HOUSE OF LORDS

Select Committee on the Constitution

16th Report of Session 2022–23

Illegal Migration Bill

Ordered to be printed 17 May 2023 and published 19 May 2023

Published by the Authority of the House of Lords

HL Paper 200

Select Committee on the Constitution

The Constitution Committee is appointed by the House of Lords in each session "to examine the constitutional implications of public bills coming before the House and to keep under review the operation of the constitution and the constitutional aspects of devolution".

Membership

The Members of the Constitution Committee are:

Lord Anderson of Ipswich
Baroness Andrews
Baroness Drake (Chair)
Lord Falconer of Thoroton
Baroness Finn
Lord Foulkes of Cumnock
Lord Hope of Craighead
Lord Keen of Elie
Lord Mancroft
Lord Strathclyde
Baroness Suttie
Lord Thomas of Gresford

Declaration of interests

See Appendix 1.

A full list of Members' interests can be found in the Register of Lords' Interests:
https://members.parliament.uk/members/lords/interests/register-of-lords-interests

Publications

All publications of the Committee are available at:
https://committees.parliament.uk/committee/172/constitution-committee/publications/

Parliament Live

Live coverage of debates and public sessions of the Committee's meetings are available at:
http://www.parliamentlive.tv

Further information

Further information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is available at:
http://www.parliament.uk/business/lords

Committee staff

The current staff of the committee are John Turner (Clerk), Rachel Borrell (Policy Analyst) and Jackie Yu Hon Lam (Committee Operations Officer).

Professor Stephen Tierney and Professor Alison Young are the legal advisers to the Committee.

Contact details

All correspondence should be addressed to the Constitution Committee, Committee Office, House of Lords, London SW1A 0PW. Telephone 020 7219 5960. Email constitution@parliament.uk

Twitter

You can follow the Committee on Twitter @HLConstitution.

CONTENTS

Illegal Migration Bill

Introduction

1. The Illegal Migration Bill was introduced in the House of Commons on 7 March 2023 and brought to the House of Lords on 27 April 2023. Second reading took place on 10 May 2023 and committee stage is scheduled to begin on 24 May 2023.

2. The purpose of the Bill is to "create a scheme whereby anyone arriving illegally[1] in the United Kingdom will be promptly removed to their home country or to a safe third country to have any asylum claim processed."[2] In the Government's words it will:

   - "Deter illegal entry into the UK;
   - Break the business model of the people smugglers and save lives;
   - Promptly remove those with no legal right to remain in the UK; and
   - Make provision for setting an annual cap on the number of people to be admitted to the UK through safe and legal routes."[3]

Rule of law

Ouster clauses and other restrictions on legal claims

3. The Bill has implications for the rule of law by limiting or removing the ability of individuals to appeal decisions to remove them from the UK and decisions to detain them pending their removal from the UK. This is achieved through ouster clauses, partial ouster clauses, time limits and restrictions placed on existing claims that would have been available prior to the Bill coming into force.

The decision to remove an individual from the United Kingdom

4. Clause 2(1) places a duty on the Secretary of State to make arrangements for the removal from the United Kingdom of a person who satisfies four conditions.[4] This duty does not apply to unaccompanied children, however clause 3(2) empowers the Secretary of State to remove an unaccompanied child who satisfies these four conditions.[5]

5. Clause 4 has the same effect as an ouster clause—a clause that removes judicial review over a decision of an administrative body. Clause 4(1) provides that the duty in clause 2(1) and the power in clause 3(2) apply in relation to a person who meets the four conditions regardless of whether the person

---

1 The Bill does not define "illegal" but the Secretary of State's duty to remove a person is triggered when the four conditions in clause 2 are met.
2 Explanatory Notes to the Illegal Migration Bill, para 1
3 Explanatory Notes to the Illegal Migration Bill, para 1
4 Illegal Migration Bill, clause 2
5 Illegal Migration Bill, clause 3(2)

makes a protection claim or a human rights claim[6], claims to be a victim of slavery or a victim of human trafficking or makes an application for judicial review in relation to their removal from the UK under the Bill.[7] Clause 4(2) requires the Secretary of State to declare inadmissible a protection claim or human rights claim made by a person who meets the four conditions set out in clause 2.[8] A claim that is declared inadmissible under subsection (2) cannot be considered under the immigration rules.[9] However, clause 4(4) provides that "a declaration under subsection (2) that a protection claim or a human rights claim is inadmissible is not a decision to refuse the claim". This has the effect of preventing an individual from using a protection claim or a human rights claim to challenge their removal from the United Kingdom. It also removes a right of appeal against such a declaration that a claim is inadmissible under the Nationality, Immigration and Asylum Act 2002.[10]

6. Clause 4 does not prevent a person from challenging the substance of a decision to remove them from the UK on the grounds listed in clause 4(1). However, these claims cannot be used to prevent the removal of an individual from the UK. In order to continue their claim, a person would have to do so from the country to which they have been removed.

7. The impact of clause 4 is strengthened by clauses 52 and 53. Clause 52 applies to "any court proceedings relating to a decision to remove a person from the United Kingdom."[11] Clause 52(3) states: "the court may not grant an interim remedy that prevents or delays, or that has the effect of preventing or delaying, the removal of the person from the United Kingdom in pursuance of the decision."[12]

8. Clause 53 provides that courts and tribunals "may not have regard" to interim measures from the European Court of Human Rights when determining any application or appeal under the Bill, unless a Minister of the Crown makes a determination that the duty to remove an individual from the United Kingdom does not apply in relation to the person who has obtained the interim measure.[13]

9. **The purpose of the Bill is to "prevent and deter unlawful migration, and in particular migration by unsafe and illegal routes, by requiring the removal from the United Kingdom of certain persons who enter or arrive in the United Kingdom in breach of immigration control."[14] Clause 4 of the Bill, read with related clauses, serves this purpose by significantly restricting access to justice. Clauses 4, 52 and 53 serve this purpose by precluding individuals from using judicial review actions to prevent their removal from the United Kingdom. The clauses do not completely restrict access to judicial review, but**

---

6 Clause 3(11) defines these by reference to the Nationality, Immigration and Asylum Act 2002. A protection claim is one that removal from the UK would breach UK obligations under the Refugee Convention or in relation to persons eligible for a grant of humanitarian protection (section 82(2)). A human rights claim is one that removal would be unlawful under section 6 of the Human Rights Act 1998 (section 113(1)).

7 Illegal Migration Bill, clause 4(1)

8 Illegal Migration Bill, clause 4(2)

9 Illegal Migration Bill, clause 4(3)

10 Illegal Migration Bill, clause 4(4)

11 Illegal Migration Bill, clause 52(1)

12 Illegal Migration Bill, clause 52(3)

13 Illegal Migration Bill, clause 53

14 Illegal Migration Bill, clause 1(1)

they reduce both access to it and its ultimate utility and ensure that a claimant would have to continue their claim from the country to which they are removed. *The House may wish to consider whether these restrictions are appropriate.*

10. **The Bill provides an unusual degree of power to the executive. Clause 4(2) requires the Secretary of State to declare individual human rights or protection claims inadmissible. Clause 53(2) empowers a Minister of the Crown to determine that the duty to make arrangements for removal is not to apply in relation to a specific individual. Both provisions have significant rule of law implications and relate to decisions hitherto reserved to the courts.**

The decision to detain

11. Clause 10 amends Schedule 2 to the Immigration Act 1971, empowering an immigration officer to:

- detain a person they suspect meets the conditions in clause 2, pending a decision as to whether the conditions are met;[15]
- detain a person they suspect the Secretary of State has a duty to remove from the United Kingdom, pending a decision as to whether the duty applies;[16]
- detain a person whom the Secretary of State has a duty to remove under clause 2, pending the person's removal;[17]
- detain an unaccompanied child pending their removal under clause 3(2);[18] or
- detain an unaccompanied child who is temporarily exempt from the duty to remove under clause 3(1), pending the granting of limited leave to enter or remain.[19]

12. Current common law limitations on immigration detention are captured by the Hardial Singh principles:[20]

(a) the Secretary of State must intend to deport the person and can use the power to detain only for that purpose;

(b) the deportee may be detained only for a period that is reasonable in all the circumstances;

(c) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, the Secretary of State should not seek to exercise the power of detention;

15 Illegal Migration Bill, clause 10(1), para 2C(a)
16 Illegal Migration Bill, clause 10(1), para 2C(b)
17 Illegal Migration Bill, clause 10(1), para 2C(c)
18 Illegal Migration Bill, clause 10(1), para 2C(d)(i), (ii) and (iii)
19 Illegal Migration Bill, clause 10(1), para 2C(d)(iv)
20 The Hardial Singh principles originate from the case of *(Hardial Singh) v Governor of Durham Prison* [1983] EWHC 1 (QB). They are outlined in *Lumba (WL) v Secretary of State for the Home Department* [2011] UKSC 12

(d) the Secretary of State should act with reasonable diligence and expedition to effect removal.

13. Clause 11 partially codifies these principles by outlining the period for which an individual may be detained. It states that individuals may be detained for "such a period 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."[21] However, it represents a significant departure from the Hardial Singh principles by allowing the Secretary of State to extend the period of detention beyond a "reasonable time". If the Secretary of State "no longer considers" that the decision to remove can be made in a reasonable time, then "a person may be detained … for such further period as, in the opinion of the Secretary of State, is reasonably necessary to enable such arrangements to be made for the person's release as the Secretary of State considers to be appropriate".[22] This clause also removes the ability of the court to determine whether detention is for a reasonable period of time[23] and places the decision with the Secretary of State. This vests in the minister the power, in certain circumstances, to determine the duration of the detention period. It is unclear whether clause 11's reliance on "the opinion of the Secretary of State" as to what period is "reasonably necessary" to enable an individual's removal or to make arrangements for their release might be interpreted so as to allow the Secretary of State to extend the period of detention indefinitely.

14. Clause 12(3)(b) extends the period for which an individual may be detained without bail from 8 to 28 days.[24] Clause 12(4) is a partial ouster clause restricting judicial review during the first 28 days of detention to challenges on the grounds that the Secretary of State has acted "in bad faith" or "in such a procedurally defective way as amounts to a fundamental breach of the principles of natural justice".[25] The clause therefore severely restricts judicial review over the decision to detain an individual for the first 28 days.

15. Under inserted paragraph 3A(5) in clause 12(4) an individual in immigration detention may apply for a writ of habeas corpus (in England, Wales or Northern Ireland)[26] or for suspension and liberation (in Scotland).[27] However, these options do not provide the same range of remedies as an application for judicial review—they determine only whether the Secretary of State or immigration officer has the power to detain an individual. Given the wide range of powers to detain in clauses 10 and 11, it is likely to be very rare that a writ of habeas corpus or suspension and liberation will succeed.

16. **Clauses 11 and 12 are partial ouster clauses of great constitutional concern. They allow for the possibility that an individual who does not meet the criteria for removal—and is therefore not a candidate for detention under the Hardial Singh principles—may be detained for up to 28 days without being able to apply for bail or challenge the decision to detain in the courts. The Secretary of State may extend the period of detention beyond 28 days with only limited judicial**

21 Illegal Migration Bill, clause 11(1)(b)
22 Illegal Migration Bill, clause 11(1)(b)
23 *R (A) v Secretary of State for the Home Department [2007] EWCA Civ 804*
24 Illegal Migration Bill, clause 12(3)(b)
25 Illegal Migration Bill, clause 12(4)
26 Illegal Migration Bill, clause 12(4), para 3A(5)(a)
27 Illegal Migration Bill, clause 12(4), para 3A(5)(b)

oversight, as clause 11 makes it clear that the Secretary of State is to determine the period of detention that is reasonably necessary to make arrangements for an individual's removal, or, when this period has passed, is reasonably necessary to make arrangement for an individual's release. Although a writ of habeas corpus is available to a detainee in the first 28 days of detention, it is unlikely to be successful given the wide range of powers to detain in clauses 10 and 11. This has serious implications for the liberty of an individual. *We invite the House to seek clarity on the operation of this provision and to examine the Government's reasoning as to why such potential threats to the liberty of the individual are appropriate.*

Suspensive claims

17. The Bill provides for two types of novel claims that may be brought to suspend the removal of an individual from the UK: a serious harm suspensive claim[28] and a factual suspensive claim.[29]

18. Clause 41 specifies that an individual making a serious harm suspensive claim must do so within eight days of having received a removal notice and the Secretary of State has four days in which to decide the claim.[30] The Secretary of State has the power to extend the claim or the decision period, by notice, "where the Secretary of State considers it appropriate to do so".[31] It is for the individual bringing the claim to provide "compelling evidence that the serious harm condition is met in relation to that person" if removed from the United Kingdom to the country specified in their removal notice.[32] The Secretary of State may refuse or grant the serious harm suspensive claim.[33] If the Secretary of State refuses to grant the claim, she may certify that the claim is "clearly unfounded".[34]

19. Clause 42 provides that a person bringing a factual suspensive claim has eight days in which to provide "compelling evidence that the Secretary of State or an immigration officer made a mistake of fact in deciding that the person met the removal conditions".[35] The Secretary of State has four days in which to decide the claim, with a power to extend both periods by notice, if the Secretary of State considers it appropriate to grant an extension.[36] When deciding whether a mistake of fact was made, the Secretary of State must take into account whether the individual failed to provide certain evidence when it was "reasonable to expect a person to have provided this evidence".[37]

---

28 Illegal Migration Bill, clause 37(2)(a)
29 Illegal Migration Bill, clause 37(2)(b)
30 Illegal Migration Bill, clause 41(7)
31 Illegal Migration Bill, clause 41(6)
32 This must be in the form prescribed in regulations made by the Secretary of State. Clause 41(4) provides the criteria that the Secretary of State must take into account when deciding a serious harm suspensive claim. These include "any assurances given by the government of the country or territory specified in the removal notice", "any support and services (including in particular medical services) provided by that government", and "in circumstances where it is reasonable to expect a person to have provided certain evidence and they have not done so, the fact that the person has not provided such evidence" Illegal Migration Bill, clause 41(4) and (5).
33 Illegal Migration Bill, clause 41(2)
34 Illegal Migration Bill, clause 41(3)
35 Illegal Migration Bill, clause 42(5)
36 Illegal Migration Bill, clause 42(6)
37 Illegal Migration Bill, clause 42(4)

The Secretary of State will decide whether a factual mistake was made and may certify that the claim is "clearly unfounded".[38]

20. If an individual brings a suspensive claim after eight days, but before the individual is removed from the United Kingdom, the Secretary of State must consider whether there are "compelling reasons for the person not to make the claim within the claim period".[39] If the Secretary of State decides there were compelling reasons, then the Secretary of State must consider the claim.[40] When this is not the case, an individual may "apply for a declaration from the Upper Tribunal that there were compelling reasons".[41] This is determined by the Upper Tribunal on written submissions and evidence.[42] If the Upper Tribunal grants this declaration, the Secretary of State must determine the suspensive claim.[43] There is no right of appeal from the decision of the Upper Tribunal in these cases.[44]

21. Clauses 43 to 49 set out the circumstances in which the Secretary of State's decision may be appealed to the Upper Tribunal. The individual may not provide new evidence to the Upper Tribunal unless the Secretary of State consents or the Upper Tribunal determines that there were "compelling reasons for the person not to have provided details of the matter before the end of the claim period."[45]

22. Clause 51 relates to appeals to the Special Immigration Appeals Commission. The Special Immigration Appeals Commission has the same powers as the Upper Tribunal. An individual may not appeal the decision of the Secretary of State to the Upper Tribunal in cases where the Secretary of State has certified that their decision was made "wholly or partly in reliance on information which, in the opinion of the Secretary of State, should not be made public" for one of three reasons: "in the interest of national security"; "in the interest of the relationship between the United Kingdom and another country"; or "otherwise in the public interest".[46] Instead, the claim must be brought to Special Immigration Appeals Commission. If the Secretary of State also certifies that this decision is clearly unfounded, then an appeal may be brought only after obtaining the leave of Special Immigration Appeals Commission. The Secretary of State therefore has a significant gatekeeping power which can be activated in the public interest.

23. Clause 49 contains a partial ouster clause which limits judicial review over certain decisions of the Upper Tribunal with regard to suspensive claims.[47] Clause 51 provides for a partial ouster clause for judicial review over decisions of the Special Immigration Appeals Commission.[48]

24. Clause 55 relates to the determination of age in order to assess whether an individual is a child. If the person is a child there is no duty to remove that individual from the UK even if they satisfy the criteria in clause 2.[49]

38 Illegal Migration Bill, clause 42(3)
39 Illegal Migration Bill, clause 45(2)
40 Illegal Migration Bill, clause 45(3)
41 Illegal Migration Bill, clause 45(4)
42 Illegal Migration Bill, clause 45(5)
43 Illegal Migration Bill, clause 45(6)
44 Illegal Migration Bill, clause 44(7)
45 Illegal Migration Bill, clause 47(5)
46 Illegal Migration Bill, clause 51(2)
47 Illegal Migration Bill, clause 49
48 Illegal Migration Bill, clause 51
49 Illegal Migration Bill, clause 55

25. Under the current law an individual is allowed to bring an action for judicial review to challenge both an error of law and an error of fact.[50] Clause 55(5), however, states that the court "may quash the decision only on the basis that it was wrong in law and may not quash the decision on the basis that the court considers the decision … was wrong as a matter of fact."[51] This seriously restricts judicial review over determinations of age, where errors are normally made not because of an error as to the definition of "a child" but because of problems with evidence to prove that an individual is under 18.

26. **Viewed in isolation the ouster provisions in relation to suspensive claims are narrower in scope than other ouster provisions in the Bill. Their impact will largely depend on how they operate in practice. *We invite the House to satisfy itself that these clauses, individually or in their cumulative effect, will not preclude access to justice or endanger the rights and protection of vulnerable applicants, particularly victims of slavery and human trafficking. The House may wish to consider how to ensure that time limits are in practice extended where required to enable individuals to provide compelling evidence to support a suspensive claim.***

27. **The cumulative impact of the ouster and partial ouster provisions in the Bill gives rise to very considerable constitutional implications.**

Retrospective effect

28. The Secretary of State's duty to remove a person from the United Kingdom under clause 2, and power to provide accommodation to unaccompanied migrant children under clause 15, apply to those who have entered the United Kingdom on or after 7 March 2023, the date on which the Bill was introduced in the House of Commons.[52] These therefore apply in relation to activity carried out before the Bill's coming into force.

29. The Committee has previously criticised legislation with retrospective effect and recommended that such provision should be properly justified and based on a compelling reason.[53]

30. ***The House may wish to assure itself that retrospective provision in the Bill is justified.***

Human rights

31. The Joint Committee on Human Rights is conducting an inquiry into the Bill and we await its findings on the compliance of the Bill with the European Convention on Human Rights and other international human rights agreements. Below, we highlight two issues of constitutional importance.

Section 19(1)(b) of the Human Rights Act 1998

32. Section 19 of the Human Rights Act 1998 requires the minister in charge of a bill to make a statement before second reading in each House about the bill's compatibility with rights under the European Convention on Human Rights

50 *R (A) v London Borough of Croydon* [2009] UKSC 8
51 Illegal Migration Bill, clause 55(5)
52 Illegal Migration Bill, clauses 2(3) and 15(4)
53 See, for instance, Constitution Committee, *Banking Bill* (3rd Report, Session 2008–09, HL Paper 19), para 7; Constitution Committee, *Jobseekers (Back to Work Schemes) Bill* (12th Report, 2012–13, HL Paper 155), para 15.

(ECHR). Both the version of the Bill introduced in the House of Commons and that brought to the Lords were accompanied by statements under section 19(1)(b) of the Human Rights Act that the minister is unable to make a statement of compatibility but nevertheless wishes the House to proceed with the Bill. This is only the third example of a bill being accompanied by such a statement on its introduction.[54]

33. A section 19(1)(b) statement does not mean a bill is necessarily incompatible with the ECHR. In a letter to all MPs and members of the House of Lords the Home Secretary, Rt Hon Suella Braverman MP, said that the statement was based on an assessment that there is more than a 50 per cent chance that provisions in the Bill may be incompatible.[55]

34. The Government's ECHR memorandum accompanying the Bill appears more sanguine than the Home Secretary's statement. It states that clauses it identifies as engaging Convention rights are compatible with, or capable of being applied compatibly with, the relevant ECHR articles.[56]

35. However, the ECHR memorandum's only consideration of clause 1(5) is:

> "Clause 1(5) provides that: 'Section 3 of the Human Rights Act 1998 (interpretation of legislation) does not apply in relation to provision made by or by virtue of this Act.' This does not affect the Government's assessment of compatibility of the Bill with Convention rights as set out below."[57]

36. This appears to overlook the impact of clause 1(5) on the courts' ability to read and give effect to the Bill's provisions compatibly with the ECHR, as well as the effect of the requirement in clause 1(3) for the courts to interpret the Bill as far as possible in a manner compatible with the Bill's purpose. Additionally, the ability of the Bill to be applied compatibly may depend on any guidance produced, or training provided, for immigration officers and other officials.

37. **It appears that the Government's ECHR memorandum is more optimistic about the likelihood of the Bill's compatibility with Convention rights than the ministerial section 19(1)(b) statement would suggest. *This requires further explanation. In particular, the potential impact of clause 1(5) on compatibility has not been adequately explained.***

38. ***We recommend that the Bill is amended to provide for guidance, subject to parliamentary scrutiny, on how the Bill is to be implemented compatibly with Convention rights.***

---

54 The others were the bill for the Communications Act 2003 and the House of Lords Reform Bill in 2012. The Communications Act was subsequently found to be compatible; the House of Lords Reform Bill did not proceed beyond second reading in the House in which it was introduced.

55 Sophie Sleigh, 'Exclusive: Suella Braverman Admits Immigration Crackdown May Not Be Legal', *Huffington Post*, 7 March 2023: www.huffingtonpost.co.uk/entry/exclusive-suella-braverman-admits-immigration-crackdown-may-not-be-legal_uk_64072e62e4b0586db70fd939 [accessed 15 May 2023]

56 ECHR memorandum on the Illegal Migration Bill, 7 March 2023; Supplementary ECHR memorandum on the Illegal Migration Bill, 25 April 2023

57 ECHR memorandum on the Illegal Migration Bill, 7 March 2023, para 5

Section 3 of the Human Rights Act 1998

39. Clause 1(3) and (5) are novel provisions. It is difficult to predict how they will be interpreted by the courts. Clause 1(5) appears expressly to disapply section 3 of the Human Rights Act 1998 so may be effective notwithstanding the principle in *Thoburn* that "constitutional statutes" could not be impliedly repealed by subsequent legislation but must be done so expressly.[58] Nonetheless, if a court considers any provision of the Bill incompatible with Convention rights it would be able to declare it so under section 4 of the Human Rights Act 1998.

40. If the Bill cannot be construed compatibly with the Human Rights Act 1998, the courts would be able to strike down subordinate legislation under the Act resulting from this Bill. Section 6 of the Human Rights Act states: "it is unlawful for a public authority to act in a way which is incompatible with a Convention right". However, that section also states that subordinate legislation is not to be deemed unlawful if "as the result of one or more provisions of primary legislation, the authority could not have acted differently" or if the authority was "acting so as to give effect to or enforce" provisions which "cannot be read or given effect in a way which is compatible with Convention rights."[59] Clause 1(3) and (5) appear to have this effect.

41. **We draw the attention of the House to the novel nature of clause 1(3) and (5) and how those provisions might be interpreted in practice. No Act of Parliament has sought specifically to disapply section 3 of the Human Rights Act 1998.**

Devolution

42. Immigration (including asylum) is a reserved matter in Scotland and Wales and an excepted matter in Northern Ireland.

43. Clause 19(1) allows the Secretary of State to make regulations enabling clauses 15 to 18 (concerning unaccompanied children) to apply in relation to Wales, Scotland or Northern Ireland.[60] The regulations cannot confer functions on devolved ministers or departments[61] but they can amend, repeal or revoke any enactment including legislation passed or made by the devolved institutions.[62]

44. Regulations under clause 19(1) are subject to the draft affirmative procedure.[63] The Government states that these regulations "will require detailed input from the devolved administrations. It is considered appropriate for this to be done in secondary legislation once the clauses in respect of England have been approved by Parliament."[64] It is not clear how the Government

58 *Thoburn v Sunderland City Council* [2002] EWHC 195. In *Thoburn*, Laws LJ cited the Human Rights Act 1998 as an example of a "constitutional statute" which could therefore be repealed only by express provision in later legislation. In the recent *Allister* decision the Supreme Court concluded that "the interpretative presumption that Parliament does not intend to violate fundamental rights cannot override the clearly expressed will of Parliament. Furthermore, the suspension, subjugation, or modification of rights contained in an earlier statute may be affected by express words in a later statute." *Allister* [2023] UKSC 5, para 66.

59 Human Rights Act 1998, section 6

60 Illegal Migration Bill, clause 19(1)

61 Illegal Migration Bill, clause 19(3)

62 Illegal Migration Bill, clause 19(2) and (4)

63 Illegal Migration Bill, clause 63(4)(c)

64 Delegated Powers Memorandum to the Illegal Migration Bill, para 28

will seek such input and whether it will seek the consent of the devolved administrations to these regulations.

45. Clauses 22 to 24 empower the Secretary of State, in effect, to override legislation passed by the devolved legislatures. Clause 22 disapplies certain modern slavery provisions relating to support in the devolved territories to persons in respect of whom the Secretary of State is under the duty to make removal arrangements in clause 2(1).[65] Clauses 23 and 24 disapply certain measures passed by the Scottish Parliament and Northern Ireland Assembly respectively.[66] The Secretary of State has the power by regulations to amend clause 23 in consequence of regulations made by Scottish ministers under the relevant devolved legislation.[67]

46. In our report on the Nationality and Borders Bill we said:

> "The Sewel convention does not apply to delegated legislation but it would be constitutionally questionable for Parliament to circumvent that convention by legislating in a way that foresees or intends delegated legislation to change devolved legislation in areas of devolved competence."[68]

And:

> "Respect for the principle which underlies the legislative consent process for primary legislation should be applied to the exercise of the [delegated law-making] power … in relation to enactments contained in, or instruments made under, legislation passed by the devolved legislatures."[69]

47. **International relations are reserved matters under the devolution legislation but observing and implementing international obligations are devolved.[70] We reiterate our conclusion that it would be constitutionally inappropriate for Parliament to circumvent the Sewel convention by allowing for delegated legislation to alter devolved legislation in areas of devolved competence. *We recommend that clause 19(1) and clauses 23–24 are amended so that the power to amend devolved legislation may not be exercised without first seeking the consent of the relevant devolved legislature.***

48. While immigration and asylum are reserved matters, the functions and duties of local authorities in respect of unaccompanied children is a devolved matter. In this regard, the powers under clause 19 relate to, and to some extent overlap with, devolved matters. Clause 20 concerns the transfer of children between local authorities, including those within the devolved nations, and therefore also affects areas of devolved competence.[71]

---

65 Illegal Migration Bill, clause 22
66 Illegal Migration Bill, clauses 23 and 24
67 Illegal Migration Bill, clauses 23(9) and 24
68 Constitution Committee, *Nationality and Borders Bill*, (11th Report, Session 2021–22, HL Paper 149), para 103
69 Constitution Committee, *Nationality and Borders Bill*, (11th Report, Session 2021–22, HL Paper 149), para 104
70 Scotland Act 1998, Schedule 5, paragraph 7; Government of Wales Act 2006, Schedule 7A, paragraph 10; Northern Ireland Act 1998, Schedule 2, paragraph 3
71 Illegal Migration Bill, clause 20

49. ***We recommend that the House seek further information from the Government on the steps it has taken to agree an appropriate approach to the treatment of unaccompanied children across the United Kingdom.***

Delegated powers

50. We draw attention to two delegated powers of constitutional significance: those in clauses 39(2) and 56.

51. Clause 39(2) empowers the Secretary of State to amend the definition of "serious and irreversible harm" in clause 38 and therefore the grounds on which a person may or may not be removed from the United Kingdom. This could result in the definition being amended such that a "real, imminent and foreseeable risk"[72] of death or torture, which are examples of serious and irreversible harm set out in clause 38(4), are no longer grounds to halt a removal.

52. **We consider that the implications of this definition are so significant that it should be amended only by primary legislation unless any delegated power to do so is limited to prevent fundamental risks of harm being removed from the definition . *Clause 39 should be removed from the Bill or heavily circumscribed.***

53. Clause 56 empowers the Secretary of State to make regulations about the effect of a decision by a relevant person not to consent to the use of specified scientific method for age assessment.[73] This may include treating the person as an adult if consent is refused,[74] with consequent restrictions on the person's legal rights. The power is subject to the negative resolution procedure. ***The power in clause 56(1) has such significant implications for an individual's legal rights that it should be subject to the draft affirmative procedure. It would also assist the House if indicative draft regulations were made available during the passage of the Bill.***

Scrutiny

Pre-legislative consideration

54. The Bill was not published in draft nor subject to consultation. The Nationality and Borders Act 2022, which dealt with similar issues and which this Bill amends, followed the 2021 *New Plan for Immigration* consultation.[75] The Government cites that consultation as relevant to this Bill but has not sought further consultation on its proposed departures from a scheme agreed a year ago.[76] In our report on the Nationality and Borders Bill we

72 Illegal Migration Bill, clause 38(3)
73 Illegal Migration Bill, clause 56(1)
74 Illegal Migration Bill, clause 56(2)
75 Home Office, *New Plan for Immigration*, July 2021: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005042/CCS207_CCS0621755000-001_Consultation_Response_New_Plan_Immigration_Web_Accessible.pdf [accessed 11 May 2023]
76 See Explanatory Notes to the Illegal Migration Bill, para 297.

criticised the short period for which the 2021 consultation was open.[77] In *The Legislative Process: Preparing Legislation for Parliament* we concluded:

> "While not every Bill will require pre-legislative scrutiny, we recommend that the Government think critically about the value of pre-legislative scrutiny for all of its proposed legislation".[78]

55. **We draw to the attention of the House that the Bill is not based on a specific consultation exercise and did not receive pre-legislative scrutiny. We note that the Bill's passage would have taken longer if such processes had been followed.**

Placeholder clauses

56. Clauses 38 and 49 in the bill as introduced in the Commons (clauses 39 and 53 in the version brought from the Commons) were described as "placeholder" provisions in the original Explanatory Notes to the Bill.[79] Both clauses are constitutionally significant.

57. Clause 49, as it appeared when the Bill was introduced in the House of Commons, empowered the Secretary of State to make regulations concerning the extent to which duties to remove persons from the United Kingdom applied even when contrary to interim measures indicated by the European Court of Human Rights.[80]

58. Clause 49 was replaced at report stage in the House of Commons by clause 53. Clause 53 goes further, establishing as a default that the Secretary of State, immigration officers, the Upper Tribunal or any other court or tribunal deciding whether a person should be removed from the United Kingdom under clause 2 "may not have regard" to interim measures indicated by the European Court of Human Rights.[81]

59. In our report on the Nationality and Borders Bill we concluded:

> "[w]hile on occasion the use of placeholder clauses is understandable, the delayed introduction of so many significant clauses, the legal implications of which are in some cases far from clear, is unacceptable. This must not become a normal way of legislating."[82]

60. **The use of placeholder clauses for constitutionally significant provisions is unacceptable and reduces the opportunity for the finalised policy to be considered.**

---

77 Constitution Committee, *Nationality and Borders Bill* (11th Report, Session 2021–22, HL Paper 149), para 11

78 Constitution Committee, *The Legislative Process: Preparing Legislation for Parliament* (4th Report, Session 2017–19, HL Paper 27), para 82

79 Explanatory Notes to the Illegal Migration Bill (as introduced in the House of Commons), paras 173 and 216. Although the original clause 38 (now clause 39) was described as a placeholder it remains almost entirely unchanged. However, the scheme set out in original clauses 37 and 38 has been altered by the addition of what is now clause 38 and amendments to clause 37.

80 Illegal Migration Bill [HC], clause 49

81 Illegal Migration Bill [HL], clause 53(6). Under clause 53(2) "A Minister of the Crown may (but need not) determine that the duty in section 2(1) (duty to make arrangements for removal) is not to apply in relation to the person."

82 Constitution Committee, *Nationality and Borders Bill* (11th Report, Session 2021–22, HL Paper 149), para 12

APPENDIX 1: LIST OF MEMBERS AND DECLARATIONS OF INTEREST

Members

Baroness Drake (Chair)
Lord Anderson of Ipswich
Baroness Andrews
Lord Falconer of Thoroton
Baroness Finn
Lord Foulkes of Cumnock
Lord Hope of Craighead
Lord Keen of Elie
Lord Mancroft
Lord Strathclyde
Baroness Suttie
Lord Thomas of Gresford

Declarations of interest

Baroness Drake (Chair)
No interests declared
Lord Anderson of Ipswich
No interests declared
Baroness Andrews
No interests declared
Lord Falconer of Thoroton
No interests declared
Baroness Finn
No interests declared
Lord Foulkes of Cumnock
No interests declared
Lord Hope of Craighead
No interests declared
Lord Keen of Elie
No interests declared
Lord Mancroft
No interests declared
Lord Strathclyde
No interests declared
Baroness Suttie
No interests declared
Lord Thomas of Gresford
No interests declared

A full list of members' interests can be found in the Register of Lords' Interests: https://members.parliament.uk/members/lords/interests/register-of-lords-interests

Professor Stephen Tierney, University of Edinburgh, and Professor Alison Young, University of Cambridge, acted as legal advisers to the Committee. They declared no relevant interests.