Amnesty International UK

BRIEFING

Government Immigration Bill, Bill 133 (Session 2022-23)

House of Lords Committee Days 2 & 3 (5 & 7 June 2023)

On Day 1 of Committee, the two most crucial provisions of this Bill were considered: Clauses 1 and 2. On Days 2 and 3, the Committee will consider various provisions in the Bill including on exceptions to Clause 2(1), a blanket bar to asylum and human rights claims, destinations for expulsion and detention powers. It is possible the Committee also considers the Bill's removal of modern slavery protections and blanket bars to UK immigration status and British nationality.

We are not briefing on all these provisions or indeed others. Not because we have any doubt as to their profound repugnance and recklessness. Amnesty International is implacably opposed to this Bill. Our reasons are briefly summarised in our briefing for Second Reading.[1] However, there is something above and beyond the authoritarian and abusive nature of each of the Bill's discrete provisions for judicial ouster and for excluding lawful, moral and decent behaviour on the part of the Home Office. It is this we seek to draw out before it may be too late.

Accordingly, we support opposition to all of the provisions of the Bill that will be consider on Days 2 and 3 of Committee. However, our opposition to the Bill is seriously enlarged by the way by which all these and indeed all provisions of this Bill are affected and controlled by the combined effect of Clause 1 – in particular subparagraphs (1) and (3) – and Clause 2. It is vital that consideration of all provisions of this Bill is founded upon an understanding of how each and every provision is made subject to these controlling Clauses and the impact of this. This briefing, therefore, considers discrete provisions under distinct headings from that perspective. However, it starts with a short response to the debate on Day 1 of the true meaning and effect of the controlling Clauses (Clause 1 and 2).

Clause 1 and 2 (their controlling effect)

Clause 1(1) states the "*purpose*" of the Bill. Whereas some discussion of this purpose at Committee presented it as the prevention and deterrence of migration, which the Bill variously describes as "*unlawful*", "*illegal*" and "*unsafe*", this description falls short of identifying the purpose stated in the Bill. That purpose is stated as achieving the prevention and deterrence of this migration "***by requiring the removal from the United Kingdom of certain persons***". That – requiring removal – is what Clause 1(3) compels all other provisions, where possible, to be read to give effect. As the minister acknowledged,

[1] All Amnesty briefings on this Bill are to be found here: https://www.amnesty.org.uk/resources/government-immigration-bill-session-2022-23-entitled-illegal-migration-bill-1

that expulsion requirement, which is given primary effect by the statutory obligation in Clause 2(1), is the Bill's purpose governing all else in the Bill.[2]

As was said on Day 1 of Committee, placing a statutory obligation upon the Home Secretary to expel people is a means to effectively exclude any legal or judicial restraint upon her exercise of expulsion powers.[3] The minister's response effectively concedes this while seeking to avoid expressly acknowledging it. He emphasises that the courts' constitutional role is to ensure the law is applied and respected while Parliament's constitutional role is to make that law.[4] If Parliament makes it law that the Home Secretary must expel someone regardless of any moral, practical or other legal consideration, the courts are to be required to give effect to that. There is, therefore, no real difference between the minister and, for example, Baroness Chakrabarti on what is the effect of these Clauses. The difference between them is as to the impropriety and injustice of this effect, including in constitutional terms. On that, we consider Baroness Chakrabarti and others are clearly in the right and the minister in the wrong.

However, the minister also seeks to argue that there is no incompatibility with international law and human rights respect in this. He says that ministers cannot confirm this formally because the Bill is "*novel*", but nonetheless that, if and when the Bill is implemented, ministers are confident the bill will not be incompatible.[5] With respect, the very best that can be said for this argument is that it essentially confuses respect for international human rights law with the sole question of *non-refoulement*.[6] It assumes that if the Bill provides sufficient protection against expelling someone to a place where that person is at risk of persecution or some equally or more severe form of human rights abuse, then that is enough. Not only is it highly questionable whether the Bill does provide sufficient protection against *refoulement*, that is by far not the limit of the UK's international human rights obligations.

There is a similar assumption concerning the best interests of unaccompanied children. Here the assumption is that deferring the statutory requirement to expel until the child reaches adulthood – albeit retaining power to expel the child during childhood[7] – is sufficient (coupled with what is assumed concerning *non-refoulement*) to respect the best interests of children. This assumption is also wrong.

This is all exacerbated because it is not only judicial restraint of the Home Secretary's expulsion powers that is excluded. Any legal or moral restraint is effectively excluded too. Of course, no statutory obligations can remove what may be practical barriers to any person's expulsion, but these are to be ignored with the consequence that a dreadful and

[2] *Hansard* HL, 24 May 2023 : Cols 918 and 941 *per* Lord Murray of Blidworth. The minister both spelled out the full purpose (requiring removal) established by Clause 1(1) and made clear the intimate relation between that purpose Clause and Clause 2

[3] e.g. *Hansard* HL, 24 May 2023 : Cols 878, 939, 940 and 972 *per* Baroness Ludford, Baroness Chakrabarti, Lord Hope of Craighead and Baroness Chakrabarti respectively.

[4] *Hansard* HL, 24 May 2023 : Cols 919 and 941 *per* Lord Murray of Blidworth

[5] *Hansard* HL, 24 May 2023 : Cols 920 and 921-922 *per* Lord Murray of Blidworth

[6] *Hansard* HL, 24 May 2023 : Cols 967-968 *per* Lord Murray of Blidworth

[7] Clause 3(2)

indefinite limbo is to be inflicted upon anyone who cannot be expelled. It means the Home Secretary can no more escape the obligation to expel than can the court – which brings us back to the minister's description of the Bill as "*novel*" as an explanation given for the inability to formally declare the Bill as human rights compatible. This 'explanation' reveals the startling recklessness of what the Government asks Parliament to do. If the claimed confidence of ministers is indeed misplaced, the so-called novelty prevents any correction save by requiring Parliament to legislate all over again. Meanwhile, the human rights incompatibility and its terrible impact on people continues.

The following Clauses are considered by reference to the impact of Clause 1 and 2 upon them. This is intended to both highlight the extent of the problems with these further Clauses and give example of the dreadful impact of the opening Clauses in governing this Bill.

Clause 3 – Unaccompanied children and power to provide exceptions

It is vital to understand that Clause 3(1) does not provide any complete exemption for unaccompanied children from the statutory obligation to expel someone who is caught by the conditions in Clause 2. There are four ways in which that is so.

First, the 'exception' to Clause 2(1) provided by Clause 3(1) is time limited. An unaccompanied child is only granted exception to the statutory obligation under Clause 2(1) for such time as they are and remain unaccompanied and a child. In the event that either of those conditions changes, Clause 2(1) applies.

Second, the 'exception' is not an exception to the power of the Home Secretary to expel the child. As Clause 3(2) makes clear, nothing in the Bill constrains, still less removes, the Home Secretary's power to expel unaccompanied children.

Third, Clause 2(7) makes clear that, even if an unaccompanied child is given limited leave to enter or remain, the child is still to be treated as meeting the fourth condition in Clause 2. The other three conditions are all ones that once met cannot be unmet. In other words, a grant of limited leave to enter or remain to a child does not affect the application of any part of the Bill.

Fourth, even though the unaccompanied child is temporarily relieved of the obligation upon the Home Secretary to expel them, the statutory purpose to require removal remains. Clause 1(1) and (3) require even Clause 3 to be read, so far as possible, to give effect to that purpose of requiring removal. It may be that the pre-existing statutory obligation to have regard to the best interests of the child will be sufficient in any particular case to defeat any impact of the statutory purpose in this Bill upon the power to expel unaccompanied children. But even that cannot be certain.

Amendments on the bests interests of children provide opportunity to probe ministers about the effect of Clause 3 as read, so far as possible, to give effect to Clause 1(1) and requiring removal. Nonetheless, it is extremely difficult to see how the best interests of children can possibly be saved by amendments such as those tabled. It is not in a child's

best interests to be placed in a permanent state of anticipated expulsion regardless of the individual circumstances of the child, including her refugee status or his experience of having been trafficked. If all children caught by Clause 2 are required to be expelled at some point, it is inconceivable that this will properly reflect or regard their best interests, which must include some real security about their future.

Clause 3(7) empowers the Home Secretary to provide for "*other exceptions*" to be made by regulations – but this is only for exceptions to Clause 2(1). Peers may wish to probe the minister as to how this power is to be read, so far as possible, to give effect to Clause 1(1) and requiring removal. Certainly, what passes for an exception for unaccompanied children by Clause 3 does not bode well. Nor does the restriction of the power in Clause 3(7) to Clause 2(1) – as is emphasised by consideration of Clause 4 (below).

Clause 4 – Disregard of certain claims, applications etc

Clause 4(1) emphasises that the expulsion requirement trumps all else as it lists certain claims and applications that must both be disregarded for the purposes of the statutory obligation to remove in Clause 2(1) and be disregarded for the purposes of the residual power to remove an unaccompanied child that is preserved by Clause 3(2).

However, Clause 4(2) and (3) go much further in respect of asylum and human rights claims. These must be declared inadmissible and cannot be considered. So long as the person is caught by the four conditions in Clause 2(2) to (6), this mandatory ban on asylum and human rights claims applies regardless of whether there is any exception for the person to Clause 2(1).

The purpose of the ban on asylum and human rights claims is both monstrous and entirely consistent with the statutory purpose of requiring removal. It is at best, therefore, an extremely delicate and difficult matter to seek to amend this Bill to effectively moderate or negate that purpose, which is required by Clause 1(3) to be read, so far as possible, into anything in or added into this Bill. It is also be read in the same way into any regulations made under this Bill, including regulations made under Clause 3(7) for making exceptions to the statutory obligation on Clause 2(1).

Two things appear clear. First, exceptions made to Clause 2(1) under powers in Clause 3(7) cannot affect the ban on asylum and human rights claims. Second, amendments that merely overcome the ban on asylum and human rights claims cannot in themselves be expected to assist a person who remains caught by Clause 2(1). Whether or not an asylum or human rights claims is made admissible and made able to be considered would not in itself provide any escape from the expulsion requirement. That is emphasised not merely because Clause 2(1) creates a statutory obligation, but also because Clause 1(3) demands that obligation, so far as possible, takes precedence in how every provision of this Bill must ultimately be read.

Clause 21 – Provisions relating to removal and leave (Modern Slavery)

Clause 21(2) expressly disapplies statutory prohibitions on expelling a victim of modern slavery and statutory obligations to grant such a victim any period of leave to remain. This

effectively mirrors the ban on asylum and human rights claims in ensuring that whatever determination may be made of a person's reported or suspected experience of modern slavery, and its impact upon them, the person is barred from receiving any related immigration status in the UK.

The purpose of this is no less monstrous and entirely consistent with the statutory purpose of requiring removal than is the case with the ban on asylum and human rights claims. It is, therefore, an equally delicate and difficult matter to seek to amend this Bill to effectively moderate or negate that purpose in relation to any victim of modern slavery who is caught by the four conditions in Clause 2(2) to (6). The same considerations regarding the difficulty of making exceptions and the ineffectiveness of the power in Clause 3(7) for such a purpose.

As has been remarked repeatedly and consistently by a range of experts and parliamentarians, the harm of this is not just done directly to people who have suffered extreme forms of human exploitation.[8] It is potentially disastrous for conducting investigations and securing convictions of human traffickers and other abusers, and thus to any aim of preventing continued and further exploitation. It is quite remarkable that such provisions are to be found in a Bill that is so widely intent on creating an environment in which many people are frightened of the authorities. It is the combined effect of all this that makes this Bill a Charter for Modern Slavery.

Clause 21(3) is another of this Bill's sham exceptions. If the Home Secretary is satisfied that she, or other authorities, have 'use' for a victim of modern slavery, the bar to the person receiving the benefit of statutory protections is lifted. But it is lifted only for so long as the Home Secretary considers the victim to be 'useful'. When she no longer has 'use' for the victim, the bar is reinstated. Moreover, even the temporary lifting of this bar is no guarantee of protection to the victim. Clause 21(5) emphasises the true intent of this Bill by requiring the Home Secretary to assume that there is no need to lift the bar in order to make 'use' of the victim. The violence of this provision is made more emphatic by Clause 1(3) in requiring that it be read, so far as possible, to reinforce the purpose of this Bill to require the person's removal.

We use the word 'use' advisedly here. Everything about this Clause, and its place in the Bill, speaks of exploitation by the state of the people who are or may become the victims of criminal exploitation.

Clause 29 – Entry into and settlement in the United Kingdom

Clause 29 is a natural corollary of the Bill's unnatural purpose. Just as the exceptions which the Home Secretary is permitted to make under Clause 3(7) cannot lift the ban on her considering someone's asylum or human rights claim, they equally cannot lift the bar in Clause 29 to her ever granting the person leave to enter or remain. Moreover, amendments to disturb the bar on asylum and human rights claims must also, to be

[8] This is in part the reason the former Prime Minister, who when Home Secretary introduced the Modern Slavery Act 2015, has said this Bill *"will drive a coach and horses through the Modern Slavery Act"*: see *Hansard* HC, 28 March 2023 : Col 886 *per* Theresa May MP

effective, disturb the bar on any grant of leave to enter or remain (as well as effectively escape the impact of Clause 1(3) and the Bill's purpose of requiring removal). Otherwise, the person whose claim is considered and successful is nonetheless faced with the bar to their being permitted any leave.

Ministers may point to the discretion given to the Home Secretary to grant leave if, and only if, she considers not to do so will contravene the European Convention on Human Rights or in some "*other exceptional circumstances*".[9] Apart from the dim prospect of this discretion ever being exercised, it is vital to recall that it too is governed by Clause 1(3) so as to be read, so far as possible, to enable the purpose of requiring the person's removal. This appears to explain why exceptional circumstances can only permit a grant of limited leave. The discretion to grant indefinite leave to remain is only available on the basis of contravention of the Convention.[10]

The construction of this Bill is that, once caught by this purpose, a person can never escape it. Even a temporary deferral can provide no real reprieve. The person remains under the threat of an inevitable expulsion, subject only to the Home Secretary finding a destination to which she can achieve this or continuing the deferral. That is the limbo created by this Bill. Among its many profound harms, and apparently wicked motivations, is the prospect that the weight of this limbo and ever present threat will break a person so severely that she, he or they will no longer resist even expulsion to a place where their life and liberty will be cruelly harmed. This harm is itself a violation of international human rights law and one the Bill is plainly designed to create.

Clause 30 – Persons prevented from obtaining British citizenship etc

We have briefed jointly with the Project for the Registration of Children as British Citizens (PRCBC) in support of amendments to remove the provisions in this Bill affecting rights of registration of British nationality. That briefing's conclusion states:

> "*The inclusion of citizenship rights within the scope of this Bill is profoundly misconceived and harmful. It is especially harmful to children. However, it is equally harmful to British citizenship and the very purpose of that citizenship.*"

What lies at the heart of that concern is a wider and deeper refusal to understand that rights of nationality are not matters of immigration. People with statutory rights to British citizenship, or other British nationality, by way of registration are not properly considered as visitors, guests or migrants but rather as British with the need to have their connection and identity affirmed by the registration of their citizenship.

This Bill, however, takes the dreadful conflation of immigration and nationality law to a new level of confusion and mess. We acknowledge that naturalisation is not a right of people who migrate to the UK, though we note as others have emphasised the obligation

[9] Clause 29(3), in particular what is to be provided for by new section 8AA(3)(b)(ii) and 4(b) to the Immigration Act 1971.

[10] See Clause 29(3) and what is to be new section 8AA(5) of the Immigration Act 1971.

upon the UK to facilitate the naturalisation of refugees.[11] Nonetheless, there is no true or proper purpose to any of the provisions affecting British nationality law in this Bill – not even its treatment of naturalisation.

To be naturalised as a British citizen, a person must be lawfully in the UK and must be settled – i.e. permitted to stay permanently by grant of indefinite leave to enter or remain.[12] Since the Bill bars that status by Clause 29, it already bars the person's naturalisation. All that is shown by the inclusion of Clauses 30 to 36 in this Bill is the dreadful extent to which those motivated by hostility towards migrants have permitted themselves to lose sight not merely of their international law obligations or basic notions of human decency, but also of this country's laws and constitutional arrangements, even its very nationality laws on which everyone's citizenship depends.

[11] See e.g. paragraph 77 of UNHCR's Legal Observation on the Illegal Migration Bill, updated May 2023

[12] See paragraphs 1(2)(c) and 2(1)(c) of Schedule 1 to the British Nationality Act 1981, which make this a mandatory requirement that cannot be waived.