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The UK's Illegal Migration Bill: human rights violated

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Introduction

Stopping asylum seekers from arriving in the UK on small boats was one of the five key pledges made by Prime Minister Rishi Sunak in January 2023.¹ An important facet of the attempt to meet that promise is the Illegal Migration Bill. Introduced in March 2023, it is proving to be highly controversial. The Bill, which seeks to 'prevent and deter unlawful migration',² has been described as 'one of the worst bills pursued by a British government in recent history'.³ The Government, in contrast, describes the policy underlying it as 'profoundly and at its heart a humane attempt to break the incentive that sustains the business model of the smuggling gangs'.⁴ What is beyond controversy is that the Bill is an unprecedented attack on the UK's system of human rights protection, as well as an affront to international human rights and refugee law.⁵

The title of the Bill refers to 'illegal migration'. However, this title is in itself inaccurate. Under international law countries where putative refugees arrive are under a duty to determine – that is, declare or otherwise – refugee status. This is implicit in the United Nations (UN) Convention on the Status of Refugees 1951. 'Arriving' cannot therefore be unlawful. In the House of Lords debate on the Bill Baroness Chakrabarti said 'a refugee convention refugee can never – I repeat, never – be illegal'.⁶ Further, the Universal Declaration of Human Rights *inter alia* provides that 'everyone has the right to seek and enjoy in other countries asylum from persecution'.

The main features of the bill

The Bill's core provision places a duty upon the Home Secretary to summarily remove persons who enter the UK in a particular way. The Home Secretary, Suella Braverman, said:

The Bill enables the detention of illegal arrivals without bail or judicial review within the first 28 days of detention. We can maintain detention thereafter under current laws, so long as we have a reasonable prospect of removal... The Bill places a duty on the Home Secretary to remove illegal entrants and, significantly, narrows the number of challenges and appeals that can suspend removal.⁷

The effect of the Bill is that it would be impossible for anyone to claim asylum in the UK unless they arrive in the country under an approved scheme. There are three such schemes at present, relating to Syria, Ukraine and Afghanistan. Since it is nearly impossible for an individual to enter the UK directly from other countries such as Iran, Venezuela, Eritrea and Sudan, individuals from these and indeed all countries would, de facto, be barred from claiming asylum in the UK.⁸

As to detention, the Bill gives the Home Office greater discretion to detain asylum seekers by clause 11 – under which detention can be indefinite. This, of course, comes with a considerable human and financial cost. As to the mental health consequences, the Royal College of Psychiatrists has noted that the Bill is likely to precipitate a significant deterioration of mental health problems in most cases.⁹ Baroness Meacher highlighted that the 'consequences for children, with both mental and physical symptoms, are particularly distressing'.¹⁰ Financially, the Government's own estimates are that the cost of detention facilities, ongoing accommodation and removals over the next two years to be between three and six billion pounds.¹¹ The Bill is in its final parliamentary stages, presently being considered at the committee stage in the House of Lords. When, and indeed whether, it will become law remains uncertain. The UK Government appears to be committed to pursuing the parliamentary process, however. Meanwhile, it has been reported that the Government may resort to the Parliament Acts 1911–1939 to enact the Bill if the House of Lords declines to provide its consent.¹²

The human rights position of the bill

Statement of compatibility and disapplication

The Illegal Migration Bill contains draconian and, in some cases, unprecedented human rights-related provisions. This is illustrated by the fact that the Home Secretary was unable to make a statement of compatibility when introducing the Bill to Parliament as ordinarily takes place. The Human Rights Act (HRA) 1998 introduced this new stage to the legislative process; requiring the government minister in charge of a Bill to make a statement that the proposed law is compatible with human rights, or to say if she is unable to make such a statement but that the Government nevertheless wishes to proceed with the Bill. The Government was forced to make the latter statement, in effect admitting that the terms of the Bill were such that it could not state it was compatible with human rights.

This is a notable and serious admission. The inability to make a statement of compatibility is very rare.¹³ That it has occurred in relation to the Illegal Migration Bill, therefore, is of some significance. The European Convention of Human Rights Memorandum produced by the Home Office together with the Bill itself provides that the rights arguably affected by it are the right to life, prohibition of inhuman or degrading treatment, prohibition of slavery, liberty and security of person, fair trial, private and family life, right to an effective remedy and prohibition of discrimination. Clearly, this gives cause for significant concern.

Of greater practical significance in the protection and promotion of human rights of persons arriving in the UK than the inability to make a statement of compatibility is the interpretative obligation under section 3 of the HRA 1998. It provides that courts must interpret the law, as far as it is possible to do so, compatible with human rights. If it is not possible to do so, then a court may make a declaration of incompatibility. Whilst not affecting the validity of that provision, it does lead to the government considering whether remedial action should be taken to remove the incompatibility.

Unprecedentedly, clause 1(5) of the Illegal Migration Bill provides that section 3 of the HRA does not apply to it, nor to provision made under it. Accordingly, this important feature of human rights law is simply excluded. Lord Hope in a House of Lords debate terms this 'a major incursion into the rights guaranteed by the convention'.¹⁴ Whilst it is legally permissible for the government, through a duly enacted Act of Parliament, to exclude the operation of section 3 of the HRA, it is not possible for that Act to affect the international legal obligation upon the UK to adhere to the terms of the European Convention on Human Rights. Ultimately, the effect of this action is to delay consideration of the human rights issues under the Bill, such that UK courts cannot take such action and it is left to the European Court of Human Rights to eventually do so.

Two further important human rights-related clauses must be noted. Clause 4 provides that certain claims and applications are to be disregarded. In essence, this excludes the courts from considering certain protection claims, human rights claims or claims that the person was a victim of slavery or human trafficking. Clause 53 provides that the Secretary of State, immigration officer, Upper Tribunal and courts may not have regard to an interim measure of the ECtHR – where the Minister of the Crown has not determined that the duty under clause 2 of the Bill is not to apply following such a measure.

Human trafficking and modern slavery

One of the most controversial aspects of the Bill, in clauses 21–28, bans victims of modern slavery from relying on the Modern Slavery Act 2015 to resist removal from the country. This conflicts with the obligations upon the UK under the Council of Europe Convention on Action against Trafficking in Human Beings. Amongst the notable critics of this has been former Prime Minister Theresa May, who argued in the House of Commons debate on the Bill that 'we are shutting the door on victims who are being trafficked into slavery here in the UK'.¹⁵ The Joint Council for the Welfare of Immigrants states that to 'deny survivors of trafficking and slavery the right to asylum extinguishes their right to safety in the UK'.¹⁶ Indeed, in the Explanatory Memorandum to the Bill, the Government notes it is these provisions which prevent it from making a statement of compatibility, alluded to above.¹⁷

Conclusion

Immigration, and in particular the recent arrival of individuals on the coast of southeast England, has become highly politicised. This politicalisation has given rise to bad law limiting and indeed conflicting with UK and international human rights and refugee law. As Baroness Chakrabarti notes 'The politics of the Bill are a populist, divisive distraction from economic turmoil caused by mismanagement and greed'.¹⁸ The Bill has been strongly opposed by a range of organisations including professional bodies and charities. One can only hope that common sense prevails and the Bill is removed from the legislative programme.

Notes

1. The pledges are listed here: <https://www.gov.uk/government/news/prime-minister-outlines-his-five-key-priorities-for-2023> (accessed 12 June 2023).
2. Illegal Migration Bill, clause 1(1).
3. Marson, L., Ineffective authoritarianism: How bad is the illegal migration bill?, Legal Action March 2023, <https://www.lag.org.uk/?id=213909&fromsearch=true#iosfirsthighlight> (accessed 12 June 2023).
4. House of Commons Hansard, vol. 729, col. 576, 13 March 2023.
5. The Joint Committee on Human Rights. Legislative scrutiny: Illegal migration bill, twelfth report of session 2022–23, 11 June 2023, concludes ‘... this Bill breaches a number of the UK’s international human rights obligations and risks breaching others’, at p. 131, <https://committees.parliament.uk/publications/40298/documents/196781/default/> (accessed 12 June 2023).
6. Baroness Chakrabarti, House of Lords Hansard, vol. 829, col. 1838, 10 May 2023.
7. House of Commons Hansard, vol. 729, col. 578, 13 March 2023.
8. The UN High Commissioner for Refugees has noted that the Bill amounts to ‘an asylum ban’, <https://www.unhcr.org/uk/news/statement-uk-asylum-bill> (accessed 12 June 2023).
9. See <https://www.rcpsych.ac.uk/news-and-features/latest-news/detail/2023/04/26/illegal-migration-bill-'unethical'-says-rcpsych-president-dr-adrian-james> (accessed 12 June 2023).
10. House of Lords Hansard, vol. 829, col. 1841, 10 May 2023.
11. BBC News, Illegal migrants plan could cost £6bn over two years, say government projections, <https://www.bbc.co.uk/news/uk-politics-65789136> (accessed 21 June 2023). In 2022, the Home Office estimated the current asylum system cost the taxpayer £1.5 billion a year, see <https://homeofficemedia.blog.gov.uk/2022/04/14/factsheet-cost-of-asylum-system/> (accessed 12 June 2023).
12. Daily Telegraph, 6 June 2023, p. 1.
13. An inability to make such a statement occurred in the passage of the Local Government Bill 1999 and the Communications Bill 2003, for reasons of sex education in schools and the prohibition of political advertising.
14. House of Lords Hansard, vol. 830, col. 875, 24 May 2023.
15. House of Commons Hansard, vol. 729, col. 593, 13 March 2023.
16. Joint Council for the Welfare of Immigrants, ‘Illegal Migration’ Bill 2023 Briefing, April 2023, <https://www.jcwi.org.uk/illegal-migration-bill-2023-briefing> (accessed 12 June 2023).
17. At para 47.
18. Baroness Chakrabarti, note 6 above.