

Bonavero  
REPORTS

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The Illegal Migration Bill:  
Constitutional  
Implications

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We deliver our mission through casework, research, policy advocacy, communications, and training, working collaboratively with colleagues across legal and civil society.

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**Liberty:** Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, inquiries and other policy fora, and undertake independent,



funded research. Liberty's policy papers are available at [www.libertyhumanrights.org.uk/policy](http://www.libertyhumanrights.org.uk/policy)

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### **The Immigration Law Practitioners' Association (ILPA)**

The Immigration Law Practitioners' Association ('ILPA') is a professional association and registered charity, the majority of whose members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, nongovernmental organisations and individuals with a substantial interest in the law are also members. ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law, to act as an information and knowledge resource for members of the immigration law profession and to help ensure a fair and human rights-based immigration and asylum system. ILPA is represented on numerous government, official and non-governmental advisory groups and regularly provides evidence to parliamentary and official inquiries.

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## **EXECUTIVE SUMMARY**

### **1. PARLIAMENTARY SOVEREIGNTY**

The Illegal Migration Bill's process through Parliament has obstructed meaningful scrutiny of the Bill by Parliamentarians.

The Illegal Migration Bill has expansive provisions containing delegated powers pertaining to important policy matters, further undermining the role of Parliament as supreme lawmaker.

### **2. RULE OF LAW**

Ouster Clauses, the retrospective nature of the Bill, and its very likely numerous breaches of International Human Rights Law undermine the Rule of Law in the UK and the Rule of Law on the international stage.

### **3. HUMAN RIGHTS**

In addition to likely breaching International Human Rights Law, the Illegal Migration Bill narrows the scope of human rights protections in the UK so as to remove such protections entirely in some cases and put the UK further in breach of its obligations under the European Convention on Human Rights.

### **4. DEVOLUTION**

The Illegal Migration Bill disturbs the devolution settlements in the UK by impinging on devolved matters without consent of the devolved nations and requiring devolved governments to engage in likely breaches of international human rights law which must be protected as a requirement of such devolution settlements.

### **5. SEPARATION OF POWERS**



While UK democracy depends on there being a clear Separation of Powers, the Illegal Migration Bill represents an attempt at a power shift which enables the UK Government to play the roles of all three branches of state – as lawmaker, adjudicator and administrator.

## **INTRODUCTION**

This is a joint briefing from the Bonavero Institute of Human Rights, Public Law Project (PLP), Amnesty International, Liberty, and the Immigration Law



Practitioners' Association (ILPA) addressing the main ways that the Government's Illegal Migration Bill threatens core constitutional principles. Each organisation has a strong history and reputation for independent, expert and high-quality casework, research, and/or policy advocacy on important constitutional matters.

Our focus on the Bill's constitutional problems does not imply disagreement with the many moral, pragmatic and political arguments against the Illegal Migration Bill developed by civil society partners and frontline organisations. We focus on constitutional issues in this briefing because that is where our legal expertise lies and because we believe that the House of Lords is well-placed to ensure that constitutional fundamentals take priority.

The briefing is structured around five constitutional themes and demonstrates how the Bill threatens each of them:

1. Parliamentary Sovereignty;
2. The Rule of Law;
3. The protection of human rights;
4. The devolution settlement in the UK; and
5. The separation of powers.

First, the Illegal Migration Bill grants the Government a range of expansive delegated powers to make important policy decisions without adequate and meaningful parliamentary scrutiny. This undermines the role of Parliament as supreme lawmaker and guarantees Parliament only a modest role in challenging and questioning policies and decisions which, for the individuals affected, are life-changing and even life-threatening. These include a number of Henry VIII powers to amend Acts of Parliament.

In addition, the Bill's process through Parliament has obstructed meaningful scrutiny of the Bill by Parliamentarians given that the Government expedited second reading in the House of Commons, chose to hold committee stage on the floor of the House, and at late notice published more than one hundred amendments at Report Stage.



On the Rule of Law, the Bill contains multiple Ouster Clauses preventing effective judicial scrutiny of Home Office decisions. For example, except for a very limited number of circumstances, the Bill prohibits judicial review of Home Office decisions to detain people – including children – for 28 days. Moreover, the Bill is retroactive, with most of its provisions taking effect from 7 March 2023, rather than from when the Bill receives Royal Assent.

Moreover, the Bill very likely breaches many of the UK's obligations under International Human Rights Law. This includes those contained in the Refugee Convention, the European Convention on Human Rights, the European Convention on Action Against Trafficking, and the UN Convention on the Rights of the Child. This both harms the UK's international standing as a country which respects the international rules-based order and harms the individuals affected by these breaches.

As well as breaching international human rights protections, the Bill radically weakens home-grown British human rights protection by, for example, disapplying section 3 of the Human Rights Act 1998 which requires British judges to interpret legislation insofar as possible so that it respects human rights. Instead, in this Bill, removing people from the UK takes precedence over all other considerations no matter how important, including protecting the human rights of vulnerable people such as pregnant women, the disabled and children affected by this Bill.

Furthermore, the Illegal Migration Bill disturbs the devolution settlement in the UK by undermining – and in some cases actually disapplying – devolved primary legislation without the consent of the devolved nations. It also requires devolved governments to engage in likely breaches of international human rights law which must be protected as a requirement of their devolution settlements. This is a recipe for constitutional, political and legal conflict and tension.

Finally, the Illegal Migration Bill systemically shifts power to the UK Government, enabling it to play the constitutional roles of all three branches of state – as lawmaker, adjudicator and administrator. The result is a diminishing of the UK's constitution and its democracy.

The House of Lords is well placed to bring a non-partisan and independent approach to this Bill and to prioritise the rule of law, human rights, international law, and the UK's global reputation. We, therefore, call on peers to reject this Bill



or to support substantive amendments which ameliorate the Bill's most damaging provisions identified in this briefing.



## 1. UNDERMINING PARLIAMENTARY SOVEREIGNTY

1. The principle of Parliamentary Sovereignty, sometimes referred to as legislative supremacy or the primacy of representative government, occupies a central position in the UK's constitution. Generally speaking, the principle states that Parliament is free to legislate as it wishes and that no person or body is recognised by the law as having a right to override or set aside its legislation. The principle is described to constitute the "default mechanism for determining the shape and content of the UK's unwritten constitutional system".<sup>1</sup> Parliamentary Sovereignty means that Parliament is the supreme lawmaker and cannot be treated as a mere rubber-stamp for the Government's legislative programme. Parliament's role as supreme lawmaker imposes practical constraints on processes around UK law-making. To the extent that the Government controls law-making processes, it must treat Parliament with respect and support meaningful scrutiny processes. For example, this includes through not deliberately misleading Parliamentarians (para 1.3, [Ministerial Code](#)) and ensuring that Parliament is the first to be told of important Government announcements (para 9.1, [Ministerial Code](#)).

### 1.1. Process through Parliament

2. The Government has rushed the Illegal Migration Bill through Parliament in a manner which has undermined Parliament's role in being able to conduct meaningful scrutiny on legislation proposed by the UK Government. First, against the usual convention that there should be two weekends between a Bill's introduction and second reading and without any objective justification provided,

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<sup>1</sup> Colm O'Conneide and Jeffrey Jowell, 'General Survey Values in the UK Constitution' in Dennis Davis, Alan Richter and Cheryl Saunders (eds.) *An Inquiry into the Existence of Global Values: Through the Lens of Comparative Constitutional Law* (Hart, 2015), page 13.



the Bill's Second Reading was expedited only a few days after its introduction into the House of Commons. This undermined the ability of Parliamentarians, civil society and experts to examine the Bill in detail and prepare effective responses. Second, instead of the usual detailed consideration and evidence-gathering at Committee Stage, the Bill had only two days on the floor of the House of Commons, hence a maximum of twelve hours of debate. Third, at Report Stage in the Commons, the Government published more than one hundred amendments at late notice dealing with both substantive and highly technical issues, many of major constitutional importance. This meant that many MPs had only a few minutes to speak to their non-Government amendments.<sup>2</sup>

**3.** Taken together, these decisions have undermined meaningful parliamentary scrutiny. As the Chair of the Joint Committee on Human Rights, Joanna Cherry KC, has said:

“It is disappointing that the Government is seemingly intent to get this Bill through Parliament as fast as it possibly can, leaving little time for adequate scrutiny to take place. Scrutiny ensures that legislation works and helps prevent serious problems once a Bill becomes law. Given the Government has admitted there is a strong likelihood that this Bill will fail to meet human rights standards, detailed legislative scrutiny is vital, and scrutiny by our committee is all the more important.”<sup>3</sup>

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<sup>2</sup> Alice Lilly, “The Slow Death of Parliamentary Scrutiny” (15 May 2023) *Politics Home* available at: <https://www.politicshome.com/thehouse/article/scrutiny-scarcity-parliament-commons-lords>.

<sup>3</sup> Joint Committee on Human Rights, “Inquiry into Illegal Migration Bill launched – Home Secretary asked to appear from Committee” (16 March 2023) available at: Inquiry into Illegal Migration Bill launched – Home Secretary asked to appear before Committee - Committees - UK Parliament.



We note that despite the Home Secretary having been publicly invited on 15 March to speak to the Joint Committee on Human Rights, she has still not appeared before the Parliamentary Committee.<sup>4</sup> Moreover, while the Government has published a series of “factsheets” to accompany the Bill, it has not published a full impact assessment including on the economic impact of the Bill, and only published an Equality Impact Assessment on 11 May – more than two months after the publication of the Bill and too late for the House of Commons to see it.<sup>5</sup> Instead, it has been left to civil society organisations – such as the Refugee Council – to produce estimates of the Bill’s likely costs and harms.

**4.** There has been no Independent Anti-Slavery Commissioner in place since Dame Sara Thornton ended her three-year term of office in April 2022. Nor has the Home Office made it a priority to fill Dame Sara’s vacancy. Therefore, Parliament has been unable to request and receive specialist, independent advice and evidence from the UK’s core public authority representing the voices and perspectives of victims of modern slavery and human trafficking. This is concerning given that the Bill expressly disqualifies victims of trafficking from using the protections afforded by the Modern Slavery Act 2015. Moreover, given the concerns raised in the House of Commons by, for example, former Prime Minister, Theresa May, and former Work and Pensions Secretary, Sir Iain Duncan

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<sup>4</sup> Joint Committee on Human Rights to The Rt Hon Suella Braverman KC MP, ‘RE: Invitation to give oral evidence to the Joint Committee on Human Rights on the Illegal Migration Bill’ (15 March 2023) available at: <https://committees.parliament.uk/publications/34409/documents/189493/default/>.

<sup>5</sup> Home Office, “Equality Impact Assessment: Illegal Migration Bill” available at: <https://bills.parliament.uk/publications/51043/documents/3381>.



Smith, on precisely the issue of modern slavery, the lack of input from the Independent Anti-Slavery Commissioner is especially regrettable.

### **A Note on the Constitutional Role of the Lords**

5. The Home Secretary has made statements that the Lords must not frustrate “the will of the British people” and referred to the Bill as a “manifesto commitment in 2019”. This type of argument implicitly refers to the “Salisbury Convention” which is a UK constitutional convention stating that the Lords ought not to vote down a Government Bill, where that Bill refers to legislation mentioned in the UK Government’s election manifesto.<sup>6</sup> However, because no legislation along the lines of the Illegal Migration Bill was referred to in the Government’s election manifesto, the Salisbury Convention is not applicable. The sole reference to asylum and refugees in the 2019 Conservative manifesto was the commitment to “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”.<sup>7</sup> Therefore, the Salisbury Convention does not bind the Lords in this context.

### **1.2. Expansive Delegated Powers**

6. The Government’s Delegated Powers Memorandum identifies at least twenty delegated powers contained in this Bill.<sup>8</sup> Many of these are addressed in more detail in the Sections below. By virtue of Clause 63(4) of the Bill, a limited set of

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<sup>6</sup> As defined on the UK Parliament website, see “Salisbury Doctrine” in the Parliamentary glossary available at: [Salisbury Doctrine - UK Parliament](https://www.parliament.uk/about/offices/salisbury-doctrine/).

<sup>7</sup> Conservative Party Manifesto 2019, page 23.

<sup>8</sup> The Government’s full Delegated Powers Memorandum is available here: <https://bills.parliament.uk/publications/50890/documents/3350>.



delegated powers exercisable by statutory instrument require the affirmative resolution procedure – meaning that parliamentary consent is required before the instrument takes effect. These are delegated powers related to devolved nations, arrangements for removal of unaccompanied children, continuation of modern slavery provisions, the meaning of serious and irreversible harm, a cap on the number of entrants using safe and legal routes, Henry VIII powers and powers relating to items to legal privilege. However, Clause 63(5) makes the negative procedure the default position for all other delegated powers. Statutory instruments subject only to the negative procedure take effect unless and until specifically annulled by either House of Parliament. As a result of this, a sizeable proportion of secondary legislation produced under the authority of the Bill may receive little to no parliamentary scrutiny before it ends up on the statute books. The House of Commons last successfully blocked delegated legislation in 1978.

**7.** There are material problems with allowing the Government to make important decisions via delegated legislation. As highlighted by the House of Lords Constitution Committee, Parliament rejects statutory instruments “extremely rarely”.<sup>9</sup> Moreover, since statutory instruments are, except in extremely unusual cases, unamendable by Parliament, that legislation is passed into law precisely as drafted by Government. This means there is ordinarily no room for compromise or meaningful input from Parliament in examining the legislation.

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<sup>9</sup> House of Lords Constitution Committee, *Response to the Strathclyde Review* (2016). Available at <https://publications.parliament.uk/pa/ld201516/ldselect/ldconst/116/11606.htm>, para 40. Only 17 statutory instruments have been rejected by the two Houses over the last 65 years out of nearly 170,000.



**8.** In this Bill, the Government seeks expansive powers to make important – and for the people concerned, often life-changing – decisions with only modest parliamentary scrutiny and challenge. For example, the Government seeks the following delegated powers which expand executive discretion, limit parliamentary scrutiny, interfere with devolved autonomy, and impinge significantly on individual human rights:

- Clause 3(3)(d) grants the Secretary of State the power to specify in regulations the circumstances where she will exercise her powers to remove unaccompanied children from the UK. Clause 3(4) makes clear that this provision “may confer a discretion on the Secretary of State.” Clause 3(7) further states that the Minister may by regulations add additional exceptions to the duty to remove people from the UK and that these regulations may modify the Illegal Migration Bill once it becomes an Act and any other enactment, including primary legislation and devolved legislation (Clause 3(8)-(10)). This is, therefore, a very broad Henry VIII power which peers should scrutinise with particular care.
- Clause 6 gives the Secretary of State the power to specify new countries to which she is satisfied it is safe to return individuals seeking asylum. The statutory instrument is subject to the affirmative procedure, but this promotes only modest scrutiny of such decisions for the reasons outlined above.
- Clause 19(1) enables the Secretary of State to extend the provisions of Clauses 15 to 18 about the accommodation of unaccompanied children



to Wales, Scotland and Northern Ireland without devolved consent. This is despite housing and the care of children being within devolved competence. In addition, Clause 19(2) states that the regulations issued under Clause 19(1) may repeal, revoke or amend any enactment, including primary legislation from the devolved legislatures (Clause 19(4)). This is a Henry VIII power which directly impinges on devolved competence.

- Clause 56 gives the Secretary of State 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 contradicts the recommendations of the Interim Age Estimation Science Advisory Committee, which recommended that “no automatic assumptions or consequences should result from refusal to consent to biological age assessment and...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”.<sup>10</sup>

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<sup>10</sup> Interim Age Estimation Science Advisory Committee, “Biological evaluation methods to assist in assessing the age of unaccompanied asylum-seeking children” (October 2022) available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1127181/14.169\\_HO\\_AESAC\\_report\\_V6\\_FINAL\\_WEB.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1127181/14.169_HO_AESAC_report_V6_FINAL_WEB.pdf), para 9.8.



- Clause 58 empowers the Secretary of State to set an annual cap, in regulations, on the number of individuals entering the UK through approved schemes which she is to specify in regulations. While Clause 59 requires the Minister to produce a report six months after the enactment of the Bill detailing, in particular, the 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 to establish and facilitate any safe routes.
- Clause 62(1)-(2) grants the Secretary of State the power to make consequential amendments to 'amend, repeal, or revoke any enactment passed or made before...this Act' (Clause 62(2)). This includes Acts of Parliament and devolved legislation (Clause 62(3)), making this a Henry VIII power of considerable breadth.



## 2. UNDERMINING THE RULE OF LAW

**9.** The Rule of Law is another core constitutional value in the UK. Albert Venn Dicey stated that the Rule of Law was a constitutional principle that shaped British public decision-making and restrained (although could not ultimately over-ride) Parliamentary Sovereignty.<sup>11</sup> Most recently the principle has been elaborated by one of the most authoritative of British judges, Lord Bingham,<sup>12</sup> whose ‘ingredients’ of the Rule of Law can be summarised as including i. legality; ii. certainty; iii. equality; and iv. access to justice and rights. Lord Bingham’s approach was unanimously adopted by all 46 countries of the Council of Europe’s Venice Commission in 2011.<sup>13</sup> The Rule of Law has received statutory recognition in UK law under the Constitutional Reform Act 2005. It is expressly stated that the Act does not adversely affect “the existing constitutional principle of the Rule of Law”.<sup>14</sup>

**10.** The “[p]ractical implementation” of Rule of Law requires independent judicial review<sup>15</sup> Indeed, it is the ability of judges to review official decisions which is the “principal engine of the rule of law”.<sup>16</sup> The Constitution Society has had this to say regarding the importance of judicial review as the main pillar of the rule of law:

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<sup>11</sup> Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 1<sup>st</sup> ed. 1885; 10<sup>th</sup> ed., 1959).

<sup>12</sup> Tom Bingham, *The Rule of Law* (Penguin 2010)

<sup>13</sup> European Commission for Democracy Through Law (Venice Commission), *Report on the Rule of Law* CDL-AD (2011).

<sup>14</sup> Constitutional Reform Act 2005, s1.

<sup>15</sup> Jeffrey Jowell, ‘The Rule of Law’ in Jeffrey Jowell, Dawn Oliver and Colm O’Cinneide (eds), *The Changing Constitution*, 8<sup>th</sup> ed, (OUP 2015), 29.

<sup>16</sup> *R (Cart) v Upper Tribunal* [2010] EWCA Civ 859 [34].



“Judicial review thus defines our constitutional climate. It plays a key role in ensuring that the executive acts only according to law. Without it, we are closer to an authoritarian or even totalitarian state. With it, we live under the rule of law”.<sup>17</sup>

**11.** The operation of the Rule of Law in this way is necessary to support Parliamentary Sovereignty and democracy in the UK. As emphasised by the President of the Supreme Court, Lord Reed, without access to courts “laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of Members of Parliament may become a meaningless charade”.<sup>18</sup>

## **2.1. Ouster Clauses Undermining the Rule of Law**

### **a. Ouster Clauses Pertaining to Appeals of Suspensive Claims**

**12.** Suspensive claims are claims that can be brought to challenge the Secretary of State’s decision to remove an individual to a third country, only before the individual has been removed. There are two types of suspensive claims: serious harm suspensive claims<sup>19</sup> and factual suspensive claims.<sup>20</sup> A factual suspensive claim is a claim that the Secretary of State or an immigration officer made a

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<sup>17</sup> Amy Street, “Judicial Review and the Rule of Law: Who is in Control?” *The Constitution Society* available at: [https://www.consoc.org.uk/wp-content/uploads/2013/12/J1446\\_Constitution\\_Society\\_Judicial\\_Review\\_WEB-22.pdf](https://www.consoc.org.uk/wp-content/uploads/2013/12/J1446_Constitution_Society_Judicial_Review_WEB-22.pdf), 12.

<sup>18</sup> *R (UNISON) v Lord Chancellor* [2017] UKSC 5, para 68.

<sup>19</sup> Illegal Migration Bill, Clause 41.

<sup>20</sup> *Ibid*, Clause 42.



mistake of fact in deciding that the person met the removal conditions. A serious harm suspensive claim is a claim made by an individual given a third country removal notice that the “serious harm condition” is met in relation to that individual. This condition is that “before the end of the relevant period” the individual would “face a real, imminent and foreseeable risk of serious and irreversible harm if removed” to the third country. There are two key Ouster Clauses in the Bill related to appeals of suspensive claims which have the same structure and are as follows:

- I. **Clause 49 Ouster Clause Pertaining to the Upper Tribunal** – This states that certain decisions made by the Upper Tribunal with respect to suspensive claims – both serious harm suspensive claims<sup>21</sup> and factual suspensive claims<sup>22</sup> - are “final, and not liable to be questioned or set aside in any other court”.<sup>23</sup> This includes not questioning the Upper Tribunal on the basis of it “having exceeded its powers by reason of any error made in reaching its decision”.<sup>24</sup> Moreover, no application for judicial review may be brought in relation to its decision.<sup>25</sup> This is with the exception of circumstances in which the decision by the Upper Tribunal is questioned for factors including whether there had been a valid application before it,<sup>26</sup> whether the Upper Tribunal was properly constituted for the purpose of dealing with the application or making the decision<sup>27</sup> or questions regarding whether the Upper Tribunal is acting or has acted in either bad faith or “in such a

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<sup>21</sup> Illegal Migration Bill, Clause 41.

<sup>22</sup> Ibid, Clause 42.

<sup>23</sup> Ibid, Clause 49 (2).

<sup>24</sup> Ibid, Clause 49 (3) (a).

<sup>25</sup> Ibid, Clause 49 (3) (b).

<sup>26</sup> Ibid, Clause 49 (4) (a).

<sup>27</sup> Ibid, Clause 49 (4) (b).



procedurally defective way as amounts to a fundamental breach of the principles of natural justice”.<sup>28</sup>

- II. **Clause 51 Ouster Clause Pertaining to SIAC** – Where appeals related to suspensive claims involve decisions certified to have been made wholly or partly in reliance of information the Secretary of State considers should not be made public, for example, in the interests of national security, the appeal will be decided by the Special Immigration Appeals Commission (SIAC).<sup>29</sup> This states that SIAC decisions with respect to consideration of new matters in suspensive claims are “final, and not liable to be questioned or set aside in any other court”, with the same exceptions as set out above with respect to the Upper Tribunal.<sup>30</sup>

### *Impact on the Rule of Law*

**13.** Because of the extremely limited exceptions they leave when judicial review may still take place, these Ouster Clauses come gravely close to being blanket bans on reviews of judicial scrutiny. First, “bad faith” is almost impossible to prove on the part of a judicial body. As emphasised by the UK’s leading judicial review expert and judge, Sir Michael Fordham KC, bad faith “is a strong accusation not lightly to be alleged and which is difficult to prove”.<sup>31</sup> The same applies, second, to the claim that a judicial body’s approach has been so “procedurally defective way as amounts to a fundamental breach of the principles of natural justice”.

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<sup>28</sup> Ibid, Clause 49 (4) (c).

<sup>29</sup> Ibid, 51.

<sup>30</sup> Ibid.

<sup>31</sup> Sir Michael Fordham KC, *Judicial Review Handbook* (Bloomsbury Publishing, 2012), 52.



According to the Bar Council, the practical reality of the tests being the only grounds on which appeal decisions can be questioned mean that “[a]ny remedy is within the sole gift of the government”.<sup>32</sup>

**14.** Such Ousters Clauses may be considered unlawful or “*ultra vires*” by the UK Supreme Court, on the basis of its previous precedent on Ouster Clauses. For example, a majority in the recent Supreme Court decision in *Privacy International v Investigatory Powers Tribunal* read down an ouster clause to the effect that it did not exclude judicial review.<sup>33</sup>

**15.** What’s more, the regime surrounding the Ouster Clauses means that errors are likely in deciding appeals and applications in relation to suspensive claims. As further highlighted by the Bar Council, the margin for the Upper Tribunal as well as SIAC to make an error of law is large given the tight time limits imposed on it (variously 7 and 23 working days)<sup>34</sup> with restrictions on the Tribunal’s powers to extend time<sup>35</sup> and that the Tribunal has power to grant permission to appeal only if it considers there is “compelling evidence” of error.<sup>36</sup> Despite this there is no redress, and as the Bar Council has emphasised, “[a]s in a game of snakes and ladders, the person must go back to the beginning and try to persuade the Secretary of State to put right the mistake that she has made”.<sup>37</sup>

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<sup>32</sup> The Bar Council, “Illegal Migration Bill: Briefing for Peers – Second Reading”, 6 available at: [Bar-Council-Briefing-for-Peers-Illegal-Migration-Bill-Second-Reading.pdf \(barcouncil.org.uk\)](#).

<sup>33</sup> *R (on the application of Privacy International v Investigatory Powers Tribunal* [2019] UKSC 22.

<sup>34</sup> Illegal Migration Bill, Clause 48.

<sup>35</sup> *Ibid*, Clause 48(4).

<sup>36</sup> The Bar Council, “Illegal Migration Bill: Briefing for Peers – Second Reading”, 6 available at: [Bar-Council-Briefing-for-Peers-Illegal-Migration-Bill-Second-Reading.pdf \(barcouncil.org.uk\)](#).

<sup>37</sup> *Ibid*.



**16.** That redress for errors should rest with the Secretary of State, rather than an independent judicial body is incompatible with respect for the Rule of Law. A fundamental tenant of the Rule of Law is that the law should be applied equally and to all. What this means in practice is that where there is an error of law in first-instance judicial decision-making with regards to suspensive claims, there ought to be the opportunity for individuals to challenge this. Particularly, as there is evidence of judicial bodies making errors in rulings precisely in the area of removals and deportations.

**17.** A key example of this is with respect to SIAC's consideration of the appeals of six Algerian individuals whom the Government previously sought to deport from the UK – "BB" (also known as "RB"),<sup>38</sup> "PP",<sup>39</sup> "W",<sup>40</sup> "U",<sup>41</sup> "Y"<sup>42</sup> and "Z".<sup>43</sup> The appeals of these individuals were eventually allowed in 2016 by SIAC, only after the Court of Appeal remitted the matter of safety of return back to SIAC for it to reconsider in 2015 in *BB*.<sup>44</sup> After repeated litigation, it was shown that SIAC's ruling that that the Algerian nationals did not face a real risk of their Article 3 ECHR rights being violated had been flawed. This was via the discovery of emails between British diplomats regarding the assurance provided by the Algerian Government that it

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<sup>38</sup> *BB SC/39/2005*.

<sup>39</sup> *PP SC/54/2006*.

<sup>40</sup> *W SC/34/2005*.

<sup>41</sup> *U SC/32/2005*.

<sup>42</sup> *Y SC/32/2005*.

<sup>43</sup> *Z SC/37/2005*.

<sup>44</sup> *BB and others v SSHD* [2015] EWCA Civ 9; [2015] 1 WLUK 501.



would protect the rights of the deportees.<sup>45</sup> Following a reassessment of the risk to the Algerian individuals, following appeals of SIAC's ruling heard by the Court of Appeal, SIAC found that such individuals were indeed at real risk of treatment contrary to Article 3 ECHR. That it took being able to appeal SIAC decisions to ensure the protection of such individuals' Article 3 ECHR rights underscores the fundamental importance of effective appeal mechanisms in this area, for ensuring that the law is properly applied and applied equally to all.

## **b. Ouster of Judicial Scrutiny of Detention**

**18.** The Illegal Migration Bill contains a further Ouster Clause which represents a drastic undermining of the protection of liberty for all in the UK. This is contained in Clause 12, which ousts judicial review of unlawful detention for the first 28 days of detention, except where the Secretary of State or an immigration officer is alleged to have acted in bad faith or to have committed a fundamental breach of the principles of natural justice. The only recourse during this time is an ancient writ of *Habeas Corpus* (or in Scotland, an application for suspension and liberation).

### *Impact on the Rule of Law*

**19.** While the right to liberty is not absolute, the right to liberty to be free of arbitrary detention is considered one of the oldest and most recognised human

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<sup>45</sup> The emails, sent on 13 November 2014, stated that '[i]n an Algeria context, there was never a realistic prospect of being able to monitor the whereabouts and well-being of the DWA deportees. That runs into sensitivities about sovereignty'. Ibid, [110] - [113].



rights in constitutional thought.<sup>46</sup> By ousting judicial review of broad detention powers, the Bill seeks to remove a key requirement of the *Hardial Singh* principles, which form the cornerstone of UK protections of the right to liberty.<sup>47</sup> This is that it is for UK courts to decide on the “reasonableness” of detention, not the UK Government, including what constitutes a reasonable period of detention.<sup>48</sup> In removing this essential safeguard, the Illegal Migration Bill puts the right to be free from arbitrary detention at great risk. Barrister, Krishnendu Mukherjee of Doughty Street Chambers, has described this Ouster Clause as “an attempt to avoid the legal scrutiny of decisions which interfere with the fundamental liberty of individuals”.<sup>49</sup>

**20.** The ousting of judicial review in this context is particularly concerning considering the expanded detention powers contained in the Bill, discussed in more detail below. According to the Bar Council, there is “no justification for these drastic restrictions” and that “[j]udicial oversight of administrative decisions is critical to ensuring the lawful and proportionate exercise of detention powers”.<sup>50</sup>

### **c. Ouster of Domestic Interim Remedies**

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<sup>46</sup> “Liberty and the Historic Context of Immigration Detention” in Justine N Stefanelli, *Judicial Review of Immigration Detention in the UK, US and EU* (Hart Publishing, 2020), 17 -32.

<sup>47</sup> Articulated in *R (I) v SSHD* [2003] INLR 196, [46] per Dyson LJ.

<sup>48</sup> *R(A) v SSHD* [2007] EWCA Civ 804.

<sup>49</sup> Krishnendu Mukherjee, “The Illegal Migration Bill is an Attack on Fundamental Human Rights and the Rule of Law” available at: [The Illegal Migration Bill is an Attack on Fundamental Human Rights and the Rule of Law, Krishnendu Mukherjee \(doughtystreet.co.uk\)](https://www.doughtystreet.co.uk/blog/the-illegal-migration-bill-is-an-attack-on-fundamental-human-rights-and-the-rule-of-law).

<sup>50</sup> Bar Council, “Illegal Migration Bill: Briefing for Peers – Second Reading” (May 2023) available at: <https://www.barcouncil.org.uk/uploads/assets/2aa8836a-28c2-4fe6-8cba240c75bb7c2b/Bar-Council-Briefing-for-Peers-Illegal-Migration-Bill-Second-Reading.pdf>, pages 2 - 3.



**21.** Clause 52 of the Bill removes the power of any UK court to 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”.

### *Impact on the Rule of Law*

**22.** Clause 52 further undermines the Rule of Law by attempting to remove the power of UK judges to hold the Government’s decisions to the standards required by International Human Rights Law, the Human Rights Act 1998, and the common law. This particularly undermines the Rule of Law requirement that no individual or body, including the UK Government, is above the law.

## **2.2. Retrospectivity**

**23.** A key requirement of the Rule of Law is that the law must be accessible and so far as possible, intelligible, clear and predictable.<sup>51</sup> Part of this, in the words of Lord Pannick, is the “basic constitutional principle that people should be penalised only for contravening what was at the time of their act or omission a valid legal requirement”.<sup>52</sup>

**24.** A significant number of provisions in the Illegal Migration Bill have retrospective effect, applying 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). Clause 5(12) provides that the legislation applies to any asylum or human rights claim made on or after 7 March 2023 by an individual

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<sup>51</sup> Tom Bingham, *The Rule of Law* (Penguin, 2010), Chapter 3.

<sup>52</sup> HL 21 March 2013, vol 744, col 741.



who entered without leave and that has not been decided by the Secretary of State – a measure likely to result in great suffering, legal uncertainty, and further chaos in the asylum system. Other retrospective measures include Clause 2, the duty to make arrangements for removal; Clause 3, the power to make arrangements for the removal of an unaccompanied child; Clauses 21-28, the application of protections for victims of modern slavery; Clauses 29 to 34, concerning ineligibility for leave or citizenship; and the Home Office powers under Clause 15 to accommodate unaccompanied children who would otherwise have been supported under the Children Act 1989.

**25.** Retrospective law-making undermines the Rule of Law. It sets a precedent that the Government can fail to abide by primary legislation enacted by Parliament and then retrospectively legitimise its conduct.<sup>53</sup> The House of Lords Constitution Committee has previously highlighted the “unacceptability of retrospective legislation other than in very exceptional circumstances”.<sup>54</sup> As Lord Kerr explained in *Walker v Innospec Limited*, “[t]he general rule, applicable in most modern legal systems, is that legislative changes apply prospectively. Under English law, for example, unless a contrary intention appears, an enactment is presumed not to be intended to have retrospective effect. The logic behind this principle is explained in *Bennion on Statutory Interpretation*, 6th ed (2013), Comment on Code

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<sup>53</sup> Reprieve, ILPA, Public Law Project and Justice, “Clause 9(5)-(7) of the Nationality and Borders Bill – Briefing for peers: Unnecessary retrospective legislation that violates the Rule of Law” (March 2022) available at: [https://files.justice.org.uk/wp-content/uploads/2022/04/12154218/2022\\_03\\_16\\_PRIV-Clause-9-NBB-Briefing-for-Ping-Pong-Lords-Reprieve-ILPA-PLP-and-JUSTICE-FINAL.pdf](https://files.justice.org.uk/wp-content/uploads/2022/04/12154218/2022_03_16_PRIV-Clause-9-NBB-Briefing-for-Ping-Pong-Lords-Reprieve-ILPA-PLP-and-JUSTICE-FINAL.pdf).

<sup>54</sup> House of Lords Select Committee on the Constitution, Nationality and Borders Bill (21 January 2022) available at: <https://committees.parliament.uk/publications/8606/documents/86994/default>.



section 97: 'If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it'.<sup>55</sup>

**26.** During the passage of the Nationality and Borders Act 2022, cross-party parliamentarians raised concerns about Section 10, which enables the retrospective validation of prior invalid and unlawful orders of the Home Secretary to deprive people of their citizenship without notice. Baroness D'Souza argued that the retroactive nature of Section 10 would create "two tiers of citizens" to which different laws and safeguards would apply.<sup>56</sup> The same logic applies to those who would be affected by the Illegal Migration Bill, who would lose access to vital protections on the sole basis of the date of their arrival in the UK and laws that did not exist at the time of their arrival.

### **2.3. Very Likely Breaches of International Human Rights Law**

**27.** The powers in the Illegal Migration Bill will very likely breach many of the UK's obligations under international law, including those deriving from the Refugee Convention, the European Convention on Human Rights (ECHR), the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT), the United Nations Convention on the Rights of the Child (CRC), and the Convention on the Reduction of Statelessness. To the extent that the Bill does not comply with a sizeable proportion of the UK's obligations under international human rights law, as set out below, this is a clear violation of the principle of the Rule of Law. Compliance with international legal obligations is a fundamental requirement of any state seeking to uphold the Rule of Law. Compliance with international law is

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<sup>55</sup> *Walker v Innospec Limited* [2017] UKSC 47, para 22.

<sup>56</sup> HL Deb 4 April 2022, vol 820, col 1858.



one of eight principles referred to by Lord Bingham, the UK's pre-eminent jurist and former Lord Chief Justice, to which a state must adhere in respecting the Rule of Law. Lord Bingham stated in clear terms that the Rule of Law "requires compliance by the state with its obligations in international law as in national law".<sup>57</sup>

**28.** It has been suggested by some that breaching international law is a legitimate action of a dualist state. However, such a suggestion seems to misunderstand that compliance with those international treaties which a state has signed is a non-negotiable aspect of upholding the Rule of Law and participating in the international legal system generally. The Vienna Convention on the Law of Treaties 1969<sup>58</sup> is clear that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith".<sup>59</sup> A failure by a State to comply with its international obligations is considered an "internationally wrongful act" in international law, and this applies "regardless" of the "origin or character" of that international law.<sup>60</sup>

**29.** Far from representing a lofty principle to which states would ideally adhere, respect for the Rule of Law is essential for international agreements to function effectively. This includes those agreements related to markets, industries, and international relations. Without respect for the Rule of Law, such international agreements lose their credibility as do those states which show themselves unwilling to uphold their commitments. States not prepared to abide by their

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<sup>57</sup> Tom Bingham, *The Rule of Law* (Penguin, 2010).

<sup>58</sup> Signed by the UK in 1970 and ratified in 1971.

<sup>59</sup> The Vienna Convention on the Law of Treaties 1969, Article 26.

<sup>60</sup> International Law Commission's Articles on State Responsibility, Articles 2 and 12.



commitments under international law are likely to face many practical disadvantages.

**30.** As highlighted by Lord Bingham, “[h]owever attractive it might be for a single state to be free of legal constraints that bind all other states, those states are unlikely to tolerate such a situation for very long and in the meantime the solo state would lose the benefits and protections that international agreement can confer”.<sup>61</sup> In the first instance, there can be no expectation on the part of that state that other states will comply with international law. That state leaves itself open to other states refusing to comply with international agreements, while having no basis on which to challenge this behaviour. Relatedly, by breaching international obligations, the UK will be siding itself with countries such as Russia, who have undermined their bargaining positions on the international stage in part through disregard for international legal standards.

## I. Breaches of the Refugee Convention

**31.** The Illegal Migration Bill provides the UK Government with powers that are very likely in breach of the Refugee Convention, which came into effect in 1951.<sup>62</sup> It was originally drafted with significant input from the UK Government<sup>63</sup> which

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<sup>61</sup> Tom Bingham, *The Rule of Law* (Penguin, 2010) 112.

<sup>62</sup> The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (“Refugee Convention”).

<sup>63</sup> Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011), page 54.



also supported the removal of the treaty's temporal and geographic restrictions.<sup>64</sup> Its overall purpose is to ensure that (1) there exists some basic level of protection for refugees, (2) responsibility to provide such protection is shared among States, and (3) prevent the protection of refugees "becoming a cause of tension among States".<sup>65</sup> The Convention defines a refugee as someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.<sup>66</sup> The Refugee Convention sets out a number of protections that states must provide to refugees to comply with their treaty obligations.

**32.** First, the Refugee Convention imposes a duty on states to determine whether individuals crossing their borders are refugees.<sup>67</sup> Article 31 of the Refugee Convention requires states to determine whether individuals meet the criteria to be recognised as refugees, and where they do meet the criteria to protect them.

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<sup>64</sup> Via the Protocol to the Convention Relating to the Status of Refugees of 31 January 1967. See Andreas Zimmerman (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011), page 71.

<sup>65</sup><sup>65</sup> The preamble of the 1951 Convention Relating to the Status of Refugees emphasises that the High Contracting Parties consider it desirable to "consolidate previous international agreements relating to the status of refugees and to extend the scope of and protection accorded by such instruments" while acknowledging that the UN has recognised that the "international scope and nature cannot therefore be achieved without international co-operation". Such previous international agreements include the 1933 and 1938 Conventions relating to the Status of Refugees, whose preambles both expressly state is to be "...desirous that refugees shall be ensured the enjoyment of civil rights, free and ready access to courts, security and stability as regards establishment and work, facilities in the exercise of the professions, of industry and of commerce, and in regard to the movement of persons, admission to schools and universities".

<sup>66</sup> Refugee Convention, Article 1.

<sup>67</sup> *Ibid*, Article 31.



This duty applies to all. However, Clause 2 of the Illegal Migration Bill imposes a duty on the Secretary of State to make arrangements to remove individuals regardless of whether they are refugees, where that individual did not come directly to the UK.<sup>68</sup> As highlighted by the UN High Commissioner for Refugees - the treaty body responsible for overseeing the implementation of the Refugee Convention - this duty almost amounts to a blanket ban on asylum in the UK. This is because almost 90% of refugees globally escape countries from which they cannot take a direct route to the UK.<sup>69</sup> The UN High Commissioner for Refugees has emphasised “[t]he reality is that for most asylum-seekers there are no safe and legal routes to enter the UK”.<sup>70</sup> Therefore, the duty contained in Clause 2 of the Illegal Migration Bill breaches the Refugee Convention requirement that states ascertain the refugee status of those entering a country regardless of how they enter.

**33.** Second, the Illegal Migration Bill breaches the Refugee Convention requirement, contained in Article 31 of the Convention, that refugees are not subject to penalties for illegal entry or presence in a state. Clauses 10 – 13 of the Illegal Migration Bill give the UK Government powers to detain people based on their method of entry to the UK. This breaches Article 31 of the Refugee Convention by imposing the penalty of detention on those who did not enter the UK using the routes narrowly defined by the UK Government. Notably, some have suggested that Article 31’s prohibition on penalties referring to refugees “coming

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<sup>68</sup> Illegal Migration Bill, Clause 2 ss (4) – (5).

<sup>69</sup> UNHCR, “Why the UK Illegal Migration Bill is an Asylum Ban”, page 1 available at: <https://www.unhcr.org/uk/media/65150>.

<sup>70</sup> UNHCR, “Legal Observations on the Illegal Migration Bill” (2 May 2023), para 8 available at: <https://www.unhcr.org/uk/media/unhcr-legal-observations-illegal-migration-bill-02-may-2023>.



directly” to the territory is the result of an intention to limit the prohibition to those refugees who have taken a single continuous route to that territory. This is based on a misunderstanding of the definition of the international legal definition of “coming directly” as clarified by the UNCHR.<sup>71</sup> International law is clear that refugees are to be held as “coming directly” even if they have transited in immediate countries.<sup>72</sup>

**34.** Third, the Illegal Migration Bill does not fully protect the principle of *non-refoulement*. This is a central protection contained in the Refugee Convention, and, as discussed further below, is referred to in a number of other treaties to which the UK is bound. The principle states that Governments cannot return refugees to countries where their “life or freedom would be threatened on account of” their “race, religion, nationality, membership of a particular social group or political opinion”.<sup>73</sup> It is true that there are provisions in the Bill which establish a threshold for preventing removal of an individual on the basis that it would result in “serious and irreversible harm”.<sup>74</sup> The Bill refers to serious and irreversible harm as constituted by the type of persecution referred to in the Refugee Convention, via Section 31 of the Nationality and Borders Act 2022.<sup>75</sup> However, it also states that such persecution will not constitute serious and irreversible harm where an individual “is able to avail themselves of protection from that persecution”.<sup>76</sup> What this means in practice is far from clear. When combined with the broad ranging

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<sup>71</sup> Ibid, para 101 – 104.

<sup>72</sup> Summary Conclusions: Article 31 of the 1951 Convention, June 2003, para. 10(c), available at: <https://www.refworld.org/docid/470a33b20.html>.

<sup>73</sup> Refugee Convention, Article 33.

<sup>74</sup> Illegal Migration Bill, Clauses 38 – 41.

<sup>75</sup> Illegal Migration Bill, Clause 38 (4) (b).

<sup>76</sup> Ibid



powers of the Secretary of State to define serious and irreversible harm, it is clear this provision may open the door to removal in cases where there may be a serious risk of persecution which is only mitigated by safeguards loosely defined by the Secretary of State.

**35.** There is a further risk of *refoulement* stemming from the Secretary of State's removal duty extending to removal of individuals to the countries or territories listed in Schedule 1 of the Bill. These are countries to which individuals can be removed if they make a protection claim with respect to the country that issued them an identity document,<sup>77</sup> unless they are nationals of "safe" countries referred to in Clause 57(3) of the Bill. These include Rwanda, whose detention centres the US Government, in its latest human rights assessment, has described as harsh and life-threatening. This is while further noting reports of torture used by police to intimidate or obtain information from individuals in unofficial detention centres.<sup>78</sup> As noted by a number of their Lordships in the Second Reading of the Bill, a number of the countries listed in Schedule 1, there is evidence that certain individuals may face persecution. For example, there are 17 countries on the list in relation to which there is evidence of discriminatory behaviour on the part of Governments towards LGBTQI+ people.<sup>79</sup>

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<sup>77</sup> Illegal Migration Bill, Clause 5 (8).

<sup>78</sup> US Department of State, "2022 Country Reports on Human Rights Practices: Rwanda" available at: [Rwanda - United States Department of State](https://www.state.gov/rwanda).

<sup>79</sup> Rainbow Migration, "Full breakdown of countries that the asylum bill considers "safe" but are not safe for LGBTQI+ people" (15/03/2023) available at: <https://www.rainbowmigration.org.uk/news/full-breakdown-of-countries-that-the-asylum-bill-considers-safe-but-are-not-safe-for-lgbtqi-people/>. See also Lee Marsons, "How the UK's Illegal Migration Bill turns its back on persecuted LGBT people" (29/03/2023) *The UK Administrative Justice Institute* available at: <https://ukaji.org/2023/03/29/how-the-uks-illegal-migration-bill-turns-its-back-on-persecuted-lgbt-people/>.



**36.** Importantly, there are no requirements in the Bill that the Secretary of State make an assessment as to whether removal would be safe and reasonable for that particular individual, contrary to references made in the ECHR Memorandum provided by the Government that removal would be to a “safe third country for consideration of any asylum claims”.<sup>80</sup> Moreover, there is nothing in the Bill which requires a receiving country have an effective asylum procedure or agree to admit an individual in accordance with effective asylum procedures. In this way, the Bill falls short of ensuring that refugees are provided with the protections which are required by the Refugee Convention.

**37.** More broadly, the Illegal Migration Bill risks being seen as a rejection of the principle underlying the Refugee Convention that protecting refugees should be a shared responsibility among states. As emphasised by the UNHCR, to insist that refugees stay in the “first safe country they reach” imposes a disproportionate responsibility on those countries, as well as others through which refugees may travel, and threatens the capacity and willingness of those countries to provide protection and long-term solutions.<sup>81</sup>

## II. Breaches of the European Convention on Human Rights

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<sup>80</sup> “Illegal Migration Bill: European Convention on Human Rights Memorandum” available at: <https://publications.parliament.uk/pa/bills/cbill/58-03/0262/ECHR%20memo%20Illegal%20Migration%20Bill%20FINAL.pdf>, para 3 (a).

<sup>81</sup> UNHCR, “Legal Observations on the Illegal Migration Bill” (2 May 2023) available at: <https://www.unhcr.org/uk/media/unhcr-legal-observations-illegal-migration-bill-02-may-2023>, para 10.



*a. Non-refoulement and Article 3 ECHR*

**38.** The very likely breaching of the principle of *non-refoulement* by the Illegal Migration Bill is one of several ways the Illegal Migration Bill will put the UK in breach of its obligations under the European Convention on Human Rights (ECHR). The ECHR is an international treaty drafted by the Council of Europe, partly at the instigation of Sir Winston Churchill.<sup>82</sup> Article 1 of the Convention creates an obligation for all Member States to ‘secure for everyone within their jurisdiction’ the ‘rights and freedoms’ defined in Section I of the Convention’.<sup>83</sup> These rights are civil and political rights which the drafters of the Convention deemed basic minimum rights to ensure the protection of democracy in Europe.<sup>84</sup>

**39.** If passed in its current form, the Illegal Migration Bill will very likely put the UK in breach of its obligations under the ECHR. This appears to have been anticipated by the UK Government to the extent that it has stated in clear terms at the beginning of the Bill that it cannot guarantee that the provisions of the Bill are compatible with the UK’s obligations. There are several ways in which the Bill will put the UK in likely breach of its ECHR obligations.

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<sup>82</sup> The Council was formed in 1949 following the signing of the Statute of the Council of Europe in May 1949 by ten European states (Belgium, France, Luxembourg, The Netherlands, UK, Ireland, Italy, Denmark, Norway and Sweden). It came into force in 1953.

<sup>83</sup> ECHR, article 1.

<sup>84</sup> As stated in the ECHR’s preamble, in signing the Convention, Contracting States reaffirm their belief that the foundations of ‘peace and justice in the world’ are best maintained by “effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend”. See also William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press, 2017), 9; Ed Bates, *The Evolution of the European Convention on Human Rights* (Oxford University Press, 2010).



**40.** In the first instance, the Bill will very likely breach Article 3 ECHR. Article 3 of the ECHR obliges states not to remove individuals where “substantial grounds” have been shown for believing that the person in question would face a “real risk of being subjected to treatment contrary to Article 3 (art. 3) in the receiving country”.<sup>85</sup> The European Court of Human Rights has emphasised that this principle applies “irrespective of the victim’s conduct”.<sup>86</sup> Article 3 ECHR is an absolute right, not subject to a general limitation Clause, and must be respected in all circumstances. It is also a non-derogable right so states may not derogate from their Article 3 obligations under Article 15 ECHR.

**41.** During the drafting of Article 3, the absolute nature of Article 3 was forcefully advocated for by a United Kingdom delegate to the drafting committee.<sup>87</sup> Moreover, as the European Court on Human Rights has repeatedly emphasised, the Convention’s prohibition of torture is seen as a defining feature of democratic nations, enshrining “one of the fundamental values of the democratic societies making up the Council of Europe”.<sup>88</sup>

**42.** Despite the UK’s historic role in creating a regional framework to absolutely prohibit torture, inhuman and degrading treatment, the Illegal Migration Bill falls short of protecting people from such treatment. This relates to the inadequacy of the limited opportunity for individuals to challenge such removals, discussed in

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<sup>85</sup> *Chahal v UK* (1996) 23 EHRR 413, para 74.

<sup>86</sup> *Ibid*, para 79.

<sup>87</sup> The UK delegate, Mr Seymour Cocks made an unsuccessful attempt to amend Article 3 so that it listed specific actions constituting torture. While the amendments were not passed the drafting Committee spoke in support of Mr Cocks’ general statements.

<sup>88</sup> *Soering v UK* (1989) 11 EHRR 439, para 88.



more detail below. Here it is important to note that the prospect of individuals being able challenge to removal fall into two categories: 1) challenges that can be made which can prevent removal and 2) challenges that can be ongoing while removal takes place “regardless” of such a claim.<sup>89</sup> There are only three key challenge that falls into category 1, and so can prevent removal to a third country, and all of them are so restricted that they are not currently capable of ensuring the human rights of individuals the Government is seeking to remove are protected.

**43.** The first is a challenge brought on the basis that such a removal to a third country would be incompatible with the ECHR rights as recognised in domestic law by the Human Rights Act 1998. However, as noted elsewhere in this briefing, the Human Rights Act 1998 is disapplied in significant ways in this context due to other provisions in the Bill. This includes via the disapplication of Section 3 of the Human Rights Act 1998, as well as Clause 4(1)(b) of the Bill which states that human rights claims cannot prevent removal where that individual meets certain conditions as set out in Clause 2 of the Bill. For human rights claims in which a person argues that being removed to their country of nationality, or a country in which they have obtained an identity document, would be unlawful under Section 6 of the Human Rights Act 1998, Clause 4 of the Bill makes their claim inadmissible, without any right of appeal.

**44.** The second is by making a factual suspensive claim on the basis that a factual error has been made in deciding that the individual met the conditions for

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<sup>89</sup> Illegal Migration Bill, Clause 4 (1) (d).



removal.<sup>90</sup> The third is making a serious harm suspensive claim regarding removal to a third country, which requires establishing that the individual would face a real, imminent and foreseeable risk of serious and irreversible harm if removed.<sup>91</sup> In setting out what would constitute “serious and irreversible harm”, the Bill states that “torture” and “inhuman or degrading treatment or punishment” are examples of harm that constitute serious and irreversible harm.<sup>92</sup> However, as mentioned above, the power to further define or re-define “serious and irreversible harm” is with the Secretary of State and there is no requirement that the Secretary of State defines this threshold in a manner which is consistent with ECHR requirements. Moreover, suspensive claims related to serious and irreversible harms are explicitly stated by the Bill to not be “human rights claims”<sup>93</sup> suggesting that there is no intention that such harms are to track ECHR protections.

**45.** The Bill establishes scope for explicit departure from ECHR requirements. The Bill states that where the standard of healthcare available in the country of return is “lower than is available” in the UK, any “harm resulting from that different standard of healthcare” will not constitute serious and irreversible harm.<sup>94</sup> Furthermore, any “pain or distress resulting from a medical treatment” that is available in the UK not being available in the country of return is stated to be “unlikely” to constitute serious and irreversible harm.<sup>95</sup> As a result of these provisions, the Bill creates leeway for a seriously ill person to face “a real risk, on

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<sup>90</sup> Ibid, Clause 37.

<sup>91</sup> Ibid, Clause 38

<sup>92</sup> Ibid, Clause 38 (4) (c) – (d).

<sup>93</sup> They are not to be human rights claims for the purposes of the Nationality, Immigration and Asylum Act 2002 or the Nationality and Borders Act 2022, per Clause 40(1).

<sup>94</sup> Ibid, Clause 38 (5) (c).

<sup>95</sup> Ibid, Clause 36 (6) – (7).



account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy”.<sup>96</sup> As has been emphasised by the UK Supreme Court, such actions would violate the Article 3 ECHR rights of that individual.<sup>97</sup>

*b. Interim measures of the European Court of Human Rights*

**46.** Clause 53 was amended by the Government during the Bill’s passage through the House of Commons, under political pressure from the faction of Conservative Party members most actively seeking the UK’s withdrawal from the European Convention on Human Rights altogether.<sup>98</sup> The amendment replaced what had been referred to as a placeholder Clause,<sup>99</sup> which granted powers to the Secretary of State to make regulations pertaining to the implementation of interim measures indicated by the Strasbourg Court, with more substantive provisions on the face of the Bill. The new substantive provisions are convoluted, but in essence allow a Minister to disapply the “duty” created by the Bill to arrange for a person’s removal should a relevant interim measure requesting a person’s removal be stayed is indicated by the European Court of Human Rights. A Minister has free rein in their decision whether or not to disapply the duty in these circumstances,

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<sup>96</sup> *Paposhvili v Belgium* [2017] Imm AR 867, para 183.

<sup>97</sup> *AM (Zimbabwe) v Home Secretary* [2020] UKSC 17.

<sup>98</sup> See, for example, BBC News, “Migration Bill: Home Secretary to Win Powers to Ignore European Court (20 April 2023) available at: <https://www.bbc.co.uk/news/uk-politics-65331272>; see also HC Deb 26 April 2023, vol 731, col 783.

<sup>99</sup> Illegal Migration Bill, Explanatory Notes, 7 March 2023 available at: <https://publications.parliament.uk/pa/bills/cbill/58-03/0262/en/220262en.pdf>, page 7.



although the Clause contains some heavy steering in relation to procedural considerations regarding how interim measures from the European Court are issued.<sup>100</sup>

**47.** Compliance with interim measures is an obligation on all parties to the Convention. Several Peers speaking at second reading of the Bill sought to make a case that no such obligation exists,<sup>101</sup> but these claims are misleading. They focused exclusively on the obligation under Article 46 ECHR for member states to abide by final judgments of the European Court of Human Rights and argued that an interim measure is not a final judgment. However, as Lord Wolfson of Tredegar himself acknowledged when making his argument,<sup>102</sup> the Grand Chamber of the European Court of Human Rights has ruled that compliance with interim measures is in fact an obligation under the European Convention of Human Rights. The Grand Chamber and Sections of the Court have repeatedly ruled,<sup>103</sup> to the point where this is now a settled area of Convention interpretation, that compliance with interim measure indications, which are only issued when there is an imminent risk of irreparable harm, is necessary for states to fulfil their obligations under Article 34 of the European Convention on Human Rights, not to hinder in any way the effective exercise of the right of individual petition.<sup>104</sup> That

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<sup>100</sup> Illegal Migration Bill, Clause 53(5)(a-d).

<sup>101</sup> See, for example, Lord Howard of Lympne, HL Deb 10 May 2023, Vol 829, Col 1795; Lamont of Lerwick, Col 1837; Lord Wolfson of Tredegar, Col 1854.

<sup>102</sup> Ibid, Lord Wolfson of Tredegar, Col 1854.

<sup>103</sup> *Mamatkulov and Askarov v. Turkey*, (App nos. [46827/99](#) and [46951/99](#)), Grand Chamber Judgment, 4 February 2005; *Paladi v. Moldova* (App no. [39806/05](#)), Grand Chamber Judgment, 10 March 2009; *Kondrulin v. Russia* (App. no. [12987/15](#)) Chamber Judgment 3<sup>rd</sup> Section, 20 September 2016.

<sup>104</sup> *Mamatkulov and Askarov v. Turkey*, (App nos. [46827/99](#) and [46951/99](#)), Grand Chamber Judgment, 4 February 2005, para 129.



this is a clearly settled aspect of Convention law is further demonstrated by the conduct of the UK government, to whom the duty to comply pertains.

**48.** The duty to comply with interim measures was never previously questioned by the UK Government,<sup>105</sup> until the controversy in the summer of 2022 regarding the government's policy of forcibly removing asylum seekers to Rwanda. Despite the vast majority of individuals targeted for the initial removal flight under that policy being removed from the flight by decisions taken either by the Home Office itself or the UK's domestic courts, a small number of interim measure indications were made at the last minute by the European Court of Human Rights, requesting that removal be paused until domestic courts could hear the claimants' substantive cases.<sup>106</sup> Such events appear to have prompted the focus on interim measures in the current Bill. Despite the clearly expressed objections of the UK Government to these interim measures, it nevertheless complied with them. This was presented at Second Reading as merely a matter of politics,<sup>107</sup> but given the political force behind delivering a working 'Rwanda policy', it seems likely that government complied with an international legal obligation it recognised as existing. Notably, every one of the claimants to whom the interim measures related were subsequently found by the domestic courts to have been subject to unlawful removal decisions by the Home Office.<sup>108</sup>

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<sup>105</sup> Interim measures have been indicated to the UK Government numerous times, including in highly politically contentious cases such as the deportation of Abu Qatada. See *e Othman (Abu Qatada) v. the United Kingdom* (App. No. 8139/09). They have always been complied with and the UK government has never previously raised a complaint about the Interim Measure system when previous reforms processes to the ECHR system were being negotiated.

<sup>106</sup> *AAA (Syria) & Ors v SSHD* [2022] EWHC 3230 (Admin) [6]-[7].

<sup>107</sup> Lord Wolfson of Tredegar, HL Deb 10 May 2023, Vol 829, Col 1854.

<sup>108</sup> *AAA (Syria) & Ors v SSHD* [2022] EWHC 3230 (Admin).



**49.** Given that compliance with interim measures is a clear duty under international law and that the duty rests on the UK government, the effect of this Clause would simply be to give parliamentary authority for a future Ministerial decision to break that duty. This point was forcefully made when the Bill was being debated in the House of Commons, by former Conservative Attorney General Rt Hon Sir Geoffrey Cox KC, who argued that the Clause asked that, “this House should approve, quite consciously and deliberately, a deliberate breach of our obligations under the Convention”.<sup>109</sup>

**50.** However, the serious implications this Clause has for the Rule of Law extend further than this. Under the Clause, if a Ministerial decision is not taken to disapply the duty to remove (a decision which can more succinctly be described as a decision to ignore an interim measure indication) any domestic court is prevented from even having regard to the existence of such a measure.<sup>110</sup> The effect of this executive decision to breach our commitments under international law is that it imposes upon our domestic courts a duty to ignore the existence of a highly relevant ruling pertaining to a case under their consideration. This is a clear breach of the Separation of Powers, as the Bill proposes that the executive dictates to the courts what information they can and cannot consider in a given case. The situation is exacerbated by the fact that the Secretary of State making this determination may also be a party to any proceedings where the bar on judicial consideration of an interim measure would apply.

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<sup>109</sup> Rt Hon Sir Geoffrey Cox KC, HC Deb 26 April 2023, Vol 731 col 785.

<sup>110</sup> Illegal Migration Bill, Clause 53(6)-(7).



*c. Article 5 ECHR: The right to liberty*

**51.** Article 5 ECHR contains protections for the right to liberty, which the Illegal Migration Bill risks breaching due to its significant expansion of the UK Government's powers to detain people. Clause 10 of the Bill allows people to be detained where an immigration officer merely "suspects" that they meet the conditions set out in Clause 2. Moreover, Clause 11 of the Bill allows such detention to take place for as long as "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" and "to enable such arrangements to be made for the person's release as the Secretary of State considers to be appropriate". As mentioned above, the Bill attempts to prevent judicial scrutiny of the exercise of these detention powers. This is likely to be incompatible with Article 5 ECHR requirements that safeguards must be in place to protect against the arbitrary deprivation of liberty<sup>111</sup>

*d. Article 4 ECHR: The right against slavery and forced labour*

**52.** The Bill will also place the UK in breach of its non-derogable obligations under Article 4 ECHR. This Article creates a human right against slavery and forced labour. 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'.<sup>112</sup> The positive 'protection' duty has 'two principal aims: to protect the victim of trafficking from further harm; and to

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<sup>111</sup> *Saadi v the United Kingdom* (2008) BHRC 123, paras 64 – 66.

<sup>112</sup> *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, [284].



facilitate his or her recovery'. However, Clauses 21 to 28 of the Bill exclude most victims of trafficking and modern slavery from recovery. As set out above, Clauses 10 – 13 of the Bill will enable individuals to be detained without establishing whether they are victims of trafficking and modern slavery. Moreover, such detention powers may create further harms for modern slavery and trafficking victim,<sup>113</sup> who are at a greater risk than others in a detention setting.<sup>114</sup>

### III. Breaches of the European Convention against Trafficking

**53.** In removing protections against modern slavery and trafficking, the Illegal Migration Bill's provisions will also put the UK in likely breach of its obligations under the Council of European Convention on Action against Trafficking in Human Beings (ECAT). Article 5(2) of ECAT requires that signatories to the Convention “shall establish and/or strengthen effective policies and programmes to prevent trafficking in human beings, by such means as: research, information, awareness raising and education campaigns, social and economic initiatives and training programmes, in particular for persons vulnerable to trafficking and for professionals concerned with trafficking in human being”.

**54.** Moreover, Article 10 of ECAT requires that states will “provide its competent authorities with persons who are trained and qualified in preventing and

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<sup>114</sup> Royal College of Psychiatrists, “Detention of people with mental disorders in immigration removal centres (IRCs)” (2021), 13 available at: <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>.



combating trafficking in human beings, in identifying and helping victims, including children” and “shall adopt such legislative or other measures as may be necessary to identify victims as appropriate”. It further requires that states “shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence... has been completed by the competent authorities”.

**55.** As highlighted by the United Nations’ International Organisation for Migration (IOM), the Illegal Migration Bill would “make it impossible” for victims arriving in an irregular manner – which would be the majority of such victims – to “get the support and protection they need”.<sup>115</sup> The Bill prevents individuals subject to the removal duty who may also be a victim of modern slavery and trafficking from accessing protections against removal that would be available under the Nationality and Borders Act 2022. The Bill is explicit that individuals may be excluded from these protections on the grounds they are a threat to public order. Some have stated this is compatible with Article 13 of ECAT, which refers to public order grounds to disapply the required 30 days recovery and reflection period. However, notably, the exception refers only to disapplying this specific protection, not all protections, such as those which were previously provided under the Nationality and Borders Act 2022, including grants of leave to remain to victims,

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<sup>115</sup> UN International Organisation for Migration, “Statement: UK ‘Illegal Migration Bill’ Exacerbates Risks for Survivors of Modern Slavery” available at: <https://www.iom.int/news/uk-illegal-migration-bill-exacerbates-risks-survivors-modern-slavery-iom#:~:text=28%20March%202023-.UK%20%E2%80%9CIllegal%20Migration%20Bill%E2%80%9D%20Exacerbates%20Risks%20for%20Survivors%20of%20Modern,the%20new%20Illegal%20Migration%20Bill.>



as required by Article 14 of ECAT. However, the Bill is explicit that a claim to be a victim of modern slavery cannot prevent removal.<sup>116</sup>

#### **IV. Breaches of the Convention on the Rights of the Child**

**56.** Insofar as the Illegal Migration Bill removes protections for trafficking and modern slavery victims, including child victims, the Bill also appears to breach the UK's obligations under the UN Convention on the Rights of the Child (CRC), which came into effect in 1990.<sup>117</sup> In particular, it breaches Article 11 of the CRC which requires that states "shall take measures to combat the illicit transfer and non-return of children abroad". The Children's Commissioner, who is given statutory authority by the Children's Act 2004 to monitor the protection of children's rights in the UK, has expressed significant concerns about the impact of the Bill on children's rights.<sup>118</sup> This includes noting that it would be in "clear breach" of the CRC and "has the potential to significantly undermine efforts to safeguard children who have arrived in this country, including those who have been trafficked or exploited".<sup>119</sup>

#### **V. Breaches of the Statelessness Conventions**

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<sup>116</sup> Illegal Migration Bill, Clause 4(1)(c).

<sup>117</sup> United Nations Convention on the Rights of the Child.

<sup>118</sup> Children's Commissioner, "Briefing for Peers on the Illegal Migration Bill (10 May 2023) available at: <https://www.childrenscommissioner.gov.uk/resource/briefing-for-peers-on-the-illegal-migration-bill/>.

<sup>119</sup> Ibid, 3.



**57.** The Illegal Migration Bill further contravenes the UK's obligations under both the 1954 Convention relating to the Status of Stateless Persons, which contain rights for stateless persons that parallel rights for refugees in the Refugee Convention, and the 1961 Convention on the Reduction of Statelessness.<sup>120</sup> Claims regarding statelessness do not suspend the duty to remove that the Bill imposes on the Secretary of State. This breaches Article 31 of the 1954 Convention relating to the Status of Stateless Persons which requires that states do not expel stateless individuals except on grounds of national security or public order. Moreover, the Bill removes the ability of stateless children born overseas to a British parent to acquire citizenship under section 3(2) of the British Nationality Act 1981, violating Article 4(1) of the 1961 Convention on the Reduction of Statelessness which requires states to grant nationality to those individuals who would otherwise be stateless, if the nationality of one of the individual's parents was of that State.

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<sup>120</sup> Together referred to here as the Statelessness Conventions.



### 3. FURTHER UNDERMINING OF HUMAN RIGHTS PROTECTIONS

#### 3.1. Section 19 Human Rights Act 1998 Statement

**59.** The Illegal Migration Bill carries the unusual statement on its front page that the Government is unable to confirm that its provisions are compatible with the European Convention on Human Rights (ECHR). The making of such a statement under Section 19(1)(b) of the Human Rights Act 1998 does not necessarily mean by itself that the Bill will be incompatible,<sup>121</sup> but it is a statement that the Government is explicitly willing to risk breaching the UK's international commitments in pursuit of its aims. The Government has sought to present the making of a Section 19(1)(b) statement as a more routine matter than it is, with Lord Murray of Blidworth saying at Lords second reading that they “have been made by Governments of all stripes”.<sup>122</sup> This obscures the very different circumstances in which the mechanism has previously been used.

**60.** In all three previous cases where a Section 19(1)(b) statement was used, it was made in relation to a pre-existing policy maintained or expanded by the Bill in question. A Section 19(1)(b) statement was added to the Local Government Bill 2000 only after the Labour Government's attempt to repeal the notorious ‘Section 28’ prohibition on ‘promoting homosexuality’ was blocked by the House of Lords,

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<sup>121</sup> Indeed, the Home Secretary made the somewhat contradictory remark during her statement on the introduction of the Bill that the Government is “certain” that the Bill would be “compliant with all our international obligations”. HC Deb, 7 March 2023, vol 729, col 160 available at:

<https://hansard.parliament.uk/commons/2023-03-07/debates/87B621A3-050D-4B27-A655-2EDD4AAE6481/IllegalMigrationBill>.

<sup>122</sup> HL Deb, 10 May 2023, vol 829, col 1921.



despite Government appeals that Section 28 “cannot be said to be compatible” with the Convention and the House of Lords could not “with any light conscience continue to vote against its repeal”.<sup>123</sup> While this failed and the policy remained in force for another three years, the Section 19(1)(b) statement here was an acknowledgment of a thwarted attempt to remedy incompatibility rather than an attempt to act outside of the law.

**61.** The Communications Act 2003 imposed a duty on the new regulator Ofcom to maintain the already-existing ban on broadcast political advertising, with the relevant Section’s potentially Article 10-incompatible wording largely carried over from the Broadcasting Act 1990. Introducing the Bill, the Minister stated that given a recent European Court of Human Rights’ ruling,<sup>124</sup> a definitive statement of compatibility could not be made despite “strong arguments” that the ban was compatible. She nonetheless stated, “we take our international obligations extremely seriously and we would seek to amend the ban in accordance with any judgment of the European Court of Human Rights in Strasbourg that ruled against the UK legislation”.<sup>125</sup> The ban was eventually ruled compatible, a full decade after passage of the Act.<sup>126</sup>

**62.** The House of Lords Reform Bill was published by the Coalition Government in 2012 with a Section 19(1)(b) statement. In attempting to create a majority-elected second chamber, the Bill would have replicated the controversial ban on prisoners voting from House of Commons elections, leaving Deputy Prime Minister Nick

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<sup>123</sup> HL Deb, 24 July 2000, vol 616, col 124.

<sup>124</sup> *VgT Verein gegen Tierfabriken v Switzerland* (24699/94) (2002) 34 E.H.R.R. 4

<sup>125</sup> HC Deb, 3 December 2002, vol 395, col 789.

<sup>126</sup> *Animal Defenders International v United Kingdom* App no 48876/08, judgment of 22 April 2013.



Clegg unable to make a statement of compatibility with the Convention. Again, this was an issue of an already-existing policy of questionable compatibility rather than the creation of something new. The Bill was withdrawn after second reading and never received Royal Assent. Moreover, in the two cases where a Section 19(1)(b) statement was made on publication of the Bill, this only came after significant pre-legislative scrutiny. Both bills were initially published in draft, with joint committees established to analyse their provisions. The Joint Committee on Human Rights likewise engaged with the Draft Communications Bill, ultimately accepting that the Government's use of the Section 19(1)(b) statement "does not evince a lack of respect for human rights and is legitimate in the circumstances".<sup>127</sup>

**63.** None of this can be said of the Illegal Migration Bill. While the Section 19(1)(b) statement is general rather than specific, the ECHR memorandum identifies Clauses 21-24 on modern slavery and human trafficking as the most legally contentious. Far from maintaining the current legal situation (as with the other bills that have carried s.19(1)(b) statements), the Government explicitly characterises these Clauses as "radical solutions" and a "new and ambitious" approach.<sup>128</sup> The Clauses (and the Bill as a whole) were not first published in draft and subjected to detailed scrutiny. Indeed, as covered above, the lack of proper scrutiny of the Bill's provisions, pre- and post-publication, is striking. What is worse, rather than attempt to resolve the incompatibility, the Government at

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<sup>127</sup> Joint Committee on Human Rights, *Scrutiny of Bills: Further Progress Report*, 3 February 2003, <https://publications.parliament.uk/pa/jt200203/jtselect/jtrights/50/5006.htm>, para 41.

<sup>128</sup> *Illegal Migration Bill*, European Convention on Human Rights Memorandum, <https://publications.parliament.uk/pa/bills/cbill/58-03/0262/ECHR%20memo%20Illegal%20Migration%20Bill%20FINAL.pdf>, para 47.



report stage in the House of Commons added two new amendments that it acknowledges are more likely than not to be incompatible with the European Convention. The supplementary ECHR memorandum recognises that provisions relating to legal challenges over age assessments and searches of electronic devices and may be incompatible with Article 6, and Article 8 and Article 1 of Protocol 1 respectively.<sup>129</sup> Introducing provisions deemed likely incompatible with the Convention at such a late stage makes a mockery of then-Lord Chancellor Lord Irvine's statement during the passage of the Human Rights Bill in 1997 that where a statement of compatibility cannot be made, "parliamentary scrutiny of the Bill would be intense".<sup>130</sup>

**64.** The making of Section 19(1)(b) statement is a rare and significant act. To immediately follow it up with two new Clauses that also cannot be said with confidence to be compatible with the Convention is a worrying normalisation of the practice. Following on from the attempt in the now reportedly shelved Bill of Rights Bill to do away with Section 19 entirely, the potential for this to become a trend is concerning.

### **3.2. New Purposive Interpretation of the Bill (Clause 1)**

**65.** 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. Clause 1(1) is a peculiar Clause that sets out the purpose of the Bill, 'to prevent and deter unlawful migration, and in particular

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<sup>129</sup> Illegal Migration Bill, Supplementary European Convention on Human Rights Memorandum, <https://publications.parliament.uk/pa/bills/cbill/58-03/0284/SuppECHRmemo.pdf> paras 24, 40 & 44.

<sup>130</sup> HL Deb 3 November 1997, vol 582, col 1233.



migration by unsafe and illegal routes, by requiring the removal from the United Kingdom of certain persons who enter or arrive in the United Kingdom in breach of immigration control', 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 to achieve that purpose. While it is unclear why the long title of the Bill is insufficient for this purpose nor why this Clause is necessary, the fact that all the provisions in the Bill will have to be read in line with Clause 1 means it has cross-cutting, detrimental implications for human rights. A similar interpretative duty to Clause 1(3) may be found in Section 3 Human Rights Act 1998, 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 Human Rights Act 1998 ("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 Human Rights Act 1998 might be applied in the quite different context of Clause 1(3) of the Bill.

**66.** The Bar Council has warned that if the Bill passes into law, the courts will assume that Parliament has decided to "trade off" the foundational constitutional principles that the law forbids the exercise of state power in an arbitrary, oppressive, or abusive manner. However, quoting Lord Justice Laws in *A v Home Secretary* [2004] EWCA Civ 1123, the Bar Council states, that this principle "cannot be set aside on utilitarian grounds as a means to further an end" in pursuit of the statutory purpose in Clause 1(1).<sup>131</sup>

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<sup>131</sup> Bar Council, "Illegal Migration Bill: Briefing for Peers – Second Reading" (May 2023) available at: <https://www.barcouncil.org.uk/uploads/assets/2aa8836a-28c2-4fe6-8cba240c75bb7c2b/Bar-Council-Briefing-for-Peers-Illegal-Migration-Bill-Second-Reading.pdf>



### 3.3. Disapplying Section 3 Human Rights Act 1998

**67.** Clause 1(5) of the Bill disapplies Section 3 of the Human Rights Act 1998 to any provision made by the Act or any subordinate legislation made under it. Section 3 Human Rights Act 1998 is the duty on public authorities, including but not limited to the UK's courts, to interpret legislation in line with the European Convention of Human Rights, so far as is possible to do so. The underlying purpose of Section 3 was to secure Parliament's intention in passing the Human Rights Act 1998, that legislation be interpreted and applied in ways that accord with the UK's international obligations under the European Convention of Human Rights.<sup>132</sup> However, the disapplication of Section 3 in this Bill forms part of the Bill's statement of its statutory purpose, being 'to prevent and deter unlawful migration'.<sup>133</sup> Thus, the Parliamentary intention that the UK's laws be applied in line with its international human rights commitments is to be replaced by a new intention, that legislation be interpreted in line with the Government's immigration policy.

**68.** Ordinarily, it could be expected that the practical consequences of disapplying Section 3 to a piece of legislation would simply be the production of far more declarations of incompatibility under Section 4 of the Human Rights Act 1998 than would otherwise occur. That was widely predicted when the Bill of Rights Bill

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<sup>132</sup> Lord Irvine LC quoted in the Report of the Independent Human Rights Act Review available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1040525/iHuman\\_Rights\\_Act\\_1998r-final-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040525/iHuman_Rights_Act_1998r-final-report.pdf), page 181.

<sup>133</sup> Illegal Migration Bill, Clause 1(1).



proposed the full repeal of Section 3.<sup>134</sup> Given the extremity of the current Bill's terms, it would seem to be very difficult to interpret its Clauses compatibly with Convention rights, even with the enhanced Section 3 powers in place. However, one of the effects of the extraordinary range of Ouster Clauses that are discussed elsewhere in this briefing could be to limit the circumstances in which declarations of incompatibility could arise. The Ouster Clauses exclude the UK's higher courts certain scrutiny of the exercise of the Bill's powers by the UK Government. Moreover, under the Human Rights Act 1998 the Upper Tribunal has no power to make incompatibility declarations.<sup>135</sup> The end result of disapplying Section 3, therefore, could lead to a ruling of incompatibility by the European Court of Human Rights.

**69.** Aside from these practical consequences, there are fundamental points of principle at stake with this proposal. Suspending a key element of the country's domestic human rights protection system for the state's dealings with a particular unpopular minority is an attack on the basic principle of equality before the law and the universality of human rights. This is not an ordinary matter of interference with qualified rights being justifiable in certain contexts. This is a systemic issue about how rights are and are not protected in this country, and about certain groups of people being subject to lesser protection, on a discriminatory basis. If this Clause is allowed to stand, Lord Scarman's famous statement that, "Every person within the jurisdiction enjoys the equal protection of our laws. There is no distinction between British nationals and others. He who is subject to English law

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<sup>134</sup> Bill of Rights Bill, Explanatory Notes, pars 8 -10 ,  
<https://publications.parliament.uk/pa/bills/cbill/58-03/0117/en/220117en.pdf>.

<sup>135</sup> Human Rights Act 1998, Section 4(5).



is entitled to its protection<sup>136</sup> will cease to be the case. The people caught by this Bill will no longer enjoy the protection of our laws on an equal footing with the rest of us, who will continue to benefit from Section 3 interpretations of any legislation we are affected by.

**70.** Stripping human rights protections, which are in many instances the only legal or political protections that the groups affected by this Bill possess, is a cause of grave concern. It should also be noted that allowing this proposal to pass opens the door to this, and other human rights protections, being switched on and off for political reasons and for any other target group, by this or any future government. These target groups will most likely be other groups that do not benefit from widespread political support. There is already example of this in the recently published Victims and Prisoners Bill.<sup>137</sup>

**71.** While the House of Lords is understandably cautious about voting down Clauses in legislation passed by the elected House, there are constitutional reasons why it should feel no such inhibition in this instance. This proposal will remove human rights protections from migrants, individuals seeking asylum, and people denied citizenship to which they would otherwise be entitled. The Human Rights Act 1998 was intended to introduce an increased level of judicial protection of human rights to the UK's political constitution. This was necessary for many reasons, but a key one was the political constitution's systemic weaknesses when it comes to providing adequate protection to the rights of minority groups, most particularly those denied the vote and thus excluded from the political process

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<sup>136</sup> *Khawaja v SSHD* [1983] UKHL 8, [67] per Lord Scarman.

<sup>137</sup> Victims and Prisoners Bill, Clauses 42, 43 and 44.



altogether.<sup>138</sup> It is within the legitimate function of the House of Lords to revise legislation from the elected House when it is proposing to strip fundamental human rights protections from a group of people excluded from the democratic process, indeed such a role is arguably a core part of the justification for a second chamber.

#### 4. UNDERMINING DEVOLUTION

**72.** The Illegal Migration Bill risks undermining the constitutional distributions of power in the UK as established by the UK's devolution arrangements. The Government has stated that the Bill relates only to immigration and nationality, which are reserved matters in Scotland and Wales and excepted matters in Northern Ireland. As such, legislative consent has not been sought.<sup>139</sup> However, this overlooks several important ways in which the Bill does related to devolved matters. The two most obvious impacts on devolved areas relate to local authorities' powers and duties in respect of looked after children (Clauses 15 – 20) and support for victims of trafficking (Clauses 23 and 24). The Bill cuts across the child protection responsibilities of Scottish councils towards unaccompanied children under the Children (Scotland) Act 1995. It does the same to Welsh

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<sup>138</sup> For example, see Colm O'Connell, "Human Rights and the UK Constitution" (British Academy, 2012) available at: <https://www.thebritishacademy.ac.uk/documents/262/Human-rights-and-the-UK-constitution.pdf>; Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP, 2009); Francesca Klug, *A Magna Carta for all Humanity: Homing in on Human Rights* (Routledge, 2015).

<sup>139</sup> Illegal Migration Bill, Explanatory Notes, 7 March 2023 available at: <https://publications.parliament.uk/pa/bills/cbill/58-03/0262/en/220262en.pdf>, Annex B.



councils under the Social Services and Well-being (Wales) Act 2014 and in Northern Ireland under the Children's (Northern Ireland) Order 1995.

**73.** Support for victims of trafficking is entirely devolved to Scotland. Clause 23 of the Bill modifies Part 2 of the Human Trafficking and Exploitation (Scotland) Act 2015 to remove the powers and duties of Scottish Ministers to provide support and assistance to survivors of trafficking, with very limited exceptions (where tightly prescribed conditions apply relating to criminal proceedings and investigations). Removing these protections will undermine the purpose and operation of the 2015 Act in Scotland. Likewise, provisions relating to support for trafficking victims in Northern Ireland are found within the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015. However, the powers and duties of the Department of Justice for Northern Ireland are removed by Clause 24, with the only exception being where tightly prescribed conditions apply relating to criminal proceedings and investigations. Beyond these specific impositions on devolved powers, the Bill also has a more fundamental constitutional impact as it prevents the devolved governments from complying with international human rights obligations and with duties imposed on them by the devolution settlements. Observing and implementing international obligations including obligations under the "Human Rights Convention", is a devolved matter under the Scotland Act 1998.<sup>140</sup> A member of the Scottish Government has "no power to act or omit to act so far as the act or omission is incompatible with any of the Convention rights".<sup>141</sup> Yet the Bill expressly risks requiring the Scottish Ministers to act incompatibly with

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<sup>140</sup> Scotland Act 1998 Schedule 5, Part 1, para 7

<sup>141</sup> Scotland Act 1998, Section 57.



international obligations under the European Convention on Human Rights as well as the Refugee Convention, the UN Convention on the Rights of the Child and the Council of Europe Convention on Action against Trafficking in Human Beings, as detailed above.

**74.** As stated in evidence to the Scottish Parliament Equalities, Human Rights and Civil Justice Committee:

“This is a constitutional quagmire for the Scottish Government, because the Scotland Act 1998 prevents the Scottish ministers from acting in contravention of the European convention on human rights, but the Illegal Migration Bill would compel them to do so”<sup>142</sup>

Many of the concerns outlined above in relation to Scotland are also applicable for Wales. Observing and implementing international obligations including obligations under the “Human Rights Convention”, is a devolved matter under the Government of Wales Act 2006. Welsh Ministers have no power to make, confirm or approve any subordinate legislation, or to do any other act, so far as that legislation or act is incompatible with any of the Convention rights.<sup>143</sup> The Welsh Ministers must not, therefore, in exercising any of their functions breach the Convention rights, but the Bill will compel them to do so.

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<sup>142</sup> Andy Sirel, legal director and partner, Justright Scotland, 25<sup>th</sup> April 2023:

<https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=15267>

<sup>143</sup> Government of Wales Act 2006, Section 81.



**75.** These constitutional disturbances in the devolution context are even more acute with respect to the Bill's impacts in Northern Ireland. Here the Bill not only creates the same problems of breach of obligations under the devolution statutes, it raises significant concerns about compliance with the Belfast/ Good Friday Agreement and the Windsor Framework/ Protocol on Ireland and Northern Ireland. The incorporation of the ECHR into Northern Ireland law was an explicit commitment of the Belfast /Good Friday Agreement, achieved through the Human Rights Act 1998. The Bill would constitute a breach of two core elements of this commitment: the guarantee of "direct access to the courts"; and the obligation to provide 'remedies for breach of the Convention' under the Rights, Safeguards and Equality of Opportunity Chapter of the Agreement, which extends to 'everyone in the community.' Claims that the removal of an individual covered by the Bill from the UK would be contrary to the ECHR, are to be declared inadmissible.<sup>144</sup> This is a direct contravention of an individual's right to direct access to the Courts and remedy for a breach of the Convention. The Bill places similar restrictions on direct access to the courts for individuals wishing to challenge the detention process.<sup>145</sup> The disapplication of Section 3 of the Human Rights Act also significantly limits an individual's ability to secure a remedy for a breach of their ECHR rights.

**76.** The Bill is also inconsistent with obligations under Article 2 of the Windsor Framework, which provides that 'no diminution of Rights, Safeguards and Equality of Opportunity, as set out in that chapter of the Belfast/Good Friday Agreement" (BGFA) should occur due to Brexit. It also details various equality and non-

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<sup>144</sup> Illegal Migration Bill, Clause 4.

<sup>145</sup> Illegal Migration Bill, Clauses 10 – 14.



discrimination EU Directives with which Northern Ireland must “keep pace”. This includes the Victims’ Directive and the Trafficking Directive. The potential for the Bill to lead to failures in identifying and supporting trafficking victims, as well as detention and removal will place Northern Ireland in direct contravention of the Directive.

## 5. UNDERMINING THE SEPARATION OF POWERS

**77.** The constitutional principle of the Separation of Powers broadly states that the three separate organs of state – the executive, the legislature and the judiciary - must not encroach upon the function of the other organs.<sup>146</sup> Put simply, the principle requires that only Parliament makes law through the authority of the King-in-Parliament. This is while the executive enacts law through operationalising the Government administration, and the judiciary applies and interprets the law - including making sure that the executive complies with it. In this way, the principle complements both Parliamentary Sovereignty and the Rule of Law.

**78.** The Separation of Powers is a core principle in the UK constitution.<sup>147</sup> The principle has been described by Lord Mustill in *R v Home Secretary ex parte Fire Brigades Union* as follows:

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<sup>146</sup> See, for example, Martin Loughlin, *The British Constitution: A Very Short Introduction* (OUP 2013); Anthony King, *The British Constitution* (OUP 2010); Jeffrey Jowell, Dawn Oliver and Colm O’Cinneide (eds), *The Changing Constitution*, 8<sup>th</sup> ed, (2015 OUP); Vernon Bogdanor, *The New British Constitution* (Hart 2009); Keith Syrett, *The Foundations of Public Law* (Palgrave 2011); A W Bradley, Keith D Ewing & CJS Knight, *Constitutional & Administrative Law*, 16<sup>th</sup> ed, (Pearson 2015).

<sup>147</sup> For example, see *Duport Steels Ltd v Sirs* [1980] 1 All ER 529.



'It is a feature of the peculiarly UK conception of the separation of powers that Parliament, the executive and the courts each have their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks right. The executive carries on the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws and see that they are obeyed'.<sup>148</sup>

UK judges have placed particular emphasis on the Separation of Powers by requiring that, in terms of constitutional competence, the judiciary has the authority to decide disputes on matters of principle. However, in relation to decisions that are matters of policy, or where the courts have less expertise than the primary decision-maker, the courts defer to the *institutional competence* of those other bodies. In *Matthews v Ministry of Defence*, it was highlighted that decisions about people's rights should be made by the judiciary, as opposed to the executive.<sup>149</sup>

**79.** Examining the Illegal Migration Bill as a whole, the cumulative effect of the changes discussed above are likely to put significant strain on the Separation of Powers, both due to the substance of the Bill and the way the UK Government is attempting to pass it. In substance, power is being taken away from Parliament and the UK judiciary and given to the UK Government. Most importantly, such power relates to the constitutional roles of both branches of state. Parliament is supreme lawmaker in the UK, yet the Bill hands broad law-making powers which

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<sup>148</sup> *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 All ER 244 [567].

<sup>149</sup> *Matthews v Ministry of Defence* [2003] 1 AC 1163.



implicate fundamental human rights to the UK Government in the form of delegated powers. Moreover, the way the Bill is being passed conforms to a recent trend of the Government rushing legislation and obfuscating and obstructing Parliamentary scrutiny in a manner which shows little respect for Parliament's constitutional role and indeed encroaches on it. Equally, the powers in the Illegal Migration Bill encroach on the constitutional role of the UK judiciary in adjudicating human rights and applying the law. In this way, while UK democracy depends on there being a clear Separation of Powers, the Illegal Migration Bill represents an attempt at a power shift which enables the UK Government to play the roles of all three branches of state – as lawmaker, adjudicator and administrator. In undermining the Separation of Powers in this way, both the UK's constitution and democracy are diminished.

22 May 2023

