remove unaccompanied asylum-seeking children while they are under the age of 18, such an obligation would arise when they turn 18 regardless of how long they have spent in the UK. The provisions of this bill could lead to unaccompanied children spending their formative years in the UK and developing significant family and private life ties here. The Bill would mean these factors would be disregarded as soon as the child turns 18 and the Home Secretary would be obliged to remove the individual in spite of these ties. Clause 3 also gives the Home Secretary power to provide further exceptions from clause 2 by way of regulations under clause 3(7). Clause 3(8) and (9) provide that:

“(8) Regulations under subsection (7) may make provision— (a) for this Act or any other enactment to have effect with modifications, 20 in relation to a person to whom an exception applies, in consequence of the application of the exception to that person...and (9) Regulations made by virtue of subsection (8)(a) may, in particular, disapply any provision of this Act or any other enactment in relation to a person to whom an exception applies.”.

Under clause 3(10) “enactment” includes—... “(b) an enactment contained in, or in an instrument made under, an Act of the Scottish Parliament.”. What contact has the Government had with the Scottish Government in relation to these provisions? Can the Government indicate the Scottish legislation to which this clause might apply?

Clause 4 (Disregard of certain claims, applications etc)

We have deep concerns about the provisions of Clause 4(1). This clause requires the Secretary of State to disregard the making of applications for judicial review, refugee protection claims, human rights claims and issues of slavery and trafficking. It means the Secretary of State will be under a duty to remove people regardless of legitimate legal proceedings or claims being in progress. This is inconsistent with the rule of law.

Clause 5 (Removal for the purposes of section 2 or 3)

In the absence of return agreements with safe third countries, the effect of this clause is to make almost all non-EU, Swiss or Albanian nationals unremovable. Clauses 5(8) and 5(9) state that where these individuals make a protection or human rights claim they will not be removed to their home country but will instead be removed to the country from where they embarked to the UK or another country where they will be admitted (a safe third country).

The returns partnership with Rwanda: [Memorandum of understanding between the UK and Rwanda - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/612442/Memorandum_of_understanding_between_the_UK_and_Rwanda_-_GOV.UK_(www.gov.uk).pdf) makes provision for the relocation of people arriving illegally in the UK. Given the large number of arrivals this clause would apply to, it is likely that most arrivals would be unremovable but

would also be in a position where the Secretary of State is legally prohibited from considering their human rights or protection claim. This would create a large population, including children, without status in the UK. We would therefore recommend that a new provision is inserted to state that if the Secretary of State cannot remove someone from the UK within a period of 3 months, she would be obliged to consider their human rights or protection claim.

Clause 6 (Powers to amend Schedule 1)

We recommend clause 6 is amended to require Parliament to approve any new countries which the Secretary of State considers to be safe to return asylum seekers. It is important that such additions are subject to thorough scrutiny by Parliament.

Clause 8 (Support where asylum claim inadmissible)

Although this clause is designed to prevent those covered by the Bill from accessing public funds, it will not do so. Local Authorities will still have an obligation under the Human Rights Act to provide support to those who would otherwise be destitute and therefore the cost of supporting people, who are unlikely to be removed, will only be moved from one public body to another. We submit this clause should be deleted.

Clause 19 (Extension to Wales, Scotland and Northern Ireland)

This clause gives the Secretary of State the power to introduce regulations which would extend the remit of Clauses 15-18, so they apply to Scotland. The regulation making power is very wide and may amend, repeal or revoke any enactment (including an enactment contained in this Act) and would include an enactment contained in, or in an instrument made under, an Act of the Scottish Parliament. This would affect devolved matters, specifically in relation to housing and social services. What contact has the Government had with the Scottish Government in relation to these provisions? Can the Government indicate the Scottish legislation to which this clause might apply?

In the event of such an extension and clauses 15-18 being extended to Scotland the following points are relevant:

Clause 15 (Accommodation and other support for unaccompanied migrant children)

This clause, if extended would allow the Secretary of State to provide for or arrange for the provision of accommodation to children in Scotland. There is no provision in this clause outlining any safeguards relating to the accommodation to be provided. There is also no provision for the circumstances in which it would be reasonable or appropriate for the Secretary of State to make an order that the care of the child be transferred and to safeguards in place to limit that power for children of a particular age or vulnerability.

The effect of this is to give a legal basis for the practice of housing unaccompanied children in hotel accommodation. This section would permit accommodating an unaccompanied child of any age in hotel accommodation not just on a temporary basis but for an undetermined period of time. This raises significant safeguarding concerns due to the fact that the accommodation would not have the same levels of support which would normally be provided by the local authority.

The resulting concern is that the welfare of unaccompanied asylum-seeking children is put at risk.

Clause 16 (Transfer of children from Secretary of State to local authority and vice versa) subsections (5)-(8)

To give the Secretary of State the power to order the transfer of an unaccompanied asylum-seeking child from the local authority's care into the care of the Secretary of State would undermine the protections for children in the Children's (Scotland) Act 1995.

Clause 17 (Duty of local authority to provide information to the Secretary of State)

This clause gives the Secretary of State the power to direct a local authority to provide them with any information specified in future regulations with the only caveat as that this would be for the purposes of helping the Secretary of State to make a decision under section 16(1) or (5)

This may result in a conflict with the duty of care owed by local authorities and undermine their ability to provide effective child protection.

18 (Enforcement of local authorities' duties under sections 16 and 17)

The enforcement powers in section 18 would leave local authorities unable to take steps needed to safeguard a child at risk as result of inappropriate accommodation arranged by the secretary of state, despite there being an ongoing duty of care (under s.22 and 25 of the Children's Scotland Act 1995).

29 (Entry into and settlement in the United Kingdom)

These provisions apply to family members even if they were in the UK before the person who meets the four conditions. Individuals already in the UK who may have an asylum claim under consideration would be caught by this, even if they have a legitimate claim that is likely to be granted. The scope of this should be reduced and only apply to family members that arrive after the main applicant. Has the Government carried out any assessment of the impact of being deprived of right to remain in the circumstances set out in this clause?

30 (Persons prevented from obtaining British citizenship etc)

Whilst we agree with the removal of the retrospective provisions from clause 30(4) at Report Stage in the House of Commons, provisions of clauses 30(3), 31(1)(a) and 31(2)(a)(i) combined continue to have the result that children born outside the UK are deprived of their British citizenship by being brought to the UK by persons to whom the bill applies: see further information from the Project for the Registration of Children as British Citizens (PRCBC) [NEWS AND UPDATES – prcbc](#).

31 (British citizenship)

We are concerned at the application of clauses 31, 32 (British overseas territories citizenship), 33 (British overseas citizenship) and 34 (British subjects) and how these affect the citizenship standing of persons

affected by other provisions in the bill. Has the Government fully explored the impact these provisions may have on people so affected?

Clauses 37-54 Legal proceedings

In relation to the chapter entitled Legal proceedings we consider that access to substantive remedies will be restricted for many of those affected by provisions in the bill. The provisions in the chapter Detention and Bail: clauses 10-14 mean that many of the people affected will be in detention and may find it difficult to access legal representation, let alone gather the “compelling evidence” that is called for in clauses 41-45. There are already further, well-documented difficulties in obtaining publicly funded legal representation in this sector. We note that clause 54(Legal Aid) relates to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which applies substantially to legal aid in England and Wales. Legal Aid in Scotland is provided for under the Legal Aid (Scotland) Act 1986 and administered by the Scottish Legal Aid Board. What discussions has the Government had with the Scottish Government in relation to such matters? These issues combined with the very short time limits attached to the remedies, is likely to result in the proposed remedies being wholly illusory for many of those affected by the Bill.

Such problems might well give rise to legal challenges on the basis that the proposed system is inherently unfair (eg. as in [Lord Chancellor v Detention Action \[2015\] EWCA \(Civ\) 840](#)). This is particularly so in light of the well-established principle “that only the highest standards of fairness will suffice in the context of asylum appeals” (*ibid*, per Master of the Rolls at [27]).

40 (Relationship with other proceedings)

The absence under clause 40(4) of a right of appeal to determine a human rights claim means that affected individuals and their family members will not have access to *any* mechanism for independently assessing the best interests of children. This is concerning as it is likely to be individuals who have a family life with children in the UK who may seek to make such human rights claims.

41 (Serious harm suspensive claims)

The requirement in clause 41(6) that any risk of harm would need to crystallise “before the end of the claim period” is an arbitrary timescale. For example, it could unfairly exclude young girls who would become vulnerable to assault at a future date or young men who fear being conscripted to the military. The same problem arises in relation to clause 42(6) of a “reasonable degree of likelihood”.

As stated above, it seems unrealistic to expect claimants to be able to gather the “compelling evidence” they are required to provide within such short time limits. Such a system seems analogous to the discredited “detained fast-track” system for processing asylum claims, which was declared unlawful by the Court of Appeal in 2015 ([Lord Chancellor v Detention Action \[2015\] EWCA \(Civ\) 840](#)). Whilst the time limits are slightly longer in the remedies proposed by the Bill this is offset by the imposition of higher evidential standards (ie. the repeated requirement to provide “compelling” evidence or, even, “compelling evidence that there were compelling reasons”: see clause 45(5)(a)).

Clauses 43 (Appeals in relation to suspensive claims) 44 (Permission to appeal in relation to suspensive claims certified as clearly unfounded) 45 (Suspensive claims out of time) 46 (Suspensive claims: duty to remove 47 Upper Tribunal consideration of new matters) 48 (Appeals in relation to suspensive claims: timing) and 49 (Finality of certain decisions by the Upper Tribunal)

These clauses engage many issues concerning the rule of law, adequacy of rights of appeal and questions relating to the appropriateness of the choice of forum. The joint briefing by a coalition of organisations working across human rights, migrant justice, asylum, modern slavery, healthcare and other civil society sectors in the UK contains many comments on these provisions: [Joint-Briefing_Illegal-Migration-Bill_HoL.pdf \(justrightscotland.org.uk\)](https://justrightscotland.org.uk).

We are very concerned about the ouster provision in clause 49 which ensures that decisions of the Upper Tribunal refusing: permission to appeal against the refusal of a suspensive claim, or a declaration that there were compelling reasons for the claimant to have not made a suspensive claim within the claim period or a determination that there were compelling reasons for the claimant to have not provided details of a new matter to the Secretary of State before the end of the claim period are final, and not liable to be questioned or set aside in any other court. Furthermore clause 49(3) provides that (a) the Upper Tribunal is not to be regarded as having exceeded its powers by reason of any error made in reaching the decision; (b) the supervisory jurisdiction does not extend to, and no application or petition for judicial review may be made or brought in relation to, the decision. This excludes the jurisdictions of the High Court in England and Wales and the Court of Session in Scotland.

The Government should make clear the reasons for putting these ouster provisions in place. Preserving rights of appeal can ensure that the risk of miscarriages of justice is reduced see: *CM (Petitioner) 2021 CSIH 15*, in which the First Tier Tribunal (FtT), Upper Tribunal (UT), and the Lord Ordinary misunderstood the petitioner's evidence and the Inner House of the Court of Session intervened to reduce the UT's decision refusing permission to appeal

Clause 52 (Interim remedies) This clause restricts the ability of a court to grant an interim remedy that would prevent or delay removal of a person subject to the duty to remove. Subsection (1) provides that subsections (2) and (3) apply to any court proceedings relating to a decision to remove a person from the UK under this Bill. Subsection (3) prevents a court from granting an interim remedy that prevents or delays, or has the effect of preventing or delaying, the removal of a person from the UK. In our view this clause impacts on the discretion of the judiciary to reach a just decision. The Government should explain why they consider this provision to be necessary,

Clause 53 (interim measures of the European Court of Human Rights)

This clause sets out how interim measures of the European Court of Human Rights (ECtHR) affect the duty in Clause 2 to make arrangements for the removal of a person from the UK. are not to be taken into account in determining rights and obligations under domestic law of a public authority or any other person. As the Explanatory Notes state at paragraph 249 "Subsection (2) provides that a Minister of the Crown may, but need not, decide that the duty to remove in section 2(1) does not apply to a person where the European

Court of Human Rights has indicated an interim measure in relation to that person.”. This application of a discretion as to whether the ECHR should be followed undermines the rule of law and will have an impact on the UK’s reputation as a signatory to the Convention.

The UK acceded to the ECHR which in Article 24 (Registry and rapporteurs) provides that the ECtHR shall have a Registry, the functions and organisation of which shall be laid down in the rules of the Court which were agreed under Article 25. Under Rule 39 of the Rules of Court, the ECtHR may indicate interim measures to any State Party to the ECHR. Measures under Rule 39 are decided in connection with proceedings before the ECtHR, without prejudging subsequent decisions on the merits of the case. The ECtHR grants such requests only on an exceptional basis when the applicants would otherwise face a real risk of irreversible harm. Rule 39 interim measures came to prominence recently when on 14 June 2022, the ECtHR granted, an urgent interim measure in the case of *N.S.K. v. the United Kingdom* (application no. 28774/22), an asylum-seeker facing imminent removal to Rwanda. The urgent interim measure concerned an Iraqi national who, having claimed asylum upon arrival in the UK on 17 May 2022 faced removal to Rwanda on 14 June 2022. The ECtHR indicated to the UK Government that the applicant should not be removed to Rwanda until three weeks after the delivery of the final decision in his judicial review proceedings. On 24 June 2022 the Government asked the Court to review its decision to grant an interim measure and for the interim measure to be lifted. Having considered further submissions from the parties, the Court confirmed the interim measure on 1 July. The material presented by the Government was not sufficient to enable it to be satisfied that the applicant could and would be returned to the United Kingdom in the event that he was successful at any stage in his legal proceedings, including in the proceedings before the Court. Moreover, in case of a finding that the applicant’s removal to Rwanda put him at real risk of irreparable harm during the period pending the final determination of his application, his return to the United Kingdom at the conclusion of appeal proceedings or proceedings before this Court would be inadequate to protect against that risk.

On 19 December 2022 the High Court handed down its judgment in the applicant’s judicial review proceedings, which had been linked to those brought by other claimants. It found that it was lawful for the Government to make arrangements for asylum seekers’ claims to be determined in Rwanda rather than in the United Kingdom. However, the way in which the Home Secretary had implemented her policy in a number of the individual cases – including that of the applicant – was found to be flawed. The High Court quashed the decisions relating to the applicant on the basis that the Home Secretary did not provide adequate reasons for her conclusion that his asylum claim was inadmissible and that the decision refusing the human rights claim did not consider the evidence put forward, and indicated that if the Home Secretary wished to apply her policy to him, she would first have to reconsider the decisions in his case: [Further requests for interim measures in cases concerning asylum-seekers’ imminent removal from the UK to Rwanda \(1\).pdf](#)

The case went to the Court of Appeal on 24 April 2023 for a four-day hearing: [Duncan Lewis to represent NSK in ongoing Rwanda challenge](#).



For further information, please contact:

Michael P Clancy

Director, Law Reform

Law Society of Scotland

DD:07785 578333

michaelclancy@lawscot.org.uk