Amnesty International UK

BRIEFING

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

House of Lords Committe Days 4 & 5 (12 & 14 June 2023)

Among other things, Days 4 and 5 of Committee will provide opportunity to consider the 'legal proceedings' by which, it is claimed, the Bill's purpose to require the expulsion of people by statutory mandate will be constrained by law. These proceedings are established by Clause 37 to 54. As explained in this briefing, they are barely even a figleaf of protection for legality and human dignity. As emphasised in our previous briefings, this is no mere accident. It is inherent to the statutory purpose to be created by Clause 1(1) and driven through this Bill, and every regulation made under it, by Clause 1(3).

Important assertions made by Ministers concerning suspensive claims

These proceedings – which are based on what the Bill refers to as two types of '*suspensive claims*" – have been touched upon in debate on Days 2 and 3 of Committee. Ministers have made two assertions that are of critical importance to understand and evaluate. These assertions arose in considering the blanket exclusion of asylum and human rights claims by Clause 4 and in considering the provisions in Clauses 5 to 7 concerning expulsion, including destinations to which a person is to be expelled.

The first of Ministers' assertions was:

> "*The Bill provides for two types of claims that would suspend removal… Those provisions provide sufficient remedies to challenge a removal notice and afford the necessary protection to a person suffering serious and irreversible harm were they to be removed to the specified third country. All other legal challenges, whether or ECHR grounds or otherwise, should be non-suspensive.*"[1]

The other was:

> "*The noble Lord, Lord Anderson, asked what would happen to an asylum or human rights claim that had been declared inadmissible, but where the person had had their factual or suspensive claim accepted. In such a case, the person's claim would be considered under the existing law. That might include existing inadmissibility provisions…*"[2]

This latter assertion prompted the question whether a declaration of inadmissibility could be reversed. The Minister's response was:

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[1] *Hansard* HL, 5 June 2023 : Col 1201 *per* Lord Murray of Blidworth
[2] *Hansard* HL, 5 June 2023 : Col 1201 *per* Lord Murray of Blidworth

> "*The provisions of the Bill in relation to that are a little involved, and I will write to the noble Lord.*"[3]

With the greatest of respect to the Minister, and notwithstanding his commitment to write to Lord Anderson, the Bill, as drafted, is complex but nonetheless does not provide the escape – involved or otherwise – about which the Minister was asked. This is critically important to both understand the nature and content of his Bill and to understand the nature and content of the "*legal proceedings*" it creates for what are called "*suspensive claims*".

Four considerations emphasising the Bill's exclusion of any escape from it

First, there is nothing in this Bill that expressly switches off any of the obligations in Clause 4(1), (2) or (3) of this Bill. Those obligations that the requirement to expel a person must be met "*regardless*" of any asylum or human rights claim [Clause 4(1)]; that any such claim "*must*" be declared inadmissible [Clause 4(2)]; and that the claim "*cannot*" be considered [Clause 4(3)]. **Ministers must expressly identify what provision or provisions in the Bill they say, if they do, can reverse any of these obligations.**

Second, this is nothing in this Bill that impliedly switches off any of these obligations – at least not conclusively. The Home Secretary may, under the extremely constrained circumstances established under Clause 29(3) permitted by the Bill, give a person leave to remain.[4] This would create a temporary escape from the fourth condition [Clause 2(6)]. However, even that is not an escape from this Bill. Clauses 29 and 30 construct exclusions from leave and citizenship on the basis of "*ever*" having met the four conditions in Clause 2(2) to (6). If and when, therefore, the person's leave expires or is withdrawn, all the obligations to expel and exclude the person are reactivated; and use of the word "*ever*" in Clauses 29 and 30 emphasises the underlying intention to expel and exclude the person.

Third, as we have emphasised in previous briefings, this Bill is unusual – Ministers appear to prefer the word "*novel*" – in expressly stating a statutory purpose of "*requiring the removal from the United Kingdom of certain persons*" [Clause 1(1)] and then requiring every provision of the Bill (and every regulation made under it) to be read, so far as possible, to give effect to that purpose [Clause 1(3)]. **Ministers must cease hiding behind what they describe as 'novelty' and straightforwardly confront and answer to the plain implication of setting a statutory purpose of requiring expulsion that must govern how all else in this Bill is to be understood.**

Fourth, only a person to whom the four conditions in Clause 2(2) to (6) do not apply is to be free of these or any other obligation under the Bill. Nonetheless, demonstrating that these conditions do not apply to the person will be vital for anyone wrongly treated as

[3] *Hansard* HL, 5 June 2023 : Col 1202 *per* Lord Murray of Blidworth

[4] Clause 29(3) is to introduce new section 8AA to the Immigration Act 1971. Subsection (4) of this new section would permit the Home Secretary to give leave to remain only if she considers it will contravene the European Convention on Human Rights not to do so or she considers there are "*other exceptional circumstances*" that would make it appropriate to give leave.

caught by the Bill. The "*factual suspensive claim*" established by Clauses 37(3) and 42 is the only legal process expressly envisaged by the Bill for this purpose. Clause 52 tends to ensure this by excluding any interim relief to prevent or delay a person's removal; and in any event it cannot be assumed the courts will exercise a discretionary power of judicial review in the face of what will presumably be the Home Secretary's submission that the factual suspensive claim provides an appropriate and adequate alternative remedy.

Purpose of this Briefing

This briefing, as our previous briefings for Committee, seeks to enable understanding of discrete provisions of the Bill in their proper context – which here is, in the word that ministers' have chosen, 'novel'. In our briefing for Days 2 and 3, we reflected on this word as it relates to this Bill and as it is used by ministers in justification of their apparently contradictory positions of stated confidence in the human rights compatibility of the Bill and their declaration that they cannot attest to that compatibility:

> "*…the Home Secretary can no more escape the obligation* [to be found in Clause 2(1) and statutorily set as purpose by Clause 1(1)] *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. 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.*"

In these circumstances, we do not brief on all the Bill's provisions. 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.[5] 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.

Legal Proceedings, Clauses 37 to 54: General

The primary effect of these Clauses is to establish two designated types of "*suspensive claims*". These are suspensive of expulsion.[6] The two types of suspensive claim are:

- A factual suspensive claim: Clause 37(3). This is a claim that the Home Secretary has made a mistake of fact in deciding that the person meets the four conditions in Clause 2(2) to (6).

[5] 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

[6] Clause 46

- A serious harm suspensive claim: Clause 38(2). This is a claim that the person would "*face a real, imminent and foreseeable risk of serious and irreversible harm*" if expelled to the specified destination [Clause 38(3)] within the period it would take for the person to make a human rights claim and pursue, from that destination, any judicial review proceedings against the safety or human rights compliance of their removal [Clause 38(3) and (9)].

These suspensive claims are to be the only legal processes whereby anyone treated by the Home Secretary as caught by the requirement to expel is to have any hope of escaping their expulsion. However, it is necessary to distinguish between the following:

- On the one hand, there is the possibility of escaping expulsion to a specific destination that may be nominated by the Home Secretary. In principle, at least, suspensive claims provide the possibility that someone can escape a specific destination for their expulsion; and, again in principle, may do so repeatedly in response to each time the Home Secretary may specify a destination.

- On the other hand (as addressed above), there is to be no escape from the Bill for anyone caught by the conditions for its application [Clauses 2(2) to (4)]. There may be temporary reprieve but even that constitutes nothing more than the continued suspension of Damocles' sword. The exception is that a person who succeeds by a "*factual suspensive claim*" in demonstrating the Bill does not apply to them can thereby escape that which the Bill never truly permitted to be applied. Properly understood, this is not constraint on the Bill and the requirement it makes for the Home Secretary to expel and exclude people. Rather, it is a constraint on the circumstances by which even the person Parliament will neither have mandated nor permitted to be caught by this Bill can nonetheless escape it.

Suspensive claims created by this Bill are tightly controlled by the Home Secretary.[7] These claims can, in certain circumstances, be appealed, but only to the Upper Tribunal.[8] The timescales for claims and appeals are short.[9] The Home Secretary is empowered to significantly control these appeals.[10] As regards serious harm suspensive claims, she is even empowered to further confine the already very limited conditions in which such a claim (or appeal against its refusal) is to ever be permitted to succeed if, for example, she

[7] A claim is not even, on the face of the provisions, treated as made if the Home Secretary decides it does not contain "*compelling evidence*" or meet other requirements that she may prescribe: see Clauses 41(5) and 42(5). If treated as not made, the Home Secretary will make no decision on the claim and there is no appeal: see Clause 43(1).

[8] The Home Secretary may – even though deciding a claim that she must have treated as including compelling evidence – certify any claim made as "*clearly unfounded*": see Clauses 41(3) and 41(3). Certifying the claim in this way bars an appeal unless the person can satisfy either Clause 44(3) or (4). But even without the certificate, there is a further requirement of "*compelling evidence*" for there even to be an appeal: Clause 43(3).

[9] The general position is as follows. Claims must be made within 8 days of the person being given a removal notice that specifies the destination to which it is intended to expel them: Clauses 41(1) & (7) and 42(1) & (7). Appeals must be made within 7 working days beginning with the day the person is given notice of the Home Secretary's refusal of their claim: Clause 49(1)(a)(i).

[10] Her controlling influence extends to questions of whether an appeal can be brought at all, whether it is to be permitted out of time and what matters may be considered on the appeal: e.g. Clauses 41, 42, 45 and 47.

considers decisions of the Upper Tribunal to be intolerable to her.[11] Above all else, what is most striking is that, notwithstanding these obvious limitations, there is no express escape from the obligation to expel the person to be secured by any success of that person's claim or appeal. This feature emphasises what we explained in our previous briefing:

> "*With respect, the very best that can be said for* [the minister's] *argument is that it essentially confuses respect for international human rights law with the sole question of non-refoulement.*[12] *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.*"

This is key. In relation to human rights obligations, the Bill is solely concerned with presenting a mirage of respect for these (and barely even that). On its face, its design – by its provisions on destination for removal and the new legal proceedings it creates – is to avoid *refoulement*. But, even assuming it achieves that much, never to give way on the requirement that the Home Secretary must expel the person. Any practical obstruction to that, including that she can find no 'safe' destination (insofar as the Bill permits recognition of any destination to be 'unsafe'), cannot bring that to an end. At best it can defer. It can do so indefinitely. Limbo is permitted, even required. All in service of a purpose to require expulsions [Clause 1(1)] that must be read, so far as possible, in every provision in, and every regulation made under, this Bill [Clause 1(3)].

Ousting UK higher courts and European Court on Human Rights

There are various provisions to exclude the courts over and above the impact of a statutory purpose to require the Home Secretary to remove the person.

In short, Clause 52 excludes the UK courts from granting any interim relief to prevent or delay someone's expulsion. Clause 53 permits Ministers to decide whether or not to abide by any interim relief of the European Court of Human Rights. Clearly, the UK cannot legislate to tell that court what it can or cannot do. However, Clause 53 is to tell UK courts that the question of whether to abide by a ruling of that court is for Ministers alone. Clause 49 excludes any consideration of various decisions of the Upper Tribunal in the suspensive claims and appeals process from review by the UK courts. Only where the Upper Tribunal is permitted and does make a final decision on a suspensive appeal – i.e. decides the ultimate question of whether the test for factual or serious harm suspension is met – that may be appealed to the Court of Appeal: Clause 43(7).

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[11] Clause 39 permits the Home Secretary to make regulations to further define or confine the interpretations specified in Clause 38.

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