
GARDEN COURT
CHAMBERS

Safe and Legal Routes? Control on Arrival

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20 March 2023

Safe and Legal Routes

- Capped safe and legal routes: an annual cap to be determined by Parliament, on the number of refugees the UK will take in (clause 51).
- Arrival from Ukraine and Hong King are separate from asylum processes with the creation of bespoke visa that does not grant refugee status.
- UNHCR resettlement schemes are extremely limited, slow and incremental. Government empowered to pick and choose who comes to the UK, how and when.
- UNHCR: *Critical resettlement schemes remain very limited, and can never be a substitute for access of asylum. The Refugee Convention explicitly recognises that refugees may be compelled to enter a country of asylum irregularly*.
- In 2022, 14 times more persons were granted asylum after travelling to the UK themselves than were resettled by the British Government.
- Clear choice for migrants seeking safety in the UK, use current safe and legal route (indeterminately long process, often involving specialist legal challenges and uncertain prospects of success) or take your chances with journeying to the UK.
- Inadmissibility procedures *decrease* rather than increase the total number of removals.

Safe and Legal Routes cont.

- Safe and legal routes will be defined in Regulations, subject only to affirmative procedure.

- Defining the routes '*depends on a number of factors including local authority capacity and the resettlement routes offered at the time of the regulations*'. (Explanatory notes)

- Unlikely to include those on work, family or study routes (EN: 'will not' so include but mandatory prohibition not replicated in the Bill).

- What is missing from the Bill is the critical aspect of the scheme, in terms of moral, political and legal credibility: viable safe and legal routes.

Control on Entry

- Blanket duty on SSHD to remove people who have 'entered or arrived in the UK illegally since 7 March 2023', without having travelled from a country where their life or liberty was threatened for a Refugee Convention reason (clause 2).
- Declares inadmissible any protection or HR claim from a person caught by the duty to remove. The inadmissibility is permanent, so that the claim will never be considered in the UK and no right of appeal. (clause 4)
- Further to duty to remove, is the duty to do so *as soon as reasonably practicable*: removal can be to Clause 50 countries (EEA, Switzerland and Albania) unless exceptional circumstances apply or designed safe third country. (clause 5)
- Detention powers extended and role of courts restricted (clauses 11 and 12). During the first 28 days of detention almost complete prohibition on review of legality of detention.
- If you are a child, a power conferred on SSHD to accommodate.
- If you are a victim of modern slavery and trafficking, almost all protection is removed.

Claim for real risk of serious and irreversible harm: suspensive

- Those subject to removal will have a very limited time in which to bring a claim based on 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** (clauses 37 – 49).

- Not a HR claim and will not attract a right of appeal, but can seek a judicial review.

- Claims can be certified as clearly unfounded.

- Upper Tribunal appeal available where suspensive claim refused and not certified as clearly unfounded.

- Tribunal Procedure Committee is required to introduce further procedure rules setting very short time limits for the appeal process with extension possible where that is 'the only way' to secure justice. Further variation of DFT, building in structural unfairness?

Support for those whose asylum claim is inadmissible

- Those who fall within the duty to remove but who are not detained will need access to support if they would otherwise be destitute.

- Support is provided on the same basis as those whose claims are declared inadmissible under section 80A or 80B of the 2002 Act.

- An inadmissible claim for asylum is to be treated as *determined* for purpose of Part 2 of the 2002 act. Schedule 3 (which restricts the type of support and accommodation to (amongst others) failed asylum seekers) is extended to include those whose claims are declared inadmissible under Clause 4.

Those not caught by the Act?

- Sur place refugees and
- Port arrivals.

Implications of the Illegal Migration Bill: Part One

Human rights framework and the rule of law

Nadia O'Mara, Garden Court Chambers

20 March 2023

Human rights framework & rule of law

- Statement under s. 19(1)(b) HRA 1998,
- Clause 1(5), disapplying s. 3 HRA 1998,
- Clause 4, requiring the SSHD to disregard any refugee protection, human rights, slavery or trafficking, or judicial review claim made by an individual.
- Clause 12, granting broad powers of detention.
- Clause 13(4), 'ouster clause' restricting ability of a judge to scrutinise broad/ subjective power to detain under clause 12 for first 28 days.
- Clause 46, undermines judicial independence by only permitting UT to hear 'additional matters' with permission of a Minister.
- Clause 48, further 'ouster clause' which makes decision of the UT final.
- Broad (unaccountable) regulation-making powers: Clauses 6 (safe country list), 38 (power to define 'serious and irreversible harm'), 49 (effect of interim measures from ECtHR on ability to remove a person).

Domestic human rights framework

European Convention on Human Rights

Secretary of State Suella Braverman has made the following statement under section 19(1)(b) of the Human Rights Act 1998:

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

Domestic human rights framework

Section 19, Human Rights Act 1999:

- Confers a duty on ministers responsible for bills, in either House, to make a statement, either to the effect that in their view the provisions of the bill are compatible with the Convention or that, although they are unable to make a statement of compatibly, the Government nevertheless wishes to proceed with the Bill.
- Purpose of s. 19 HRA = to ensure (a) ministers think about human rights before presenting bills to Parliament, (b) where a statement of compatibility could not be made, to encourage 'intense' scrutiny by Parliament.
- Very rare for a statement to be made under s. 19(1)(b) re incompatibility.
- Government's reported position – more than 50% chance the provisions of the Bill are not compatible with the UK's ECHR obligations.

Domestic human rights framework

Section 19(1)(b)

- In a normal world, this statement would result in anxious and intense scrutiny of the extraordinary provisions contained in the Bill.
- Truncated timetable and Government majority mean this will not happen.
- Fundamental rights cannot be impliedly repealed, requiring clear and unambiguous statutory language.
- The statement under s. 19 HRA shores up the Government's position, looking forward to (inevitable) legal challenge, i.e., clear Parliamentary intent.
- ECHR Memorandum.

Domestic human rights framework

Clause 1(5)

Section 5 of the Human Rights Act 1998 (interpretation of legislation) does not apply in relation to provision made by or by virtue of this Act.

Domestic human rights framework

- Section 3 HRA: requires courts and public authorities to interpret legislation compatible with human rights, insofar as it is possible to do so.
- In praise of s. 3 HRA, see: IHRAR report and JCHR report on HRA reform.
- Clause 1(5) excludes the application of s. 3 HRA to the Bill (unprecedented).
- 'By or by virtue of' this Act – includes both provisions of the Bill and Regulations made under the Bill.
- Without s.3 HRA, if a Court believes that provisions in the Bill violate human rights, the only option will be a declaration of incompatibility under s. 4 HRA (not binding on Govt/ Parliament).
- BUT – wide-ranging (and gratuitous) powers to make regulations will also be subject to s. 6 HRA and can potentially be struck down by the courts (unlike provisions of primary legislation).

Ouster Clauses

- Bill contains two 'ouster' clauses: Clauses 13(4) and 48
- An ouster clause seeks to exclude courts from reviewing actions and decisions of the executive branch of government.
- Limiting the supervisory jurisdiction of the High Court to review decisions.
- First: Decisions of the Upper Tribunal to refuse 'suspensive claims' [*the only, extremely limited procedure available to an individual subject to removal*] (Clauses 40 and 41).
- Second: Detention of individuals during the first 28 days of detention.

Ouster clauses

- **Clause 13(4)** → restricts the ability of the courts to scrutinise the broad/ subjective detention power under Clause 12. Clause 13(4) makes the SSHD's decision 'final' and 'not to be questioned or set aside in any court' for 28 days. Contains limited exceptions, blocking almost any means to challenge unlawful detention within first 28 days.

- **Clause 48** → 'suspensive claims' under the Bill = limited backstop on removal to third countries on grounds of 'serious and irreversible harm' (Clause 40) and factual error (Clause 41). A decision to refuse can be appealed only to the UT but a decision by the UT is final (no onwards appeal or JR).*

**Note – 'serious and irreversible' harm left to definition by Regulation.*

Ouster Clauses

- Judicial treatment of ouster clauses, see: *R (on the application of Privacy International) v Investigative Powers Tribunal & Ors* [2019] UKSC 22 (and cases cited therein, including *Jackson v AG*)..
- Language in the Bill mirrors that of the provisions ousting Cart JRs under s. 2 Judicial Review and Courts Act 2022.
- Tight drafting, i.e., inclusion of references to 'purported decisions' and 'supervisory jurisdiction'.
- Not complete ouster: e.g., under Clause 13(4), exceptions (a) judicial review on limited grounds (bad faith/ fundamental denial of natural justice), (b) writ of habeas corpus.
- Neither will provide meaningful/ effective oversight but this fictional accountability enough to satisfy courts to give effect to clause?

Regulation-making powers

Bill grants ministers broad regulation-making powers not subject to full rigour of parliamentary scrutiny

- **Clause 6:** SSHD given power to include new 'safe' countries on list.
- **Clause 38**: SSHD given power to define 'serious and irreversible' harm for purposes of Clause 37.
- **Clause 49**: SSHD given power to produce regulations about the effect of interim measures from the ECtHR on her ability to remove a person ('placeholder provision').
- **Clause 51:** SSHD must make regulations specifying cap on number of entrants using 'safe and legal routes'.

Things to think about: while s. 3 HRA is disapplied, the rest of the HRA remains in play. Regulations would therefore be subject to challenge, *inter alia*, under s. 6 HRA (see, *RR v SSWP* [2019] UKSC 52.

Illegal Migration Bill:

Entry, Settlement, and Citizenship (clauses 29-36)

Adrian Berry

20 March 2023

Entry, Settlement, and Citizenship (clauses 29-36)

- The proposed measures lock out certain people including children, present in the UK, from securing lawful re-entry, residence, and/or citizenship. They dovetail with the proposed duty on the Home Secretary to remove certain people from the UK.

- The narrow exceptions or saving provisions come no-where near rescuing those affected from breaches of their fundamental rights.

Entry, Settlement, and Citizenship (clauses 29-36)

- 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 makes submissions to relieve themselves from being placed outside the law regulating lawful residence.

Entry, Settlement, and Citizenship (clauses 29-36)

- 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, and their UK-born children, 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, and with no route to integration and acceptance. It will be a life so arid as to be without basic dignity; it will be a life of degradation.

Entry, Settlement, and Citizenship (clauses 29-36)

- To whom do the measures apply?

- The proposed measures apply would apply to all those people requiring permission to enter or remain in the UK, including asylum seekers, who on or after 7 March 2023:

(i) arrive in the UK without any required prior permission,
(ii) arrive without a required electronic travel authorisation (ETA)
(iii) enter the UK without permission,
(iv) enter using deception; or
(v) have been deported.

Entry, Settlement, and Citizenship (clauses 29-36)

- To whom do the measures apply?

- For all of them, the proposed measures apply where they have not come directly to the UK from a country in which their life and liberty were threatened by reason of their race, religion, nationality, membership of a particular social group or political opinion.

- Further, in the proposed measures, they will not have come directly if they stopped in or passed through a country where there life or liberty were not threatened. This formulation suggests a focus on asylum seekers who seek Refugee Convention protection. However, the measures would apply to all people caught by the definitions.

Entry, Settlement, and Citizenship (clauses 29-36)

- The 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), as well their family members (spouses, children, etc.):

(i) 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

(ii) cannot be given permission to travel to the UK by way of entry clearance or an electronic travel authorisation (ETA).

Entry, Settlement, and Citizenship (clauses 29-36)

- The exclusion from UK entry and residence

- In respect of *subsequent conferral* of permission to travel or time-limited permission to enter or remain, there are narrow exceptions where the Home Secretary considers it necessary as the UK is bound by an international treaty such as the Human Rights Convention, or where she considers there are compelling circumstances for that person that render it appropriate to grant permission.

- As regards of conferral of indefinite leave, the discretion is limited to where the Home Secretary considers it necessary as the UK is bound by an international treaty such as the Human Rights Convention.

Entry, Settlement, and Citizenship (clauses 29-36)

- The exclusion from UK entry and residence

- Immigration Rules will be required to provide that applications that do not engage with one of those exceptions, will be treated as void and will not be considered.

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

Entry, Settlement, and Citizenship (clauses 29-36)

- 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. To understand what is proposed, it is necessary only to consider the proposals in respect of British citizenship.

- The proposed measures apply to all the people to whom the proposals apply (noting that the Home Secretary will be under a duty to remove them), as well to children born in the UK on or after 7 March 2023 who have such a parent.

Entry, Settlement, and Citizenship (clauses 29-36)

- Exclusion from access to British nationality

- Those affected are excluded from a raft of existing provisions for those applying to register as British citizens by entitlement: including from registration provisions for:

- children where one parent secures indefinite leave in the UK
- children who have been UK born and thereafter raised in the UK for 10 years, and
- 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.

Entry, Settlement, and Citizenship (clauses 29-36)

- Exclusion from access to British nationality

- 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.

Entry, Settlement, and Citizenship (clauses 29-36)

- Exclusion from access to British nationality

- 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 the Borders, Citizenship, and Immigration Act 2009, s 55, and as underpinned by Article 3 of the 1989 UN Convention on the Rights of the Child.

- 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.

Thank you

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