Illegal Migration Bill

Briefing for MPs – Second Reading

About Us

The Bar Council represents approximately 17,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Summary

The Illegal Migration Bill (the Bill), if enacted, will end the right to seek asylum in the United Kingdom for the majority of applicants, expand powers of executive immigration detention whilst reducing judicial oversight of detention, and jeopardise the United Kingdom's compliance with its international obligations, setting the United Kingdom on a collision course with the European Court of Human Rights. It is most unlikely that the Bill as a whole is compliant with the UK's obligations under the European Convention on Human Rights (ECHR).

The Bar Council is concerned that some features of the Bill, if enacted, would run counter to normal conceptions of the rule of law, for instance the attempt to curtail the Court's supervisory jurisdiction in the early stages of detention.

The Bill, a major piece of legislation, has been introduced without prior consultation and on an extraordinarily truncated timescale, with just four working days between introduction and second reading. There is no justification for such exceptional haste, which inevitably impacts the level of scrutiny and debate to which the Bill will be subjected in the Commons. It is important that the issues raised by the Bill are properly considered and debated on their merits.

The Bar Council has been unable, in the time available, to prepare a detailed briefing on every issue raised by the Bill, but is producing this short statement to identify areas of particular and immediate concern.

The Bill

The areas of particular concern to the Bar Council fall under six broad heads: (1) efficacy, enforceability and consequential risks, (2) the right to seek asylum, (3) detention, (4) modern slavery protections, (5) European Convention on Human Rights compliance, and (6) the rule of law.

(1) Efficacy, enforceability and consequential risks

At the heart of the Bill are the *duty* in Clause 2 to make arrangements for the removal of any person meeting the four conditions therein "*as soon as is reasonably practicable after the person's entry or arrival in the United Kingdom*" and the *duty* in Clause 4 to "*disregard*" protection claims, human rights claims and modern slavery claims.

The existence of a duty to remove does not impact upon the practical obstacles to removal which exist. In the year to September 2022, only 489 failed asylum seekers were forcibly removed.[1] The scheme created by the Bill is further complicated by the fact that, for most asylum claimants, removal will be to an identified safe country, not the home country. In most such cases, removal will only be possible where a returns agreement is in place. As matters stand, the only such agreement is with Rwanda (currently the subject of protracted litigation). Even if upheld as lawful, the Rwanda scheme could not allow for removals on the scale envisaged by the Bill in the foreseeable future.

Where there is no means to remove, the Clause 4 duty to disregard any protection, human rights or trafficking claim remains. The inevitable consequence would appear to be that there will be large numbers of people who are unremovable, potentially in perpetuity, but who will also never be able to regularise their status. These people will therefore need be supported at public expense (in or out of detention).

The Bar Council is not aware of any clear evidence-based case advanced by the Government that the proposed legislative scheme will achieve its broader aim of preventing and deterring unlawful migration by unsafe and illegal routes. There is an obvious risk that removing existing protections for asylum seekers and victims of modern slavery will give rise to the incentive, on those who travel, to evade detection rather than to seek to regularise their status. This could therefore lead to a greater use of unsafe routes rather than reduce them which would appear to be directly inimical to at least one of the purposes of such legislation.

(2) The right to seek asylum

The Bill contemplates a total prohibition on asylum claims by those falling within Clause 2(1) (i.e., irregular migrants who did not come "*directly*" to the United Kingdom from a country in which their "*life and liberty were threatened*" for one of the Refugee Convention reasons). A person will not be treated as coming directly if they have "*passed through or stopped in*" another country where they were not at risk. Given that very few asylum claimants arrive in the United Kingdom directly from their country of persecution, the impact of this provision will be to exclude the vast majority of potential applicants from the refugee determination process. The Bar Council notes that the UNHCR has said that 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.*"[2]

(3) Detention

The expansion of detention powers as currently proposed by the Bill is in the Bar Council's view no less than alarming, in particular:

a. Clause 11 creates new powers to detain where an immigration officer "*suspects*" a person is within Clause 2, and suspects that a person is subject to the removal duty in Clause 2, where the duty exists, or where the duty would exist but for the fact that the person is an unaccompanied child (and family members of such persons). Significant limitations on the detention of certain vulnerable individuals that previously applied will not apply to this power. In the view of the Bar Council, this is a retrograde step.

[1] https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-december-2022
[2] https://www.unhcr.org/uk/news/press/2023/3/6407794e4/statement-on-uk-asylum-bill.html

b. Clause 12 codifies the second and third of the so-called *Hardial Singh* principles. These are: (ii) that detention is only lawful for a period that is reasonable in all the circumstances, and (iii) that detention ceases to be lawful where it is apparent that removal within a reasonable period will not be possible.

   It is a critical feature of the *Hardial Singh* jurisprudence that a Court will itself gauge the reasonableness of detention. In contrast to other areas of public law challenge, it is not limited to reviewing the rationality / legality of the Home Secretary's decision. As Keene LJ said in *R(A) v SSHD* [2007] EWCA Civ 804, "*It is to my mind a remarkable proposition that the courts should have only a limited role where the liberty of the individual is being curtailed by administrative detention. Classically the courts of this country have intervened by means of habeas corpus and other remedies to ensure that the detention of a person is lawful,* ***and where such detention is only lawful when it endures for a reasonable period, it must be for the court itself to determine whether such a reasonable period has been exceeded***."

   The innovation in Clause 12 is that, if enacted, a person may be detained for a period that, "*in the opinion of the Secretary of State*" is reasonably necessary to achieve the stated purpose. The Explanatory Notes say that Clause 12 is intended to overturn the principle in *R(A)* referred to above. If the proposed provisions have the intended effect, they will constrain the court to reviewing the legality of the Home Secretary's judgement, a significant restraint on the Court's ability to protect individual liberty.

c. Clause 13 prevents those detained under the new powers in Clause 11 seeking bail from the Tribunal for 28 days. It also bars judicial review challenges to detention for that period.[3] In the view of the Bar Council, there is no warrant for these drastic restrictions. Judicial oversight of administrative detention is critical to ensuring the lawful and proportionate exercise of detention powers. This is so a fortiori where the impact of the Bill may be to drastically increase the number of people held in immigration detention.

(4) Modern slavery protections

The duty to remove in Clause 2 is not disapplied in cases where an individual claims to be a victim of modern slavery. Clause 21 makes express provision for the disapplication of modern slavery protections for those who fall within Clause 2. Some of the provisions to be disapplied are contained within the Nationality and Borders Act 2022 and have been in force for barely six weeks. That Act was itself directed towards objectives that are broadly in line with the stated purpose of the Bill.[4] It is hard to see what has changed to alter the need so fundamentally for provisions which were deemed necessary less than one year ago. Nor is it easy to understand why such amendments need to be introduced at the pace at which the government seeks to move.

In the view of the Bar Council, the proposal to exclude irregular migrants from the modern slavery protections is perverse. Victims of modern slavery are frequently transferred across borders by those who exploit them. The Bill, if enacted, would render a facet of the trafficking scenario a barrier to accessing trafficking protections. It would also potentially increase risks to trafficking victims, in that it would strongly disincentivise them from seeking help from authorities. Conversely, it is not

[3] It does not preclude an application for a writ of *habeas corpus*, grounds for which at least arguably correspond with those on which a claim for judicial review might be brought, so it is unclear if the exclusion of judicial review would have the intended effect.

[4] https://www.legislation.gov.uk/ukpga/2022/36/notes/division/2/index.htm

fanciful to suppose that this could embolden, rather than deter, those involved in their trafficking, thereby directly undermining the Bill's stated purpose.

It is hard to see how the modern slavery provisions of the Bill could be compatible with the United Kingdom's obligations under the Council of Europe Convention on Action against Trafficking in Human Beings and Article 4 ECHR (Prohibition of slavery and forced labour). It is clear from the *European Convention On Human Rights Memorandum* accompanying the Bill (at § 47) that it was the risk of a breach of Article 4 arising from these provisions that led to the Home Secretary being unable to make a statement under s.19(1)(a) of the Human Rights Act 1998. The Government's assertion that it is "*satisfied that these provisions are capable of being applied compatibility with Article 4 ECHR*" is hard to reconcile with its apparent acceptance that a finding of a breach is more likely than not.[5]

(5) European Convention on Human Rights compliance

The modern slavery provisions discussed above are likely to be in breach of Article 4 ECHR. A number of provisions relating to unaccompanied children give risk to a serious risk of breaching Article 8 ECHR. The proposals on detention risk breaching Article 5. Other examples may be cited but, the scheme of the Bill itself potentially undermines domestic and international human rights protections. In particular:

a. Clause 1(5) disapplies the interpretative obligation in section 3 of the Human Rights Act 1998 in relation to "*provision made by or by virtue of this Act*". This restriction on the power of the court to interpret the legislation compatibly with the Convention increases the prospects of declarations of incompatibility being made under s.4 of the Human Rights Act and of protracted litigation before the European Court of Human Rights.

b. Clause 49 is a "*placeholder*" provision which, in its current form, empowers the Home Secretary to make provision about interim measures indicated by the European Court of Human Rights. Whilst the scope of any amendment to or regulations made under Clause 49 remains to be seen, it appears to signal an intention to limit (or exclude) compliance with Rule 39 indications in breach of the United Kingdom's international obligations.[6]

(6) The rule of law

The issues raised herein in the Bar Council's view represent threats to the rule of law in the United Kingdom. We further note the proposed use of ouster clauses within the Bill and the absence of, or extreme limitation of appeal rights, with very truncated timescales. Whether those subject to the Bill will be able to access competent and timely legal advice is also a matter of grave concern.

The Bar Council
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[5] "*In a letter to MPs, seen by the BBC, the home secretary said there was "more than a 50% chance" that the legislation was incompatible with the ECHR.*" https://www.bbc.co.uk/news/uk-politics-64875591

[6] See *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 494 at § 128.