ARTICLES

HUMAN RIGHTS

Hubris and calculation: some thoughts on the Illegal Migration Bill

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Introduction

Beginning on its opening page, the Illegal Migration Bill (IMB) exudes controversy.[1] In keeping with the statement previously made by the Home Secretary, Mrs. Braverman, Lord Murray of Blidworth writes:

> I am unable to make a statement that, in my view, the provisions of the Illegal Migration Bill are compatible with the Convention rights, but the Government nevertheless wishes the House to proceed with the Bill.

A statement under s.19(1)(b) of the Human Rights Act 1998 – a rarity in any event - is unprecedented in immigration law.[2] All the same and as reactions to the IMB show, it is likely to prove well-judged. For example, in her letter to both Parliamentary Speakers,[3] Dunja Mijatovic, the Council of Europe's Commissioner for Human Rights, warned that the IMB's '…provisions create clear and direct tension with well-established and fundamental human rights standards, including under the European Convention.'[4] The United Nations High Commissioner for Refugees (UNHCR) drew a similar conclusion.

> The Bill, if enacted, would breach the United Kingdom's obligations under the Refugee Convention, the 1954 Convention relating to the Status of Stateless Persons, the 1961 Convention for the Reduction of Statelessness and international human rights law and would significantly undermine the international refugee protection system.[5]

Domestically, the Equality and Human Rights Commission (EHRC) endorsed these criticisms:

> The EHRC remains seriously concerned that the Bill risks placing the UK in breach of its international legal obligations to protect human rights, and exposing people to serious harm. Provisions providing for the detention of children and pregnant women, and removing protections for victims of trafficking and modern slavery are particularly worrying.[6]

The Commission identified six particular problems: undermining the principle of universality, removing existing protections to victims of trafficking, punishing refugees, breaching the principle of *non-refoulement*, creating very broad powers of detention, and the giving of insufficient consideration to the

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[1] All references are to the Bill as it entered the House of Lords. The Bill is now an Act of Parliament.

[2] The IMB was published alongside the Home Office's *Illegal Migration Bill – European Convention of Human Rights Memorandum* https://assets:publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1140977/echr_memo_illegal_migration_bill_final.pdf in which, among other things, the Home Secretary explained why she believed that the Bill would survive legal challenges on human rights grounds.

[3] Respectively, Sir Lindsay Hoyle MP and Lord McFall.

[4] Dunja Mijatovic, *Letter to the Speakers of the UK Parliament*, 24 March 2023 https//rm.coe.int/commhr-2023-8-letter-to-united-kingdom-speaker-of-the-houses-of-parlia/1680aaad61

[5] UNHCR, *Legal Observations on the Illegal Migration Bill*, 2 May 2023 https://www.unhcr.org/uk/media/unhcr-legal-observations-illegal-migration-bill-02-may-2023

[6] Equality and Human Rights Commission, *Statement on Illegal Migration Bill ahead of House of Commons Report Stage*, 24 April 2023

impact on equality. Later, the House of Lords Select Committee on the Constitution,[7] and the Joint Committee on Human Rights,[8] published their own analyses. Both concluded that on multiple counts the IMB would breach constitutional principle and human rights law.

Political realities, however, ensured that the IMB comfortably received its Second Reading in the Commons on 13 March 2023 by 312 votes to 250. No Conservative MPs voted against, though a number joined former Prime Minister, Mrs. Theresa May, in declining to register a vote. Subsequent fears that wrecking amendments might force the Bill's withdrawal also failed to materialise, the IMB going on to receive its Third Reading on 26 April: 289 votes to 230.[9] It came before the House of Lords the following day and is now proceeding through committee. Peers' reactions have been overwhelmingly critical. Yet, while those opposed to the IMB certainly have the 'numbers' to introduce significant amendments, it remains to be seen whether they have the will to insist on them. Equally, if peers do decline to back down, Parliament-watchers might yet enjoy one of the most compelling games of legislative 'ping-pong' in living memory.

Politics and the Bill

The IMB is a response to the Prime Minister's 'five pledges' speech,[10] boldly promising to end, once and for all, small boat crossings. If Mr. Sunak and his colleagues are to be believed, this is vital not only for protecting the UK's borders but also its social stability and indeed its very 'way of life'.[11] Yet, the IMB is also an unusual admission of failure. Mrs. Braverman, in particular, has consistently highlighted the ineffectiveness of the IMB's immediate predecessor - the Nationality Asylum and Borders Act 2022 ('NABA') - despite its very recent vintage and the fact that it has yet to be fully implemented.[12] In her view only the boldest measures, those that deliberately push against the boundaries of the law,[13] can 'stop the boats'. In the process, of course, she is flagging both her personal human rights agenda - she supported the ill-starred British Bill of Rights ('BBORB') and wishes to withdraw the UK from the ECHR – and her status as *the* premier Conservative right-winger.[14]

Differences between the IMB and NABA, however, should not be overstated. Both share the same strategic thinking: exploiting the UK's 'end-of-the-line' geographical location, shifting responsibility for migration to neighbouring countries, and downplaying the lack of safe and legal routes for refugees to enter the UK. They are also constructed upon the same electoral calculations. Asylum is seen in Government circles as a 'wedge' issue, capable of undermining Labour's efforts to reconstruct its famed 'Red Wall'. Elsewhere, legal challenges to the IMB in the European Court of Human Right (ECtHR) raise the possibility of repackaging and reviving the 'Brexit' agenda.

Time and chance will determine whether the IMB will pay the Government and Mrs. Braverman the political dividend they seek. By then, however, the Bill could have impacted profoundly on the lives of

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https://www.equalityhumanrights.com/en/our-work/news/statement-illegal-migration-bill-ahead-house-Commons-report-stage

[7] House of Lords Select Committee on the Constitution, *Illegal Migration Bill,* 16th Report of Session 2022-23 (HL Paper 200)

[8] Joint Committee of Human Rights, *Legislative Scrutiny: illegal Migration Bill*, 12th Report of Session 2022-23 (HC 1241, HL Paper 208)

[9] Once again very senior Conservatives – Mrs. May, Sir Iain Duncan Smith and Sir Geoffrey Cox among them – voiced doubts over the Bill's fairness and legality.

[10] Delivered on 4 January 2023

[11] See Mr. Robert Jenrick's speech to Policy Exchange on 25 April 2023 - 'Sovereign Borders in an Age of Mass Migration' - which led to further accusations that the Government was drawing directly on the Far Right 'playbook'. See: Rajeev Syal, ''Values and lifestyles' of small boat refugees threaten social cohesion, says Jenrick', *Guardian*, 25 April 2023.

[12] The Prime Minister, Mr. Sunak, has agreed to pay the French government £500 million over three years to help finance more patrols and construct a new detention centre. A new Small Boats Command Centre has been created to manage small boat crossings though the absence of a 'push back' policy naturally limits what this can achieve.

[13] Short of withdrawing from the Refugee Convention and the ECHR.

[14] The possibility that yet another Conservative leadership contest might be less than sixteen months away is unlikely to have been lost on her.

some of the world's most vulnerable people, to say nothing of the UK's international reputation and its system of rights protection. It is to these, infinitely more important, possibilities we now turn.

Duties under the Bill

Let us consider the IMB from the perspective of the thousands of migrants who enter the UK each year seeking the protection of its government and its laws. What might they learn about the Bill and its implications for their future well-being?

The removal and other duties

The IMB's most distinctive feature lies in its preferred method for preventing the overwhelming majority of migrants from obtaining the protection they seek and which, under current rules, would be granted in the majority of cases.[15] The Government acknowledges this.

> The Illegal Migration Bill goes considerably further than any previous immigration Bill. For the first time, it will prevent those who travel via safe countries and enter the UK illegally from having their asylum claim considered by the UK and stops illegal migrants from being able to access our modern slavery system. It goes further than NABA by placing a duty on the Home Secretary to remove illegal migrants, rather than the previous discretionary duty *that can be interpreted more liberally by the courts* (emphasis added).[16]

Quite simply, the Home Secretary is creating and then placing herself under a statutory duty to remove from the UK any person ('P') who meets the four conditions set out in Clauses 2((2)-(4) and (6).[17] These are that: on or after 7 March 2023 P entered the United Kingdom without leave to enter or other permissions; did not enter directly from a country in which their life and liberty were threatened because of their social characteristics or political opinions;[18] and, though they required leave to enter or remain, did not have it. The Joint Committee on Human Rights (JCHR) is deeply critical.

> The scope of… (the removal duty) is extremely broad and would deny the right to asylum to the vast majority of refugees, including children and victims of modern slavery.[19]

The removal duty sits alongside the duty in Clause 4. This applies where, on arrival or entry, P makes a protection or a certain type of human rights claim.[20] The mere fact that P meets the four conditions then obliges the Secretary of State to declare that claim permanently inadmissible.[21] No assessment of its merits can or will take place.[22] The Lords' Constitution Committee points out that the effect is akin to an ouster clause, subsequently reinforced by Clauses 52-53 (analysed in more detail below).[23] Further controversy surrounds additional provisions denying P access to protections available to victims of

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[15] The Refugee Council's data suggests that roughly 90 per cent of those who safely cross the Channel on small boats claim asylum. Of these, approximately two-thirds are likely to be successful. See: Rhys Clyne and Sachin Savur, *The Illegal Migration Bill: seven questions for the government to answer*, Institute for Government, 10 March 2023 https://www.instituteforgovernment.org.uk/publication/illegal-migration-bill

[16] Home Office Policy Paper *Nationality and Borders Act compared to the Illegal Migration Bill: factsheet* Updated 23 May 2023 https://www.gov.uk/government/publications/illegal-migration-bill-factsheets/nationality-and-borders-act-compared-to-illegal-migration-bill-factsheet

[17] Clause 2(1)

[18] See Clause 2(4). The concept is amplified at Clause 2(5), which states that P '… is not to be taken to have come directly to the United Kingdom from a country in which their life and liberty are threatened…if, in coming from such a country, they passed through or stopped in another country outside the United Kingdom where their life and liberty were not so threatened'.

[19] Joint Committee on Human Rights, *Legislative Scrutiny: Illegal Migration Bill,* p. 7

[20] Defined at Clause 4(5) as a claim that P's removal from the UK either to a country of which she is a national or citizen, or a country or territory in which she has obtained a passport or other document of identity, would be unlawful under s.6 HRA. Provision for other types of human rights claims is made at Clause 40(4).

[21] See: Clause 4(3).

[22] A final sting: since the inadmissibility declaration is not a refusal to admit the claim, P is denied the right to appeal it to the First-tier Tribunal under s. 82(1)(a)-(b) of the Nationality, Immigration and Asylum Act 2002.

[23] House of Lords Select Committee on the Constitution, *Illegal Migration Bill,* paras. 5 and 7

slavery or human trafficking under ss. 61-62 and 65 NABA. These are disapplied at Clauses 21(1)-(2), which in turn require several amendments to existing statutes, notably the Modern Slavery Act 2015 and NABA itself. Of these, the amendment to s.63 NABA is especially important, since it extends the existing public order disqualification,[24] to all those who meet the four conditions, as well as foreign nationals convicted of any criminal offence regardless of sentence length.[25] These are major departures from existing policy and, per the UNHCR's intervention, have been widely condemned for breaching both the spirit and the letter of several treaties.

Clause 4 is also complemented, if that indeed is the correct word, by Clause 29.[26] Once P's claim has been declared inadmissible, the Secretary of State is placed under yet another duty: to refuse to grant them leave to enter or remain in the UK at any future point. In the interests of consistency, however, she can make an exception for unaccompanied children or those assisting criminal investigations into modern slavery. Similar prohibitions apply to grants of entry clearance or electronic travel authorisation (ETA), settlement and citizenship. This duty is, however, subject to Clauses 29(3)-(5), which give the Secretary of State limited discretion to set it aside where it would breach the ECHR, or where other exceptional circumstances apply.[27]

Removal options: Clauses 5-6

The Home Secretary's message to P is: Parliament requires me to remove you from the United Kingdom regardless of your personal circumstances or any claims you intend to make.[28] Three options then present themselves. One: where P is a national or has a relevant passport or other documentation, they can be removed to a country designated safe under s.80AA(1) Nationality, Immigration and Asylum Act 2002 ('NIAA').[29] A protection or human rights claim can be used to block removal *to that particular country* but only if the Secretary of State believes exceptional circumstances apply.[30] Two, alternatively P may be removed to the country from where they embarked for the UK.[31] Three, if neither are possible,[32] the Secretary of State can instead remove P to any country listed in Schedule 1, providing she believes P will be admitted.[33]

Thanks to Clause 6, the Secretary of State possesses the power to add new countries to that Schedule, a power that could prove invaluable should the Government conclude additional third country 'outsourcing' agreements. Certain constraints are placed on her discretion. In adding a country she must satisfy herself that *in general* there is no serious risk of persecution and that removal will not *in general* contravene the UK's obligations under the ECHR (emphasis added).[34] She must also have regard to all the circumstances of that country and information from an appropriate source.[35] These requirements

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[24] Section 63(1)(a) NABA.

[25] There is a very limited exception to the disapplication of protections, which arises where P might be of use to the UK authorities in the course of an attempt to prosecute people traffickers. However, it is hedged with multiple qualifications. Most importantly, the exception will not override the removal duty, no matter how helpful P has been. See Clause 21(3) read alongside Clauses 21(4)-(7).

[26] This adds a new s.8AA to the Immigration Act 1971.

[27] Clauses 30-34 contain several provisions making P ineligible for being granted or registered for British citizenship, though the Secretary of State can opt to set aside the duty in individual cases where she considers that the UK's ECHR obligations would be contravened.

[28] Exceptions are provided at Clause 2(11), the main one being that officials accept that P is an unaccompanied child. In this case, the duty is (temporarily) transformed into a power, only to be restored as a duty on P's eighteenth birthday The others are that; P's circumstances fall under exceptional categories created by regulations made by the Secretary of State, a Minister of the Crown has made a personal determination that an interim measure made by the ECtHR prevents removal or P is a victim of slavery who the Secretary of State wishes to remain in the UK to co-operate with criminal proceedings.

[29] See Clauses 5(3)(a)-(b). This list contains thirty-three European countries, including Albania.

[30] See Clause 5(5). They include: a case where the country is derogating from its obligations under the ECHR in accordance with Article 15 of the Convention and a case where the Member State is the subject of a proposal initiated in accordance with Article 7(1) TEU.

[31] Clause 5(3)(c)

[32] For example, there is no 'returns' agreement in place, or that country is not listed in Schedule 1

[33] See Clause 5(3)(d). Fifty-three countries are listed, including the Republic of Rwanda.

[34] Clause 6(1)

[35] Clause 6(4). International organisations constitute such a source.

should make legal challenges easier to mount. Yet the reference to generalities seems designed to give the Secretary of State considerable 'wriggle room'. So too does the reference to a 'serious risk of persecution', which implies that a lesser risk of persecution is legally acceptable, providing there is no general (that word again) contravention of the UK's obligations under the ECHR.

Removal of unaccompanied children

This is the most significant exception to the removal duty. Whilst the Secretary of State can remove unaccompanied children before their eighteenth birthday, she can do so only in four circumstances: reunion with a parent; removal to a country listed in s. 80AA(1) NIAA; removal to any other country (a) of which P is a national, or has obtained a passport, etc., or (b) from where P embarked for the UK *providing they have not made a protection or human rights claim*;[36] or (c) in such other circumstances as may be specified in regulations. Once P reaches the age of eighteen, however, the removal duty immediately applies.

These limited protections, however, are contingent on the successful outcome of an age assessment. Challenging adverse assessments will not be easy. Under Clause 55, a partial ouster clause, these may not be appealed to the First-tier Tribunal.[37] P will be able to apply for judicial review yet their application has no suspensive effect, forcing them to continue their application from abroad. Further, the court may only quash the assessment on the narrow basis that it was wrong in law, rather than in fact. Clause 56 further disadvantages P's legal position. It empowers the Secretary of State to make regulations about the effect of P's decision to deny consent to the use of a specified scientific method for determining age where, in the view of the Secretary of State, there are no reasonable grounds for that decision. The regulations may disapply s.52(7) NABA,[38] such that P is then treated as an adult. For the record, the JCHR[39] and professional opinion,[40] are both highly critical of these provisions.

Powers and the Bill

The legal duties in Clauses 2 and 4 show that, *when it comes to removing P,* the Secretary of State has little appetite for discretionary powers, preferring instead the better protection afforded by the common law doctrine of parliamentary sovereignty and the rules of statutory interpretation. However, this still begs the question of what happens to P before they are forced to leave? This is anything but a trite question. Aside from the notorious inefficiency of the Home Office, under the IMB P cannot be removed until they have received a written removal notice, stating their country of destination.[41] This can be challenged and if P is successful, an alternative destination will have to found. It is also possible that the Government's removal options will not range quite as widely as Ministers might have us believe. Consequently, at this juncture the broad thrust of the Bill changes, the previous onus on constraints (duties) shifting to a new emphasis on discretion (powers). This movement will be examined in two contexts: detention and the welfare of unaccompanied children.

The power to detain

[36] It is thus axiomatic that P's ability to thwart removal will depend upon access to legal advice.

[37] This places P under significant disadvantages. An appeal under s. 54(2) NABA obliges the First-tier Tribunal to determine P's age on the balance of probabilities and assign them a date of birth. The Tribunal may consider any matter it thinks relevant, including any matter of which the assessor was unaware and any matter arising after the date of the initial decision. Most importantly, its determination is binding on the executive.

[38] A provision which means that a refusal to consent can damage P's credibility.

[39] See: JCHR, *Legislative Scrutiny: Illegal Migration Bill*, pp. 7-8

[40] See, for example, Shona York*, Amendments to the Illegal Migration Bill attack basic legal rights and processes*, Free Movement, 25 April 2023 https://freemovement.org.uk/amendments-to-the-illegal-migration-bill-attack-basic-legal-rights-and-processes/

[41] Clause 7(2)

The Bill's provisions on detention are extensive. Essentially, Clauses 10(2) and (6) empower immigration officials and the Secretary of State to detain P, where they meet *or are suspected of meeting* the four conditions. This power extends to P's family members including accompanying children. Unaccompanied children can be also detained, though only under regulations. It will be, however, for the Secretary of State to determine whether these specify time limits. Finally, P can be detained at a location the Secretary of State considers appropriate,[42] paving the way for new and controversial detention facilities in ex-military bases and converted barges and ferries.

Clause 11 concerns the length of detention. Again, two sets of provisions operate in parallel; one concerned with detention on entry under the Immigration Act 1971, the other with continued detention on the authority of the Secretary of State.[43] The Lords' Constitution Committee describes Clause 11 as a partial codification of the common law principles originating in *Hardial Singh v Governor of Durham Prison*:[44] partial because Clause 11 significantly departs from them. This is so because the Secretary of State is empowered to extend P's detention for removal purposes beyond a reasonable time. The initial question she has to answer is: *in her opinion*, how long is it reasonably necessary to detain P pending arrangements for their removal? However, in forming her opinion she is fettered neither by the existence of factors delaying removal, nor any subsequent acceptance that removal simply cannot be made within a reasonable period, if at all.[45] A second question then arises. If there is no reasonable prospect of P being removed, for how long should they continue to be detained? The answer, once again, is for as long as, in the opinion of the Secretary of State, it is reasonably necessary for appropriate arrangements to be made for their *release*. This contrasts with the common law. It also has major implications for civil liberties in the UK, in particular the prospect that P's detention can continue indefinitely.[46]

Clauses 10-11 should be read alongside Clause 12. This prohibits the First-tier Tribunal granting P immigration bail for the first 28 days of detention. Neither, during this period, can P seek judicial review, other than in respect of decisions made in bad faith or involving severe procedural breaches.[47] An application can be made for a writ of habeas corpus.[48] However, given that detention powers are so widely drawn, the likelihood of such an application succeeding seems remote. The absence of a legal remedy is particularly important once it is remembered that the Clause 10 power to detain applies to those who are merely suspected of meeting the four conditions, or where it is suspected but not established that the Secretary of State has a duty to remove them. It might prove to be the case that P does not meet these criteria, in which case under the *Hardial Singh* principles they would have been ineligible for detention. Under the IMB by contrast, they may be detained for up to twenty-eight days without a realistic possibility of legal challenge.

Whilst the decision to detain can be challenged after twenty-eight days, the nature of the Secretary of State's powers limits judicial oversight and guards against legal defeat. When forming her opinion on the duration of detention, the IMB is silent on the factors that the Secretary of State must take into account. As a result, the question of what constitutes a reasonable period of detention is taken from the courts and placed in the hands of the executive.[49] This is another matter of great constitutional concern, one with '…serious implications for the liberty of the individual'.[50] The JCHR makes the additional point that in seemingly every aspect of detention, the IMB does not require the Secretary of State to

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[42] This is so whether or not the detention is ordered under the Immigration Rules or s. 62 NIAA.
[43] In addition, Clause 11(5) inserts new provisions into s. 36 Borders Act 2007 (detention relating to deportation) to bring these into line with the amendments to s. 62 NIAA.
[44] [1983] EWHC 1 QB. The 'Hardial Singh principles' were subsequently outlined by the Supreme Court in *Lumba (WL) v Secretary of State for the Home Department* [2011] UKSC 12.
[45] As per detention under the Immigration Act 1971, existing limitations on the detention of unaccompanied children and pregnant woman will apply.
[46] This is the fear of the Lords' Select Committee on the Constitution. See its report on the Illegal Migration Bill at para. 13.
[47] As a result, according to the Lords' Constitution Committee this makes Clause 12 another of the Bill's partial ouster clauses.
[48] In Scotland, suspension and liberation.
[49] House of Lords Constitution Committee, *Illegal Migration Bill*, para. 13
[50] Ibid. para. 15

distinguish the position of children and adults. Consequently, it predicts that these clauses will clash with the UK's obligations under the United Nations Convention on the Rights of the Child (UNCRC).[51]

A final fetter on the Secretary of State's discretion is removed by Clause 13, which disapplies her duty under s.57 Borders, Citizenship and Immigration Act 2009 to consult the Independent Family Returns Board.[52] Given the widespread opposition to the principle of child detention, it is possible that the Board would have advised against extensive use of Clause 10, especially in the absence of time limits under Clause 11. The Government, it would seem, is unwilling to take the chance that the Board might have taken a more deferential approach.

The welfare of unaccompanied children

The breadth of the Secretary of State's discretion is also apparent in the provision of accommodation and support for unaccompanied children. The IMB's implications for child welfare are discussed at length in the report of the JCHR, which notes that children are affected by every aspect of the Bill.[53] Under Clause 15(1) the Secretary of State may provide or arrange accommodation in England, and for as long as P resides in Home Office accommodation, the Secretary of State has the discretion to provide other support.[54] Further, under Clause 16 she can decide if and when a child is to cease residing in Home Office accommodation, subject to the duty to direct an English local authority to provide accommodation under s.20 Children Act 1989. Similarly, the Secretary of State may direct that an unaccompanied child in local authority care cease to be provided with that accommodation, once again subject to a duty to arrange for an alternative.

The JCHR is deeply unhappy with these provisions. Its main concern is that the IMB is silent on the form Home Office accommodation must take, a silence that also settles over the associated issues of standards and other requirements. In addition, and unlike local authority accommodation, Home Office accommodation is not subject to the requirements of the Children Act 1989, despite the latter being '…the main way children's welfare is safeguarded in England'. This makes Clauses 16(4)-(7) especially troubling, since their effect is to remove a child from that Act's protection. On this point, the JCHR notes the well-reported instances of children going missing from Home Office accommodation, together with continued fears over its adequacy and security.[55]

Courts and the Bill

By now, P will have become only too aware of their limited ability to seek redress in the domestic courts: the preceding commentary being a tale of '…ouster clauses, partial ouster clauses, time limits and restrictions placed on…claims that would have been available prior to the Bill coming into force'.[56] At the same time, P will be advised that, whilst it is still possible to challenge their removal notice, they can *suspend its effect* only through a suspensive claim. A protection or human rights claim, a claim as a victim of modern slavery or an application for judicial review cannot achieve this. This is implied at Clause 4(1) and reinforced at Clause 52. In any proceedings relating to a removal decision, the court cannot grant an interim remedy preventing or delaying that removal, or having that effect, it being immaterial whether Convention rights are under consideration.[57]

Suspensive claims can be made on the grounds that P will suffer serious harm as a consequence of removal or that the decision is factually incorrect. We shall focus on the former. A serious harm suspensive claim is made to the Secretary of State.[58] In making her decision, she must take account of several factors, including assurances given by the government of the receiving country and the failure

[51] Joint Committee on Human Rights, *Legislative Scrutiny: Illegal Migration Bill,* p. 7
[52] This body advises the Home Office on safeguarding children during their family's removal from the UK.
[53] Joint Committee on Human Rights, *Legislative Scrutiny: Illegal Migration Bill,* p. 7
[54] See Clause 15(3)
[55] Joint Committee on Human Rights, *Legislative Scrutiny: Illegal Migration Bill,* p. 7
[56] House of Lords Select Committee on the Constitution, *Illegal Migration Bill*, para. 3
[57] Clause 52(3)
[58] Clause 41

of P to provide 'certain evidence' when it was reasonable for her to have done so.[59] Time pressures on P are considerable. A suspensive claim must be made within eight days of receiving a written removal notice.[60] Further, where P has been removed following the expiry of the claim period, they are prohibited from making a suspensive claim out of country; a prohibition that also applies where P has given notification that they intend not to make a suspensive claim only to change their mind after removal. The Secretary of State can also prescribe information the claim must include and the form and manner in which it must be made.[61] Since the Secretary of State has a duty to reach her decision within four days, P might also wonder whether, once submitted, their claim can receive anything approximating proper consideration.

The evidential threshold for a successful claim is daunting.[62] To succeed, P's supporting evidence must be *compelling* and show that they '…would face a real, imminent and foreseeable risk of serious and irreversible harm if removed from the United Kingdom'. The IMB defines serious and irreversible harm as including death, persecution, torture, inhuman or degrading treatment or punishment and onward removal to another country where P would face a real risk, etc. of any harm mentioned above. [63] Accordingly, this definition does not cover all rights protected by the ECHR, for example, the right to private life. Similarly, forms of persecution not falling within s.31 NABA are excluded.[64] Neither, for that matter, does persecution meeting that definition, but where the Secretary of State judges that P can avail themselves of protection against it.[65] These provisions significantly ease the legal pressure on the Secretary of State when minded to reject a suspensive claim. She might also take advantage of Clause 39, which gives her the power to make additional regulations, one, amending the meaning of 'serious and irreversible harm' and, two, revising the associated list of examples. In this way, she can reassert control over the claims process should the Upper Tribunal or SIAC interpret serious harm in ways the Government finds unhelpful.[66]

If their claim is rejected, P has limited rights of appeal. Firstly, since the suspensive claim is expressly excluded as a protection or human rights claim, no right of appeal lies to the First-tier Tribunal under s.82(1)(a)-(b) NIAA.[67] This also applies to the Secretary of State's rejection of a human rights claim relating to P's removal to a third country.[68] Secondly, the Secretary of State can also certify a rejected claim as clearly unfounded.[69] Where this is the case, and P still wishes to appeal, they must first apply to the Upper Tribunal for permission. However, under Clause 44(3), this may be granted only if the Tribunal considers there is compelling evidence that the serious harm condition is met and the risk ('real, imminent and foreseeable') is obvious.[70]

Where a certification under Clause 41(3) is not made or permission is granted under Clause 44(3), an appeal lies to the Upper Tribunal.[71] It might be redirected, however, by the Secretary of State to the Special Immigration Appeals Commission (SIAC).[72] The appeal must be brought on the grounds that, contra the Secretary of State's decision, the serious harm condition is in fact met and, once again, the notice of appeal contains compelling evidence of this. When adjudicating, the Upper Tribunal must take

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[59] Clause 41(4)
[60] The Secretary of State may extend this where she considers it appropriate. See: Clause 41(6).
[61] Clause 41(5)(b)-(c)
[62] In this respect, there are powerful echoes of BBORB, especially Clauses 8 and 20.
[63] Clause 38
[64] Clause 38(5)(b)
[65] Clause 38(5)(c) read alongside Clause 38(8)
[66] Clause 38(6)
[67] See: Clause 40(2) – a provision that mirrors Clause 4(4)
[68] Clause 40(4)
[69] Clause 41(3)
[70] The Bill also specifically excludes harm resulting from a lower standard of healthcare in the receiving country as falling within the definition of 'serious and irreversible', even when that could be precisely its practical result. On a related point, pain or distress resulting from the realisation that medical treatment available in the United Kingdom will not be available to P in the receiving country is unlikely to meet the serious harm test. See Clause 38(3).
[71] Clause 43(7) provides that under s. 13 Tribunals, Courts and Enforcement Act 2007 an appeal can be made to the Court of Appeal on a point of law subject to any order made by the Lord Chancellor (Secretary of State for Justice).
[72] See Clause 51

into account the factors mentioned in Clause 41(4), i.e. precisely those factors the Secretary of State herself also had to take into consideration.[73] Clause 47 places a further constraint on the Tribunal by limiting its ability to consider new matters. Whilst the Tribunal can set aside ministerial objections and consider new evidence, it must first apply the 'compelling reasons' test.[74] The importance of Clause 47 cannot be under-estimated. Given the very limited time for P to challenge the removal notice, it is quite possible they will wish to raise new matters on appeal. Clause 47 is designed to 'choke off' that possibility.

Finally, P's ability to appeal the Upper Tribunal's decision to a senior court is heavily restricted. Under Clause 44(7) no right exists to appeal the Tribunal's ruling that a suspensive claim is indeed clearly unfounded. A limited right lies under Clause 49(4) to appeal the Tribunal's final decision. However, this is restricted to questions of whether: the Tribunal had a valid application before it,[75] was improperly constituted, or acted either in bad faith or using procedures so defective they amounted to a fundamental breach of natural justice. Exactly the same provisions apply to appeals against the Upper Tribunal's refusal of an out of time claim or to consider new matters.

Article 39 ECHR

The most eye-catching constraint on the courts is contained in Clause 53, added late following concessions extracted from the Prime Minister by right-wing Conservative MPs. To an extent, it complements Clause 52, which as we have seen denies domestic courts the power to grant interim relief delaying removal. Clause 53 is heavily influenced by Clause 24 BBORB, added late following the ECtHR's ruling to halt the deportation of an asylum seeker to Rwanda.[76] If Clause 24 was law at that stage, no account would have been taken of interim measures granted by the ECtHR, whilst the domestic courts would have been prevented from having regard to such measures when granting relief.

The political impact of Clause 53 is likely to be significant, since it calls into question the continued willingness of the UK Government to honour its obligations under the ECHR. Essentially, before immigration officers or the domestic courts can have regard to an interim order made under Article 39 ECHR, a Minister must personally disapply the removal duty under Clause 2(1). Their discretion is wide: the Minister being entitled to take into account any matter deemed relevant.[77] There is, however, an expectation that they will pay particular attention to the manner in which the ECtHR has responded or is likely to respond to the arguments of the UK government or any future representations it might make.[78] These touch upon longstanding complaints that Strasbourg fails to give proper consideration to the arguments of Ministers or provide adequate justifications for its rulings.[79]

Clause 53 aims to appease those sections of Conservative opinion who lobby for outright withdrawal from the Convention. Whilst Mr. Sunak opposes such a move, all the same his Government seems willing to risk confrontation with the Strasbourg authorities. In her letter of 24 March Dunja Mijatovic advises that the ECtHR is unlikely to accept that Clause 53 gives the Government legal authority to disregard its interim rulings.

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[73] The Tribunal must also take into account P's failure to provide evidence when it was reasonable for her to have done so: see Clause 41(5)

[74] Clause 47(5)(b)

[75] This allows an appeal on the grounds that P's initial claim was not clearly unfounded or where there were compelling reasons for them making the claim outside the permitted period.

[76] *NSK v United Kingdom* (application no. 28774/22), dated 14 June 2022.

[77] Clause 53(4)

[78] Clause 53(5)

[79] These were allegedly restated by Mr. Sunak in his meeting Siofra O'Leary, the President of the ECtHR in May 2023. This followed his address to the Council of Europe meeting in Reykjavik, when he sought to persuade European leaders that illegal migration is one of the three key issues facing the Continent in light of Russia's invasion of Ukraine. See Ben Quinn, 'Rishi Sunak to push for Europe-wide approach to illegal migration, *Guardian*, 16 May 2023

> …interim measures issued by the European Court of Human Rights, and their binding nature, are integral to ensuring that member states fully and effectively fulfil their human rights obligations.[80]

This raises the prospect that Clause 53 will acquire the characteristics of a 'stalking horse', pushing the Government into an adversarial, possibly hostile relationship with the ECtHR as a pretext for including a formal commitment to withdraw in a future Conservative manifesto: Mr. Sunak's reservations notwithstanding.

Statutory interpretation: the duties under Clause 1

As if all of this was not sufficiently disheartening for P, running in the background is Clause 1(3). This presses the domestic courts to defer to Minsters when interpreting the IMB. It does so by placing a statutory duty on any court or tribunal, *insofar as this is possible*, to read and give effect to the IMB to achieve its stated purpose. This 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.[81]

This is amplified by Clause 1(2), which lists eight specific provisions that 'advance that purpose'. These are: the removal duty, the inadmissibility of protection and certain human rights claims; the detention of persons subject to the removal duty; disapplication of protections, etc. available to victims of modern slavery; the prevention of those who meet the conditions for removal from being given leave to enter or remain in the UK, or settling or obtaining citizenship, the provision of the suspensive claim procedure; and, finally, a provision that all other legal challenges to removal are non-suspensive. Clause 1(4) lists six additional provisions, though these are not designated as necessary to advance the purpose of the Bill.[82]

The Government's hand is strengthened further by Clause 1(5). Uniquely (for the moment!), this disapplies s.3 HRA, effectively displacing it in favour of Clause 1(3). This decision is described by Professor Kavanagh as unprecedented and one that runs directly counter to the intention of Parliament when passing the Human Rights Act.[83] She points out that whilst the two clauses share the same language, the latter redirects the courts' '…interpretative focus away from achieving rights-compatibility towards fulfilling the legislative purpose directed by Parliament'.[84] This is, as she says, wholly consistent with previous Conservative attempts to reform human rights law. With BBORB now 'mothballed', the current impetus for reform would appear to be channelled through the IMB.

The Constitution Committee is critical of both measures, partly because of their novelty and the uncertainty they create. In noting that it is '…difficult to predict how they will be interpreted by the courts', the Committee argues that the latter will have to take a view on whether the language of Clause 1(5) expressly disapplies s.3 HRA. Whilst the Committee believes that to be so, it adds that it is still possible Clause 1(5) might be caught by the *Thoburn* principle on the implied repeal of constitutional

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[80] Dunja Mijatovic, *Letter to the Speakers of the UK Parliament*, 2

[81] Clause 1(1)

[82] These are: provision for periods of immigration detention, unless exceptional circumstances apply disapplication of protections of victims of modern slavery or human trafficking and for persons sentenced to any period of imprisonment and who are liable to deportation, inadmissibility of asylum and human rights claims made by nationals of certain safe States, provision for regulations to 'cap' the number of people able to lawfully enter the UK annually and, finally for certain kinds of behaviour by a person making an asylum or a human rights claim to be taken into account as damaging that person's credibility.

[83] A. Kavanagh, *Is the Illegal Migration Act itself illegal? The Meaning and Methods of Section 19 HRA*, U.K. Const. L. Blog (10th March 2023). She goes on to note that 'When section 3 HRA was enacted, it was intended to apply 'to all primary and secondary legislation whenever enacted'. It was not envisaged that subsequent governments could adopt a 'pick and choose' approach.'

[84] Ibid.

statutes.[85] The Committee goes on to note that the IMB does not seek to disapply s.4 HRA. Consequently, in the aftermath of a declaration of incompatibility a second question arises: can the court strike down subordinate legislation or is it prevented from doing so under s.6(2) HRA?[86] It might be added that judicial willingness to make declarations will be determined by the emphasis they choose to place on the doctrine of deference. On this point, human rights lawyers will be mindful of the well-publicised concerns over the shifting mind set of the Supreme Court under Lord Reed's presidency.[87]

Ultimately, however, a still greater problem looms. As Ms. Mijatovic (among others) has noted, the combined effect of Clauses 1(3) and 1(5) risks once again[88] '…creating divergence with the case law of the European Court of Human Rights'. Should that risk materialise, it would shift primary responsibility for rights-protection in the UK *back* to Strasbourg. This would weaken the domestic courts' working relationship with the ECtHR and defeat Parliament's intentions when passing the 1998 Act. The long-term damage – to the influence of the domestic courts and the principle subsidiarity- is likely to be considerable.[89]

Rights and the Bill

In its Memorandum of 7 March, the Home Office accepted that several of the IMB's clauses raised implications for a number of Convention rights, notably Articles 2-6, 8 and 13-14. In each case, however, it maintained that, even where there was *prima facie* evidence of interference, the Government would succeed in defending its position. This was so despite its admission that there was a better-than-evens-chance of a court ruling that Convention rights had indeed been breached.[90]

This invites further comparison with BBORB, built on Mr. Raab's critique of human rights law following publication of the report of the Independent Human Rights Act Review.[91] This critique was structured upon the following themes: the negative 'rights culture' encouraged by the Act, its adverse impact on service delivery, the restrictions it placed of the government's ability to protect the public,[92] and the barriers it placed on the ability of elected politicians to remedy the above. The principal source of these defects was the 'living instrument' doctrine developed by the ECtHR, subsequently imported into domestic law by the combined effect of ss.2(1) and 3 HRA. Accordingly, BBORB was presented as a much-needed constitutional 'reset'. It is worth dwelling for a moment on how this was to have been achieved.

- The influence of the ECtHR on domestic human rights would have been significantly curtailed and not simply in respect of Article 39 ECHR;
- The concept of 'fundamental rights' would have been modified by the filtering of what the Ministry of Justice argued were trivial and undeserving claims. Introducing exacting evidential thresholds were also part of this. So, too, was the rule that the ECHR could not be used by the domestic courts to create positive obligations;
- The incremental expansion of Convention rights would have been prevented by the refusal to include in BBORB an equivalent to s. 3 HRA. Consequently, the only means of challenging primary legislation would have been via the retention of s.4;
- Ministers would have been encouraged, at least in theory, to innovate by the absence of an equivalent to s. 19 HRA;

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[85] *Thorburn v Sunderland City Council* [2002] EWHC 195 (Admin).
[86] House of Lords Constitution Committee, *Illegal Migration Bill*, paras 39-41
[87] See for example Professor Conor Gearty, 'In the Shallow End', *London Review of Books*, volume 44, no. 2, 27 January 2022.
[88] Ms. Mijatovic has in mind the British Bill of Rights, the nature and likely consequences of which she had criticised in a previous report.
[89] Dunja Mijatovic, *Letter to the Speakers of the UK Parliament*, 24 March 2023, p. 2
[90] This was the reason why she declined to make a s.19(1)(a) HRA statement.
[91] Ministry of Justice *Human Rights Act Reform: A Modern Bill of* Rights, December 2021, CP 588.
[92] The exploitation of human rights rules by foreign national offenders (FNOs) was specifically mentioned in this respect.

- Most importantly, several provisions would have directed the courts *as to how they should interpret and apply BBORB*;[93] thereby reinforcing the principle of judicial deference to elected institutions. Elsewhere, other provisions aimed to 'anglicise' the concept of human rights.[94]

Comparison of the IMB and BBORB must not be stretched too far. The latter was a wide-ranging constitutional statute. The former, by contrast, focuses on a specific policy area and has to exist alongside the very thing the BBORB would have replaced: the Human Rights Act. Equally, some of the principles underpinning BBORB also shape the IMB. This is so, for example, in respect of Clauses 53, 38, 1(3) and 1(5); it is also evident in the s.19(1)(b) statement. Further, BBORB informs the IMB's fundamental distinction between migrants deserving of protection in the UK and those who are not. Most importantly, its influence can be seen in the effective disablement of the Human Rights Act as a means of protection. Assuming the Bill comes into effect, s. 6 HRA can be used neither to force the Home Office to consider an application for leave to enter, nor remain, nor suspend, leave alone or prevent, removal. The BBORB lies dormant:[95] its impact on Government policy-making anything but.

Conclusions

This article has focused on several aspects of the IMB that (hopefully) are of interest to those who study, teach and practice the law (not just human rights). However, the author is mindful that for reasons of space, there are others – new search powers, the annual 'cap', to name but two – that have not been considered. He is also mindful that the IMB has attracted much adverse comment for a different reason: the profound lack of evidence that it can ever hope to achieve the purposes set out in Clause 1(1). This point was made by Mrs. May, who, during the Second Reading debate, told MPs that "…whenever you close a route, the migrants and people smugglers will find another way, and anybody who thinks that this bill will deal with the issue of illegal migration once and for all is wrong".[96] This brings into sharper focus the question of whether Mrs. Braverman (or her successors) will manage to quickly remove large numbers of migrants arriving on or after 7 March 2023 to locations permitted under Clause 5. It is arguable that the listing of Albania as a safe State under s. 80AA NIAA will help,[97] particularly in light of the agreement signed by Mr. Sunak and his Albanian counter-part, Mr. Edi Rama, in December 2022.[98] At the same time, as so many have pointed out, similar agreements are not and currently cannot be in place for nationals from States such as Afghanistan, Eritrea, Iran, Sudan and Syria. In their cases, the Secretary of State's options will depend heavily upon third-country agreements such as the Migration and Economic Development Partnership signed with the Republic of Rwanda.

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[93] These are evident in Clause 1, reinforced by Clause 7, and Clause 3 when read in conjunction with Clauses 4-6 and 8.

[94] See Clauses 4 and 9

[95] At the time of writing, the Government suddenly announced that it had ditched the Bill of Rights Bill. The history of this decision is tortuous. In its first Cabinet meeting (7 October 2022), the Truss government had agreed to pause BBORB's progress: it had been due to return to the Commons the following week. However, the government's subsequent collapse and the appointment of Mr. Sunak as the new Prime Minister, with Mr. Raab as his Deputy, fed speculation that the Bill would be included in the new Government's legislative programme. That was certainly the impression created by a bullish Mr. Raab when speaking to the JCHR on 14 December 2022. As it transpired, Mr. Raab's optimism over the Bill's prospects was misplaced, his forced resignation on 21 April 2023 seemingly killing off its chances of resuming its parliamentary progress this side of the next general election. This has since been confirmed by his successor as Justice Secretary, Alex Chalk MP, in an answer to a parliamentary question. See Martin Bet 'Bill of Rights will be ditched, says Justice Secretary' *The Independent*, 27 June 2023.

[96] Becky Morton, 'Theresa May says asylum plan won't solve illegal migration issue', *BBC News website*, 13 March 2023

[97] The fairness of this is questionable. In 2022, no fewer than forty-eight per cent of initial decisions on asylum claims brought by Albanians were positive. Further, of the 166 refusals appealed, fifty-seven per cent were successful. See Peter William Walsh and Kotaro Oriishi, 'Albanian asylum-seekers in the UK and EU: a look at recent data', *The Migration Observatory,* 27 April 2023 https://migrationobservatory.ox.ac.uk/resources/commentaries/albanian-asylum-seekers-in-the-uk-and-eu-a-look-at-recent-data/

[98] Equally, a degree of caution is called for. It is undoubtedly the case that, in 2022, Albanians constituted the largest group of asylum claimants from any one country (15,925 of all applicants). However, the number of new arrivals from Albania tailed off markedly from last October, a trend that has continued into 2023. This suggests that the number of those removed under the Bill might be not as high as might once have been the case.

With this last point in mind, the Refugee Council has published a valuable impact assessment of the Bill.[99] This is based on three assumptions: that the legal and practical obstacles to the Rwandan scheme are overcome,[100] that the scheme will indeed enable the Government to remove 30,000 souls from the UK, but that no other comparable scheme will be negotiated. Accordingly, the Council estimates that three years after the IMB comes into force, 225,000 - 257,000 people will have had their claims deemed inadmissible.[101] Of this number 161,000 - 193,000 will remain in 'legal limbo': unable to make an admissible claim (and hence unable to work) yet incapable of being removed. On the further assumptions that between 50-100 per cent of asylum seekers leave detention after an average of twenty-eight days and the Government does not need more hotels to accommodate them, the cumulative costs will still total £8.7-9.7 billion.[102] In an implicit recognition that accommodation will remain an issue, in the same month as the Bill was published the Government announced that it intended to use three ex-military bases (in Lincolnshire, Essex and East Sussex) with the capacity to house several thousand people. However, even then Mr. Jenrick has conceded that this will be insufficient to bring about an immediate end to the use of hotels.[103]

Herein might lie the ultimate fate of a Bill conceived in hubris and shaped by crude political calculation: large-scale suffering for political gain, leaving the real causes of a complex problem unaddressed and a viable solution a long way out of sight.

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[99] The assessment can be found at https://www.refugeecouncil.org.uk/wp-content/uploads/2023/03Refugee-Council-Asylum-Bill-impact-assessment.pdf. See also the excellent analysis of Clyne and Savur, ibid.

[100] This might be easier said than done. On 29 June 2023, some weeks after the Refugee Council published its assessment, the Court of Appeal ruled that, until deficiencies in the Rwandan asylum system are corrected, removing asylum seekers to that country would be unlawful. This not only called into question the viability of the Rwandan policy, it is likely to have significant implications for other third-country schemes the Government wishes to negotiate: *AAA (Syria) & Ors, R (on the application of) v Secretary of State for the Home Department* [2023] EWCA Civ 745. The judgment was not unanimous. Sir Geoffrey Vos, MR and Lord Justice Underhill agreed with the appellants; Lord Burnett LCJ took a different view. Significantly perhaps, Lord Burnett, who read the judgement, also took the opportunity to affirm that the court's decision did not imply any view whatsoever on the political merits of the Rwandan scheme. Its concern lay solely with whether the scheme complied with the law as laid down by Parliament.

[101] This number will include between 39,500 and 45,006 children, approximately one-third of whom will be unaccompanied.

[102] The costs of supporting asylum seekers hinge on the number of those who, after being informed their claims are inadmissible, are eligible to claim accommodation and support under s. 4 Immigration Act 1999, amended by Clause 8 IMB for this purpose. The Refugee Council is clearly concerned that applying for s. 4 support, difficult under normal circumstances, will be beyond the vast majority of those caught by Clause 4 IMB. Those who do not qualify risk being left permanently destitute: denied support yet still unable to work.

[103] 'How is the UK stopping Channel crossings and what are the legal routes to the UK?', BBC News website, 10 May 2023 https://www.bbc.co.uk/news/explainers-53734793