

Illegal Migration Bill

House of Lords, Second Reading

Introduction

A large coalition of organisations working across human rights, migrant justice, asylum, modern slavery, healthcare and many more civil society sectors in the UK have collectively contributed analysis and recommendations to provide this single joint briefing on the Illegal Migration Bill. Its purpose is to collate the insights of the broad range of civil society actors who are concerned by this Bill, making it simpler for parliamentarians to navigate. This briefing is organised thematically, and is divided into sections which examine the implications of the Bill’s clauses from a number of different perspectives. Each section has been endorsed by a different organisation or group of organisations, and a contact for further information on each theme is listed accordingly.

Collectively, we oppose the Bill in its entirety. While some of us have proposed specific amendments, our view is that tweaks will not alter the substance of this Bill, nor limit its extremely damaging impacts. We, therefore, call on Parliament to reject this Bill in its entirety.

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Acronyms

BGFA	Belfast Good Friday Agreement
CA 1989	Children Act 1989
CA 2004	Children Act 2004
ECAT	European Convention on Action against Trafficking
ECF	Exceptional Case Funding
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EN	Explanatory Notes
ETA	Electronic Travel Authorisation
HRA	Human Rights Act 1998
NRM	National Referral Mechanism
NTS	National Transfer Scheme
SIAC	Special Immigration Appeals Commission
TPC	Tribunal Procedure Committee
UNCRC	UN Convention on the Rights of the Child
UNHCR	United Nations High Commissioner for Refugees

Executive Summary

The Illegal Migration Bill represents an extreme assault on the rights of migrants and the rule of law.

The Bill starts with a statement under section 19(1)(b) of the HRA that the Minister is unable to say that its provisions are compatible with the rights in the ECHR, an express acknowledgement that the Bill puts human rights at risk. The Bill is also an abrogation of the UK's responsibilities under the Refugee Convention, the UNCRC and the ECAT.

For most refugees, this Bill is a ban on seeking safety in the UK. The Bill will block almost anyone who arrives here by means the Home Office deems irregular,¹ from making admissible human rights and asylum claims.² By making the claims of people who have entered and arrived in the UK by irregular means permanently inadmissible, it also makes nearly all these people unremovable in reality, despite placing a duty on the Home Secretary to remove them if they meet certain conditions. This will create a large and permanent population of people who will live in limbo at public expense for the rest of their lives, without any hope of securing lawful status. For those who may be removed to a third country, there will be a new complex "fast track" system, with limited judicial scrutiny, to make a claim that suspends removal.

The Bill gives the Home Secretary wide powers to detain any person whose claim is inadmissible. During their first 28 days in detention, people will not be able to apply for bail or challenge their detention in a manner that would result in their release. Refugee Council predicts that this Bill will result in as many as 250,000 people (including 45,000 children) being detained or left destitute in state-provided accommodation, and that, in the first three years of this Bill's operation, between £8.7bn to £9.6bn will be spent on their detention and accommodation.³

For victims of modern slavery, who are targeted for removal, the Bill removes almost all protections. It will result in a cruel choice: go to the authorities and be removed from the UK or stay with your trafficker and let the abuse continue. This should never be a choice presented to a

¹ Clause 2 defines this as a person requiring leave to enter but entering without such leave, or with leave obtained by deception; entering the UK in breach of a deportation order; entering or arriving in the UK at a time when the person is an excluded person and certain exceptions do not apply; requiring valid entry clearance but arriving without it; requiring valid electronic travel authorisation but travelling to the UK without it.

² In addition to having arrived by irregular means, persons must also have arrived on or after 7 March 2023, without having come directly to the UK from a place in which their life and liberty were threatened for a Refugee Convention reason, and require leave to enter or remain in the UK but not have it.

³ Refugee Council, 'Illegal Migration Bill - Assessment of impact of inadmissibility, removals, detention, accommodation and safe routes' 4 <<https://www.refugeecouncil.org.uk/wp-content/uploads/2023/03/Refugee-Council-Asylum-Bill-impact-assessment.pdf>> accessed 3 April 2023.

human being, let alone be one required by the law. Contrary to the Government's claims, the Bill will strengthen the hand of traffickers over their victims. Traffickers will coerce people with the threat that, if they escape and contact the authorities, they will be removed from the UK. Moreover, the Bill breaches the UK's obligations to victims of trafficking under ECHR and ECAT.

For children, this Bill is a punitive and regressive approach which breaches their rights under the UNCRC and will negatively impact their health and wellbeing. Protective arrangements intended for all children will effectively be withdrawn for children arriving or entering the UK after 7 March 2023 'in breach of immigration control'. The children affected may have entered with their families, or be unaccompanied, or were born in the UK to parents in breach of immigration control. Those children will be denied the right to seek refugee and human rights protection and protection as victims of trafficking. They can be held in indefinite immigration detention, placed in Home Office (and, therefore, unsafe) accommodation, and will be removed from the UK at age 18, or earlier. They will be denied access to British citizenship registration arrangements open to other children and denied appeal rights concerning their protection and human rights claims. The Bill undermines the CA 1989 by allowing for lone children to be outside the established child protection system, the consequences of which have been shown by 200 children having gone missing from Home Office hotels since 2021.

Further, the Bill's net is cast far wider than the Government suggests. While the Government claims that it is designed to deal with people arriving by 'small boats', the Bill applies to everyone who irregularly arrives in the UK, by whatever means, as of 7 March 2023, making its effects truly draconian. Its overturning of well-established common law principles in relation to detention applies across the board, not only to those detained under the Bill's new powers. Similarly, the power it creates for the Home Secretary to declare inadmissible all human rights claims from EEA, Swiss and Albanian nationals, applies to all individuals arguing that the refusal of their entry to or removal from the UK would be unlawful under section 6 HRA, regardless of whether there is a duty to remove them under the Bill.

Since its introduction, cross-party parliamentarians, the Children's Commissioner for England, religious leaders, UNHCR, the International Organisation for Migration, the UN Special Rapporteur on Contemporary Forms of Slavery, the former Independent Anti-Slavery Commissioner, UK medical representatives and hundreds of civil society organisations have condemned the Bill for the ways it will block swathes of people from ever being able to access protection, support, and justice.⁴ Far from addressing these criticisms or even setting out crucial

⁴ UNHCR, (7 March 2023, Statement on UK Asylum Bill <<https://www.unhcr.org/uk/news/press/2023/3/6407794e4/statement-on-uk-asylum-bill.html>> accessed 25 April 2023; Children's Commissioner (11 April 2023), Illegal Migration Bill – Unaccompanied Children Seeking Asylum <<https://www.childrenscommissioner.gov.uk/blog/illegal-migration-bill-unaccompanied-children-seeking-asylum/>> accessed 25 April 2023; IOM (28 March 2023), UK "Illegal Migration Bill" Exacerbates Risks for Survivors of Modern Slavery: IOM <<https://www.iom.int/news/uk-illegal-migration-bill-exacerbates-risks-survivors-modern>

details of the legislation, the Home Secretary appears to be treating the Bill as a *fait accompli*, through highly-publicised plans to implement the Bill alongside the Rwanda scheme.

We appreciate that the House of Lords will give careful consideration to the Salisbury Convention. However, it does not apply to the Illegal Migration Bill, which was not a commitment in the 2019 Conservative Party Manifesto. In fact, the Manifesto stated,

'We will continue to grant asylum and support to refugees fleeing persecution, with the ultimate aim of helping them to return home if it is safe to do so'.⁵

The Bill will not achieve this aim. Instead, it will put the rights and health of refugees, children, and victims of modern slavery at risk, and will undermine constitutional principles of access to justice and the rule of law. Further, it will harm the UK's global standing.

slavery-

[iom#:~:text=Its%20purpose%20is%20to%20%E2%80%9Cprevent,in%20breach%20of%20immigration%20control%E2%80%9D>](#) accessed 25 April 2023; Home Affairs Committee (19 April 2023) Oral evidence: Human Trafficking, HC 1142 <<https://committees.parliament.uk/oralevidence/13010/pdf/>> accessed 2 May 2023.

⁵ Conservatives, *The Conservative and Unionist Party Manifesto 2019*, page 23

<<https://www.conservatives.com/our-plan/conservative-party-manifesto-2019>> accessed 4 April 2023.

Case Studies

Yasmin's story

Yasmin is a refugee from Eritrea. In her home country, she is a human rights defender, covertly documenting testimonies of survivors of torture at the hands of the Eritrean Government. Yasmin was arrested by the Eritrean internal security forces. She was held in a windowless cell and was raped and tortured for five months. Against the odds, Yasmin's father managed to secure her bail and arranged for her to be smuggled to the UK. Now, Yasmin has been granted asylum and she continues her work on advancing human rights in Eritrea.⁶

Yasmin's story would have ended very differently had she arrived with the Illegal Migration Bill in force. Given that she was smuggled to the UK, it is very likely that she passed through other safe countries. But in practice she would not have been free to claim asylum in these places as she was under the control of her smuggler. Nevertheless, under this Bill, the Home Secretary will still be obliged to remove Yasmin, disregarding any claims she might make for protection. Sadly, Yasmin would find it very difficult to successfully challenge her removal given that she would only have eight days to do so and because the onus would be on her to provide compelling evidence that she would suffer serious and irreversible harm before she has exhausted her avenues for challenge. Due to her rapid escape from Eritrea, she is unlikely to have brought evidence to that standard with her.

Yasmin would also struggle to obtain independent legal advice to challenge the Home Secretary's attempts to remove her, given the small number of immigration and asylum legal aid providers in the UK. Worse, the Home Secretary would have the power to detain Yasmin indefinitely pending her removal, without the court determining for itself whether the period of detention is reasonable. Given her horrific experiences as a victim of torture in prison, this will be a profound trauma for Yasmin.

Linh's story

Linh was trafficked into the UK at the age of 15. She was discovered by police in the back of a lorry. Social services placed her with a foster family, where it was discovered that Linh was five months pregnant, having been raped by her traffickers. Linh thought that if her real age was discovered, her baby would be taken away. She therefore lied and said she was 19. Linh was placed in adult accommodation but with support she was able to request an age assessment and challenge

⁶ Refugee Council, 'Yasmin's story' <<https://www.refugeecouncil.org.uk/latest/case-studies/yasmins-story/>> accessed 17 April 2023.

the decision that she was 19. This challenge succeeded and Linh was able to move in with a foster family and give birth to her son.⁷

Under the Illegal Migration Bill, Linh will not be able to use her status as a victim of human trafficking to challenge her removal. And even if Linh had passed through a safe country, she could not have claimed asylum there because she was held prisoner by her trafficker. Under this Bill, Linh would not be able to make a new life in the UK for her and her son.

The hand of Linh's captor would also have been strengthened because of this Bill. They would have threatened that if she tried to escape and contact the authorities, she would be removed from the UK rather than be provided with safety. The Illegal Migration Bill would serve the interests of Linh's captors rather than secure her rights.

Faisal's story

Faisal's family had lived in Kuwait for generations. But the Government refused to recognise his family's citizenship and he was therefore unable to access basic services for his disabled daughter. He, his wife and four children undertook a long and arduous journey through Iraq, Turkey and Greece.

In the latter two countries, Faisal and his family were kept in detention camps, and for a while in Turkey, had to sleep on the streets. Eventually, Faisal and his family found smugglers who were able to bring them to the UK. Faisal had so far been unable to access care for his disabled daughter, carrying her in his arms throughout their journey. When arriving in the UK, Faisal's daughter was finally able to access care and for the first time had her own wheelchair.⁸

Under the Illegal Migration Bill, because of the way that Faisal arrived in the UK, the Home Secretary will be obliged to remove him and his family, including his disabled daughter. The entire family would be able to be detained indefinitely under the new powers in the Bill. Like with Yasmin, Faisal will find it difficult to successfully challenge his and his family's removal given that he has just over a week to do so and because the onus is on him to prove that they would suffer serious harm. Faisal faces additional personal difficulties challenging his and his family's removal. All this must be done while caring for a disabled daughter.

⁷ Refugee Council, 'Linh's story' <<https://www.refugeecouncil.org.uk/latest/case-studies/linhs-story/>> accessed 17 April 2023.

⁸ Refugee Council, 'Faisal's story' <<https://www.refugeecouncil.org.uk/latest/case-studies/faisals-story/>> accessed 17 April 2023.

John's story

John is an Albanian victim of torture who arrived in the UK *via* lorry. He had been tortured by police while detained which had led him to flee the country. He fears repeat torture if he is removed and also has a human rights claim regarding the risk of mental health breakdown should he be removed to the situation of his previous torture. Under the Illegal Migration Bill, John would not have been able to challenge his detention and the Home Office would be obliged to remove him to Albania without considering if this would constitute *refoulement* because of his method of travel to the UK. Both men and women from Albania have valid protection claims which they should be able to have assessed.

Adriana and Simon's story

Adriana, an Albanian woman, and Simon, her son, fled Albania due to serious domestic violence by Adriana's ex-partner. Simon was only 13 when he came to the UK. Recently Adriana won her First-tier Tribunal appeal. In the determination, there is a finding that Simon also has a well-founded fear of persecution on the basis of domestic violence and that the ex-partner is connected to the police in their home area meaning they could be found on their return. The family needs protection due to the Albanian government's systemic failure to provide adequate protection to families in their situation. The finding of the First-tier Tribunal Judge clearly means that both Adriana and Simon's claims have merit and would be subject to serious harm if returned to their home area in Albania. The passing of the Illegal Migration Bill would mean that both Adriana and Simon would not have their claims assessed and they would be returned, as Albania would be deemed a "safe country".

Human Rights Implications

Section 19(1)(b) HRA 1998

It is the Government's reported position that there is a more than 50% chance that the provisions of this Bill are not compatible with the UK's human rights obligations.⁹ The purpose of section 19 of the Human Rights Act 1998 ('HRA') is to ensure (a) that before a Bill is presented to Parliament the minister had taken account of and examined potential human rights issues, and (b) that where such a statement cannot be made, to encourage 'intense' scrutiny by Parliament.

Lord Irvine, then Lord Chancellor, stated in Committee stage on 3 November 1997 about a statement of compatibility under section 19 HRA, when it was still a Bill in the House of Lords,

*'[w]here such a statement cannot be made, parliamentary scrutiny of the Bill would be intense.'*¹⁰

Intense scrutiny has not been possible. The Bill has been rushed through the House of Commons, without pre-legislative scrutiny and with second reading taking place only days after the Bill's introduction, contrary to the two-weekend convention. There was no possibility of any evidence being taken in its 12 hours in Committee of the whole house and there was little possibility of intense scrutiny of the 145 Government amendments to the Bill in the 5 hours of Report Stage. By comparison, the Institute for Government notes, '*the Criminal Justice and Immigration Act 2008 underwent detailed scrutiny in 24 committee sittings, the Immigration Act 2014 had 11 committee sittings and received 66 pieces of written evidence and the Immigration Act 2016 had 15 committee sessions and received 55 written pieces of evidence*'.¹¹

Therefore, every attempt should be made to make intense scrutiny possible in the House of Lords.

The admission on the face of the bill of potential incompatibility with the European Convention on Human Rights ('ECHR') is an express acknowledgment that the Bill is likely to lead to the UK breaching its international obligations under both the ECHR and other international human rights treaties it has signed (and which the European Court of Human Rights would examine when deciding, in some cases, if a government has acted in breach of the Convention).

⁹ Sophia Sleight, 'Exclusive: Suella Braverman Admits Immigration Crackdown May Not Be Legal' *Huffington Post* (7 March 2023) <https://www.huffingtonpost.co.uk/entry/exclusive-suella-braverman-admits-immigration-crackdown-may-not-be-legal_uk_64072e62e4b0586db70fd939> accessed 11 March 2023.

¹⁰ *HL Deb 3 November 1997, vol 582, col 1233.*

¹¹ Hannah White, 'Illegal Migration Bill highlights how expectations of legislative scrutiny have plummeted' (13 March 2023) *Institute for Government* <<https://www.instituteforgovernment.org.uk/comment/illegal-migration-bill-legislative-scrutiny>> accessed 3 April 2023.

Where Parliament has passed legislation knowing that it may be in breach of the Convention, the courts will have due respect for the sovereignty of Parliament. However, that will not stop the courts finding the Act to be incompatible with the Convention.

The Bill's potential incompatibility with the Convention was not fixed in the House of Commons. Indeed, at Report stage the Government added two new clauses and a schedule relating to electronic devices and legal challenges to age assessments that they acknowledge have a more than 50% chance of being incompatible with the ECHR.¹²

It is for Parliament to consider, analyse, debate, and think about the human rights issues raised by the Bill, and the implications this has, including for the UK's standing and [reputation internationally](#), very carefully. Given the truncated period that was allocated to the Bill for consideration at its Commons stages, the lack of expert evidence, and the potential for future Government amendments touching on the UK's international obligations, it is all the more crucial for the House of Lords to carefully consider the Bill's full implications. The human rights memorandums¹³ accompany the Bill show starkly the many ways in which the Bill interferes with rights enshrined under the HRA.

New Purposive Interpretation (Clause 1)

If Clause 1 of the Bill remains in its current form, any attempts to add clauses to the Bill, including to protect the rights of children, may be read in light of its damaging purposive aims.

Unusually, Clause 1(1)-(3) set out the purpose of the Bill and stipulates that, so far as it is possible to do so, provision made by or by virtue of this Bill must be read and given effect so as to achieve that purpose.

Acts of Parliament have not traditionally set out their purpose in a legislative provision. No explanation has been provided as to why the long title of the Bill is insufficient to list its purposes. There is no obvious reason why legislation should include within its substantive provisions a statement of purpose and a summary of the subsequent provisions.

A similar interpretative duty to Clause 1(3) may be found in section 3 HRA, which the Government wishes to preclude from applying to the Bill. It is possible that in using language very close to that of section 3 HRA ('*so far as it is possible to do so*') the Government intends Clause 1(3) to have a similar effect. However, it is not clear how the principles of statutory interpretation developed by the courts in the context of section 3 HRA might be applied in the quite different context of Clause 1(3) of the Bill. If anything, Clause 1 is apt to cause confusion, considerable uncertainty, and extensive litigation for years to come, given that our courts have an established and highly developed approach to interpretation of statutes without provisions of this kind.

¹² Home Office, 'Illegal Migration Bill: Supplementary European Convention on Human Rights Memorandum', (26 April 2023) <<https://publications.parliament.uk/pa/bills/cbill/58-03/0284/SuppECHRmemo.pdf>> accessed 26 April 2023.

¹³ *ibid*; Home Office, 'Illegal Migration Bill: European Convention on Human Rights Memorandum' (7 March 2023) <<https://publications.parliament.uk/pa/bills/cbill/58-03/0262/ECHR%20memo%20Illegal%20Migration%20Bill%20FINAL.pdf>> accessed 10 March 2023.

Disapplying Section 3 HRA - (Clause 1(5))

The Bill is another attempt¹⁴ by the Government to shield itself from human rights by undermining a central feature of the HRA, namely that all subsequent measures be interpreted in a way which is compatible with Convention rights where this is possible. Clause 1(5) of the Bill disapplies section 3 HRA for the purposes of the Bill, meaning that courts will no longer be required to read provisions, and any regulations the Home Secretary makes under the [extensive delegated powers](#) she gives to herself, in this Bill compatibly with Convention rights.

The point of section 3 HRA is to give effect to Parliament's intention to legislate in a way that complies with human rights by requiring courts to interpret legislation so that it is compliant. It is a key part of the HRA's architecture used by our courts to provide a primary domestic remedy for victims, to avoid having to find that domestic law breaches international law, and to avoid courts needing to issue declarations of incompatibility. As recognised by the Independent Human Rights Act Review, the courts have been cautious in their approach to section 3 HRA, using it to address narrow and specific rights violations.¹⁵ Courts only interpret laws with the grain of the legislation,¹⁶ which helps realise Parliament's overarching intention and rectify drafting errors or address factual circumstances not foreseen by legislators. Courts are required to do no more than what is 'necessary'¹⁷ to ensure compliance with human rights standards.

Clause 1(5) seems bound to result in increased declarations of incompatibility, increased need for remedial regulations creating further work for an already busy Parliament, and more challenges brought against, and lost by, the UK in Strasbourg for breach of Convention rights. The UK will remain responsible for any breaches and will have to face the damage to its human rights record and [international reputation](#).

Interim measures of the European Court of Human Rights

Clause 53 replaces what was originally a placeholder clause for the treatment of interim measures of the ECtHR. It is an unusual clause, which takes a strange and circuitous route to block interim measures. It provides that in cases where the ECtHR has indicated an interim measure in proceedings relating to the intended removal of a person from the UK under the Bill, a Minister has discretion to decide whether or not to disapply the duty on the Home Secretary to remove that person. If the Minister decides that the duty continues to apply, then courts, tribunals, the Home

¹⁴ In addition to attempts in the Bill of Rights Bill to repeal s.3 HRA (see Clauses 1 and 40), and to disapply section 3 in Clauses 42 to 45 of the Victims and Prisoners Bill (as introduced).

¹⁵ The Independent Human Rights Act Review (Cm 586, 2021)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/ihrar-final-report.pdf accessed 28 April 2023 [5.81]. It is worth noting that when consulted on the proposal to repeal the interpretative duty of section 3 of the Human Rights Act, 79% of respondents advocated for no change. Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights, Government Consultation Response* (June 2022, CP 704) [69]

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1084540/modern-bill-rights-consultation-response.pdf accessed 28 April 2023.

¹⁶ Section 3 HRA cannot be used where it would lead to a departure from 'a clear and prominent feature' of legislation (*Re Z* [2015] EWFC 73 at [35]-[36]).

¹⁷ *R (Aviva Insurance) v Secretary of State for Work and Pensions* [2021] EWHC (Admin) at [28] and [36].

Secretary, and immigration officers may not have regard to the interim measure and must enact the removal. In other words:

Step 1: The Bill imposes a duty on the Home Secretary to remove people in certain circumstances.

Step 2: Clause 53 applies where the ECtHR indicates an interim measure to the UK to stop the removal of Person A.

Step 3: A Minister of the Crown may (but need not) determine that the duty does not apply to the Home Secretary in relation to Person A, taking into account various factors relating to the procedure by which the interim measure was indicated.

Step 4: If the Minister decides that the Home Secretary's duty does continue to apply notwithstanding the interim measure, then relevant bodies may not have regard to the interim measure. The Home Secretary must remove Person A.

Clause 53 is a highly concerning shift of power away from Parliament and towards the Executive. In deciding whether or not the UK should comply with its international obligations, and considering whether to disapply the duty to remove a person, the Minister may have regard 'in particular' to 'the procedure by reference to which the interim measure was indicated', including whether the Government was given an opportunity to present observations and information before the measure was indicated, the form of the decision, whether the ECtHR will take account of any representations from the Government seeking reconsideration, without delay, and the likely duration of the measure and timing of substantive determination.

Furthermore, Clause 53 is an unnecessary and unwarranted intrusion into the role of the courts as a distinct branch of government in the constitutional order:

1. **It is unnecessary as there is no evidence of abuse.** The fact that interim measures are occasionally obtained from the ECtHR by persons resisting removal from the UK does not by itself demonstrate that the supervisory system of the ECtHR is being exploited. No evidence of any abuse has been advanced.
2. **Domestic courts have the necessary expertise to weigh up the factors bearing on whether to exercise discretion and grant interim relief.** It does not follow that interim relief must be granted by a court merely because another person in a superficially similar situation obtained an interim measure from the ECtHR.
3. **The provision creates the risk courts will not consider matters material to consideration of Convention rights protection** (including the reasons given by the ECtHR on the evidence before it when making an interim measure in another case).

Considering press reports of the negotiations currently underway between the UK Government and ECtHR over the procedure for deciding interim measures, this subsection appears to be more politics than law. With the likely result of a Minister finding Strasbourg's procedure unacceptable on these points being to ignore the interim measure, this clause appears to be included as a signalling exercise at best and at worst a threat: either the ECtHR must change its approach, or the UK will stop complying, and the rest of the Council of Europe could follow suit.

This is a provocative step, and not one that appears wise if the aim is open and good faith negotiation on procedural reform.

The introduction of Clause 53 would not only hinder discussions on procedural reform, it also makes the broader conflict with the ECtHR all but inevitable. Interim measures are issued only ‘on an exceptional basis, when applicants would otherwise face a real risk of serious and irreversible harm’.¹⁸ They are a vital tool that allows the Court in extreme circumstances to place a temporary stop on an action likely to produce a significant breach of human rights to allow time for a full judgment to take place. For example, the ECtHR recently granted interim measures in the cases of *Pinner v Russia* and *Aslin v Russia and Ukraine* (application nos. 31217/22 and 31233/22) concerning British nationals who are members of the Armed Forces of Ukraine who surrendered to Russian forces and had been sentenced to death.¹⁹ Notwithstanding this, applications for interim measures are most often rejected. When they are granted, it is on the basis of serious need, and contracting states are under an obligation to comply with them. To do otherwise would be a breach of our Article 34 ECHR responsibility not to hinder the effective exercise of individual application to the Court.²⁰

While the Government has been reluctant to fully acknowledge our obligations imposed by interim measures, the unusual construction of this clause (providing a discretion to disapply a duty) demonstrates that there is a level of awareness of this fact. Whether the UK adheres to international law does not come down to a matter of drafting. If there is dissatisfaction with procedures in the ECtHR, the solution is to pursue reform on a European level, not to unilaterally refuse to comply with our obligations. The UK’s interests are better served by remaining, in the Foreign Secretary’s words, “a serious player on the world stage”, rather than undermining its own influence.²¹

The Human Rights Implications section of this Briefing is endorsed by: Public Law Project; Refugee Action; Liberty; and the Immigration Law Practitioners’ Association (ILPA). Please note that contributing organisations have only approved the content of the specific section(s) of this Briefing which they have endorsed and should not be taken as endorsing any other parts of the Briefing.

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¹⁸ European Court of Human Rights, ‘Factsheet - Interim measures’ (February 2023) 1 <https://echr.coe.int/documents/fs_interim_measures_eng.pdf> accessed 28 April 2023.

¹⁹ European Court of Human Rights, ‘European Court grants urgent measures in cases lodged by two British prisoners of war sentenced to death in the so-called “Donetsk People’s Republic”’ (30 June 2022) <<https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7374152-10078472&filename=Urgent%20measures%20in%20cases%20lodged%20by%20two%20British%20prisoners%20of%20war%20sentenced%20to%20death%20in%20the%20so-called%20Donetsk%20People%27s%20Republic.pdf>> accessed 11 March 2023.

²⁰ *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 494 at [128].

²¹ Crerar, P. and Syal, R., *James Cleverly defies Tory right’s push to leave ECHR*, The Guardian, 20 April 2023: <https://www.theguardian.com/uk-news/2023/apr/20/james-cleverly-defies-tory-rights-push-to-leave-echr?CMP=Share_iOSApp_Other> accessed 28 April 2023.

International Obligations & Reputation

The Illegal Migration Bill is a flagrant breach of the UK's international obligations, including the right to seek and enjoy asylum; the obligation of *non-refoulement*; protection from torture and modern slavery; the right to liberty, including of children whose immigration detention is prohibited and other vulnerable groups; and the right to an effective remedy. It also penalises refugees based on their mode of arrival, creating a discriminatory two-tiered asylum system.

The UK is abrogating its international responsibilities and obligations towards refugees, individuals seeking asylum, and trafficking and slavery survivors. It is seeking to entirely shift its asylum responsibilities onto other countries, against the object and purpose of the 1951 Refugee Convention and its commitments to global responsibility sharing. The UK ending access to asylum, reneging on its obligations, and refusing to share responsibility, threatens the international protection regime and sets a very dangerous precedent.

The first page of the Bill states that the Government cannot guarantee its compatibility with the Human Rights Act 1998 and the European Convention on Human Rights (ECHR). In practice, the Bill would put the UK on a direct collision course with the Council of Europe, including enabling Ministers and UK courts to ignore interim measures issued by the ECtHR, which may ultimately lead to the UK leaving the Council of Europe (something the UK government has not ruled out). This undermines the whole European convention system and international rules-based order more broadly, potentially encouraging other serial violators of the ECHR to also disregard their obligations and ignore decisions of the Court, resulting in serious, irreparable human rights harms beyond the UK.

The European Home Affairs Commissioner Ylva Johansson has told the UK Government that the Bill violates international law,²² while the Council of Europe Commissioner for Human Rights Dunja Mijatović urged UK parliamentarians to prevent legislation being passed that is incompatible with the UK's international obligations.²³

If the UK were to withdraw from the ECHR, the EU could terminate the law enforcement and judicial cooperation in criminal matters part of the UK-EU Trade and Cooperation Agreement (TCA), according to Article 692 of the agreement. The TCA also allows the EU to suspend or terminate the agreement as a whole if there is a 'serious and substantial failure' by the UK to respect human rights and the human rights treaties to which both are parties, which 'has international repercussions'.²⁴

²² Suzanne Lynch, 'EU tells UK its asylum plan "violating international law"' *Politico* (8 March 2023) <<https://www.politico.eu/article/ylva-johansson-eu-tells-uk-suella-braverman-its-asylum-plan-violating-international-law/>> accessed 24 April 2023.

²³ Dunja Mijatović's Letter to Rt Hon Sir Lindsay Hoyle MP and Rt Hon the Lord McFall of Alcuith (Ref: CommHR/DM/sf 007-2023, 24 March 2023) <<https://rm.coe.int/commhr-2023-8-letter-to-united-kingdom-speaker-of-the-houses-of-parlia/1680aaad61>> accessed 24 April 2023.

²⁴ Articles 763(1), 771, 772.

The International Obligations & Reputation section of this Briefing is endorsed by: Human Rights Watch, Anti Trafficking and Labour Exploitation Unit (ATLEU); Refugee Action; Liberty; and the Immigration Law Practitioners' Association (ILPA). Please note that contributing organisations have only approved the content of the specific section(s) of this Briefing which they have endorsed and should not be taken as endorsing any other parts of the Briefing.

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Removal and Inadmissibility

Duty to make arrangements for removal (Clauses 2-9)

The unprecedented step taken by this Bill is that it would make any asylum application made by someone who arrives irregularly in the UK permanently inadmissible, including those made by both accompanied and separated children. Any claim that is declared inadmissible cannot subsequently be considered within the UK's asylum process. UNHCR has said that the Bill 'would amount to an asylum ban' as it would extinguish 'the right to seek refugee protection in the United Kingdom for those who arrive irregularly, no matter how compelling their claim may be'.²⁵ If other countries followed suit, we would see an end to refugee protection. Although the Home Office has not published an impact assessment of the Bill, it would mean that the vast majority of people who claim asylum in the UK would never have their claim heard here.

Clause 2 of the Bill places a new duty on the Home Secretary to take steps to remove anyone who fulfils the following four conditions:

- They entered the UK by means the Home Office deems irregular;
- They arrived on or after 7 March 2023;
- They did not travel directly from a country in which their life and liberty was threatened for a Refugee Convention reason; and
- They require leave to remain in the UK but do not have it.

While there are extremely narrow exceptions to this duty, it is important to note the Home Secretary retains a power to remove unaccompanied children which she may exercise in certain circumstances.²⁶ Clause 4 requires the Home Secretary to automatically declare a protection or human rights claim,²⁷ made by a person who meets the four conditions in Clause 2, "inadmissible". This means their claim will never be considered in the UK and there is no right of appeal, no matter how strong their claim might be. There are no exemptions to this – it applies to men, women and children (either with their family or on their own).

It does not only target people crossing in boats.

The four conditions in Clause 2 are extremely wide and will not just affect those who arrive on small boats. The criteria will capture the majority of people who seek asylum in the UK, particularly as it is not possible to apply for asylum without being physically present in the UK and there is no visa that allows someone to travel to the UK for the purpose of claiming asylum. Despite the focus on those arriving by small boats, in 2022 people arriving in that way accounted

²⁵ UNHCR UK, 'UK asylum and policy: Illegal Migration Bill' <<https://www.unhcr.org/uk/uk-asylum-and-policy>> accessed 19 April 2023.

²⁶ Clause 2(11) and Clause 3(2)-(3).

²⁷ Clause 4(5) relates to a human rights claim that removal to a country of their nationality, citizenship or a country in which they have obtained an identity document would breach section 6 HRA.

for less than half (45%) of all asylum applicants.²⁸ Even for those people from countries like Afghanistan, Iran, Eritrea, Syria and Sudan, who made up half of those who crossed the channel last year,²⁹ at most they accounted for only two thirds of the combined applications from those nationalities.

The duty to remove will also impact those who do not apply for asylum in the UK. For example, the duty would apply to someone who meets the four criteria having been trafficked into the UK.

Children are not exempt.

Whether children arrive in the UK with family or on their own, their asylum claims will be inadmissible and they will never receive protection in the UK. This is a significant departure from current policy which treats unaccompanied children as unsuitable for third country inadmissibility actions.³⁰ The duty to remove in Clause 2 does not apply to unaccompanied children, but Clause 3 gives the Home Secretary the power to remove them before they turn 18, for the purposes of family reunion with a parent, removal to a ‘safe country’ of which they are a national or have obtained an identity document, or if they do not make a protection claim or human rights claim removal to a country of which they are a national, have obtained an identity document, or embarked to the UK, or other circumstances the Home Secretary may specify.³¹ Accompanied children will also be removed to countries to which they have no connection, without the vital safeguard to consult with the Independent Family Returns Panel.³² Furthermore, once they turn 18 the Home Secretary then has a duty to remove them, preventing children from ever being able to integrate and settle properly in the UK.

Permanent inadmissibility makes nearly all irregular entrants and arrivals (from outside the EEA, Switzerland, and Albania) unremovable in reality.

Since January 2021, of the 18,494 asylum applications that were potentially inadmissible only 83 inadmissibility decisions have been served.³³ Nearly 10,000 have been admitted into the UK’s asylum system. The new Bill changes the current inadmissibility system by removing the requirement to have an agreement in place with another country, to which an individual can be

²⁸ 40,302 asylum applications were made by people who arrived by small boat out of a total of 89,398. See: Home Office, *Official Statistics: Irregular migration to the UK, year ending December 2022* (February 2023) <<https://www.gov.uk/government/statistics/irregular-migration-to-the-uk-year-ending-december-2022/irregular-migration-to-the-uk-year-ending-december-2022#how-many-migrants-were-detected-arriving-in-the-uk-via-small-boats>> accessed 28 April 2023.

²⁹ Refugee Council, *The Truth About Channel Crossings* (March 2023) <<https://www.refugeecouncil.org.uk/wp-content/uploads/2023/01/Refugee-Council-Channel-Crossings-briefing-March-2023.pdf>> accessed 28 April 2023.

³⁰ Home Office, ‘Inadmissibility: safe third country cases’ (updated 28 June 2022) <<https://www.gov.uk/government/publications/inadmissibility-third-country-cases/inadmissibility-safe-third-country-cases-accessible>>

³¹ Clause 3(3).

³² Clause 13 of this Bill disapplies the safeguard to consult with the Independent Family Returns panel when a child is removed or detained, paving the way for dangerous enforced removals of families who are deemed inadmissible.

³³ Home Office, ‘How many people do we grant protection to?’ (23 February 2023) <<https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-december-2022/how-many-people-do-we-grant-protection-to>> accessed 28 April 2023.

removed, before an inadmissibility decision can be made. Until that point, the claim is in effect paused.

Clause 5 allows for people, from 32 countries designated as safe countries,³⁴ whose asylum applications have been ruled inadmissible to be returned to their own country (including Albania). For nationals of all other countries outside of this list they cannot be returned to their own country, e.g., an Afghan cannot be returned to Afghanistan, or a Syrian to Syria. Instead, they can only be removed to one of the 57 countries listed in the Schedule to the Bill. However, the Migration and Economic Development Partnership with Rwanda is the only removal agreement the UK has in place that includes third country nationals. The legal and practical challenges faced by that scheme are well documented, and even if it does become operational, it will not be possible to remove thousands of people to Rwanda.

The Bill creates a large and permanent population of people, including children in families and unaccompanied children, living in limbo at public expense indefinitely.

Given the current 0.7% success rate of removing people under the inadmissibility provisions, Refugee Council's analysis³⁵ has shown that at the end of the third year of the Bill, between 161,147 and 192,670 people will have had their asylum claims deemed inadmissible but not have been removed. They will be unable to have their asylum claims processed and therefore unable to work and will be reliant on Home Office support and accommodation indefinitely, which the Refugee Council predicts will cost between £4.9bn and £5.7bn in the first three years.³⁶ For those who are not detained, Clause 8 amends section 4 of the Immigration Act 1999 so that people whose claims are declared inadmissible are potentially entitled to support under that section. This support is usually available to those whose claim has been refused. It is not clear how someone under this Bill would meet the conditions for support under section 4 for which it is also particularly difficult to successfully apply.³⁷ Two possibilities are left: tens of thousands of people qualify for section 4 support and are accommodated indefinitely by the Home Office, unable to work. Or tens of thousands of people do not qualify for section 4 support and are left permanently destitute, unable to get support or work.

If, instead of pursuing the Bill, the Government were to process all inadmissible asylum claims, their status would be able to be resolved. But instead, under this Bill, they will all be left in the UK relying on support. The effect of the high number of people that will be stuck in destitution and indefinite limbo is not only inhumane but will put further strain on local authorities, services and communities.

³⁴ Listed in Clause 57.

³⁵ Refugee Council (March 2023) Illegal Migration Bill - Assessment of impact of inadmissibility, removals, detention, accommodation and safe routes <<https://www.refugeecouncil.org.uk/wp-content/uploads/2023/03/Refugee-Council-Asylum-Bill-impact-assessment.pdf>> accessed 28 April 2023.

³⁶ *ibid.*

³⁷ Asylum Support Appeals Project (ASAP), *Section 4 Support* (2021) <https://www.asaproject.org/uploads/Factsheet_2_-_Section_4_support_30_July_2021.pdf> accessed 28 April 2023.

The legal obligations an immigration officer may place on private actors and companies are far-reaching and unrealistic.

For example, an immigration officer may require a captain of a ship or aircraft to detain a person or not allow them to disembark, and may thus require them to act contrary to their ethical and other legal obligations.³⁸ If such a captain were to knowingly permit a person to disembark in the UK, the Bill would make it a criminal offence.³⁹ A person may be detained by a private actor for a period that, in the opinion of the Secretary of State, is reasonably necessary to enable the examination or removal to be carried out, the decision to be made, or the directions to be given.

Inadmissibility of certain asylum and human rights claims (Clause 57)

Clause 57 intends to extend the current inadmissibility process for asylum claims from EU nationals, in section 80A Nationality, Immigration and Asylum Act 2002, to cover other nationalities (Albania, Iceland, Liechtenstein, Norway and Switzerland) and to also make their human rights claims⁴⁰ inadmissible.

The inclusion of Albania

The inclusion of Albania on this list is significant. Albania accounted for both the highest nationality applying for asylum and crossing the channel in small boats in 2022. The initial grant rate for Albanian women last year was 85% and for Albanian children it was 87%. Under this Bill, those women and children recognised as refugees by the UK Government would have been returned to their own country where they faced individual danger and threats to their lives. This Bill does not recognise the risk to individuals fleeing from personal danger from a country the government deems ‘safe’.

Inadmissibility of all Human Rights Claims

The problem with extending the EU asylum inadmissibility to cover human rights claims is that human rights claims are not necessarily based on a risk abroad. It makes no sense to extend safe country inadmissibility criteria to cover human rights claims. Human rights claims (unlike protection claims) are usually based on a person’s connection to the UK, such as having a partner or children in the UK, being dependent on a person in the UK, or their lack of ties to the country

³⁸ Clause 7(8)-(14).

³⁹ Clause 9(2)(a).

⁴⁰ Clause 64 states that ‘human rights claim’ has the meaning given by, or is to be interpreted in accordance with Clause 3(11), which states human rights claim” has the meaning given by section 113(1) of the Nationality, Immigration and Asylum Act 2002. Section 113(1) defines it as ‘a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998’.

of proposed return. The level of safety in the country of proposed return is usually not of direct relevance (if it were, the claim would usually be a protection not a human rights claim).

It is likely to cause breaches of individual rights to impose a near-blanket ban on their consideration due to the perceived safety of the country of return. An ‘*exceptional circumstances*’ test due to the alleged safety of the country of proposed return is simply the wrong test for human rights claims.

The Removal and Inadmissibility section of this Briefing is endorsed by: Refugee Council, Immigration Law Practitioners’ Association (ILPA), Anti Trafficking and Labour Exploitation Unit (ATLEU), and Refugee Action. Please note that contributing organisations have only approved the content of the specific section(s) of this Briefing which they have endorsed and should not be taken as endorsing any other parts of the Briefing.

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Detention and Bail (Clauses 10-14)

This Bill grants the Home Secretary wide new discretionary powers over who is detained, where and for how long people are detained, while removing or reducing vital safeguards of judicial scrutiny and consultation. It grants the Home Secretary new powers to detain children and families, children who are alone, pregnant women and other people considered to be at additional risk of harm. In doing so, it risks exponentially increasing the number of people detained, the duration of their detention and incidences of neglect, abuse and serious health problems in detention.

Background

The detention of people seeking asylum or those with an unsettled immigration status is for administrative purposes and cannot lawfully form part of any criminal sentence or be utilised as a deterrent. The decision to detain is made administratively by Home Office caseworkers without judicial authorisation. It is recognised as an exceptional and draconian power. Subject to limited exceptions, there is no overall time limit on how long people can be detained; the UK is the only country in Europe where indefinite detention is lawful.

However, our courts have held that the broad power to detain migrants is subject to limitations: in a series of cases dating back to 1983, our courts have developed the *Hardial Singh* principles, which among other things require the court to decide for itself whether a given period of detention is reasonable.⁴¹ This established judicial scrutiny operates to keep UK law consistent with Article 5 ECHR.⁴²

The Immigration Acts of 2014 and 2016 contain further limits on the time and the circumstances in which certain groups can be detained: 24 hour time-limit for unaccompanied children, and 72 hours, or not more than seven days if personally authorised by a Minister, for pregnant women⁴³ and families with children.⁴⁴ Similarly, the Home Office must consult with the Independent Family Returns Panel, which advises on the rights of and welfare of children impacted by removal and detention, before allowing the detention of families with children. These provisions have very

⁴¹ *R (Hardial Singh) v Governor of Durham Prison* [1983] EWHC 1 (QB).

⁴² *Saadi v United Kingdom* (application no. 13229/03, 29 January 2008); *JN v United Kingdom* (application no 37289/12, 19 May 2016).

⁴³ Immigration Act 2016, s.60, imposes 72 hour time-limit or not more than seven days where a longer period of detention is authorised personally by a Minister of the Crown.

⁴⁴ Immigration Act 2014, s.6 introduced a time-limit of not more than 72 hours in pre-departure accommodation or not more than seven days in cases where the longer period of detention is authorised personally by a Minister of the Crown.

significantly reduced the detention of these groups, for whom detention is harmful, inappropriate and, in many cases, would breach international human rights standards.

Legislation and Home Office policy require that a person’s vulnerability is considered as part of all immigration detention decisions and in principle provides for safeguards to identify and protect vulnerable people from detention or continued detention. This is a key element to ensuring that the detention is lawful. This requirement was put on a statutory footing with section 59 of the Immigration Act 2016 and the Adults at Risk (AAR) Statutory Guidance. The AAR policy intended to ensure that vulnerable individuals or adults at particular risk of harm in detention should not be detained and can only be detained when ‘immigration factors’ outweigh their indicators of risk.

However, the existing legal protections, policy and safeguards are ineffective and fundamentally flawed. Long-standing concerns have been identified and evidenced in numerous reports by parliamentary committees⁴⁵, monitoring bodies,⁴⁶ and independent investigations and reviews⁴⁷. Evidence to the Brook House Inquiry, the Inquiry into mistreatment and abuse in breach of Article 3 ECHR at Brook House IRC, has further exposed how detention safeguards are defective.⁴⁸

Evidence from the clinical expert to the Brook House Inquiry indicated that the entire system was “dysfunctional”.⁴⁹ He described a “deprivation of safeguards” which contributed to the ill-treatment and abuse at Brook House in 2017.⁵⁰ This is the context in which high levels of use and

⁴⁵ Joint Committee on Human Rights, ‘Inquiry into Immigration Detention’ (2019) <<https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1484/1484.pdf>> accessed 25 April 2023; House of Commons Home Affairs Committee, ‘Immigration detention: Fourteenth Inquiry Report of Session 2017-2019’ (March 2019) <<https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/913/913.pdf>> accessed 25 April 2023.

⁴⁶ For example, see ICIBI, ‘Third annual inspection of Adults at Risk Immigration Detention June to September 2022’ (12 January 2023) <<https://www.gov.uk/government/publications/third-annual-inspection-of-adults-at-risk-immigration-detention-june-to-september-2022>> accessed 25 April 2023; HMIP, ‘Report on an unannounced inspection of Brook House Immigration Removal Centre by HM Chief Inspector of Prisons (30 May – 16 June 2022)’ (23 September 2022) <<https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2022/09/Brook-House-web-2022.pdf>> accessed 25 April 2023.

⁴⁷ For example, see Home Office, ‘Review into the welfare in detention of vulnerable persons: A report to the Home Office by Stephen Shaw’ (January 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf> accessed 2 May 2023; Home Office, ‘Assessment of government progress in implementing the report on the welfare in detention of vulnerable persons: A follow-up report to the Home Office by Stephen Shaw’ (July 2023) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728376/Shaw_report_2018_Final_web_accessible.pdf> accessed 2 May 2023.

⁴⁸ For a summary of the evidence to the Brook House Inquiry, see Medical Justice, ‘The Brook House Inquiry: Briefing on Key Issues’ (2022) <https://appgdetention.org.uk/wp-content/uploads/2023/01/BrookHouseInquiryBriefingKeyIssues_Final.pdf?x94316> accessed 25 April 2023.

⁴⁹ Dr Jake Hard, 28 March 2022, 72/17-19 <<https://s3-eu-west-2.amazonaws.com/brookhouse-prod-storage-15trcu6wv3q1/uploads/2022/03/bh280322.pdf>> accessed 25 April 2023.

⁵⁰ *ibid*, 178/20-25 and 179/ 7-9.

misuse of force, segregation and other inappropriate management tools are used by detention staff in an environment which is wholly unsuitable for such vulnerable people to be held. The evidence also indicated that there was institutionalised racism in the IRC system.⁵¹ There is no indication that the situation has improved since 2017.⁵²

In their 2020 report about Brook House, the Independent Monitoring Board (IMB) found that the whole detained population was subject to inhumane treatment.⁵³ The IMB identified the same continuing failures that operated in 2017 with similarly high levels of vulnerable people deteriorating in detention, evidenced by high levels of self-harm and suicidal ideation with correspondingly increased use of force and segregation.

UK courts have made the rare finding of a breach of Article 3 ECHR – protection from inhuman and degrading treatment – on eight occasions in relation to immigration detention.⁵⁴ There have been an alarming number of deaths in detention and there have been cases where neglect has been found by coroners to have contributed to these.⁵⁵

This is most recently evidenced by the terrible death of Frank Ospina in Colnbrook Immigration Removal Centre, in April 2023.⁵⁶ Ospina's death is believed to have been self-inflicted and reportedly prompted several more detainees to attempt suicide.⁵⁷ Although awful, such incidents should not come as a surprise; the Royal College of Psychiatrists note that Immigration Removal Centres (IRCs) are likely to precipitate a significant deterioration of mental health in most cases.⁵⁸

There is unequivocally clear clinical evidence showing the severely harmful impact of immigration detention, particularly on the mental health of people who are detained.⁵⁹ Those with pre-existing vulnerabilities are at particular risk of being harmed by their detention. This includes people with

⁵¹ Professor Bosworth, 29 March 2022, 97/10-12 <<https://s3-eu-west-2.amazonaws.com/brookhouse-prod-storage-15trcu6wv3q1/uploads/2022/03/bh290322.pdf>> accessed 25 April 2023.

⁵² *ibid*, 97/10-13.

⁵³ IMB, 'Annual Report of the Independent Monitoring Board at Brook House IRC for reporting year 1 January 2020 – 31 December 2020' (2021) <<https://s3-eu-west-2.amazonaws.com/jotwpublic-prod-storage-1cx01dnrmkg14/uploads/sites/13/2022/10/Brook-House-AR-2020-for-circulation.pdf>> accessed 25 April 2023.

⁵⁴ For further details, see: Medical Justice, 'Harms in Detention: inhumane and degrading treatment' <<https://medicaljustice.org.uk/healthcare-in-detention/inhuman-degrading-treatment/>> accessed 25 April 2023.

⁵⁵ For further details, see: Medical Justice, 'Harms in Detention: deaths in detention' <<https://medicaljustice.org.uk/healthcare-in-detention/deaths-in-detention/>> accessed 25 April 2023.

⁵⁶ Diane Taylor, 'Death of detainee near Heathrow prompts immigration detention crisis fears' *The Guardian* (1 April 2023) <<https://www.theguardian.com/uk-news/2023/apr/01/death-of-detainee-near-heathrow-prompts-immigration-detention-crisis-fears>> accessed 20 April 2023.

⁵⁷ *ibid*.

⁵⁸ Royal College of Psychiatrists, 'Detention of people with mental disorders in immigration removal centres (IRCs)' (April 2021) <<https://www.rcpsych.ac.uk/docs/default-source/improving-care/better-mh-policy/position-statements/position-statement-ps02-21---detention-of-people-with-mental-disorders-in-immigration-removal-centres---2021.pdf>> accessed 20 April 2023. ('RCP, 'Detention of people with mental disorders in immigration removal centres (IRCs)')

⁵⁹ *ibid*.

mental health conditions, survivors of trafficking, torture and other forms of cruel or inhuman treatment, including sexual violence and gender-based violence.⁶⁰ People seeking asylum are known to have a higher prevalence of mental health disorders, trauma histories and complex mental health needs, making them particularly vulnerable to harm and deterioration because of detention.⁶¹

Detention risks re-traumatisation and negative long-term physical and mental health outcomes. The Royal College of Psychiatrists states that evidence shows that survivors of torture and trafficking are at *'greater risk of harm, including deterioration in mental health and increased risk of anxiety, depression and PTSD, than would be experienced in the general detained population.'*⁶² Detention can also prevent victims of trafficking from being identified and receiving crucial support⁶³ to which they are entitled under Article 4 ECHR. Immigration detention remains a wholly inappropriate environment, especially for vulnerable persons, including for survivors of trafficking.

Research in the UK has also shown the long-lasting damage detention has on children's lives. The effects on their physical and mental health included weight loss, sleeplessness, nightmares, skin complaints, self-harm, depression and symptoms of post-traumatic stress disorder.⁶⁴ In its Concluding Observations on the UK in 2016, the UN Committee on the Rights of the Child welcomed the government's 2010 decision to end the detention of children for immigration purposes, and reiterated its recommendation that the UK 'cease the detention of asylum-seeking and migrant children'.⁶⁵ The danger of detention for pregnant women is also particularly acute, increasing the likelihood of stress, which can impact their unborn baby's health, and interrupting their access to maternity care.⁶⁶ Prior to the introduction of the time limit in 2016, there was evidence that the healthcare pregnant women received in immigration detention was inadequate and fell short of the NHS equivalent and the National Institute for Health and Care Excellence

⁶⁰ *ibid.*

⁶¹ See: *ibid.*, 7-8; Verhülsdonk, I., Shahab, M., & Molendijk, M., 'Prevalence of Psychiatric Disorders Among Refugees and Migrants in Immigration Detention: Systematic Review with Meta-analysis' (2021) *BJPsych Open* 7(6) 5.

⁶² RCP, 'Detention of people with mental disorders in immigration removal centres (IRCs)', 13.

⁶³ Labour Exploitation Advisory Group, *Detaining victims: human trafficking and the UK immigration detention system* (2019) 25 and 36 <<https://respect.international/wp-content/uploads/2019/08/Detaining-Victims-Human-Trafficking-and-the-UK-Immigration-System.pdf>> accessed 20 April 2023.

⁶⁴ The Children's Society, 'What have I done? The experiences of children and families in UK immigration detention: Lessons to learn' (2011) <<https://resourcecentre.savethechildren.net/pdf/5485.pdf>> accessed 20 April 2023; BiD, *Last resort or first resort? Immigration detention of children in the UK* (2011) <<https://resourcecentre.savethechildren.net/document/last-resort-or-first-resort-immigration-detention-children-uk/>> accessed 25 April 2023.

⁶⁵ Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland (03 June 2016) <[UK-CRC-Concluding-observations-2016-2.pdf \(unicef.org.uk\)](https://www.unicef.org/uk/press-releases/2016/06/03/uk-crc-concluding-observations-2016-2)> , Accessed 03 May 2023

⁶⁶ Medical Justice, *Expecting Change* (2013) <<https://medicaljustice.org.uk/research/expecting-change/>> accessed 25 April 2023.

(NICE) standards.⁶⁷ In his first major review of immigration detention, commissioned by the Government and published in 2016, Stephen Shaw stated that ‘*detention has an incontrovertibly deleterious effect on the health of pregnant women and their unborn children ... I take this to be a statement of the obvious.*’⁶⁸ The detention of pregnant women and children was considered so harmful that strict time limits were introduced. It is unfathomable that the Bill will remove these limits.

Despite serious mental health needs, detained people do not have access to specialist services for complex mental health conditions. Meanwhile, the effectiveness of mental health treatment in detention settings is extremely limited: detention centres are not therapeutic environments and are not conducive to the disclosure of symptoms.

Among its many regressive proposals, it appears that the “Illegal Migration” Bill will result in vastly larger numbers of people, including people seeking asylum, children, pregnant women, and survivors of torture and trafficking, being detained, for longer periods of time, with significantly fewer safeguards and protections. It would standardise the statutory detention of people arriving in the UK, formalising the regular use of what should be an exceptional practice. Accordingly, a large increase in detention facilities will be required, with many more people experiencing the devastating suffering and harm that detention is known to inflict, and which can in some cases be permanent.

This Bill would additionally allow a person to be detained indefinitely without many of the protections that arise from the UK’s case law that act to regulate excessively long or unnecessary detention (*e.g.*, where removal cannot be effected within a reasonable time). This will include, but is not limited to, people seeking asylum. It establishes a 28-day period during which bail applications cannot be made, removing a key remedy to unlawful or unjustified detention. It curtails essential legal safeguards put in place to protect the fundamental right to liberty and to prevent the damage caused by prolonged and indefinite detention. In accordance with both common law and Article 5 ECHR, detention should not be indefinite. The broad discretionary powers contained in Clause 10 thus amount to a similar breach of Article 5 ECHR - particularly due to the ability to detain all vulnerable groups in indefinite detention.

This concern is exacerbated by the fact that the prospects of removal are extremely limited due to the lack of transfer agreements in place and the ongoing Rwanda litigation, meaning that individuals (including children, whether with family or alone) will be at risk of long-term and indefinite detention in unsuitable conditions. Recent data suggests that almost 200,000 people⁶⁹

⁶⁷ *ibid.*

⁶⁸ Stephen Shaw, Review into the Welfare in Detention of Vulnerable Persons: A Report to the Home Office (2016).

⁶⁹ Refugee Council, ‘Nearly 200,000 people could be locked up or forced into destitution, new report on asylum bill reveals’ (2023) <<https://www.refugeecouncil.org.uk/latest/news/nearly-200000-people-could-be-locked-up-or-forced-into-destitution-new-report-on-asylum-bill-reveals/>> accessed 25 April 2023.

could be indefinitely detained in immigration detention facilities or forced into destitution, with the current already overstretched detention estate being unable to hold anywhere near the numbers anticipated.⁷⁰

Clause 10 - Powers of detention

The effect of Clause 10 is to provide the Home Secretary with wide new discretionary powers as to where people are detained and for how long they are detained. This would place the indefinite detention of children and pregnant women in camps such as Manston on a statutory basis. There have been repeated scandals involving abuse, mistreatment and death⁷¹ of those in detention, including the events at Brook House Immigration Removal Centre, which are the subject of a public inquiry, whose report will be released in summer 2023.⁷²

Clause 10 introduces:

- **a new discretionary power** exercisable by the Home Secretary to detain people who are, or who she *'suspects'* are, subject to the removal duty in Clause 2.
- **the detention of unaccompanied children** (i.e. children who are alone) pending removal, regardless of whether there are intractable obstacles to removal, or pending a decision on whether to grant them leave to remain under the new powers. They would not be subject to the 24-hour time limit and other protections in the 2014 Act, and, therefore, represent a significant expansion of detention powers in respect of unaccompanied minors, reversing the intention of the 2014 Act. The power to detain children may be exercised in circumstances specified in regulations by the Home Secretary.
- **much broader discretion as to where people are detained** (in Clause 10(2)). The new provision would allow detention 'in any place that the Secretary of State considers appropriate'. Presently, the list of places where people can be detained for immigration purposes is set out in the Immigration (Places of Detention) Direction 2021. As of 2022, the capacity of the immigration detention system, which includes seven Immigration Removal Centres (IRCs), was approximately 2,245. In 2022, 45,755 people crossed the English

⁷⁰ At the time of writing the detention estate can hold approximately 2,280 people. The accommodation facilities recently announced by the Government, would have capacity to host about 5,400 asylum seekers, combined. See: Free Movement, 'Vessels and barracks: Home Office asylum accommodation announcements' (2023) <https://freemovement.org.uk/vessels-and-barracks-home-office-asylum-accommodation-announcements/?mc_cid=46b755ef71&mc_eid=a1b23b35a0> accessed 25 April 2023.

⁷¹ For further details, see: Medical Justice, *Harms in Detention: deaths in detention* <<https://medicaljustice.org.uk/heathcare-in-detention/deaths-in-detention/>> accessed 25 April 2023.

⁷² For further details, see the *Brook House Inquiry* website <<https://brookhouseinquiry.org.uk/>> accessed 25 April 2023.

Channel.⁷³ Under the Bill, all such individuals would be subject to detention by virtue of their having arrived *via* an irregular route.

- **the indefinite detention of children and their families in pre-departure accommodation** under the new powers. Presently, under the 2014 Act there is a maximum of 72 hours, or seven days in cases where the longer period of detention is authorised personally by a Minister of the Crown) (Clause 10(4)).
- **the indefinite detention of pregnant women** under the new powers. These would reverse the restrictions in the 2016 Act of a maximum of 72 hours (or seven days when the longer period of detention is personally authorised by a Minister of the Crown) (Clause 10(11)).⁷⁴

Clause 11 - Period for which persons may be detained

Clause 11 overturns the long-established common law principle that it is for the court to decide for itself whether the detention of a person for the purposes of removal is for a period that is reasonable.⁷⁵ The intention appears to be to restrict the role of the courts in providing oversight of the exercise of the statutory immigration detention powers. The Home Office already has very wide powers of detention, with no overall time limit and limited oversight by the courts. The purpose of immigration detention is to facilitate removal and there is no evidence that these changes are necessary to improve the Home Office's performance with regard to removals. If the clause achieves its intended purpose, it will mean the Home Office can continue to detain people where, for example, it is not pursuing removal diligently or where removal is not in fact possible. Given the lack of returns agreements in place, this is likely to result in a growing number of people being detained indefinitely.

Clause 11 applies to all forms of detention, not just those who have arrived irregularly. For example, it is intended to allow a software engineer who overstayed her visa to be detained for far longer than a suspected terrorist with far less judicial oversight. This is particularly concerning given how extraordinarily complex the Immigration Rules are.⁷⁶

⁷³ Sky News, 'More than 400 migrants cross Channel in one day in record for 2023' (2023) <<https://news.sky.com/story/more-than-400-migrants-cross-channel-in-one-day-in-record-for-2023-12851451#:~:text=The%20Home%20Office%20confirmed%20437,crossings%20last%20year%20was%2045%2C755>> accessed 25 April 2023.

⁷⁴ Immigration Act 2016, s.60.

⁷⁵ EN, para 88; *R(A) v SSHD* [2007] EWCA Civ 804, per Keene LJ: '*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.*'

⁷⁶ *Pokhriyal v SSHD* [2013] EWCA Civ 1568 per Jackson LJ, at [4]: '*The rules governing the PBS are set out in the Immigration Rules and the appendices to those rules. These provisions have now achieved a degree of complexity which even the Byzantine Emperors would have envied.*'

It also creates specific statutory powers to detain where the Home Secretary considers that removal is no longer possible within a reasonable period of time ‘for such further period as, in the opinion of the Secretary of State, is reasonably necessary to enable such arrangements to be made for the person’s release as the Secretary of State considers appropriate’. This appears to confer more discretion than the limited ‘grace period’ for making such arrangements held to be lawful by the courts. UNHCR notes, in their formal legal observations on the Bill, that such detention ‘for the purpose of making arrangement for release, moreover, is arguably not permissible under Article 5 ECHR’, which contains an exhaustive list of cases in which a person may be deprived of their liberty including detention ‘(f)... of a person against whom action is being taken with a view to deportation or extradition’.⁷⁷

Clause 12 - Powers to grant immigration bail

Clause 12 would mean that the First-tier Tribunal is unable to grant bail to a person detained under the new powers in Clause 10 for the first 28 days they are detained. Currently, the First-tier Tribunal can grant bail eight days after a person’s arrival in the UK.⁷⁸ Delaying the period after which people can be granted bail, when practised alongside deteriorating safeguarding mechanisms, is likely to lead to vulnerable people being held unlawfully in detention, putting their lives at further risk.

Clause 12 also severely restricts the jurisdiction of the High Court to review the lawfulness of the first 28 days of detention of people held under the new powers in Clause 10, and a decision of the Home Secretary to refuse bail in that period. Presently, as set out above, an individual can challenge their detention in judicial review proceedings on the basis it breaches the *Hardial Singh* principles or the Home Office’s detention policies.

This Clause purports to restrict the High Court’s jurisdiction in judicial review proceedings to situations in which the Home Office acts in bad faith or ‘in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice’ (Clause 12(4)). Only the more limited form of review, a right to apply for a writ of *habeas corpus*, is preserved (and in Scotland, the right to apply to the Court of Session for suspension and liberation is preserved).

Although the Explanatory Notes suggest there will ‘*be no restriction on an individual’s ability to claim damages in relation to unlawful detention, including in respect of the first 28 days of detention*’,⁷⁹ this statement is conflicting: either the ouster clause achieves its purpose in restricting the grounds on which detention can be challenged or it does not.

⁷⁷ UNHCR, ‘Legal Observations on the Illegal Migration Bill’ (11 April 2023) para 123 <<https://www.unhcr.org/uk/sites/uk/files/legacy-pdf/641d7b664.pdf>> accessed 20 April 2023.

⁷⁸ Immigration Act 2016, Schedule 10, Part 1, para 3(3).

⁷⁹ EN, para 94.

Clause 13 - Disapplication of duty to consult Independent Family Returns Panel

The removal of the safeguard of the duty to consult with the Independent Family Returns Panel increases the risk of decisions being made without adequate regard to the best interests of children and on an arbitrary basis.

Clause 13 provides that the duty to consult with the Independent Family Returns Panel on safeguarding and promoting the welfare of children does not apply in relation to decisions to return or detain families with children covered by Clause 2 and unaccompanied children covered by Clause 3(2). The Independent Family Returns Panel is designed to ensure that the best interests of children are properly taken into account when decisions to remove and detain families with children are considered.

Clause 14 - Electronic Devices

Clause 14 poses a considerable threat to individuals' right to privacy. The new schedule confers powers on immigration officers to search persons liable to be detained, premises, vehicles and property in order to seize and retain mobile phones and other electronic devices, as well as conferring the ability to access, copy and use information stored on these devices. This provision has been put forward in what appears to be a response to a High Court decision in 2022 which found that there was serious unlawfulness involved in the Home Office's previous blanket seizures of mobile phones from all migrants entering the UK irregularly.⁸⁰ In this judgment, the High Court found that *'the seizure and retention of the claimants' mobile phones violated the claimants' Article 8 [HRA] rights'*.⁸¹ On 26 April the Government itself confirmed that this new clause has a more than 50% chance of being incompatible with the ECHR.⁸² **Clause 60** amends section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 to provide that a person's credibility should be damaged, where they refuse to provide access to information stored in electronic form that was found on them, or in their possession.

The Detention and Bail section of this Briefing is endorsed by Detention Action, Medical Justice, Bail for Immigration Detainees, Refugee Action, the Immigration Law Practitioners' Association and Women for Refugee Women. Please note that contributing organisations have only approved the content of the specific section(s) of this Briefing which they have endorsed and should not be taken as endorsing any other parts of the Briefing.

For additional information in relation to the issues covered in this section, please contact:

⁸⁰ *R (HM) v Secretary of State for the Home Department* [2022] EWHC 695 (Admin) (25 March 2022).

⁸¹ *ibid*, [135].

⁸² Home Office, 'Illegal Migration Bill: Supplementary European Convention on Human Rights Memorandum', (26 April 2023) <<https://publications.parliament.uk/pa/bills/cbill/58-03/0284/SuppECHRmemo.pdf>> accessed 26 April 2023.

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Children’s Care (Clauses 15-20)

UK law currently states that local authorities and other specified agencies providing services to children and those exercising any function of the Home Secretary in relation to immigration, asylum, or nationality to children in the UK must make arrangements for ensuring that their functions and any services are discharged having regard to their duty to safeguard and promote the welfare of children.⁸³ The Guidance issued to decision-makers dealing with children advised that ‘Every child matters even if they are someone subject to immigration control’.⁸⁴ The substantive outcome sought to be achieved – the safeguarding and promotion of all children’s welfare – is outlined as,

- *protecting children from maltreatment*
- *preventing impairment of children's mental and physical health or development*
- *ensuring that children grow up in circumstances consistent with the provision of safe and effective care*
- *taking action to enable all children to have the best outcomes.*⁸⁵

These protective arrangements intended for all children will effectively be withdrawn for children arriving or entering the UK after 7 March 2023 ‘in breach of immigration control’. The children affected may have entered with their families or are unaccompanied. These children are to be:

- denied the right to seek refuge and human rights protection and protection as victims of trafficking;
- held under immigration detention powers that are without statutory time restriction;
- placed in Home Office (and, therefore, unsafe) accommodation;
- removed from the UK at age 18, or earlier if certain conditions⁸⁶ are met;
- denied access to British citizenship registration arrangements open to other children; and
- denied appeal rights concerning their protection and human rights claims.

⁸³ The Children Act 2004 (‘CA 2004’) ss10, 11. The Children Act 2004 duties are placed on a range of institutions and individuals including local authorities and district councils, NHS organisations; the police, Governors/Directors of Prisons and Young Offender Institutions; Directors of Secure Training Centres and Youth Offending Teams/Services. See also Children (Scotland) Act 1995, ss16, 17, 22; Borders, Citizenship and Immigration Act 2009, s55.

⁸⁴ Home Office UK Border Agency and Department for Children, Schools and Families, ‘Every Child Matters: Change for Children’ (November 2009) [2.7]
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257876/change-for-children.pdf> accessed 10 March 2023.

⁸⁵ See the Children Act 2004 statutory guidance: HM Government, ‘Working together to safeguard children: A guide to inter-agency working to safeguard and promote the welfare of children’ (March 2015, last updated 1 July 2022) pages 6-7
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/942454/Working_together_to_safeguard_children_inter_agency_guidance.pdf> accessed 10 March 2023. This is guidance issued under (inter alia) the Local Authority Social Services Act 1970 and the Children Act 2004.

⁸⁶ Clause 3(3).

The children affected by these discriminatory arrangements are shown to be highly vulnerable. Some are very young. In 2022, there were 5,242 asylum applications by unaccompanied children.⁸⁷ For vulnerable children, the Bill's proposed arrangements deny refugee and human rights protection and recovery from trafficking, and prolong their fears and insecurity by denying them the reassurance that they have found safety. Their removal before or at age 18 exposes them to real risk. As noted by the Court of Appeal, '*It is not easy to see that risks of the relevant kind to a person who is a child would continue until the eve of that [18th] birthday, and cease at once the next day.*'⁸⁸ A decade ago, the majority of unaccompanied children were granted temporary leave to remain until they turned 18 (rather than refugee status) and we know that the fear of removal forced many children to go underground and go missing,⁸⁹ at extreme risk of exploitation and incredible danger of self-harm and suicide.⁹⁰

Accommodation and other support for unaccompanied migrant children

Clause 15 permits the Secretary of State to provide, or arrange for the provision of accommodation for unaccompanied children⁹¹ in England, including allowing the Secretary of State to ask a third party to provide this accommodation.⁹² The Children's Commissioner for England has repeatedly raised her concerns about the impact of the Bill on 'the right to care and support up to adulthood from the local authority, as set out under the Children Act 1989.'⁹³

The Bill seeks to embed through primary legislation the unlawful Home Office practice over past years of directly accommodating children, including very young unaccompanied children, in hotels; some for extended periods. The most recent information provided by the Minister set out a total of 4,600 children accommodated in hotels up to January 2023 with 440 missing episodes and

⁸⁷ Home Office, 'National Statistics: How many people do we grant asylum or protection to?' (Updated 3 March 2022) <<https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-december-2022/how-many-people-do-we-grant-protection-to>> accessed 10 March 2023.

⁸⁸ *DS (Afghanistan) v Secretary of State for the Home Department* [2011] EWCA Civ 305 at [54].

⁸⁹ Joint Committee on Human Rights, Human Rights of unaccompanied migrant children and young people in the UK (2013), p. 34 <<https://publications.parliament.uk/pa/jt201314/jtselect/jtrights/9/9.pdf>> accessed 24 April 2023.

⁹⁰ Refugee & Migrant Children's Consortium, Illegal Migration Bill – Committee Stage Amendments to safeguard children (2023), p.2. <<https://refugeechildrenconsortium.org.uk/wp-content/uploads/2023/03/RMCC-HOC-Committee-stage-briefing-Illegal-Migration-Bill-FINAL.pdf>> accessed 25 April 2023

⁹¹ Illegal Migration Bill Explanatory Notes (7 March 2023) <<https://publications.parliament.uk/pa/bills/cbill/58-03/0262/en/220262en.pdf>> accessed 12 March 2023 ('EN') state at [97] that 'These powers do not apply to unaccompanied migrant children outside the scope of the duty to make arrangements for removal'. However, Clause 15 refers to 'unaccompanied migrant children' and thus it leaves ambiguous whether the Clause 3(3) definition of an 'unaccompanied child' (who must meet the four conditions in Clause 2) applies.

⁹² EN, para 100.

⁹³ Statement from the Children's Commissioner on Illegal Migration Bill (03 May 2023) <[Statement from the Children's Commissioner on the Illegal Migration Bill | Children's Commissioner for England \(childrenscommissioner.gov.uk\)](https://www.childrenscommissioner.gov.uk/statement-from-the-childrens-commissioner-on-the-illegal-migration-bill)> Accessed 03 May 2023

200 children who remain missing.⁹⁴ Case experience shows that traffickers monitor hotels and hostels where unsupervised children are known to be living. It is generally assumed missing children from these hotels and hostels have been taken by traffickers or when living on the street will be recruited by traffickers. There is general agreement that such missing children are at real risk of exploitation and abuse.

Furthermore, there have been whistle-blower reports of emotional abuse, including staff at Home Office run hotels ‘threatening to throw children out of the window and joking about them going missing’.⁹⁵ In his inspection, the Independent Chief Inspector of Borders and Immigration found that two hotels had staff living onsite, with access to the master keys to all rooms, who had not been Disclosure and Barring Service cleared.⁹⁶

The provisions in this Bill:

- fundamentally undermine access to the legal duties of the Children Act 1989 (‘CA 1989’) for unaccompanied migrant children, which are critical for ensuring their safeguarding and wellbeing.
- contain no time limit on how long any child spends in Home Office accommodation.
- contain no standards, safeguards, or protective obligations for the Home Office provided accommodation for children. As the law stands, accommodation provided for children under section 20 CA 1989 must be ‘suitable’.⁹⁷ Accommodation provided to children aged 15 and younger accommodated under section 20 CA 1989 must be regulated.⁹⁸
- contain no information as to what ‘other support’ is required for Home Office accommodated children. The Explanatory Note in a dismissive tone suggests, ‘*It is for the local authority where an unaccompanied child is physically located to consider its duties under the Children*

⁹⁴ HC Deb 24 January 2023, Vol 726, Col 859 <<https://hansard.parliament.uk/commons/2023-01-24/debates/290AF292-5D7E-411C-8FB8-A6E0F288365C/UnaccompaniedAsylum-SeekingChildren>> accessed 2 May 2023

⁹⁵ Mark Townsend, ‘Revealed: child migrants racially abused and threatened with violence at Home Office hotel’ *The Observer* (28 January 2023) <<https://www.theguardian.com/uk-news/2023/jan/28/child-migrants-racially-abused-home-office-hotel-brighton-criminals>> accessed 17 April 2023.

⁹⁶ ICIBI, ‘An inspection of the use of hotels for housing unaccompanied asylum-seeking children (UASC)’ (March - May 2022) [5.71] <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1111982/An_inspection_of_the_use_of_hotels_for_housing_unaccompanied_asylum-seeking_children_UASC_March_to_May_2022.pdf> accessed 17 April 2023.

⁹⁷ Children Act 1989, s 20(1)(c).

⁹⁸ Children Act 1989, s 22C; The Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021). Children aged 15 or younger can only be placed with a relative or friend, foster parent, in a children’s home or, when approved, a care home, a hospital, residential family centre, school providing accommodation or an establishment that provides care and accommodation for children as a holiday scheme for disabled children.

Act 1989.⁹⁹ There is no explanation as to how children will access their entitlements from local authority children’s services when accommodated by the Home Office with regards to education, health, protection and care planning.

Termination of children’s ‘Looked After’ care status

Clause 16 creates a power for the Home Secretary to decide a ‘looked after’ child is to cease being ‘looked after’ by the local authority in England, and ‘must direct’ the local authority to cease looking after the child on the transfer date.

Children are ‘looked after’ when they are within the local authority area, in need, and appear to the local authority to require accommodation as a result of there being no person who has parental responsibility, the child being ‘lost or abandoned’, or the person who has been caring for that child being prevented (whether or not permanently, and for whatever reason) from providing the child with suitable accommodation or care.¹⁰⁰ Section 20 CA 1989 imposes a duty on local authorities to provide accommodation for such children in need. A child who has been in the care of a local authority for more than 24 hours¹⁰¹ becomes a ‘looked after’ child and the local authority assumes a range of duties to safeguard and promote the welfare of a child, including care and support planning.

The ‘looked after’ decision is outside the Home Secretary’s competence and knowledge base. It is a decision the Children Act 1989 reserved to local authorities. The duties are well-established and local authorities have the institutional expertise to support unaccompanied migrant children. The Home Office does not. This was expressly recognised by the Divisional Court in February 2023:

*... unlike local authorities, the Home Office and its officials do not have the facilities, the skills, or the legal powers and duties to look after children pursuant to the Children Act 1989. It is plainly not in the best interests of [unaccompanied asylum seeking] children to be accommodated, at any rate for more than very short periods, in hotels or immigration reception centres.*¹⁰²

The proposed clauses cannot lawfully stand. The proposed clause is deleterious to vulnerable children. It is also discriminatory: the loss of ‘looked after’ status affects children’s access to the important safeguards and protections associated with that status.

⁹⁹ EN, para 101.

¹⁰⁰ CA 1989, s 20.

¹⁰¹ CA 1989, s 22(2).

¹⁰² *R (Medway Council) v Secretary of State for the Home Department* [2023] EWHC 377 (Admin) at [39].

Information gathering

Clauses 17 and 18 could undermine the child protection functions of local authorities, depending on the information sought by the Home Office. Clause 17(2) gives the Home Secretary the power to direct a local authority to provide ‘information about the support or accommodation provided to children who are looked after by the local authority’ and ‘such other information as may be specified in regulations made by the Secretary of State’. Social work care and protection functions require the trust of children in their care. Their protective role is undermined if children fear their confidences and personal information could be disclosed to Home Office staff.

Extension to Wales, Scotland and Northern Ireland

Clause 19 overreaches into devolved matters. The Bill appears to empower the Home Secretary to extend the provisions of the Bill regarding unaccompanied migrant children to all nations in the United Kingdom. This would require interfering with devolved matters. For more information on the Bill’s interference with devolved matters (including in relation to Clause 19), see the [Devolution section](#) below.

The Clause contains a broad [delegated power](#) that allows the Home Secretary to amend ‘any enactment’, including this Bill and other primary legislation such as important constitutional statutes governing devolution, by way of regulations. Although these regulations would be subject to the affirmative resolution procedure, this still represents minimal Parliamentary scrutiny.

The Children’s Care section of this Briefing is endorsed by: Immigration Law Practitioners’ Association (ILPA), Refugee Council, and Refugee Action. Please note that contributing organisations have only approved the content of the specific section(s) of this Briefing which they have endorsed and should not be taken as endorsing any other parts of the Briefing.

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Modern slavery (Clauses 21-28)

It is inarguably clear that the clauses of the Illegal Migration Bill dealing with modern slavery and trafficking breach the UK's obligations to victims of trafficking¹⁰³ under Article 4 ECHR and ECAT. The Bill will encourage trafficking and modern slavery and deprive victims and survivors of their right to recovery. Preventing victims of trafficking from entering the NRM and having access to the asylum system plays into the hands of traffickers, who will use this as a way to trap those already in exploitation or cause further exploitation.

These provisions contained in this Bill will therefore act to empower traffickers, who will have an additional weapon in their arsenal to coerce victims. By eradicating protections that are clearly needed to enable a person to feel able to escape exploitation, the Bill forces victims of trafficking and modern slavery to choose between remaining in a situation of exploitation, prolonged and traumatising detention, or removal.

What protections do victims of trafficking and modern slavery currently receive?

Currently, many individuals who enter or arrive in the UK without leave to do so are victims of trafficking or modern slavery. Roughly three quarters of all survivors of trafficking in the UK are not British nationals and many will be in the country without leave to remain.¹⁰⁴ In order to get some form of protection in the UK, they can be referred into the NRM – the UK's framework designed to identify and protect victims of trafficking and of modern slavery – and/or will claim asylum. The trafficking experience of survivors, and risk of being re-trafficked if returned to their country of origin, can form part or all of the grounds for their asylum claim. It is through these systems that survivors will be able to access any form of support, assistance and protection. There is no published data on how many people seeking asylum are survivors of trafficking nor on how many are in both the asylum system and NRM, but 93% of Helen Bamber Foundation clients who are survivors of trafficking are in both systems.¹⁰⁵

On being referred into the NRM, a preliminary 'reasonable grounds' decision is made to a lower standard of proof, following which most individuals are recognised as potential victims and allowed to remain in the UK, with financial support and accommodation, until they receive a final

¹⁰³ This briefing uses the terms 'victim' and 'survivor' interchangeably.

¹⁰⁴ Home Office, *Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK, end of year summary 2022* (2 March 2023) <<https://www.gov.uk/government/statistics/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2022/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2022#:~:text=2022%20was%20a%20record%20year,from%203%2C193%20to%20reach%204%2C580>> accessed 12 April 2023.

¹⁰⁵ Of the 83,236 people that arrived in the UK on 'small boats' between 1 January 2018 and 31 December 2022, 7% (6,210 people) were referred to the NRM. Most of these individuals (5,897 or 95%) also had an asylum claim lodged.

‘conclusive grounds’ decision, which is made on the balance of probabilities. Home Office statistics for 2022 show the vast majority of ‘reasonable grounds’ and nearly all ‘conclusive’ grounds decisions to be positive.¹⁰⁶

Victims and survivors without the requisite immigration status awaiting a conclusive grounds decision are not permitted to work or access public funds.¹⁰⁷ However, they are protected from removal from the UK and are provided with accommodation, minimal financial support, and the assistance of a support worker to facilitate their recovery. After a positive conclusive grounds decision, recognised victims can apply for leave to remain in the UK, usually with a right to work and to access public funds. However, the percentage of individuals granted leave to remain is incredibly low.¹⁰⁸ An increasing number of individuals are actively refusing their consent to enter the NRM,¹⁰⁹ likely due to the limited support and protection available or fear of authorities. 2022 marked a 43.57% increase from 2021 in the number of people actively refusing their consent to enter the NRM - this was the highest annual number since the NRM began in 2009.¹¹⁰ Additionally, endemic delays have meant that being entered into the NRM may result in years of limbo, often without the right to work or without appropriate accommodation. For instance, the average

¹⁰⁶ Home Office, Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK, end of year summary 2022 (2 March 2023) <<https://www.gov.uk/government/statistics/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2022/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2022#:~:text=2022%20was%20a%20record%20year,from%203%2C193%20to%20reach%204%2C580.>> accessed 12 April 2023. This summary notes that: ‘the competent authorities issued the highest number of reasonable and conclusive grounds decisions in 2022, with almost 17,000 reasonable grounds and just over 6,000 conclusive grounds decisions made; of these, 88% of reasonable grounds and 89% of conclusive grounds decisions were positive’; ‘The proportion of positive reasonable grounds decisions was 87% for adult and 90% for child potential victims (data table 16). The proportion of positive decisions has remained relatively similar in recent years, with around 9 out of every 10 referrals receiving a positive decision.’; and ‘The proportion of positive conclusive grounds decisions was 87% for adult and 92% for child potential victims (data table 19).’

¹⁰⁷ There is a limited exception regarding the right to work for Overseas Domestic Workers who have received a positive reasonable grounds decision while their visa remains valid. However, the Overseas Domestic Worker visa contains a No Recourse to Public Funds condition. For more information, see: Kayalaan, *Dignity, not destitution: the impact of differential rights of work for migrant domestic workers referred to the National Referral Mechanism* (2019) <http://www.kalayaan.org.uk/wp-content/uploads/2019/10/Kalayaan_report_October2019.pdf> accessed 20 April 2023.

¹⁰⁸ Only 447 (7%) out of 6,066 people who had been confirmed as trafficked who applied for leave to remain between April 2016 and June 2021 were granted. 4,695 trafficking survivors (77%) had their applications rejected. See: Scottish Refugee Council, *New FOIs reveals chronic slowness of the UK’s asylum system* (5 January 2022) <<https://scottishrefugeecouncil.org.uk/new-fois-reveals-chronic-slowness-of-the-uks-asylum-system/>> accessed 20 April 2023.

¹⁰⁹ Public authorities have a statutory duty to notify the Home Office when they come across potential victims of modern slavery. When individuals refuse to be entered into the NRM, public authorities record this in a Duty to Notify report (DtN).

¹¹⁰ Home Office, Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK, end of year summary 2022 (2 March 2023) <<https://www.gov.uk/government/statistics/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2022/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2022#:~:text=2022%20was%20a%20record%20year,from%203%2C193%20to%20reach%204%2C580.>> accessed 12 April 2023.

(median) time taken from referral to conclusive grounds decisions made in 2022 across the competent authorities was 543 days (increasing from 449 days in 2021).¹¹¹

We are already seeing fewer people entering the NRM than should be, due to the Government's refusal to ensure the system provides meaningful protection and support to victims and survivors of trafficking. This Bill will act to worsen this trend by freezing victims and survivors out of protection and support. It will prevent people from escaping exploitation and reporting to the authorities thereby increasing the risks of continued exploitation and re-trafficking.

What does the Bill do?

The Bill blocks anybody entering and arriving in the UK *via* a route the Home Office deems irregular route from claiming asylum or benefitting from the modern slavery protections and leaves them subject to detention and removal from the UK, in violation of international law.⁵ The Bill removes almost all protections for victims of modern slavery and trafficking who are targeted for removal. For a person targeted for removal under Clause 2, who the Home Office decides to be a potential victim of trafficking, Clause 21 would make it so that:

1. There is no obligation to grant such potential victims leave to remain; and
2. They may be removed from the UK before a conclusive grounds decision is made.

There is a narrow exception outlined in Clause 21(3) for some individuals who are cooperating with investigations or criminal proceedings relating to their exploitation, if the Home Secretary considers it '*necessary for the person to be present in the United Kingdom to provide that cooperation*'. This is likely to benefit a very small number of individuals, especially as the Home Office's own statutory guidance recognises that many victims do not feel safe enough to do so until they have had the time to recover from their exploitation.¹¹² The Government added a presumption that it is not necessary for a person to be in the UK in order to cooperate with an investigation and/or prosecution unless there are '*compelling circumstances*', to be determined with regard to new statutory guidance. Further, as drafted, this clause only applies where an individual is cooperating with a public authority. It does not account for those who indicate that they want to but have not yet engaged. As it stands, individuals would be removed before cooperation has commenced (and before this exception applies). In any event this clause does not save the Bill from undermining the work of the authorities to investigate and prosecute traffickers or exploiters. This is because the Bill will increase fear of any contact with authorities and the potential for exploiters to use this to prevent victims from coming forward. Clause 28 also amends

¹¹¹ *ibid.*

¹¹² Home Office, 'Modern Slavery: statutory guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and non-statutory guidance for Scotland and Northern Ireland' (updated 3 March 2023) page 144 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1139341/Modern_Slavery_Statutory_Guidance_EW_Non-Statutory_Guidance_SNI_v3.1.pdf> accessed 10 March 2023.

section 63 of the Nationality and Borders Act 2022, to create a statutory presumption that the public order disqualification applies to a non-British person, convicted in the UK of an offence, for which they have been sentenced to a period of imprisonment of any length.

Therefore, the vast majority of victims of trafficking and modern slavery who meet the criteria under Clause 2, will be disqualified from any protections that would prevent or delay their removal as victims of trafficking in the NRM. This will completely freeze many victims and survivors of trafficking out of modern slavery protections and support as most non-British victims trafficked into the UK will come via an irregular route.

However, on a practical basis victims cannot be removed from the UK unless they are a national of a specific list of ‘safe countries’, or can be removed to Rwanda. Therefore, at present, the majority of people will remain in the UK, unable to move on with their lives, either in detention or reliant for long periods on Home Office provided support and accommodation. This state of limbo will compound both the trauma of their trafficking and causes of vulnerability such as family members being threatened over debt. Further, for trafficking survivors, immigration detention increases the risk of re-traumatisation and negative long-term physical and mental health outcomes.

The failure to create a framework where people feel able to come forward and be identified will mean that individuals cannot be protected, in violation of Article 4 ECHR and the obligation to protect.¹¹³

Is this legal?

Article 4 ECHR and ECAT both prohibit slavery and trafficking and place positive obligations on the UK to protect victims of trafficking and to prevent their exploitation. Article 4 ECHR is not a right from which the UK can derogate in times of emergency.¹¹⁴

States are obliged to set up a ‘*spectrum of safeguards [which] must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking*’.¹¹⁵ The positive ‘protection’ duty has ‘*two principal aims: to protect the victim of trafficking from further harm; and to facilitate his or her recovery*’.¹¹⁶

It is clear that the measures proposed in this Bill exclude most victims of trafficking and modern slavery from recovery, trapping them in exploitation and exposing them to a substantial and increased risk of exploitation. In particular, victims will not be given time in a place of safety to recover from their experiences and they will face return either to their countries of origin or

¹¹³ See: *Rantsev v Cyprus & Russia*, 51 EHRR 1 [284].

¹¹⁴ Article 15(2) ECHR.

¹¹⁵ *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1 [284].

¹¹⁶ *VCL and AN v UK* (App. Nos. 74603/12 and 77587/12) [159].

unfamiliar third countries, where they are liable to be re-exploited. The lack of any incentive to come forward as a victim of trafficking will also prevent victims assisting in police investigations into their traffickers, thereby facilitating rather than stopping trafficking.

The ECHR Memorandum¹¹⁷ published with the Bill states that the Government believes its provisions can be applied compatibly with Article 4 ECHR and ECAT. This is plainly incorrect:

1. The Government has attempted to justify the denial of support and protection for victims and survivors of trafficking by using the public order exemption under Article 13 of ECAT.¹¹⁸ The compliance with ECAT is ‘*premised*’ on deeming all victims of trafficking who fall within these measures as a ‘*threat to public order*’,¹¹⁹ which they are not. There is no basis in law for such a wide use of that provision. This seemingly blanket policy of saying that someone’s arrival through an irregular route means that they present a threat to public order is in breach of the non-punishment principle contained within ECAT.¹²⁰ The Article 13 exemption cannot be applied to convictions for activity the person was compelled to do as a victim of slavery or human trafficking, and moreover, an individual risk assessment should be conducted. It cannot simply be said that individuals present such an ongoing risk to public order as to come under this exemption by the mere fact that they arrived in the UK through an irregular route.
2. Victims targeted by Clause 2 will receive no support for their recovery or protection in the UK; conversely, they will be detained and face removal to unknown third countries. The prohibition on removal linked to the ‘*Reflection and Recovery*’ period, as well as the requirement to provide support all fall within the scope of Article 4 ECHR (Prohibition of slavery and forced labour).¹²¹ No exceptions can be made to these requirements. Moreover, it should be noted that Article 4 is non-derogable under Article 15 ECHR (Derogation in time of emergency).
3. The only exception to these measures for a person who falls within them is to make a claim that they would face a real risk of serious and irreversible harm on removal; this is much more restrictive than the standards to be applied under the ECHR and ECAT.

¹¹⁷ Home Office, ‘Illegal Migration Bill: European Convention on Human Rights Memorandum’ (7 March 2023) <<https://publications.parliament.uk/pa/bills/cbill/58-03/0262/ECHR%20memo%20Illegal%20Migration%20Bill%20FINAL.pdf>> accessed 10 March 2023.

¹¹⁸ EN, para 135.

¹¹⁹ Home Office, ‘Illegal Migration Bill: European Convention on Human Rights Memorandum’ (7 March 2023) at [45] <<https://publications.parliament.uk/pa/bills/cbill/58-03/0262/ECHR%20memo%20Illegal%20Migration%20Bill%20FINAL.pdf>> accessed 10 March 2023.

¹²⁰ ECAT, Article 26 ‘Non-punishment provision’.

¹²¹ See *VCL & AN v The United Kingdom* (Applications nos. 77587/12 and 74603/12); *Chowdhury & Ors v. Greece* (Application No. 21884/15, 30 March 2017).

These provisions would eradicate protections for victims of trafficking and modern slavery in the UK, enabling trafficking gangs and undermining the UK's anti-slavery efforts. It is a flagrant breach of international and domestic law. On 29 March 2023, the Group of Experts on Action against Trafficking in Human Beings (GRETA), who are responsible for monitoring the implementation of ECAT, stressed that, *'if adopted, the Bill would run contrary to the United Kingdom's obligations under the Anti-trafficking Convention, to prevent human trafficking, and to identify and protect victims of trafficking, without discrimination.'*¹²²

The Modern Slavery section of this Briefing is endorsed by Focus on Labour Exploitation (FLEX); Helen Bamber Foundation; Anti Trafficking and Labour Exploitation Unit (ATLEU); Anti-Slavery International; and the Immigration Law Practitioners' Association (ILPA). Please note that contributing organisations have only approved the content of the specific section(s) of this Briefing which they have endorsed and should not be taken as endorsing any other parts of the Briefing.

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¹²² Council of Europe, UK's Illegal Migration Bill should be reviewed to ensure it complies with the anti-trafficking convention", says GRETA (29 March 2023) <[https://www.coe.int/en/web/portal/-/uk-s-illegal-migration-bill-should-be-reviewed\[...\].jure-it-complies-with-the-anti-trafficking-convention-says-greta](https://www.coe.int/en/web/portal/-/uk-s-illegal-migration-bill-should-be-reviewed[...].jure-it-complies-with-the-anti-trafficking-convention-says-greta)> accessed 12 April 2023.

Entry, settlement and citizenship (Clauses 29-36)

The proposed measures lock out certain people present in the UK, from securing lawful re-entry, residence, and/or citizenship. They will come into force upon the Bill receiving Royal Assent, regardless of whether the Home Secretary is, in fact, able to remove people under her self-imposed duty.

The narrow exceptions or saving provisions, further narrowed during Report stage in the House of Commons, come nowhere near rescuing those affected from breaches of their fundamental rights.

In practice, the people affected will be locked out by legislation, which will be likely applied in a blanket fashion by Home Office decision-makers. Thereafter, the people affected will have to scramble to secure advice and representation and make submissions to relieve themselves from being placed outside the law regulating lawful residence.

The result will be to create a large class of people, present in the UK, but without any hope of securing lawful status. In reality, there will be a permanent population of people present in the UK but with no access to procedures for regularising their status. This denizen sub-class will be condemned to a life without the ability to live meaningful lives from the fruits of their own work and effort: unable to work, unable to rent, with no route to integration and acceptance, and at risk of exploitation. It will be a life so arid as to be without basic dignity; it will be a life of degradation.

Exclusion from UK entry and residence

All the people to whom the proposed measures apply (noting that the Home Secretary will be under a duty to remove them):

1. cannot be given permission to enter or remain in the UK (subject to narrow exceptions for unaccompanied children and victims of modern slavery or human trafficking), and
2. cannot be given permission to travel to the UK by way of entry clearance or an ETA.

In respect of subsequent conferral of permission to travel or time-limited permission to enter there are narrow discretionary exceptions. The first is where the Home Secretary considers failure to confer would contravene the UK's obligations under the ECHR. The second is where she considers there are '*exceptional circumstances*' for that person that render it appropriate to grant limited leave to enter, entry clearance, or an ETA.

For time-limited permission to remain, there are two narrow exceptions. The first is where the Home Secretary considers failure to confer would contravene the UK's obligations under the ECHR or any other international agreement to which the UK is a party. The second exception is extremely narrow and only applies if the Home Secretary has exercised her power to grant a form of permission to travel or enter, then in conferring further permission to remain, the Home Secretary can continue to exempt the person if there are '*exceptional circumstances*' that render it appropriate to grant limited leave to remain.

As regards conferral of indefinite leave, the discretion is limited to where the Home Secretary considers failure to confer would contravene the United Kingdom's obligations under the ECHR.

The proposed measures ignore the existing safeguards to refuse individual applications under the General Grounds of Refusal on grounds of character, conduct, or association.¹²³

Exclusion from access to British nationality

The proposed measures exclude people from access to four classes of British nationality: British citizenship, British Overseas Territories citizenship, British Overseas citizenship, and British subject status.

The proposed measures apply to any person who has ever met the four conditions in Clause 2.

Those affected are excluded from existing provisions for those applying to register as British citizens *by entitlement* for children born overseas to a British citizen parent (who has that status only by descent) who subsequently come to the UK with their parents as a family, and for registration of British Overseas Territories citizens including those with a connection to Gibraltar.

Those affected are also excluded from a raft of existing provisions for those applying to be British citizens *at discretion*, including from the provision to register any minor, and provisions for adults to naturalise on the basis of UK residence.

As regards UK-born children, as well as children arriving in the UK, such measures plainly contradict the requirement to consider a child's 'best interests' as a primary obligation as required by section 55 of the Borders, Citizenship, and Immigration Act 2009, and Articles 3 and 7 of the 1989 UN Convention on the Rights of the Child. Removing the ability of stateless children born overseas to a British parent to acquire citizenship under section 3(2) of the British Nationality Act 1981 violates Article 4(1) of the 1961 Convention on the Reduction of Statelessness.

Further, as regards adults as well as children, the proposed measures ignore the existing safeguards to refuse individual applications for citizenship either at discretion or on grounds of a failure to meet a 'good character' test.

The only insufficient safeguard is that the Home Secretary *may* exempt a person from these citizenship provisions if their application would contravene the UK's obligations under the ECHR. This safeguard was narrowed during Report stage in the House of Commons to remove the ability to exempt a person from these punitive provisions, so as to comply with obligations under other international agreements to which the UK is a party. This would limit the ability of stateless people to apply for British nationality in reliance on Article 32 of 1954 Convention relating to the Status of Stateless Persons, and refugees to apply in reliance on Article 34 of the 1951 Refugee Convention.

¹²³ For example, Immigration Rules, Part 9.

The Entry, settlement and citizenship section of this Briefing is endorsed by: the Immigration Law Practitioners' Association ('ILPA') and Refugee Action. Please note that contributing organisations have only approved the content of the specific section(s) of this Briefing which they have endorsed and should not be taken as endorsing any other parts of the Briefing.

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Access to Justice

Legal Proceedings (Clauses 37-54)

The Bill seeks to define and limit the circumstances in which legal proceedings will have the effect of suspending removal of an individual (in Clause 2) and an unaccompanied child (in Clause 3).

What are the avenues for challenging removal?

A national of a country listed in the new section 80AA of the Nationality, Immigration and Asylum Act 2002 which the Bill proposes to insert into the 2002 Act (presently an EEA, Albanian or Swiss national):

- who is to be removed to their country of nationality or a country in which they have obtained an identity document, who makes a protection or human rights claim, will not have it considered, unless ‘exceptional circumstances’¹²⁴ apply. They will have no right of appeal and the intention of the Bill is for them to have no ability to make a claim that would suspend their removal (a suspensive claim).¹²⁵
- who is to be removed to a third country, in which they embarked for the UK or any other country (listed in the Schedule to the Bill) where there is reason to believe they may be admitted (such as Rwanda), may bring a suspensive claim.
- can have any human rights claim they make, including that their removal to a third country would be unlawful under section 6 HRA 1998, declared inadmissible unless ‘exceptional circumstances’ apply, and without any right of appeal.¹²⁶

An individual who is not a national of a country listed in section 80AA:

- cannot be removed to their country of nationality or to a country in which they have obtained an identity document.
- who is to be removed to a third country, in which they embarked for the UK or any other country (listed in the Schedule) where there is reason to believe they may be admitted (such as Rwanda), may also bring a suspensive claim.
- can additionally make a human rights claim against removal to a third country, which does not suspend removal, and, if refused, there is no right of appeal but the decision may be challenged by way of an application for judicial review.¹²⁷

¹²⁴ ‘Exceptional circumstances’ are narrowly defined in Clause 5(5) with reference to Article 15 ECHR and Article 7(1) of the Treaty on European Union.

¹²⁵ On the Bill’s introduction, Clause 4(1)(d), read with Clause 1(2)(h), appeared to mean the Home Secretary must disregard court orders (including those suspending removal) made under judicial review procedures. This intention of the Government was confirmed in Report stage by the addition of new Clause 52 ‘Interim remedies’.

¹²⁶ This is the effect of Clause 57.

¹²⁷ Clause 40(3)-(6).

What is a suspensive claim?

Suspensive claims are only against removals to third countries listed in the Schedule.

Suspensive claims are not human rights claims. Therefore, any human rights claim (which would not itself be suspensive) would need to be made additionally and would run concurrently to the suspensive claim process.

There are only two types of suspensive claims:

1. **Serious harm suspensive claims** for which a person must show that they would face a *'real, imminent and foreseeable risk of serious and irreversible harm'* and, further, that the harm would arise before the period it will take for their human rights claim to be decided, including the time for judicial review¹²⁸ to be concluded. Specifically precluded from constituting serious and irreversible harm is *'any harm'* resulting from a lower standard of healthcare in the third country. Furthermore, Clause 39 still provides that the Home Secretary *may* amend the definition of *serious and irreversible harm* in regulations.
2. **Factual suspensive claims** for which a person must show that the Home Secretary or immigration officer has made a factual mistake in deciding that the person meets the removal conditions.¹²⁹

New “Fast Track” Procedure

In 2015, Nicol J quashed the previous Fast Track Rules 2014, finding them to be structurally unfair and to put appellants at a serious procedural disadvantage. This was upheld in the leading judgment of then Master of the Rolls, Lord Dyson, who concluded that ‘justice and fairness should not be sacrificed on the altar of speed and efficiency’.¹³⁰

Nevertheless, this Bill proposes a new “fast track” procedure for appeals.

1. **Individual to lodge suspensive claim within 8 days**, beginning with the day on which the person is given the third country removal notice: The claim must contain *'compelling'* evidence, be in a form and manner yet to be prescribed, and contain information yet to be prescribed.¹³¹ This is an extremely short period of time for a person without a legal representative to find one, give instructions, gather evidence, and make the suspensive claim.

Out of time claims:

- a. If a person fails to meet the 8-day timeframe, they must provide *'compelling reasons'* why they did not claim in-time.

¹²⁸ See definition of ‘relevant period’ in Clause 38(9).

¹²⁹ Clause 42(2)(a).

¹³⁰ *ibid* [49].

¹³¹ Clauses 41(5)(a) and 42(5)(a). These will also be prescribed in regulations made by the Secretary of State.

- b. If the Home Secretary decides there were not compelling reasons, a person can apply to the Upper Tribunal within 7 working days for a declaration that there were such reasons.
 - c. The Upper Tribunal must determine the declaration application and give notice within 7 working days.
 - d. There is no right of appeal, and there are limited grounds for judicial review (given the ouster in Clause 49), if the Upper Tribunal finds there were no such reasons.
2. **Secretary of State to make a decision on the suspensive claim within 4 days of receipt**,¹³² unless the decision period is extended: The decision maker may accept the claim, refuse the claim, or refuse it and also certify that it is ‘*clearly unfounded*’.
- a. **If the claim is refused but not certified as clearly unfounded:**
 - i. An appeal must be lodged with the Upper Tribunal within 7 working days. The only available grounds of appeal are that the ‘*serious harm*’ condition, or that a mistake of fact occurred and ‘*compelling*’ evidence must be provided in the notice of appeal.
 - ii. The Upper Tribunal must make a decision within 23 working days.¹³³
 - iii. Onward appeal is to the Court of Appeal or Court of Session.¹³⁴
 - b. **If the claim is refused and certified as clearly unfounded**¹³⁵:
 - i. An application for permission to appeal must be made to the Upper Tribunal within 7 working days. There is no automatic right of appeal, and the thresholds are raised. For a serious harm suspensive claim, the Upper Tribunal may grant permission ‘*only*’ if it considers there is ‘*compelling*’ evidence that the person meets the ‘*serious harm condition*’ and the risk is ‘*obvious*’.¹³⁶ Permission hearings will be on the papers only, unless the Upper Tribunal considers an oral hearing is necessary for justice to be done in a particular case.¹³⁷ There is no right of onward appeal, and very limited scope for judicial review given the ouster in Clause 49.
 - ii. The Upper Tribunal must determine the permission application and give notice within 7 working days.
 - iii. If permission to appeal is granted, then the procedure reverts to §2(a) above.

¹³² EN, para 178.

¹³³ Clause 48(1)(b).

¹³⁴ Clause 43(7).

¹³⁵ Under Clause 41(3) or Clause 42(3).

¹³⁶ Clause 44(3).

¹³⁷ Clause 44(5).

- iv. If permission to appeal is refused, there is no right of appeal, and there are limited grounds for judicial review (given the ouster in Clause 49).

Time limits can be extended by the Tribunal ‘if it is satisfied that it is the *only* way to secure that justice is done in a particular case’, and time limits for determining applications for permission to appeal or making a decision on an appeal can be extended by up to 3 working days where a new matter is raised.^{138 139}

Key problems with this new “fast track” procedure include:

- **Restriction of judicial oversight:** Even where appeal rights exist, these are only to the Upper Tribunal (or for certain cases to the Special Immigration Appeals Commission), with entire categories of decision unchallengeable due to the ouster in Clause 49.
- **Timescales are unreasonably short for applicants:** The restriction of judicial oversight is especially concerning because the timescales imposed on both the individual and the Home Secretary are unreasonably short. It is foreseeable that many people will struggle to express themselves in English let alone to make ‘*compelling*’ written representations, meeting the form and content yet to be prescribed, while detained and without access to a lawyer within eight days of being served a notice of removal. This is a wholly unreasonable burden on a claimant. There are strong and legitimate reasons why people seeking safety may delay revealing their experiences or coming forward with evidence. This may be due to trauma, distrust of authorities, or fear they will face continued persecution. Further, it is wholly unrealistic to expect that people fleeing persecution will come equipped with extensive ‘*compelling*’ evidence. These difficulties will only be exacerbated if the person is detained during the process, as distress levels are often so high that it is not possible to take a full witness statement and doing so risks re-traumatisation. This will result in extremely vulnerable people being removed simply due to unnecessary timing constraints, putting them at risk of harm and in some cases death.
- **Timescales are unreasonably short for decision making:** The requirement for the Secretary of State to consider those representations within just four days is likely to lead to hurried and low-quality decision making, rubber-stamping rejections. There are also short timescales for the Upper Tribunal to determine applications and appeals. When shortened timescales in the area of asylum decision making have been attempted in the past, they have led to the higher courts finding an unacceptable risk of unfairness in the system, and the suspension of fast-track systems. The proposed timescales and tests, combined with the lack of judicial oversight, build in unfairness and are likely to be unworkable in practice.
- **Upper Tribunal workload:** The provisions will impose a huge burden on the resources of the Upper Tribunal and Court of Appeal while removing all appeals to the specialist First-tier Tribunal. The Bill was so unworkable, as introduced, that the Home Secretary introduced her

¹³⁸ Clause 48(4) (emphasis added).

own amendments during Committee in the Commons to amend the Tribunals, Courts and Enforcement Act 2007 to treat all First-tier tribunal judges as Upper Tribunal judges.¹⁴⁰

- **There does not appear to be any provision for making a fresh claim that removal would result in ‘serious irreversible harm’:** Any new evidence, no matter how compelling, has to meet the cumbersome requirements relating to ‘new matters’ requiring permission of the Home Secretary, proof of ‘compelling’ reasons for lateness, and may require a determination from the Upper Tribunal or SIAC that there *were* compelling reasons why the details of the new matter were not provided sooner. If it is determined on the papers that there were no compelling reasons, there is no oral renewal hearing, and the decision is not subject to appeal to the Court of Appeal or Court of Session.¹⁴¹ This is blatant interference with judicial independence over the administration of court hearings for the benefit of the executive. Where fundamental rights and a test of ‘serious and irreversible harm’ are in play, new evidence should simply be accepted, if credible, without having to meet additional hurdles. These unnecessary hurdles will only add to the workload of all parties, the Upper Tribunal and SIAC.
- **Clause 38 creates a new test and will lead to litigation of that test:** Although the term ‘serious and irreversible harm’ is derived from the case law of the European Court of Human Rights and already appears in the Immigration Act 2014, that Act provides for ‘serious irreversible harm’ to be an example of when removal might be unlawful, rather than setting out the sole test. Setting ‘serious and irreversible harm’ as a new statutory test will inevitably lead to litigation on the meaning of the test and will likely conflict with ECHR protections.
- **Provision for Secretary of State to amend the meaning of ‘serious and irreversible harm’ through Regulations:** This provision is extremely concerning, especially set against the restrictions of judicial oversight and the unreasonably tight timeframes for making a Clause 41 or Clause 42 suspensive claim. The Home Secretary may define the test through Regulations in response to disagreement with judicial interpretation of Clause 38. Any definition given by the Home Secretary is very likely to be incompatible with ECHR protections and judicial interpretation in other case law. Clause 39 hands power to the executive to define and limit the scope of fundamental rights without full [Parliamentary scrutiny](#).

The Legal Proceedings section of this Briefing is endorsed by: the Immigration Law Practitioners’ Association (ILPA); Anti Trafficking and Labour Exploitation Unit (ATLEU); Public Law Project; and Refugee Action. Please note that contributing organisations have only approved the content of the specific section(s) of this Briefing which they have endorsed and should not be taken as endorsing any other parts of the Briefing.

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¹⁴⁰ Clause 50 amends section 5(1) of the Tribunals, Courts and Enforcement Act 2007 to provide for judges of the First-tier Tribunal (including Employment Judges) to be judges of the Upper Tribunal.

¹⁴¹ Clause 47(8).

Legal Aid

Provision of legal aid to individuals who seek redress is not simply a matter of compassion; it is a key component in ensuring the constitutional right of access to justice, itself inherent in the rule of law.¹⁴² The courts have repeatedly upheld the principle that a failure to provide legal aid can amount to a breach of fundamental rights.¹⁴³ Legal aid is essential in ensuring that people without means can secure effective access to justice and redress. This is particularly true where the areas of law dealt with in this Bill - immigration, asylum, human rights, and nationality - are increasingly complex and need specialist advice. Despite this, this Bill provides no legal support for people trapped in its provisions.

Legal Services must be in Scope

Despite this, the Bill does not secure or ensure the right of individuals to free legal advice and representation for all affected by it. On introduction, it contained no specific provisions¹⁴⁴ on legal aid in England, Wales, or in the other devolved nations.

At Report Stage in the House of Commons, Clause 54 was introduced to the Bill. However, it only ensures that provision of civil legal services to a person in receipt of a removal notice is in scope of legal aid. Prior to receipt of a removal notice, the provision does not confirm or secure access to free legal advice in relation to making an asylum or human rights claim. Furthermore, the Bill does not ensure such provision in Scotland and Northern Ireland.

In England and Wales, most non-asylum immigration matters are excluded from the scope of legal aid. In order to access legal aid, individuals have to apply for Exceptional Case Funding ('ECF'), on the basis that refusal of legal aid would risk breaching an individual's rights under the ECHR.¹⁴⁵ Solicitors are often reluctant to support such applications, as they do not receive remuneration when claims are unsuccessful. ECF, however, is '*heavily dependent on the participation of [these] providers, given the difficulties clearly faced by lay applicants and the absolute need of assistance for those with disabilities.*'¹⁴⁶ The cumulative effect makes ECF, in the words of one judge, '*inherently defective and therefore unfair.*'¹⁴⁷ In cases where ECF is granted, the applicant is personally responsible for locating a legal aid provider with capacity to support their case, taking, in some instances, upwards of six months.

¹⁴² Echoing the words of Lord Reed in *R (Unison) v Lord Chancellor* [2017] UKSC 51 at §66.

¹⁴³ *R (oao Gudaviciene & Others) v Director of Legal Aid Casework and Lord Chancellor* [2014] EWCA Civ 1622; 'Spending of the Ministry of Justice on legal aid' House of Commons Library briefing, (October 2020) <<https://researchbriefings.files.parliament.uk/documents/CDP-2020-0115/CDP-2020-0115.pdf>> accessed 20 April 2023 [1.2].

¹⁴⁴ By contrast, the Nationality and Borders Act 2022 contained specific provisions in ss. 66 and 67 to increase the scope of legal aid in England and Wales to cover certain add-on services in relation to referral into the NRM and seven hours of civil legal services for recipients of Priority Removal Notices (which are the precursor to that Act's expedited appeal process) in s. 25.

¹⁴⁵ Legal Aid, Sentencing and Punishment of Offenders Act 2012, s. 10.

¹⁴⁶ *The Director of Legal Aid Casework & Anor v IS* [2016] EWCA Civ 464 [55].

¹⁴⁷ *ibid*, per Briggs LJ dissenting [68].

Accordingly, the Bill must secure the provision and availability of in scope civil legal services in relation to all protection, human rights, and suspensive claims, and subsequent challenges and any legal proceedings to which this Act extends. ECF cannot fill the gap left by any services left out of scope.

Lack of Legal Representation

This Bill provides an extremely short timeframe of eight days for an individual to *seek* legal advice and representation and provide sufficient instructions for a representative to lodge a suspensive claim with compelling evidence against removal to a third country. As a result, the vast number of inadmissible applicants, which the Home Secretary will have a duty to remove, will simply not be able to find a legal representative to challenge their detention, make an asylum, human rights and/or suspensive claim, or plead any exceptional circumstances as to why they should be excluded from the draconian provisions of this Bill. Even where legal aid is available, it will often be difficult or even impossible for vulnerable individuals to access legal advice, particularly if they are in detention, face language or practical barriers, and/or are traumatised.

In England and Wales, following a decade of austerity and cuts to legal aid services and fees,¹⁴⁸ the decreasing number of legal aid providers in asylum and immigration law with capacity to take these cases makes access to free legal advice impossible in any meaningful sense. Government figures from 2022 suggest that around half the number of people seeking asylum do not have access to legal aid advice.¹⁴⁹ An October 2022 report by the Anti Trafficking and Labour Exploitation Unit (ATLEU) reveals a staggering 90% of support workers surveyed struggled to find a legal aid immigration lawyer for a survivor of trafficking and modern slavery in the past year, with devastating impacts.¹⁵⁰

Further, in December 2022, a survey of people in detention conducted by Bail for Immigration Detainees showed that only 43% had legal representation.¹⁵¹ Evidence gathered by Detention Action in 2021 showed that the Detained Duty Advice Scheme through which 30 minutes of free legal advice are provided to people in detention (after which the representative must undertake means and merits test) was operating with persistent fundamental defects, including people not knowing whether they had a legal representative willing to take on their case at the end of the

¹⁴⁸ For example, hourly rates, which were introduced on 1 October 2007 in the Community Legal Service (Funding) Order 2007 have not risen, but were further cut in 2011 by 10% in the Community Legal Service (Funding) (Amendment No.2) Order 2011.

¹⁴⁹ Dr Jo Wilding, ‘New Freedom of Information data indicates half of asylum applicants are unable to access legal aid representation’ *Refugee Law Initiative* (4 November 2022) <<https://rli.blogs.sas.ac.uk/2022/11/04/new-freedom-of-information-data-indicates-half-of-asylum-applicants-are-unable-to-access-legal-aid-representation/>> accessed 19 April 2023.

¹⁵⁰ Anti Trafficking & Labour Exploitation Unit (ATLEU) “‘It has destroyed me’”: A legal advice system on the brink’ (2022) 4 <<https://drive.google.com/file/d/15xlzaXCpN2eyXSIw7Ubx2Au1lr6mRXRF/view>> accessed 19 April 2023.

¹⁵¹ Bail for Immigration Detainees, ‘Autumn Legal Advice Survey’ (December 2022) <https://hubble-live-assets.s3.amazonaws.com/biduk/file_asset/file/716/221205_LAS.pdf> accessed 19 April 2023.

session, being denied representation on the basis of complexity or provider capacity, not being given written advice, and providers lacking knowledge of law and practice on key issues.¹⁵²

By introducing new “fast track” procedures, claims, applications, and appeals, the Bill will place further limitations on the already stretched capacity of a limited pool of providers practising in this area. To make matters worse, expansion of the detention estate in advice deserts¹⁵³ across England and Wales will erect a further barrier to access to advice and representation. For example, in Lincolnshire, where the Home Office has proposed to create a new, large-scale asylum accommodation facility at RAF Scampton¹⁵⁴, there is no provision for legal aid at all.¹⁵⁵ Significant capacity within these sectors is spent on searching for legal representation, detracting from the ability to support the core needs of survivors and other vulnerable persons. However, even more fundamentally, without access to legal advice, they may be left without access to support, liberty, safety and justice.

The Legal Aid section of this Briefing is endorsed by the Joint Council for the Welfare of Immigrants (JCWI), the Immigration Law Practitioners’ Association (ILPA), Anti Trafficking and Labour Exploitation Unit (ATLEU), Public Law Project, and Refugee Action. Please note that contributing organisations have only approved the content of the specific section(s) of this Briefing which they have endorsed and should not be taken as endorsing any other parts of the Briefing.

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¹⁵² *R (Detention Action) v Lord Chancellor* [2022] EWHC 18 (Admin).

¹⁵³ Jo Wilding, *Droughts and Deserts: A report on the immigration legal aid market* (2019) <<https://www.jowilding.org/assets/files/Droughts%20and%20Deserts%20final%20report.pdf>> (accessed 9 August 2022); J. Wilding, M. Mguni, T. Van Isacker, *A Huge Gulf: Demand and Supply for Immigration Legal Advice in London* (2021) <<https://www.phf.org.uk/publications/a-huge-gulf-demand-and-supply-for-immigration-legal-advice-in-london/>> (accessed 9 August 2022); Jo Wilding, *The Legal Aid Market* (2021, Bristol University Press).

¹⁵⁴ Joe Duggan, ‘Row erupts over plans for detention centre at RAF base that ‘may scupper £300m revamp project’ *i-News* (8 March 2023) <<https://i-news.co.uk/news/immigration-detention-centre-plans-raf-scampton-row-regeneration-2194731>> accessed 20 April 2023.

¹⁵⁵ Jo Wilding, *No access to justice: How legal advice deserts fail refugees, migrants and our communities* (2022, Refugee Action) 19 <https://assets.website-files.com/5eb86d8dfb1f1e1609be988b/628f50a1917c740a7f1539c1_No%20access%20to%20justice-%20how%20legal%20advice%20deserts%20fail%20refugees%20and%20our%20communities.pdf> accessed 20 April 2023.

Rule of Law

Retrospectivity

A vast number of provisions in this Bill have retrospective effect and apply to persons who entered or arrived in the UK, on or after 7 March 2023 (the day this Bill was introduced) but before the Bill becomes law (assuming it is enacted). No justification or exceptional circumstances have been provided. Retrospective law-making undermines the rule of law.

Legal certainty requires that individuals know what their rights are and how they can be enforced. Lord Bingham's first principle of the rule of law was that the law should be 'accessible and, so far as possible, intelligible, clear and predictable'. This is especially important when the UK's international legal obligations and fundamental human rights are at stake. For example, under this Bill, an adult who arrived in the UK and made an asylum claim, on or after 7 March 2023 but before this Bill becomes law, must have their protection or human rights claim declared inadmissible under Clause 4, and the Home Secretary will be under a duty to remove them, if they meet the four conditions in Clause 2. Such individuals could not have planned their life according to the law, as this Bill was not law at the time of their arrival. The retrospective provisions are likely to affect a significant number of people; it is a recipe for legal chaos, uncertainty and distress for individuals with considerable vulnerability in the asylum system.

Attack on Judicial Scrutiny

In addition to undermining the role of our domestic courts through disapplying their interpretative obligations under [section 3 HRA](#) and giving Ministers the ability to effectively ignore Rule 39 [interim measures indicated by the ECtHR](#), the Bill severely limits common law principles and ousts judicial scrutiny in relation to detention and legal proceedings suspending removal. In exercising its sovereignty, Parliament should give careful consideration to overturning principles enshrined in the common law.

Detention

The provisions in Clause 11 of this Bill would mean that someone can be detained for as long as the Home Secretary thinks is necessary in order to remove that person, based on her subjective view. This clause would overturn the long-established common law principle in *Hardial Singh* that it is for the court to decide for itself whether the period of detention is objectively reasonable.¹⁵⁶ This principle is important for ensuring compliance with Article 5 ECHR.¹⁵⁷

This is an example of the Government attempting to insulate itself from judicial scrutiny. These changes would lead to an expansion of the power of administrative detention beyond anything

¹⁵⁶ EN, para 88.

¹⁵⁷ See: *SSHD v Fardous* [2015] EWCA Civ 931 at [43]. Lord Chief Justice Thomas held, 'It is this objective approach of the court which reviews the evidence available at the time that removes any question that the period of detention can be viewed as arbitrary in terms of Article 5 of the European Convention on Human Rights'.

previously seen in the state, exercisable at the whim of a civil servant, with minimal judicial oversight.

The provisions in Clause 12 of the Bill take such insulation of detention decisions from judicial scrutiny a step further by expressly ousting the powers of the court. Clause 12(4) makes the Home Secretary's decision final and not liable to be overturned in court for 28 days. The only exceptions are: (a) judicial review on very limited grounds, which will almost never arise in reality (bad faith and fundamental denial of natural justice); and (b) a writ of habeas corpus,¹⁵⁸ which is where a court examines whether 'someone is detained without any authority or the purported authority is beyond the powers of the person authorising the detention and so is unlawful'.¹⁵⁹

But given that the Bill expressly authorises a blanket power of indefinite detention, it is likely to be very difficult to succeed *via* habeas corpus. There would be no basis for a person to argue that they were being unlawfully detained, because the Bill authorises it. A court would have to imply or read in conditions that are not on the face of the Bill and, given that the senior judiciary currently strongly prioritises the literal language of legislation,¹⁶⁰ this would be an extremely difficult legal argument.

Disregard for Court Orders

Clause 1 requires so far as it is possible to do so for the Bill to be read and given effect so as to ensure 'all other legal challenges to the removal of persons under this Act do not suspend the duty to make arrangements for their removal'.¹⁶¹

Clause 4(1)(d) requires the Home Secretary's duty and power to remove persons to apply regardless of whether 'the person makes an application for judicial review in relation to their removal from the United Kingdom under this Act'. The language used in Clause 4 suggests that the lodging of a claim for judicial review in the High Court will not in and of itself 'suspend' the duty or power to make arrangements for removal. It is unclear if the intention is that an order of the court (including an interim order) in such a claim could not have the effect of suspending the duty or power.

If the combination of these provisions means that the Home Secretary is above the reach of the courts and must disregard court orders made under judicial review procedures, it will place the government and the courts on a collision course.

Clause 52, introduced at Report Stage, would further exacerbate this by providing that a court may not grant an interim remedy that prevents or delays, or that has the effect of preventing or delaying, the removal of the person from the United Kingdom in pursuance of the decision. This extends far beyond Clause 53 concerning interim measures of the ECtHR: it would apply to domestic judicial reviews whereby an individual might seek interim relief to prevent their removal or deportation, so that they can have a chance to present their full case to the court. Clause 52 would remove a

¹⁵⁸ In Scotland, the right to apply to the Court of Session for suspension and liberation is preserved.

¹⁵⁹ *R v Secretary of State for the Home Department ex p. Cheblak* [1991] 1 WLR 890 at 894C-E.

¹⁶⁰ See, for example, *R (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department* [2022] UKSC 3

¹⁶¹ Clause 1(2)(h) and (3).

vital way that the courts to act quickly to prevent actual or threatened harm to an individual. One of the logical implications of Clause 52 would be to require courts to make quicker final decisions; however, given existing court backlogs (and the Bill's further exacerbation of them), this is unlikely to be practical.

Suspensive Claim Ouster Clauses

Clauses 49 and 51(5) set out an 'ouster' which severely limits the grounds on which certain decisions of the Upper Tribunal and Special Immigration Appeals Commission ('SIAC') can be challenged in the High Court or Court of Session by way of judicial review.

The decisions of the Upper Tribunal that Clause 49 would insulate from challenge relate to:

1. applications for permission to appeal against suspensive claims declared 'clearly unfounded' by the Home Secretary;
2. applications for a declaration that there were 'compelling reasons' a person made a suspensive claim out of time;
3. determinations of the Upper Tribunal as to whether there were 'compelling reasons' for a person who has raised a new matter in the course of an appeal or application not to have raised them before the end of the eight-day claim period.

Clause 51(5) would insulate from challenge decisions of SIAC in relation to applications for a declaration that there were compelling reasons for the person not to have provided details of the new matter to the Home Secretary before the end of the claim period.

But for these 'ouster clauses', these decisions of the Upper Tribunal and SIAC would fall within the supervisory jurisdiction, exercised through the judicial review procedure.

As a result, these decisions can only be challenged in extremely limited circumstances set out in Clause 49(4) and 51(5), which disapplies this ousting so far as the decision involves or gives rise to any question as to whether the Upper Tribunal or SIAC:

- has/had a valid application before it;
- is/was properly constituted for the purpose of dealing with the application;
- is acting/has acted in bad faith, or in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice.

Therefore, the ousters would make entire categories of decision unchallengeable. Most of these decisions will have been subject to the tight time limits in the Bill, and therefore will have been rushed (and will be looking at Home Office processes which were themselves rushed). These will be the final decisions on a person's life and safety.

These ouster clauses are not comparable to section 2 of the Judicial Review and Courts Act 2022, as in the ousted *Cart* judicial reviews, the First-tier Tribunal will have considered and refused the appeal, before both the First-tier Tribunal and the Upper Tribunal having considered and refused the application for permission to appeal. Under these clauses, only a single First-tier Tribunal

judge, sitting in the Upper Tribunal, need have refused the relevant application before an appeal on the matter is not heard and the supervisory jurisdiction of our courts is ousted.

The consequences of such an ouster of jurisdiction are extremely serious. One can have full respect for the institutional expertise of the Upper Tribunal and SIAC, and still admit the possibility that it may lapse into error in a given case. One can also admit the possibility that the decisions of higher courts may be required to correct that error. If this ouster clause is enacted, the question will arise as to whether there is a meaningful method to challenge these Upper Tribunal and SIAC decisions.

The last attempt of the government to introduce a clause, that created a single tier tribunal and ousted supervision of higher courts, in the Asylum and Immigration (Treatment of Claimants, etc.) Bill, in the 2003-2004 session of Parliament, was condemned by peers as ‘contrary to the constitutional principle on which our nation is founded that Her Majesty’s courts must always be open to all, citizens and foreigners alike, who seek just redress of perceived wrongs’,¹⁶² a ‘constitutional outrage and an affront to the rule of law’,¹⁶³ and ‘shameful’.¹⁶⁴ Faced with strong resistance in the House of Lords, in 2004, the Government relented and permitted oversight by the administrative court.¹⁶⁵

Age Assessments

New Clause 55, introduced during Report stage in the House of Commons, provides that if a decision regarding the age of a person (who meets the four conditions of Clause 2) is made under sections 50 or 51 of the Nationality and Borders Act 2022, the person cannot appeal the decision. This is the case even if the age assessment is made for purposes other than removal, such as for a local authority deciding whether or how to exercise any of its functions, under Part 3 to 5 of the CA 1989 or statutory provisions conferring corresponding functions on local authorities in the devolved nations.

Any judicial review will not prevent or suspend the Home Secretary from exercising a duty or power to remove a person under this Bill. Therefore, if removed, the age disputed person would have to continue their judicial review from overseas, and may struggle to find the appropriate support and facilities to effectively participate in it. Furthermore, a court may *only* quash the decision on the basis of a factual or legal error.

In the supplementary ECHR memorandum issued alongside the new amendments to the Bill, the Government stated that while it was satisfied the provision was "capable" of being applied

¹⁶² Immigration Law Practitioners' Association, *A Briefing for Peers on the Asylum and Immigration (Treatment of Claimants, etc.) Bill Second Reading in the House of Lords 15 March 2004, Clause 14 - the Unification of the Appeal System* <<https://ilpa.org.uk/wp-content/uploads/resources/12992/04.03.334.pdf>> accessed 19 April 2023. See page 11 for the extract of the speech of Lord Steyn at Inner Temple Hall on 3 March 2004.

¹⁶³ *ibid*, Col 72, per Lord Donaldson of Lynton.

¹⁶⁴ *ibid*, Col 92, per Baroness Kennedy of The Shaws.

¹⁶⁵ *ibid*, Col 51, Lord Falconer.

consistently with Article 6 ECHR, "Lord Murray of Blidworth would be unable to make a statement under section 19(1)(a) of the Human Rights Act 1998 in respect of this new clause."¹⁶⁶

A 2022 review by the Independent Chief Inspector of Borders and Immigration found substantial issues in the Home Office's practice of age assessments, stating that at Tug Haven '*the age assessment process was perfunctory and engagement with the young people was minimal. Data collected about the number of age dispute cases handled at TH was poor and no feedback was given to operational staff*'¹⁶⁷. The risk of Home Office performing age assessments was highlighted also by the British Association of Social workers who recommended that their members not take positions on the Home Office's National Age Assessment Board.

Furthermore, there are substantial problems with the Home Office's method for age assessments. Guidance for the National Age Assessment Board makes clear that '*physical appearance is a notoriously unreliable basis for assessment of chronological age*' and '*demeanour can also be notoriously unreliable and by itself constitutes only somewhat fragile material*'. The Interim Age Estimation Science Advisory Committee stated clearly, in a review of age assessment methods for the Home Office that the '*committee acknowledges that there is no infallible method for either biological or social-worker-led age assessment that will provide a perfect match to chronological age*'¹⁶⁸. Yet the Home Office will remove the right to appeal this decision; meaning children who are wrongly assessed to be over 18 will be placed at risk of substantial harm with no remedy available.

Attack on Parliamentary Scrutiny

The very process followed with respect to the Bill has made it difficult for Parliament to exercise proper scrutiny of the Bill. There was no public consultation, as there was before the Nationality and Borders Act 2022 was introduced, and no pre-legislative scrutiny (given the constitutional implications). Against the usual convention, and with no objective justification, the Bill's second reading was rushed through only a few days after its introduction into the House of Commons. Instead of the usual detailed consideration and evidence-gathering at committee stage, it had a two-day Committee of the Whole House. The Government has also failed to publish an official impact assessment explaining its view of the real-world implications of this Bill. This has also prevented proper scrutiny by parliamentarians, civil society organisations, and expert commentators. To make matters worse, the Bill remains incomplete: four placeholder clauses, or

¹⁶⁶ Home Office, Illegal Migration Bill Supplementary European Convention on Human Rights Memorandum, 25 April 2023, <https://publications.parliament.uk/pa/bills/cbill/58-03/0284/SuppECHRmemo.pdf>

¹⁶⁷ The Independent Chief Inspector of Borders and Immigration *An inspection of the initial processing of migrants arriving via small boats at Tug Haven and Western Jet Foil* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1092487/E02726679_ICIBI_Tug_Haven_and_Western_Jet_Foil_Web_Accessible.pdf>

¹⁶⁸ Home Office Interim Age Estimation Science Advisory Committee, 'Biological evaluation methods to assist in assessing the age of unaccompanied asylum-seeking children' (published 10 January 2023) [9.8] <<https://www.gov.uk/government/publications/methods-to-assess-the-age-of-unaccompanied-asylum-seeking-children/biological-evaluation-methods-to-assist-in-assessing-the-age-of-unaccompanied-asylum-seeking-children-accessible>> accessed 2 May 2023

legislative IOUs, remain to be elaborated, meaning Parliamentarians are legislating in the dark on significant issues such as the UK's continued adherence to international obligations.

Parliament has not only been side-lined by the process followed with respect to this Bill: its substance also undermines parliamentary oversight of the law. The Bill gratuitously grants the Home Secretary broad regulation-making powers which are not subject to the full rigour of parliamentary scrutiny. This matters because those regulations will give the government the power to further undermine human rights and stop people from seeking legitimate protection in this country. We would highlight the following:

- Clause 6 gives the Home Secretary the power to include new countries which she is satisfied are safe to return asylum seekers to. The Minister must obtain the approval of Parliament through laying draft regulations in each House under Clause 63(4)(b) but it is exceptionally rare for regulations to be defeated in either House, undermining this mechanism as one providing serious and searching scrutiny.
- Clause 53 provides that where the ECtHR has issued an interim measure in favour of a person who the Home Secretary intends to remove from the UK under the Bill, a Minister has the discretion to decide whether or not to disapply the duty on the Home Secretary to remove that person. If the Minister decides that the duty continues to apply, then courts, tribunals, the Home Secretary, and immigration officers may not have regard to the interim measure and must enact the removal. Parliamentarians are effectively being asked to hand over significant powers to the Home Secretary to breach our international obligations, without knowing anything about what the Home Secretary will seek to do and who this violation of our obligations will harm.
- Clause 56 gives the Home Secretary the power to make regulations about the effect of a decision of a person not to consent to the use of a specified scientific method for the purposes of an age assessment, where there are no reasonable grounds for the decision. Regulations may even provide that the person is to be treated as if the decision-maker had decided that the person was over the age of 18, if the child refuses to undergo scientific age assessment. This would contravene the recommendations of the Interim Age Estimation Science Advisory Committee, who recommended that *'[i]n line with the guidance produced by the European Union Agency for Asylum (EUAA, 2018) no automatic assumptions or consequences should result from refusal to consent to biological age assessment and, in cases of refusal, the applicant should not be automatically considered an adult. The consequences of refusal should not be so disproportionately adverse as to bias the applicant towards consent.'*¹⁶⁹
- Clause 58 empowers the Home Secretary to set an annual cap on the number of refugees entering the UK through approved schemes. While Clause 59 requires the Home Secretary to produce a report six months after the enactment of the Bill detailing, in particular, the

¹⁶⁹ Home Office Interim Age Estimation Science Advisory Committee, 'Biological evaluation methods to assist in assessing the age of unaccompanied asylum-seeking children' (published 10 January 2023) [9.8] <<https://www.gov.uk/government/publications/methods-to-assess-the-age-of-unaccompanied-asylum-seeking-children/biological-evaluation-methods-to-assist-in-assessing-the-age-of-unaccompanied-asylum-seeking-children-accessible>> accessed 2 May 2023.

safe routes to the UK which exist and any proposed routes she intends to create, there is nothing in the Bill which imposes a duty on the Home Secretary to establish and facilitate any safe routes at all. This means that Parliament cannot be satisfied that safe routes will be created. The Home Secretary's admission that she would not be creating safe routes for people - including children - fleeing Sudan was revealing and would not change under this legislation.¹⁷⁰ The Bill is discretionary: the Home Secretary is obliged to provide only information and this Bill empowers Parliament to require nothing more of her.

- Clause 10, rather than providing safeguards for unaccompanied children in detention on the face of the Bill, provides the Home Secretary to specify in regulations (subject to the negative procedure) the circumstances in which she will exercise her powers to detain unaccompanied children, and she *may* specify time limits that are to apply pending a decision to remove and removal of the child under the Bill.
- Clause 11 repeatedly emphasises the importance of the opinion of the Home Secretary in what a 'reasonable period' of detention is. At present, it is for the courts to apply the *Hardial Singh* principles in a Judicial Review claim. Lord Thomas in *Fardous v SSHD* made clear that objective judicial oversight of the lawfulness of detention ensured it was not arbitrary for the purpose of Article 5 ECHR.
- Clause 21 gives the Home Secretary retrospective power to revoke limited leave to remain granted to victims of modern slavery under the Nationality and Borders Act 2022 who arrived after the Bill was introduced.

The Rule of Law section of this Briefing is endorsed by: Public Law Project; Refugee Action; Liberty; and the Immigration Law Practitioners' Association (ILPA). Please note that contributing organisations have only approved the content of the specific section(s) of this Briefing which they have endorsed and should not be taken as endorsing any other parts of the Briefing.

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¹⁷⁰ The Independent (28 April 2023) *Suella Braverman appears to rule out safe and legal routes for refugees from Sudan* <<https://www.independent.co.uk/news/uk/suella-braverman-sudan-refugees-uk-b2327972.html>> accessed 2 May 2023.

Cap on entrants using safe and legal routes (Clause 58)

Clause 58 requires the Home Secretary to make, by regulations,¹⁷¹ an annual cap on the number of persons who can enter the UK using ‘safe and legal’ routes. This is a cap, not a target or a quota. It is a ‘maximum number’ of persons who can enter *via* these routes. This number may apply for several years,¹⁷² until revised by subsequent regulations. The Bill itself does not create any safe and legal routes.

If the UK exceeds the cap, in any year, the Home Secretary has six months to set out the number of people who entered using safe and legal routes in that year, and explain why the cap was exceeded, in a statement laid before Parliament.

The Home Secretary has a duty to consult with local authorities and other relevant bodies, as she ‘considers appropriate’, before setting the cap.¹⁷³ The purpose of this is to take into account their resources particularly in relation to housing and capacity to provide integration services. The duty to consult falls away if the cap urgently needs to be changed. The Explanatory Notes state this will be ‘in cases of humanitarian emergency’,¹⁷⁴ although this is not stated on the face of the Bill.

What is a ‘safe and legal’ route?

‘Safe and legal’ routes will be defined in regulations. This is a crucial aspect of the Bill, left to regulations subject only to the affirmative procedure. The Explanatory Notes have argued that defining the routes ‘depends on a number of factors including local authority capacity and the resettlement routes offered at the time of the regulations’.¹⁷⁵

Although the Explanatory Notes state that it ‘will not include those on work, family or study routes’,¹⁷⁶ this is not stated on the face of the Bill.

- **Bespoke Schemes:** There is nothing in the Bill or Explanatory Notes that would prevent Regulations including the bespoke resettlement schemes for Hong Kong, Afghanistan and Ukraine:
 - In 2022, 210,906 were granted under the Ukraine routes, and from 31 January 2021 to the end of 2022, there have been 129,415 grants on the Hong Kong route.¹⁷⁷ Therefore, if an annual cap was set at, for example, 50,000 people, it would be exceeded by these ‘safe and legal’ routes for Hong Kong and Ukraine, without the UK being able to resettle a single

¹⁷¹ The regulations are subject to the affirmative procedure, per Clause 63(4).

¹⁷² EN, para 220.

¹⁷³ Clause 58(2).

¹⁷⁴ EN, para 220.

¹⁷⁵ EN, para 221.

¹⁷⁶ EN, para 220.

¹⁷⁷ Home Office, ‘How many people do we grant protection to?’ (23 February 2023)

<https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-december-2022/how-many-people-do-we-grant-protection-to> accessed 12 March 2023.

vulnerable and persecuted person from any other country (unless the Home Secretary wished to have to explain to Parliament her reasons for exceeding the cap).

- Therefore, if the Afghan Citizens Resettlement Scheme (subject to its own 5-year cap of 20,000) were included in the definition of ‘safe and legal’ routes, this may serve to further defer operationalisation of its third pathway for vulnerable women, girls, and minorities at risk.¹⁷⁸ Similarly, if the uncapped Afghan Relocations and Assistance Policy were included in the definition of ‘safe and legal’ routes, this may serve as a *de facto* cap on the scheme for those who worked for or with the UK Government in Afghanistan.¹⁷⁹
- **Family Reunion:** In 2023, only ‘4,473 partners and children of refugees living in the UK were granted entry to the UK through family reunion visas’.¹⁸⁰ If family reunion was included as a ‘safe and legal’ route in regulations, as it is in paragraph 4 of the Explanatory Note, Clause 58 could cap the number of family members of refugees who may enter.
- **General Resettlement Routes:** If other general resettlement schemes, such as the UK Resettlement Scheme, Mandate Resettlement Scheme, and Community Sponsorship Scheme, which only resettled a total of 1,163 individuals in 2022,¹⁸¹ were included in the definition of ‘safe and legal’ routes, they may be unable to resettle any persons if the cap includes other routes, with simple entry application processes.

‘Safe and legal routes’ are inaccessible to most, and bespoke routes are restricted to a very small number of countries.

Moreover, those resettled on bespoke routes for Ukraine, Hong Kong, and Afghanistan, other than the pathway for those referred by the United Nations High Commissioner for Refugees (‘UNHCR’), are not recognised as refugees and are not given refugee family reunion rights.

The general UK and Mandate Resettlement Schemes depend on UNHCR identifying refugees. This ignores the fact that if fleeing persecution or war, individuals may not have time to wait for UNHCR to process their application. It also ignores the fact that the UNHCR may not have the capacity to identify eligible refugees. Further, UNHCR will only identify individuals outside their country of persecution, for example, after they have fled Afghanistan and are in Iran or Pakistan.¹⁸²

¹⁷⁸ Home Office, ‘Afghan citizens resettlement scheme’ (updated 16 August 2022)

<<https://www.gov.uk/guidance/afghan-citizens-resettlement-scheme>> accessed 12 March 2023. ‘Pathway 3 was designed to offer a route to resettlement for those at risk who supported the UK and international community effort in Afghanistan, as well as those who are particularly vulnerable, such as women and girls at risk and members of minority groups’.

¹⁷⁹ Immigration Rules, Appendix Afghan Relocation and Assistance Policy (ARAP).

¹⁸⁰ Home Office ‘National Statistics: How many people do we grant protection to?’ (23 February 2023) <<https://www.gov.uk/government/statistics/immigration-system-statistics-year-ending-december-2022/how-many-people-do-we-grant-protection-to>> accessed 12 March 2023.

¹⁸¹ Home Office, ‘Asylum and resettlement datasets: Asylum applications, initial decisions and resettlement Asy_D02’ <<https://www.gov.uk/government/statistical-data-sets/asylum-and-resettlement-datasets#local-authority-data>> accessed 12 March 2023.

¹⁸² UNHCR, ‘Information for Afghans’ (2022) <<https://help.unhcr.org/uk/afghanistan/>> accessed 12 March 2023.

The inadequacy of the general resettlement schemes and the bespoke Afghan schemes is shown by the fact that Afghans were among the top nationalities using small boats to reach the UK. In 2022, 20% of small boat arrivals were from Afghanistan.¹⁸³ The Government's statistics note that, 'in October to December 2022, only 9% of small boat arrivals were Albanian (1,099). Afghans were the top nationality for small boat arrivals in these 3 months, 33% of arrivals (3,834)'.¹⁸⁴ If Afghans manage to reach the UK via an irregular route, they are subject to all the measures that have come with the Nationality and Borders Act 2022 and that would come with the passing of this Bill.

The Government will effectively have *carte blanche*, through regulations, to determine which nationalities have the right to protection in the UK. The Government has not made any other proposals for 'safe and legal routes' for resettlement or family reunion. The fairness of this clause will entirely depend on the Government's capacity and ability to establish schemes which actually work in practice. Without such proposals, it is difficult to have confidence in the Government's commitment to resettle refugees in any meaningful non-discriminatory way. Picking and choosing who the UK is to protect is compounded by the lack of any safe and legal routes and access to territorial asylum in the UK, for the vast majority of those fleeing persecution. Imposing a cap simply compounds the existing problem.

What is missing are new proposals for 'safe and legal' routes to enter the UK to make this provision workable in addition to ensuring that the UK fulfils its obligations under the Refugee Convention. In the absence of this, vulnerable refugees are dependent on local UNHCR teams and infrastructure and the goodwill of the UK government. However, it is important to note that even if safe routes are provided, they can never be a substitute for the right to seek asylum as per the UK's obligation under international law.

The Cap on Entrants Using Safe and Legal Routes section of this Briefing is endorsed by: Immigration Law Practitioners' Association and Refugee Action. Please note that contributing organisations have only approved the content of the specific section(s) of this Briefing which they have endorsed and should not be taken as endorsing any other parts of the Briefing.

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¹⁸³ Home Office, 'Irregular migration to the UK, year ending December 2022' (23 February 2023) <<https://www.gov.uk/government/statistics/irregular-migration-to-the-uk-year-ending-december-2022/irregular-migration-to-the-uk-year-ending-december-2022#irregular-arrivals>> accessed 12 March 2023.

¹⁸⁴ *ibid.*

Unevidenced Claims, Misuse of Data & Inflammatory Rhetoric

Unevidenced claims of misuse and abuse of the modern slavery system

The government's unevidenced claims and inflammatory rhetoric have been roundly criticised by a number of United Nations Special Rapporteurs;¹⁸⁵ the former Independent Anti-Slavery Commissioner Dame Sara Thornton; the Office for Statistics Regulation, the Gangmasters and Labour Abuse Authority and by the anti-trafficking sector. This is in the context of wider criticism of the Home Secretary's rhetoric from former Conservative Chairman Baroness Warsi.

While survivors of trafficking brought to the UK are struggling to receive the support they need to recover and rebuild their lives, political rhetoric about them has become increasingly hostile, with the Government frequently claiming that victims of slavery are 'abusing the system'.¹⁸⁶ These allegations bear no relation to reality nor the Government's own data. The Statistics Regulator publicly reprimanded the Home Office for misusing modern slavery data,¹⁸⁷ following a sector-wide letter,¹⁸⁸ stating that the available figures did not support the claim that people were 'abusing' the UK's framework for recognising trafficking survivors.¹⁸⁹ Instead, rising trafficking cases were more likely to indicate growing awareness of the system among 'first responder' organisations like the police.

Those working on the frontline see cases every day where people who have been trafficked have not been identified and have been treated as criminals rather than victims and locked up, suffering significant physical and mental harm as result. One case shared in the report 'Abuse by the System: Survivors of Trafficking in Immigration Detention'¹⁹⁰ involved a young man detained and being subsequently trafficked following his release despite there being clear indicators of him being a victim of trafficking. He was detained following a further two-year period of detention during which his mental health suffered to the point that he was placed on suicide watch. He was

¹⁸⁵ OHCHR, 'UK: UN experts condemn attacks on credibility of slavery and trafficking victims' (19 December 2022) <<https://www.ohchr.org/en/press-releases/2022/12/uk-un-experts-condemn-attacks-credibility-slavery-and-trafficking-victims#:~:text=%E2%80%9CMisleading%20statements%20that%20exaggerate%20the,UN%20experts%20said%2C%20%E2%80%9Cand%20that>> accessed 31 March 2023.

¹⁸⁶ BBC News, 'Home Secretary Suella Braverman to change law to stop channel migrants' (4 October 2022). <<https://www.bbc.co.uk/news/uk-politics-63137769>> accessed 12 April 2023.

¹⁸⁷ Office for Statistics Regulation, 'Ed Humpherson to Maya Esslemont and Anna Powell-Smith: Modern slavery data' (8 December 2022) <<https://osr.statisticsauthority.gov.uk/correspondence/ed-humpherson-to-maya-esslemont-and-anna-powell-smith-modern-slavery-data/>> accessed 12 April 2023.

¹⁸⁸ Office for Statistics Regulation, 'Maya Esslemont and Anna Powell-Smith to Ed Humpherson: Modern slavery data' (26 October 2022) <<https://osr.statisticsauthority.gov.uk/correspondence/maya-esslemont-and-anna-powell-smith-to-ed-humpherson-modern-slavery-data/>> accessed 12 April 2023.

¹⁸⁹ Office for Statistics Regulation, 'Ed Humpherson to Jennifer Rubin: use of National Referral Mechanism statistics' (8 December 2022) <<https://osr.statisticsauthority.gov.uk/correspondence/ed-humpherson-to-jennifer-rubin-use-of-national-referral-mechanism-statistics/>> accessed 12 April 2023.

¹⁹⁰ Helen Bamber Foundation, *Abuse by the System: survivors of trafficking in immigration detention* (2022) <<https://www.helenbamber.org/resources/reportsbriefings/abuse-system-survivors-trafficking-immigration-detention>> accessed 12 April 2023.

eventually recognised as a victim of trafficking, granted refugee status and awarded substantial damages following a claim for false imprisonment based on the impact the detention had had on him.

The anti-trafficking sector entirely rejects the unevidenced claim that people are fraudulently referring themselves into the NRM. Firstly, it is not possible to refer yourself into the NRM. Rather, you must be referred by a designated First Responder Organisation after being identified as a potential victim of trafficking.¹⁹¹ Secondly, an increasing number of individuals are actively refusing their consent to enter the NRM,¹⁹² likely due to the already limited support and protection available. 2022 marked a 43.57% increase from 2021 in the number of people actively refusing their consent to enter the NRM - this was the highest annual number since the NRM began in 2009. 63% of these refusals were recorded by the Home Office.¹⁹³ Eritreans and Albanians were the first and second highest nationalities of those who did not consent to be entered into the NRM despite being identified as a potential victim by a First Responder Organisation. It should be no surprise that many people do not consent to enter an identification system which does not appear to work in their best interests; identification decisions are intended to take around 6 weeks. In fact, it is not unusual to meet people who have been waiting in the system, in limbo, for years. Those who do not have the appropriate immigration status are not given permission to work. This means the system expects people who may be in debt bondage or who have been pushed into exploitation due to poverty to put their lives on hold indefinitely, compounding the impact of their trafficking and their trauma. Rather than endemic misuse and abuse, we are seeing fewer people entering the NRM than should be, due to the Government's refusal to ensure the system provides meaningful protection and support to victims and survivors of trafficking.

At the moment people are still being identified as trafficked against the odds. This Bill will prevent the identification of anyone who entered or arrived in the UK irregularly, despite many having no real influence or even knowledge over the process of travel. This will actively keep people in exploitation, unable to seek help from the authorities. The implications of this are horrific and inhumane.

Inflammatory rhetoric

We are concerned that the hostile language being used by Government officials, which delegitimises and demonises refugees, people seeking asylum and survivors, risks creating resentment and hostility towards them by some sections of the public. This will ultimately put their safety at risk and could lead to reprisals.

On 30 October 2022, a man killed himself after throwing a number of incendiary devices at an immigration detention centre in Dover, resulting in two people being injured. We were extremely

¹⁹¹ An organisation authorised to refer a potential victim of human trafficking or modern slavery to the National Referral Mechanism. First responders receive specialist training to enable them to identify indicators of trafficking and make appropriate referrals into the NRM, subject to the person's consent (in the case of an adult). There are currently 19 statutory and non-statutory first responder organisations in England and Wales, including local authorities, specified NGOs, police forces and government agencies.

¹⁹² Public authorities have a statutory duty to notify the Home Office when they come across potential victims of modern slavery. When individuals refuse to be entered into the NRM, public authorities record this in a Duty to Notify report (DtN).

¹⁹³ UK Visas and Immigration: 2,624 (57%); Immigration Enforcement IE: 221 (5%).

alarmed that the very next day, speaking in the House of Commons on 31 October 2022, the Home Secretary used vilifying and sensationalist language, claiming that the south coast of the UK was facing an “invasion” by migrants.¹⁹⁴ In November 2022, it was reported that the Home Secretary had been warned by senior government lawyers that her inflammatory anti-migrant rhetoric could inspire far-right terrorist attacks.¹⁹⁵ Similarly, in January 2023, the Albanian foreign minister, Olta Xhaka, accused the Immigration Minister Robert Jenrick MP of the “*verbal lynching of a whole nation in language that sounds like the minister is declaring open season on Albanians*” following his comments celebrating the work of UK immigration enforcement to “*find the Albanians, to detain them, to put them on to coaches, to take them to the airport and get them back to Tirana.*”¹⁹⁶ The febrile anti-migrant rhetoric from Government officials is resulting in concerning real-world impacts and tarnishing the UK’s reputation globally.

On the 25th of April, the immigration minister Robert Jenrick claimed that asylum seekers entering the UK via the channel threatened to “*cannibalise*” the UK’s compassion. He further stated that that their “*values and lifestyles*” were a threat to social cohesion and that asylum seekers “*tend to settle in already hyper-diverse areas, undermining the cultural cohesiveness that binds diverse groups together*”¹⁹⁷. This claim is not based on any known evidence and was widely rejected as being dangerous and inflammatory. On the same day, when questioned on the ability of Sudanese refugees fleeing the recent conflict to claim asylum in the UK, the Home Secretary stated that the UNHCR “*is present in the region and they are the right mechanism by which people should apply if they do want to seek asylum in the UK*”. This is not correct, and prompted a response from the UNHCR which stated clearly that “*there is no asylum visa or ‘queue’ for the United Kingdom*”, adding that the overwhelming majority of refugees have no access to safe and legal routes to the UK¹⁹⁸. This is the latest in a deeply concerning trend of Home Office ministers making false, unevicenced and often inflammatory claims in order to justify measures present in the bill.

We are also concerned at the use of disparaging and hostile language towards lawyers who assist victims of trafficking and modern slavery. Unfounded comments made by the Home Secretary, including the term ‘small boat-chasing lawyers’,¹⁹⁹ also further amplify the hostile rhetoric towards

¹⁹⁴ The Independent, ‘Suella Braverman ‘putting lives at risk’ with ‘migrant invasion’ claims day after firebomb attack’ (31 October 2022) <<https://www.independent.co.uk/independentpremium/uk-news/suella-braverman-migrant-crisis-invasion-b2215370.html>> accessed 12 April 2023.

¹⁹⁵ Mark Townsend, ‘Suella Braverman was warned ‘hate speech’ could inspire far right’ (2022) <<https://www.theguardian.com/politics/2022/nov/06/suella-braverman-was-warned-hate-speech-could-inspire-far-right>> accessed 12 April 2023.

¹⁹⁶ The Independent, ‘Albanian government accuses Tory minister of ‘verbally lynching’ country’ (16 January 2023) <<https://www.independent.co.uk/news/uk/politics/channel-migrant-boats-albania-tories-b2262875.html>> accessed 13 April 2023.

¹⁹⁷ The Guardian, ‘Values and lifestyles’ of small boat refugees threaten social cohesion, says Jenrick’ (25 April 2023) <[‘Values and lifestyles’ of small boat refugees threaten social cohesion, says Jenrick | Immigration and asylum | The Guardian](https://www.theguardian.com/immigration/2023/apr/25/values-and-lifestyles-of-small-boat-refugees-threaten-social-cohesion-says-jenrick)> accessed 02 May 2023

¹⁹⁸ The Independent, Braverman rebuked for falsely claiming Sudanese asylum seekers have ‘various’ ways of coming to UK (26 April 2023) <[Braverman rebuked for claim Sudanese asylum seekers have ‘various’ ways to come to UK | The Independent](https://www.independent.co.uk/news/uk/politics/suella-braverman-rebuked-for-falsely-claiming-sudanese-asylum-seekers-have-various-ways-of-coming-to-uk-b2262875.html)> accessed 02 May 2023

¹⁹⁹ Molly Blackhall, ‘Home Office could face legal challenge to Braverman small boat asylum ban after charities say it is unlawful’ (2022) <<https://inews.co.uk/news/home-office-small-boat-asylum-ban-legal-challenge-migrant-crossings-unlawful-1892648>> accessed 12 April 2023

human rights lawyers and organisations working with victims and survivors of trafficking or on their cases.

Home Office backlog of undecided asylum applications

On 23 March 2023, the UK Statistics Authority (UKSA) rebuked the Government’s use of inaccurate figures to support misleading claims regarding people seeking asylum.²⁰⁰ In the response to the Shadow Minister for Immigration’s original letter, the UKSA confirmed that the Government’s claims regarding the backlog of undecided asylum applications “*do not reflect the position shown by the Home Office’s statistics*”. At the time of writing, the Minister for Immigration has not yet corrected their earlier statements despite being asked to do so.²⁰¹

The Unevidenced Claims, Misuse of Data & Inflammatory Rhetoric section of this Briefing is endorsed by: Focus on Labour Exploitation (FLEX), Anti Trafficking & Labour Exploitation Unit (ATLEU), Refugee Action and Anti-Slavery International. Please note that contributing organisations have only approved the content of the specific section(s) of this Briefing which they have endorsed and should not be taken as endorsing any other parts of the Briefing.

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²⁰⁰ Office for Statistics Regulation, ‘Response from Sir Robert Chote to Stephen Kinnock MP – asylum backlogs’ (23 March 2023) <<https://uksa.statisticsauthority.gov.uk/correspondence/response-from-sir-robert-chote-to-stephen-kinnock-mp-asylum-backlogs>> accessed 12 April 2023.

²⁰¹ BBC News, ‘Rishi Sunak asked to correct asylum figures error’ (4 April 2023) <<https://www.bbc.co.uk/news/65179974>> accessed 12 April 2023.

Homelessness & Destitution

Summary

The Refugee Council estimate that at the end of three years following the provisions coming into effect, between 161,147 and 192,670 people will have had a claim for protection deemed inadmissible but will not have been removed from the UK, due to the lack of returns agreements in place with third countries.²⁰² People in this position, as well as being unable to have their claims processed, will be unable to work. Although some will be eligible for destitution-related support from the Home Office, many may face barriers to accessing this.

With the Bill denying any asylum-related route to settlement in the UK, disengagement from the asylum system will likely increase, as will the number of people who choose to disappear into the community upon arrival rather than presenting themselves to the authorities. Those who do this will be dependent on informal support networks.

Years of experience working with non-UK nationals experiencing homelessness tells us that people seeking protection in the UK must be supported to unlock their full potential within communities. Yet the Bill thus leaves people whose claims have been deemed inadmissible in permanent purgatory. As such, it is likely to drive the growth of an ever-larger population of people unable to put down roots in our communities, and highly vulnerable to destitution, homelessness, and exploitation, as well as worsening health and wellbeing.

Risk of homelessness and destitution amongst persons subject to Clause 4

Clause 4 provides that any ‘protection claims’ and/or ‘human rights claims’ made by people meeting the conditions in Clause 2 must be declared inadmissible. People whose claims are deemed inadmissible will have no right to work. As within the current system, most will also have restricted or no recourse to public funds (NRPF), and be ineligible for specified welfare benefits, homelessness assistance, and social housing, whilst also being barred from legally accessing private rented accommodation.

People whose claims are deemed inadmissible may be eligible for support and accommodation from the Home Office. However, anyone who does not fall within the eligible groups will be dependent on informal or insecure housing arrangements (e.g., sofa surfing), or support from voluntary services, if they are to avoid rough sleeping. NACCOM (the No Accommodation Network) is a UK-wide network of voluntary services supporting refugees, people seeking asylum, and other migrants facing homelessness and destitution. Last year, 45% of people who approached the network for accommodation arrived directly from informal or insecure accommodation arrangements.²⁰³ These arrangements are precarious and liable to break-down, placing people at constant risk of rough sleeping.

²⁰² Refugee Council, *Illegal Migration Bill - Assessment of impact of inadmissibility, removals, detention, accommodation and safe routes* (2023), 1 <<https://www.refugeecouncil.org.uk/wp-content/uploads/2023/03/Refugee-Council-Asylum-Bill-impact-assesment.pdf>> accessed 25 April 2023.

²⁰³ NACCOM, *Annual Survey Data 2022* (2022), 2 <<https://naccomm.org.uk/wp-content/uploads/2022/12/NACCOM-Briefing-Annual-Survey-Data-UK-Version-.pdf>> accessed 25 April 2023.

Voluntary services supporting migrants experiencing homelessness, such as those within the NACCOM network, will play a vital role in helping people whose claims are deemed inadmissible to avoid destitution and homelessness, both via delivering accommodation services, and assisting people to make asylum support applications. However, the voluntary sector supporting migrants experiencing homelessness is already operating at capacity and facing additional pressures due to the cost-of-living crisis. We are concerned that the Illegal Migration Bill will result in people experiencing prolonged periods of destitution and homelessness.

Risk of exploitation and disengagement from support

The prospect of having any potential asylum claim deemed inadmissible under Clause 4 of the Illegal Migration Bill and the closing off of asylum-related routes to settlement presents a major risk that many people arriving in the UK in search of protection will choose not to engage with the system upon arrival rather than presenting themselves to the authorities. Meanwhile, those who initially engage with the Home Office process may later choose to disengage from asylum support when threatened with removal or faced with the prospect of never being able to regularise their status and move on with their lives.

Those who disengage from the system will be entirely dependent on informal support networks, and face a heightened risk of destitution, homelessness, and exploitation in the housing and labour market. Some may resort to unregulated housing provided by rogue landlords, where they will not only be susceptible to exploitation, but also unsafe, inappropriate, and insecure housing far short of legal requirements and lacking in legal protections from eviction.²⁰⁴ This may make it more difficult for people to access legal advice on whether they have other rights to remain in the UK.

With no access to asylum-related routes to settlement that would provide pathways for improving their situation, people have far fewer incentives to continue to engage with the system.

Health implications of long-term homelessness and unsettled status

By closing off asylum-related routes to settlement for those whose claims have been deemed inadmissible, the Bill will result in tens of thousands of people left in permanent limbo, constantly at risk of homelessness, destitution, exploitation, detention, and deportation, with no hope of gaining settled status or being able to independently support themselves or their families.

The physical and mental health implications of this would be unprecedented, though there is already clear evidence of the damage to health caused by homelessness, and prolonged precarity in the asylum and immigration system. A recent briefing by leading medical and humanitarian organisations in the UK on the medical consequences of the Illegal Migration Bill lays out the

²⁰⁴ JCWI, COVID-19: Briefing to the Home Affairs Committee (2020), 4
<<https://www.jcwi.org.uk/Handlers/Download.ashx?IDMF=b904a8c1-4a3b-4833-b035-f494de60702f>> accessed 25 April 2023.

serious implications for the “health, wellbeing and dignity of people seeking safety and trafficked people in the UK.”²⁰⁵

These implications include the fact that “people experiencing homelessness face significant health inequalities and poorer health outcomes than the rest of the population. Mortality rates are ten times higher than the rest of the population and life expectancy is around 30 years less.”²⁰⁶ Research from the Equality and Human Rights Commission found that even people in receipt of destitution-related support from the Home Office experienced barriers to accessing healthcare.²⁰⁷

In a recent research report by Praxis on the 10-year-route to settlement, even people who had hope of eventually being able to secure settled status experienced negative health and wellbeing impacts due to their prolonged precarity in the immigration system and restrictions in accessing welfare. The research showed that two thirds of people on the 10-year-route reported feeling constantly stressed and anxious; nearly half said their mental health had worsened; and three-fifths of parents stated that both their children’s physical and mental health had worsened as a result.²⁰⁸

The Homelessness & Destitution section of this Briefing is endorsed by: the No Accommodation Network (NACCOM), Refugee Action, Praxis and Refugee Council. Please note that contributing organisations have only approved the content of the specific section(s) of this Briefing which they have endorsed and should not be taken as endorsing any other parts of the Briefing.

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²⁰⁵ Doctors of the World *et al.*, The Medical Consequences of the New ‘Illegal Migration Bill’ (2023), p.1. <http://www.doctorsoftheworld.org.uk/wp-content/uploads/2023/04/Illegal-Immigration-Bill-Briefing_FINAL.pdf> accessed 25 April 2023.

²⁰⁶ National Institute for Health & Care Excellence (NICE), New Draft Guideline to Help Reduce Health Inequalities in People Experiencing Homelessness (2021) <<https://www.nice.org.uk/news/article/new-draft-guideline-to-help-reduce-health-inequalities-in-people-experiencing-homelessness>> accessed 25 April 2023.

²⁰⁷ Equality and Human Rights Commission (EHRC), Research Report 122: The lived experiences of access to healthcare for people seeking and refused asylum (2018), 61 <<https://www.equalityhumanrights.com/sites/default/files/research-report-122-people-seeking-asylum-access-to-healthcare-lived-experiences.pdf>> accessed 25 April 2023.

²⁰⁸ Praxis, Experiences on the 10-year Route to Settlement (2023), 21 <<https://www.praxis.org.uk/briefings/experiences-on-the-10-year-route-to-settlement>> accessed 25 April 2023.

Devolution

Scotland

There are a number of elements of the Illegal Migration Bill that impact devolved areas of law. The two most prominent are in relation to unaccompanied children (Clauses 15-20) and support to victims of trafficking (Clause 23).

As a preliminary matter, whilst the Explanatory Notes recognise that Clauses 19 and 23 extend and apply the Bill to Scotland,²⁰⁹ they advise that ultimately the Bill relates to reserved matters²¹⁰ and does not engage the Legislative Consent Motion process. Considering the implications highlighted below in relation to the Children (Scotland) Act 1995 ('the 1995 Act') and the Human Trafficking and Exploitation (Scotland) Act 2015 ('the 2015 Act'), this understanding of the Bill is flawed. Both clauses will encroach significantly on Scotland's devolved competencies. When considering provisions in the Nationality and Borders Act 2022 which related to children and trafficking, the Scottish Parliament debated and passed a Legislative Consent Motion on 22 February 2022 which withheld consent for these aspects of the 2022 Act.²¹¹

Clauses 15 – 20 – Unaccompanied Children

In Scotland, the child protection functions of local authorities are a devolved matter and are contained within the 1995 Act. If Clause 19 of the Bill is enacted and subsequent Regulations are implemented by the Home Secretary, these will encroach on devolved matters and constrain the ability of local authorities in Scotland to fulfil their current legislative duties. This includes the local authority's duty to accommodate an unaccompanied child,²¹² which would conflict with the power provided to the Secretary of State to provide and arrange accommodation for unaccompanied children in Clause 15.

When a child is looked after by a local authority in Scotland, they have a duty to safeguard and promote the child's welfare and that this should be their paramount concern.²¹³ Clauses 16(5) and 16(6) provide the Secretary of State with the power to decide whether a child should cease to be looked after in local authority care, but neither the Bill nor Explanatory Notes clarify how this power will be used in practice and what assessment, if any, will be carried out in these cases by the Secretary of State. If Clauses 16(5) and 16(6) are applied to Scotland in their current form,

²⁰⁹ EN, page 43, Annex B – Territorial Extent and Application in the United Kingdom.

²¹⁰ Scotland Act 1998, Schedule 5, B6.

²¹¹ Scottish Parliament, 'Meeting of the Parliament: Decision Time' (20 February 2022) <<https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/chamber-and-committees/official-report/what-was-said-in-parliament/meeting-of-parliament-22-02-2022?meeting=13590&iob=123351>> accessed 20 April 2023.

²¹² Children (Scotland) Act 1995, s 25(1).

²¹³ Children (Scotland) Act 1995, s 17(1)(a).

migrant children will be removed from care under the 1995 Act in a manner that would be unlawful for non-migrant children, potentially without an assessment of the child's welfare or the type of support they will be provided whilst in the care of the Home Office.

By providing the Secretary of State with such powers over unaccompanied children, these provisions will create a discriminatory system where children in Scotland receive inadequate care and safeguarding from their local authorities due to their immigration status. Furthermore, it will result in the deciding factor of a child's care being the date they arrived in the UK, rather than their support needs.

Despite Clauses 15 to 18 applying explicitly to England, the power to produce regulations on these matters set out in Clause 19 will encroach on Scotland's devolved competencies and may disregard any protection available to children in Scotland. There has been no consideration of any negative effects this could have on the Scottish Government's human rights responsibilities relating to children.

Clause 23 - Trafficking Support

Provision and funding of victim support services is completely devolved in Scotland, with the protection, support, and assistance to victims of trafficking and modern slavery primarily provided through Part 2 of the Human Trafficking and Exploitation (Scotland) Act 2015. The 2015 Act also defines the crime of human trafficking (section 4) and provision of support and assistance to individuals who are victims of the crime as defined.

Sections 9(1) and (2) of the 2015 Act place a duty on Scottish Ministers to secure support and assistance during a defined period where there are reasonable grounds to believe that an adult is a victim of trafficking. Through regulations, this is a 90-day recovery and reflection period.²¹⁴ The 2015 Act also gives Scottish Ministers the power to provide support and assistance to victims outside this period (i.e. pre-reasonable grounds decision; post 90-day recovery and reflection period; and post conclusive grounds decision).²¹⁵ Section 10 of the Act gives Scottish Ministers the power to provide support and assistance to an adult victim of the crime of trafficking as defined in the Act. Through these provisions, and the rest of the 2015 Act, Scotland meets its obligations to victims of trafficking under ECAT and Article 4 ECHR.

Clause 23 of the Illegal Migration Bill has the effect of amending the 2015 Act by stripping away the duties and powers Scottish Ministers have under sections 9 and 10 to provide support and assistance to victims of trafficking who meet the Clause 2 removal criteria. The Explanatory Notes accompanying the Bill suggests that the Bill does not legislate on matters within devolved

²¹⁴ Home Office, *National referral mechanism guidance: adult (Northern Ireland and Scotland)* (updated 19 May 2022)

<<https://www.gov.uk/government/publications/human-trafficking-victims-referral-and-assessment-forms/national-referral-mechanism-guidance-adult-northern-ireland-and-scotland>> accessed 24 April 2023.

²¹⁵ 2015 Act, s 9(3).

competences.²¹⁶ However, legislating on the duties and powers for Scottish Ministers to provide assistance and support to victims of trafficking in Scotland is clearly legislating on a matter within the devolved competence of the Scottish Parliament.

Clause 23 raises significant and unprecedented constitutional questions. It prohibits the Scottish Government from supporting a large category of migrant victims of trafficking, in a manner that would be unlawful for non-migrant victims. The provision and support for victims is a positive obligation under Article 4 ECHR and Article 12 ECAT. In particular, non-discrimination in the provision of support is guaranteed by Article 3 ECAT and Article 14 ECHR. In essence, the UK Government is compelling a devolved nation to violate international human rights law in a devolved area. Whether such an unprecedented step can be taken by Westminster, without the agreement of the Scottish Parliament, simply by using the Clause 23(2) phraseology that the provisions of the 2015 Act “do not apply”, is a matter of urgent consideration for constitutional experts. It has far reaching consequences for devolution itself.

The clause also undermines the efforts of the Scottish Government to tackle human trafficking in the areas of identifying human traffickers, bringing perpetrators to justice, disrupting criminal activity, and tackling the circumstances which foster human trafficking in Scotland. These key areas rely on the engagement of victims with service providers and law enforcement authorities. For a Bill that purports to combat organised crime, its provisions on trafficking and modern slavery do the opposite.

The Scotland section of this Briefing is endorsed by: JustRight Scotland and Scottish Refugee Council. Please note that contributing organisations have only approved the content of the specific section(s) of this Briefing which they have endorsed and should not be taken as endorsing any other parts of the Briefing.

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Northern Ireland

The Illegal Migration Bill, in its current form, is inconsistent with the UK’s obligations under the **Belfast/Good Friday Agreement** (‘BGFA’) and **Article 2 of the Windsor Framework/Protocol on Ireland and Northern Ireland** (Windsor Framework/Protocol). The Bill’s broadly drafted conditions for removal further capture individuals who cross the **island of Ireland’s land border** for purposes other than to make an asylum claim.

The disapplication of section 3 HRA, the duty to make human rights claims inadmissible and the power to regulate on the effect of interim measures are inconsistent with the UK’s obligations under the BGFA.

²¹⁶ EN, pages 43 - 44.

The “Rights, Safeguards and Equality of Opportunity” chapter of the BGFA requires the continued ‘full incorporation into Northern Ireland law of the ECHR with direct access to the courts and remedies for breach of the Convention’.²¹⁷ The rights enshrined in this chapter of the BGFA extend to ‘everyone in the community’, not only British or Irish citizens.²¹⁸

The HRA was the mechanism through which the UK government fulfilled its commitment to incorporate the ECHR and provide direct access to the courts. This Bill marks a significant step backwards. Removing the obligation for courts to interpret its provisions compatibly with the Convention by disapplying section 3 HRA does not guarantee those rights for everyone in the community.²¹⁹ The Secretary of State’s duty to declare inadmissible any human rights claim submitted by an individual who meets the removal conditions significantly restricts the direct access to the courts that the BGFA guarantees.²²⁰ Enabling the government to regulate the effect of interim measures ordered by the ECtHR further limits access to remedies for breaches of the Convention.²²¹ Each of these provisions interferes with the full incorporation of and access to the Convention and its remedies. If enacted this Bill may breach the UK’s obligations under the BGFA.

Subjecting victims of trafficking to this Bill’s detention and removal scheme breaches the UK’s obligations under Article 2 of the Windsor Framework/Protocol

Article 2 of the Windsor Framework/Protocol contains specific commitments by the UK Government that ‘no diminution of Rights, Safeguards and Equality of Opportunity’, as set out in that chapter of the BGFA should occur as a result of Brexit. It also details various equality and non-discrimination EU Directives in Annex 1 with which Northern Ireland must “keep pace”. There are other EU laws, beyond those listed in Annex 1, which underpin rights outlined in the “Rights, Safeguards and Equality of Opportunity” chapter of the BGFA. This includes the Victims’ Directive²²² and the Trafficking Directive, because it protects a subset of victims in Northern Ireland.²²³ The non-diminution principle also expressly applies to victims of trafficking in

²¹⁷ The Belfast Agreement: An Agreement Reached at the Multi-Party Talks on Northern Ireland (April 1998, Cm 3883) 16, para 2 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1034123/The_Belfast_Agreement_An_Agreement_Reached_at_the_Multi-Party_Talks_on_Northern_Ireland.pdf> accessed 25 April 2023

²¹⁸ NIHRC-ECNI, *Working Paper: The Scope of Article 2(1) of the Ireland/Northern Ireland Protocol* (December 2022) (‘NIHRC-ECNI, Working Paper’) para 3.4 <<https://nihrc.org/uploads/NIHRC-and-ECNI-Scope-of-Article-2-Working-Paper-1.pdf>> accessed 20 April 2023; and *ibid*, page 16, para 1.

²¹⁹ Clause 1(5).

²²⁰ Clause 4(2).

²²¹ Clause 53.

²²² Northern Ireland Office, ‘UK Government Commitment to “no diminution of rights, safeguards and equality of opportunity” in Northern Ireland: What does it mean and how will it be implemented?’ (NIO, 2020) at para 13

²²³ NIHRC-ECNI, *Working Paper*, para 3.2.

Northern Ireland.²²⁴ Further, modern slavery and human trafficking is a devolved matter in Northern Ireland and this Bill diverges from The Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 which makes provision relating to human trafficking in Northern Ireland.²²⁵

This Bill disapplies various provisions of the Trafficking Directive and subjects victims or potential victims of trafficking to detention and removal, in direct contravention of the Directive. Enacting this Bill in its current state would breach the UK's commitments under Article 2 of the Windsor Framework/Protocol.

The broad conditions for removal raise severe and unforeseen consequences for foreign nationals crossing the land border on the island of Ireland.

The broad conditions for removal set out in this Bill appear to capture any visa national resident in the Republic of Ireland who enters Northern Ireland without the correct leave or without an Electronic Travel Authorisation ('ETA') where required.

If implemented as written, the new legislation could result in a Kenyan national residing legally in Donegal, who travels across the land border to Derry to go shopping without obtaining the correct visa, being detained indefinitely, restricted access to the courts, and potentially removed to a third country that is not the Republic of Ireland. If 'Deemed Leave' is voided by failing to obtain ETA, another foreseeable outcome would be for a Brazilian or American (non-visa) national visiting Ireland, who travels to Northern Ireland for a day trip, without obtaining ETA, being similarly detained and removed. The government does not appear to have considered these severe outcomes that would result in this Bill's application in Northern Ireland.

The Northern Ireland section of this Briefing is endorsed by Committee on the Administration of Justice (CAJ); the PILS Project & NI Human Rights Commission (NIHRC). Please note that contributing organisations have only approved the content of the specific section(s) of this Briefing which they have endorsed and should not be taken as endorsing any other parts of the Briefing.

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Wales

In addition to the numerous concerns raised by this Bill described earlier in this briefing, there are at least **three main sources of devolved issues in Wales**.

²²⁴ *ibid*, para 3.4.

²²⁵ *ibid*, para 4.1.

First, on a technical level, in the Explanatory Notes the UK Government has suggested that the entirety of the Bill's clauses fall outside of devolved competence (because immigration, asylum and nationality are reserved matters). It has therefore not engaged the legislative consent motion process.

This analysis is cursory as the Bill has several implications regarding the social care of unaccompanied children which is a devolved matter. As such **the Welsh Government has laid a legislative consent memorandum before the Senedd recommending that it withhold consent for the Bill**. It further explains that consent could never be recommended for legislation where the UK Government is unable to confirm compatibility with the ECHR, especially in a context where many leading organisations are highlighting potential incompatibilities.

The provisions which it is argued require the legislative consent of the Senedd are:

- Clause 19 as it enables the Secretary of State to extend the provisions of Clauses 15 to 18 (relating to the accommodation of unaccompanied children) to Wales **without devolved consent**. This is despite **all legislative and policy decisions relating to social services lying clearly with Welsh ministers**.
- Clause 20 as it relates to the transfer of unaccompanied children and **therefore has implications for Welsh local authorities**.
- There are also cost implications which have not been considered by the UK Government relating *inter alia* to the cost of transferring children between local authorities and the impact on their wellbeing and resulting support needs.

Second, the substance and process put forward in the Bill is **fundamentally incompatible with devolved legislation and policy in Wales**:

- The Social Services and Wellbeing (Wales) Act 2014 considers all unaccompanied asylum-seeking children as looked-after. It provides for a “child first, migrant second” approach and empowers local authorities in Wales to assess and consider their care and support needs in line with Wales’ domestic incorporation of the United Nations Convention on the Rights of the Child. **The Bill risks undermining this approach and the role provided by social workers in Wales**, not least because it creates a risk of harm for those falling under its provisions. For example, it lacks any consideration of appropriate time-limits or for appropriate standards of accommodation.
- Wales is aiming to be a **nation of sanctuary** – providing a welcoming and supporting environment for refugees and asylum seekers – and is aiming to strengthen its human rights and equality frameworks. These efforts will clearly be **undermined by the Illegal Migration Bill as it would be detrimental to the human rights and wellbeing of these groups, and especially vulnerable people like victims of modern slavery and children**.
- The ECHR is **materially relevant to the competencies of the Senedd**. Furthermore, the UK’s ongoing commitment and respect for its provisions are a bedrock upon which Wales

plans to strengthen human rights. **Any legislation which may deliberately bring the UK into conflict with the ECHR is therefore of significant devolved concern.**

Finally, the Welsh Government is recommending that the Senedd refuse legislative consent. At the time of writing the LCM has not been debated, but recent experience suggests a high likelihood of consent being withheld.

If the UK Government presses ahead yet again with legislation in devolved areas despite refusal of consent, this **will only continue to raise constitutional tensions and undermine cooperation.**

The Wales section of this Briefing is endorsed by the Welsh Civil Society Forum. Please note that contributing organisations have only approved the content of the specific section(s) of this Briefing which they have endorsed and should not be taken as endorsing any other parts of the Briefing.

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Impact on LGBTQI+ people

Resettlement

While established resettlement routes may prioritise LGBTQI+ people as a particularly vulnerable group,²²⁶ the fact is that for many of the countries where being LGBTQI+ is criminalised²²⁷ there are no resettlement options. For example, Uganda has recently passed a law that criminalises merely being gay, as well as imposing a duty on friends and family to report people in same-sex relationships.²²⁸ Neighbouring countries are similarly unsafe. The only route available to LGBTQI+ people in Uganda is for them to make their way to the UK by whatever means necessary, should this be the country they choose to seek safety in.

‘Safe’ third countries

Clause 5 provides for the Home Secretary to send people who have come to the UK seeking safety and refuge to what is referred to as a “safe third country”.²²⁹ Notwithstanding the lack of returns agreements that would facilitate such a process, it is clear that no consideration has been given to the human rights of LGBTQI+ people in devising the list of “safe third countries” set out at the Schedule to the Bill.

There are several countries listed in the Schedule where the UK has recognised LGBTQI+ people from there as being refugees in recent years, owing to the risk of their being persecuted because of their sexual orientation or gender identity. This includes Albania, Brazil, Gambia, Ghana, Jamaica, Kenya, Nigeria and Sierra Leone.²³⁰ Nationals of other countries on the list are also claiming asylum in the UK based on their sexual orientation, but in numbers too low to be reported by the Home Office, this includes Malawi, Mauritius and Rwanda.²³¹ Other countries listed in the Schedule are known for their hostile attitudes, and in some cases violence, towards LGBTQI+ people, this includes Bulgaria, Hungary, Poland, Romania and Serbia. An example of what could therefore happen under Clause 5 and the Schedule is that a gay man from Iran who comes to the UK seeking asylum could be sent to Ghana, if a returns agreement was made with that country.

²²⁶ Home Office, *National statistics: Asylum claims on the basis of sexual orientation 2021* (September 2022) <<https://www.gov.uk/government/statistics/immigration-statistics-year-ending-june-2022/asylum-claims-on-the-basis-of-sexual-orientation-2021--2>> accessed 28 April 2023.

²²⁷ Human Dignity Trust, *Map of Countries that Criminalise LGBT People* <<https://www.humandignitytrust.org/lgbt-the-law/map-of-criminalisation/>> accessed 28 April 2023.

²²⁸ BBC News, ‘Uganda Anti-Homosexuality bill: Life in prison for saying you're gay’ (March 2023) <<https://www.bbc.co.uk/news/world-africa-65034343>> accessed 28 April 2023.

²²⁹ EN, 2(b)

²³⁰ *ibid*, Home Office, Table SOC_02.

²³¹ *ibid*, Home Office, Table SOC_02.

Clause 6(2) gives the Home Secretary the power to say that countries listed in the Schedule are safe for certain groups only. This has been done for women, for example Kenya, Nigeria and Ghana are listed as safe for men only. However, these countries are not safe for gay or bisexual men, as is demonstrated by the fact that the UK grants refugee status to men from there, based on their fear of persecution because of their sexual orientation. The fact that it is possible in the Bill to exclude LGBTQI+ people from being sent to these countries in the way that women have been, but this has not been done, seems to signal an intention that LGBTQI+ people will be sent to danger. This view is supported by the position that has been taken on sending LGBTQI+ people to Rwanda,²³² a country that is very unsafe for them.²³³

Evidential requirements to prevent removal

Clause 41 sets out the requirements to challenge removal to a third country, which is that “compelling evidence” must be provided (at Clause 41(5)) and the threshold is “real risk of serious and irreversible harm”. Most LGBTQI+ people have to rely on their own account as evidence of their identity, as documentary evidence is unlikely to exist. It is unclear whether a person’s own account would be enough to meet what is a very high threshold, but it seems unlikely. Further, we still see the Home Office routinely disbelieving people who are LGBTQI+ (Rainbow Migration’s report *Still Falling Short*²³⁴ remains relevant as the same issues are regularly encountered). With the extremely limited timescales and restrictions on challenging poor decision-making as proposed in the Bill, there is a serious risk that this will result in LGBTQI+ people being sent from the UK into danger.

Regarding the “real risk of serious and irreversible harm” threshold; many of the countries listed in the Schedule are discriminatory towards LGBTQI+ people, and they will suffer if sent there. The threshold of “real risk of serious and irreversible harm” seems likely to be reached for countries where the UK is already recognising LGBTQI+ people as refugees. However, because the Schedule states that these countries are safe for people, those issues will need to be litigated on an individual basis, instead of acknowledging that LGBTQI+ people should not be sent to those countries generally. Further, in other countries the high threshold of risk may not be reached, however LGBTQI+ people will be disproportionately impacted due to societal attitudes and discrimination, harassment, and an inability to access employment or healthcare.

²³² The Guardian, ‘Home Office admits LGBTQI+ refugees could be persecuted if sent to Rwanda’ (10 May 2022) <<https://www.theguardian.com/uk-news/2022/may/10/home-office-admits-gay-lesbian-refugees-could-be-persecuted-sent-rwanda>> accessed 28 April 2023.

²³³ Rainbow Migration, ‘Proposals to offshore asylum claims to Rwanda will be harmful to LGBTQI+ people’ (2022) <<https://www.rainbowmigration.org.uk/news/proposals-to-offshore-asylum-claims-to-rwanda-will-be-harmful-to-lgbtqi-people/>> accessed 28 April 2023.

²³⁴ Rainbow Migration, ‘Still Falling Short’ (2018) <<https://www.rainbowmigration.org.uk/publications/still-falling-short/>> accessed 28 April 2023.

The Impact on LGBTQI+ People section of this Briefing is endorsed by Rainbow Migration, Refugee Action and Public Law Project. Please note that contributing organisations have only approved the content of the specific section(s) of this Briefing which they have endorsed and should not be taken as endorsing any other parts of the Briefing.

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Annex

Table of Clauses

<i>Clause 1 - Introduction</i>	
Clause 1	Aims to place a duty to interpret provisions in line with the purpose in Clause 1(1) and disapplies the section 3 HRA duty to interpret provisions of the Bill compatibly with human rights obligations ‘so far as it is possible to do so’
<i>Clauses 2-9 – Duty to make arrangements for removal</i>	
Clause 2	Aims to place a blanket duty with limited exceptions on the Home Secretary to remove people who have ‘entered or arrived in the UK illegally’ ²³⁵ since 7 March 2023, without having travelled from a country in which their life or liberty was threatened for a Refugee Convention reason.
Clause 3	Aims to make the duty to remove <i>discretionary</i> for unaccompanied children until they turn 18 and to give the Home Secretary power to make other exceptions to the duty.
Clause 4	Aims to declare inadmissible any protection or human rights claim a person targeted by the duty to remove might make, where this relates to a claim that removal would be unlawful under s.6 HRA 1998. This aims to be a permanent status, whereby the person’s claim will never be considered in the UK, and there is no right of appeal against a declaration of inadmissibility.
Clause 5	Aims to ensure that where the duty to remove applies, people will be removed as soon as reasonably practicable from the UK (or for unaccompanied children this would be once they turn 18). People can be removed to Clause 50 countries (EEA, Switzerland, and Albania) unless exceptional circumstances apply or to a designated safe third country listed in the Schedule to the Bill.
Clause 6	Explains how the list of safe third countries in the Schedule can be amended and the test to be applied. A country can be designated as safe for only specific groups and only part of a country can be designated safe.
Clause 7	Requires a removal notice to be given explaining the planned country/territory of removal, time limits, and the process to challenge removal (which is set out in Clauses 40-41). Provisions are added to allow the Home Secretary to force private individuals and companies to make removal arrangements and help enforce

²³⁵ Illegal Migration Bill Explanatory Notes (7 March 2023) <<https://publications.parliament.uk/pa/bills/cbill/58-03/0262/en/220262en.pdf>> accessed 12 March 2023 (hereinafter ‘EN’) para 40.

	removal, including by detaining people in accordance with the new wide periods of detention in Clause 12.
Clause 8	Provides access to asylum support on the basis that ‘individuals who fall within the duty to remove who are not detained will need access to support if they would otherwise be destitute’.
Clause 9	Aims to amend existing removals legislation in line with the Bill.
<i>Clauses 10-14 – Detention and Bail</i>	
Clause 10	Introduces wide new powers for detaining persons the Home Secretary has or may have a duty to remove (under Clause 2), together with their family members, new powers for detaining unaccompanied children and pregnant women, and widens the list of places where people can be detained to ‘any place that the Secretary of State considers appropriate’.
Clause 11	Aims to restrict the role of the courts in providing oversight of the exercise of the statutory immigration detention powers, by overturning a well-established common law principle, and provides more discretion for the Home Secretary to detain ‘for such further period’ as she thinks ‘reasonably necessary’ to make arrangements for release.
Clause 12	Aims to make it very difficult for people targeted by this Bill to secure their release on bail for the first 28 days of their detention, and to restrict the jurisdiction of the courts to review the lawfulness of a decision to detain or to refuse bail.
Clause 13	Disapplies the Home Secretary’s duty ²³⁶ to consult the Independent Family Returns Panel on how best to safeguard and promote the welfare of the children in relation to return and detention of families.
Clause 14	Gives authorities the power to search vehicles, premises and property, for things on which certain information is or may be stored in electronic form as well as powers to seize and retain such things, and to access, copy and use information stored on those things

²³⁶ Borders, Citizenship and Immigration Act 2009, s 54A(2).

Clauses 15-20 – Unaccompanied children

Clauses 15-20 purport to ‘*make provision for the care of unaccompanied migrant children in scope of the duty pending their removal as adults or if it is decided to use the power to remove as a child*’.²³⁷ The clauses will confer broad retrospective powers on the Home Secretary to provide accommodation for ‘looked after’/unaccompanied children as well as the projected power to terminate a child’s ‘looked after’ care status and the key legal protections provided by local authorities to these migrant children:

Clause 15	Confers a power on the Home Secretary to directly provide accommodation to unaccompanied migrant children or to ask a third party to do so (without any limit for the period a child can spend in Home Office accommodation)
Clause 16	Purports to facilitate ‘ <i>the transfer of an unaccompanied migrant child from accommodation, which the Secretary of State has the power to provide or arrange to provide under Clause 15, to a local authority in England</i> ’ and vice versa within 5 working days ²³⁸
Clause 17	Imposes a duty on local authorities to provide information to the Home Secretary for the purpose of allowing ‘ <i>the sensible flow of information that would be relevant to a child transferring into local authority care or out of their care</i> ’ ²³⁹ akin to the National Transfer Scheme (‘NTS’)
Clause 18	Provides for an enforcement mechanism to ensure compliance by local authorities with information requests
Clause 19	Creates a broad delegated power for the Home Secretary to amend ‘any enactment’ to extend the provisions in Clauses 15-18 to Wales, Scotland and Northern Ireland
Clause 20	Amends section 69 of the Immigration Act 2016 to facilitate the transfer of responsibility for caring for particular categories of unaccompanied migrant children from one local authority to another

²³⁷ EN, para 97.

²³⁸ EN para 102.

²³⁹ EN para 106.

Clauses 21-28 – Modern Slavery

The Bill removes almost all protections for victims of modern slavery and trafficking who are targeted for removal.

Clause 21	Extends the public order disqualification to potential victims of modern slavery, to a person targeted for removal under Clause 2, unless they are cooperating with an investigation or criminal proceeding
Clause 22	Disapplies the duties on the Secretary of State under section 50A of the Modern Slavery Act 2015 to provide necessary assistance and support to potential victims of modern slavery during the recovery period
Clause 23	Disapplies equivalent mandatory and discretionary powers ²⁴⁰ in Scotland to support potential victims of modern slavery
Clause 24	Disapplies equivalent mandatory and discretionary powers ²⁴¹ in Northern Ireland to support potential victims of modern slavery
Clause 25	Automatically suspends provisions in Clauses 21 to 24 two years after commencement, and allow provisions to be suspended before that and to be revived by Regulations made by the Home Secretary
Clause 26	If the provisions suspend, they can be revived by regulations subject to the affirmative procedure, or the made affirmative procedure in cases of urgency.
Clause 27	Aims to make support and assistance, the recovery period, any additional recovery period, temporary leave for potential victims of slavery, and revocation of leave, subject to the public order disqualification
Clause 28	Adds persons liable to deportation as categories of persons who are considered to be a threat to public order and disqualified from protection

²⁴⁰ Human Trafficking and Exploitation (Scotland) Act 2015, ss 9(1), (3) and 10(1).

²⁴¹ Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, any duty under s 18, and powers under ss 18(8) and 18(9), to provide assistance and support.

Clauses 29-36 – Entry, Settlement and Citizenship

These clauses place a permanent bar on those who fall within the scheme from lawfully re-entering the UK or from securing settlement or British citizenship through naturalisation or registration, subject only to exceptions to comply with international agreements where there are compelling circumstances.

Clause 29	Bars persons targeted for removal under Clause 2, and their family members, from settlement and from lawful re-entry to the UK following their removal, subject to certain exceptions
Clause 30	Sets out which people will not be eligible for British citizenship, British Overseas Territories citizenship, British overseas citizenship and British subject status
Clause 31	Provides that ineligible persons will not be able to register or naturalise as a British citizen under the specified provisions
Clause 32	Prevents ineligible persons from acquiring British Overseas Territories citizenship under routes which mirror the routes for British citizenship.
Clause 33	Prevents ineligible persons from acquiring British overseas citizenship under section 27(1) of the British Nationality Act 1981
Clause 34	Prevents ineligible persons from registering as a British subject under section 32 of the British Nationality Act 1981
Clause 35	Allows the Home Secretary to determine that a person is not ‘ineligible’ for registration or naturalisation, if she considers it necessary in order to comply with the UK’s obligations under the ECHR or an international agreement to which the UK is a party
Clause 36	Amends the relevant provisions of the 1981 Act to make them subject to the Bill

Clauses 37-54 – Legal Proceedings

Persons subject to removal will have a limited time in which to bring a claim based on a real risk of serious and irreversible harm arising from their removal to a specified third country or a claim that they do not fall within the cohort subject to the duty to remove.

All other challenges are non-suspensive, and can only be made out of country.

Clause 37	Defines the interpretation of terms for the purposes of clauses 38 to 51
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Clause 38	Contains an expanded definition of the meaning of “serious harm suspensive claim” for the purposes of the Bill.
Clause 39	Allows the Secretary of State to amend the meaning of “serious and irreversible harm”.
Clause 40	Provides that a serious harm suspensive claim is not a human rights claim, and will not attract a right of appeal, but a person can seek a judicial review
Clause 41	Sets out the process for the submission and determination of valid serious harm suspensive claims, and provides for restrictive time limits
Clause 42	Sets out the process for the submission and determination of valid factual suspensive claims, and provides for restrictive time limits
Clause 43	Provides for an appeal, on limited grounds, to the Upper Tribunal where the Home Secretary has refused a suspensive claim and has not certified the claim as clearly unfounded, which can be further appealed to the Court of Appeal or Court of Session
Clause 44	Makes provision for permission to appeal against a decision by the Home Secretary to certify a suspensive claim as clearly unfounded (as there is no automatic right of appeal), and sets a high threshold for permission
Clause 45	Makes provision for out-of-time suspensive claims made before a person’s removal from the UK
Clause 46	Details the consequences for removal of a person making a suspensive claim ²⁴²
Clause 47	Makes provision for the Upper Tribunal to consider new matters that were not available to the Home Secretary, if there are ‘compelling reasons’
Clause 48	Requires the Tribunal Procedure Committee to introduce procedure rules setting very short time limits for the appeals process, with extensions if that is the ‘only way’ to secure justice is done in a particular case
Clause 49	Ousts supervisory jurisdiction of the High Court and Court of Session to consider judicial review challenges of certain decisions of the Upper Tribunal, even if the Upper Tribunal has acted beyond its powers
Clause 50	Redefines Upper Tribunal judges to include First-tier Tribunal judges
Clause 51	Provides for appeals and applications for permission to appeal if the Home Secretary certifies the decision was made wholly or partly in reliance on information which, in the opinion of the Secretary of State, should not be made public, to lapse and instead be appeals to the Special Immigration Appeals Commission (SIAC).

²⁴² EN, para 200.

Clause 52	Restricts the granting of certain interim remedies by a court in proceedings relating to a decision to remove a person from the United Kingdom under the Bill.
Clause 53	Provides that an interim measure indicated by the European Court of Human Rights does not affect the duty in clause 2 of the Bill to make arrangements for the removal of a person from the United Kingdom, unless a Minister of the Crown acting in person determines that it is to do so.
Clause 54	This new clause provides for the provision of civil legal services to a person in receipt of a removal notice is in scope of legal aid in England & Wales.
<i>Clauses 55-56 – Age Assessments</i>	
Clause 55	Makes provision about challenges to decisions about a person’s age where the person meets or may meet the conditions for removal from the United Kingdom under the Bill.
Clause 56	Contains a power to make regulations about the effect of a refusal, by a person to whom the Bill applies, to consent to the use of a scientific method in an age assessment.
<i>Clause 57 – Inadmissibility of certain asylum and human rights claims</i>	
Clause 57	Intends to extend the current inadmissibility process for asylum claims from people from the EU, in section 80A Nationality, Immigration and Asylum Act 2002, to cover other nationalities (Albania, Iceland, Liechtenstein, Norway and Switzerland) and to also make human rights claims inadmissible
<i>Clauses 58-59 – Annual number of entrants using safe and legal routes</i>	
Clause 58	Requires the Secretary of State, by regulations, to determine an annual cap (determined following consultation with local authorities and other relevant bodies) on the resettlement of refugees admitted to the UK <i>via</i> safe and legal routes
Clause 59	Requires the Secretary of State to prepare and publish a report on ‘safe and legal routes’ for entry into the United Kingdom, and lay the report before Parliament.
<i>Clause 60 – Credibility of Claimant</i>	
Clause 60	Amends section 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 to provide for certain kinds of behaviour relating to an identity document or electronic information by a person who makes an asylum claim or a human rights claim to be taken into account as damaging the claimant's credibility