

ILLEGAL MIGRATION BILL

SUPPLEMENTARY EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

Introduction

1. The Home Office (“the Department”) published on 7 March 2023, when the Illegal Migration Bill was introduced, a memorandum addressing issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Illegal Migration Bill (“the Bill”).
2. This supplementary memorandum addresses issues arising under the ECHR in relation to amendments tabled by the Government for Report stage in the House of Commons. References to new clause and amendment numbers are to those in the amendment paper at: [illegal_migration_rep_rm_0424.pdf\(parliament.uk\)](https://www.parliament.uk/resources/illegal-migration-rep-rm-0424.pdf).
3. In summary, the amendments addressed by this supplementary memorandum:
 - a. Amend clause 2(2) to add a person who has entered the UK despite being subject to a travel ban imposed by the United Nations or the UK (amendment 89).
 - b. Insert new subsections (2A) and (2B) into clause 3 to specify how the power in clause 3(2) is to be exercised (amendment 174).
 - c. Amend clause 3(6) of the Bill to allow exception regulations made under the clause to be retrospective from 7 March 2023 (amendment 107).
 - d. Amend clause 11 (amendments 136 and 137).
 - e. Replace clause 21(5), which was a marker clause, with further provision about when it is necessary for a person to be present in the UK in order to cooperate with an investigation or prosecution into their alleged exploitation (amendments 95 to 102).
 - f. Replace clause 28(3) and (4), which was a marker clause, with amendments to section 63 of the Nationality and Borders Act 2022 (“NABA”) (amendments 111 to 121).
 - g. Narrow the circumstances in which the Secretary of State may give a person to whom the bans in clause 29 apply limited leave to enter, an entry clearance, an ETA or limited leave to remain in the United Kingdom on the basis of “exceptional circumstances” to where the person has already left or been removed from the United Kingdom. The Secretary of State may still give a person limited leave to enter, an entry clearance, an ETA or limited leave to remain in the United

Kingdom if she considers that failure to do so would contravene the United Kingdom's obligations under the Human Rights Convention (amendments 104 and 105).

- h. Narrow the grounds on which the Secretary of State may give a person to whom the bans in clause 29 apply indefinite leave to remain. The Secretary of State may only give a person indefinite leave to remain in the United Kingdom if she considers that failure to do so would contravene the United Kingdom's obligations under the Human Rights Convention (amendment 122).
 - i. Narrow the grounds on which the Secretary of State may disapply clauses 31 to 34 (citizenship provisions); she may only determine that a person is not to be an "ineligible person" if she considers that failure to do so would contravene the United Kingdom's obligations under the Human Rights Convention (amendment 123).
 - j. Provide for legal challenges of decisions relating to a person's age. This provision applies where a relevant authority decides the age of a person who falls within the duty to make arrangements for removal under clause 2. The right of appeal to age assessment decisions under sections 50 and 51 of NABA will be disapplied to those whose decisions on age fall within this clause. A judicial review challenge to a decision on age under this provision does not suspend removal and the court can only quash the decision where there is an error in law. (New clause 24)
 - k. Provide that the Courts may not grant an interim remedy preventing or delaying the removal of the person from the United Kingdom under this Act. (New clause 22)
 - l. Clarify the meaning of serious and irreversible harm. (New clause 17)
 - m. Provide new powers for immigration officers to search for, seize and retain electronic devices, such as mobile phones, from individuals who are liable to be detained under new paragraph 16(2C) of Schedule 2 to the Immigration Act 1971, as well as powers to access and examine information on them. (New clause 23 and new Schedule 1)
 - n. Provide that Minister may (but need not) determine that an interim measure indicated by the European Court of Human Rights does not affect the duty in clause 2 of the Bill to make arrangements for the removal of a person from the United Kingdom. (New clause 26)
4. The Department considers that Government amendments which are not mentioned in this memorandum do not give rise to any human rights issues.

Amendment to clause 2(2)

5. Clause 2 sets out the four conditions defining an illegal migrant for the purpose of the duty on the Home Secretary to make arrangements for removal. The first condition relates to the lawfulness of a person's entry or arrival in the UK. The amendment to clause 2(2) [the first condition] adds a person who has entered the UK despite being subject to a travel ban imposed by the United Nations or the UK ("an excluded person").
6. It is not considered that this amendment raises issues under Articles 2, 3 or 8 ECHR since the excluded person's leave would be refused or cancelled under section 8B of the Immigration Act 1971 unless the provisions of section 8B(5A) of that Act applied.

Insertion of clause 3(2A) and (2B)

7. New clause 3(2A) sets out how the power in clause 3(2) may be exercised. New clause 3(2B) states that a discretion can be conferred on to the Secretary of State with regards to circumstances not set out in clause 3(2A)(a)-(c). These circumstances in clause 3(2A)(a)-(c) are for the purpose of family reunion with the person's parent, a country listed in new section 80AA(1) of the Nationality, Immigration and Asylum Act 2002 (as inserted by clause 52), where a person has not made a protection or asylum claim or such other circumstance as specified in regulations.
8. Clause 3(2) when read together with clause 3(2A) and (2B) is likely to engage Article 8 where an unaccompanied child (UC) is not removed for potentially some years in which time, the UC may have built some considerable family and/or private life (although a majority of unaccompanied children who claimed asylum in 2022 are aged 16 or 17). It is accepted that in some instances, the removal of the UC (prior to turning 18 years old) under these provisions may cause interference with Article 8 rights (although this would be mitigated by the exceptions in clause 29). However, the Government considers that any interference is justified under Article 8(2) for being in accordance with the law and necessary in a democratic society. Accordingly, the Government considers the provisions to be compliant with Article 8 of the ECHR.
9. In any event, removal under these provisions would not breach Articles 2 or 3 ECHR since the individuals would be removed to a place where they would be safe, whether that is a return to their family or where it has been deemed that they would not be at risk such that it would breach those articles.
10. To the extent that persons subject to new clause 3(2A) are removed, and to the extent there is any difference in treatment between individuals in analogous circumstances within the meaning of Article 14 ECHR (in relation to which the Government wishes to reserve its position), the Government will ensure that any exclusions are made consistently with Article 14 ECHR, when read together with, for example, Articles 2, 3 and/or 8.

Amendment to clause 3(6) to allow exception regulations made under the clause to be retrospective from 7 March 2023

11. Clause 3(5) contains a power to make exception regulations which would exclude individuals from the scope of the duty under clause 2, either on a permanent or temporary basis. The amendment to clause 3(6) will allow regulations made under clause 3(5) to be retrospective from 7 March 2023 such that those regulations (if made) would exclude individuals from the duty from the 7 March 2023.
12. It is not considered that this amendment raises issues under Articles 2, 3 or 8 ECHR since the individuals' (to whom the regulations apply) protection or human rights claim (if made) would be considered under pre-existing legislation and policy rather than under the Bill.
13. To the extent that persons are excluded from the duty, and to the extent there is any difference in treatment between individuals in analogous circumstances within the meaning of Article 14 ECHR (in relation to which the Government wishes to reserve its position), the Government will ensure that any exclusions are made consistently with Article 14 ECHR, when read together with, for example, Articles 2, 3 and/or 8.

Amendments to clause 11

14. These amendments limit the new detention powers in Clause 11 so that they may only be used to detain unaccompanied children in the circumstances specified in regulations made by the Secretary of State. They also allow the Secretary of State to make regulations specifying time-limits for detaining unaccompanied children where detained for the purposes of removal, if required. These amendments do not impact the previous ECHR analysis of Clause 11 set out in the memorandum of 7th March 2023, rather they provide an additional safeguard in relation to the detention of unaccompanied children.

Modern slavery – amendments to clauses 21, 23, 24 and 28

Replacement of clause 21(5)

15. On introduction, clause 21(5) contained a power for the Secretary of State to make regulations about when it was necessary for a person to be in the UK for the purpose of cooperating with an investigation. The amendment replaces this provision, which was a marker clause, with substantive provision that there is a presumption that the person does not need to be in the UK to cooperate with an investigation or prosecution, unless the Secretary of State considers that there are compelling circumstances which require the person to be present in the UK for that purpose. In determining whether there are compelling circumstances, the Secretary of State will be required to have regard to statutory guidance issued by the Secretary of State.

16. It is not considered that this amendment raises issues under ECAT and/or Article 4 ECHR in addition to those addressed by the Government in its memorandum of 7 March 2023.

Amendment of section 63 of the Nationality and Borders Act 2022

17. Section 63 of NABA provides the relevant competent authority with a discretion to apply the consequences in section 63(2) to a person who is a threat to public order or who has made a modern slavery allegation in bad faith. Section 63(3) contains a non-exhaustive list of those who are to be considered a threat to public order. Section 63(3)(f) current covers foreign criminals within the meaning of section 32 of the UK Borders Act 2007 who have been convicted of an offence in the United Kingdom and who are either sentenced to a period of imprisonment of at least 12 months or convicted of an offence specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (serious criminal), and is sentenced to a period of imprisonment. Clause 28(1) (with clause 28(2) of the Bill as introduced added to the list in section 63(3). Clause 28(3) (together with clause 28(4)) of the Bill as introduced is a marker clause.

18. The amendment which replaces the marker clause will: (a) amend section 63(1) so that it becomes a rebuttable presumption so that the decision maker must apply section 63(2) unless there are exceptional circumstances, and (b) amend section 63(3)(f) so that it applies to a person who is not a British citizen and has been convicted of an offence in the United Kingdom and is sentenced to a period of imprisonment of any length.

19. The Government considers that this is consistent with the public order disqualification in Article 13(3) of ECAT, and that the consideration of exceptional circumstances in section 63(1) (as amended) will also ensure compliance with Article 4 ECHR, the requirements of which were discussed in the Government's memorandum of 7 March 2023.

Amendments to clause 29

20. The Government considers that these amendments do not affect the analysis relating to the UK's obligations under the ECHR contained in its memorandum of 7 March 2023 at paragraphs 49 to 52.

Narrowing the grounds for the disapplication of the citizenship ban (clauses 31 to 34)

21. The Government considers that these amendments do not affect the analysis contained in its memorandum of 7 March 2023 at paragraphs 53 to 55.

Age assessments – legal challenges

22. New clause 24 deals with legal challenges of decisions relating to a person's age. This provision applies where a relevant authority decides the age of a person who falls within the duty to make arrangements for removal. The right of appeal to age assessment decisions under sections 50 and 51 of NABA will be disapplied to those whose decisions on age fall within this clause. The right of appeal under section 54 of NABA has not been commenced. A judicial review challenge to a decision on age to which this provision applies does not suspend removal under the Bill. Where a court is considering such a judicial review, the court can only quash the decision if there has been an error in law.
23. Under the Bill, a child is defined in clause 3(3) as a person who "is under the age of 18". In order to assist with achieving the aims of the Bill, the provision provides that where a court is considering a judicial review challenging a decision on age which falls within this provision, the court can only quash the decision where there is an error in law in how an individual's age was determined (bearing in mind that these individuals will generally not have any way of definitively proving their age one way or another, because they no longer have or never had documentary proof, whether deliberately or inadvertently).

Article 6 ECHR

24. In line with existing case law, any removal decision would be outside the scope of Article 6. However, decisions on age which fall within this provision may be conducted by other public authorities, such as local authorities, for purposes other than removal. The Government is satisfied that this provision is capable of being applied compatibly with Article 6 ECHR and concluded that it is important to make this change to prevent individuals frustrating the aims of the Bill. However, on introduction of the Bill in the House of Lords, Lord Murray of Blidworth would be unable to make a statement under section 19(1)(a) of the Human Rights Act 1998 in respect of this new clause.
25. The appropriate support and facilities will need to be in place in the country of removal to ensure that the individual can effectively participate in their judicial review from abroad.

Article 8 ECHR

26. This provision may engage an individual's Article 8 ECHR rights in respect of the removal of individuals who have an outstanding judicial review challenging a decision on their age. An individual who has claimed to be a child and whose age has been disputed will not be deemed an adult, and treated accordingly under the Bill, until either (1) two Home Office members of staff, one at least of Chief Immigration Officer or Higher Executive Officer grade, have independently assessed that the individual's physical appearance and demeanour very strongly suggests that they are significantly over 18 years of age, or (2) an age assessment has been

conducted by a local authority or the National Age Assessment Board and determines the individual to be an adult, or (3) there is clear and credible documentary evidence showing that the individual is an adult.

27. Assessment of Article 8 ECHR rights will be on a case-by-case basis and appropriate safeguards will be put in place for the removal process of those who fall within this clause, including ensuring procedural safeguards in respect of an individual participating in a hearing from abroad. Any interference is justified under Article 8(2) as in accordance with the law, and as being a necessary and proportionate means of achieving the legitimate aims to achieve the policy objectives of the Bill.

Article 14 ECHR

28. Article 14 ECHR rights, either taken with Article 6 or 8, may also be engaged in the way that the provision sets out the basis on which a court can quash a decision on age depending on whether the individual falls within the duty to make arrangements for removal under the Bill or not. If there is any difference in treatment on the ground of a status within Article 14, any such difference in treatment can be objectively and reasonably justified.

Article 13 ECHR

29. Article 13 is not one of the scheduled Convention rights for the purposes of the HRA 1998, so the domestic court cannot consider compliance with Article 13. The Government is satisfied that this provision is capable of being applied compatibly with Article 13 ECHR.

United Nations Convention on the Rights of the Child (UNCRC)

30. Section 55 of the Borders, Citizenship and Immigration Act 2009 was enacted in order to implement the UNCRC requirements around the best interests of children, set out particularly in Article 3 UNCRC. Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the Secretary of State to have regard to the need to safeguard and promote the welfare of children in the UK in the exercise of her functions in relation to immigration and asylum. The duty does not mean that it is the only factor that must be considered and other relevant factors must be taken into account. In making decisions and devising policy guidance under this Bill, the Home Office will continue to comply with the section 55 duty. This would include devising any policy or guidance in respect of the processes around determining age and removal of those under this clause.

Electronic devices etc.

31. New clause 23 and new Schedule 1 (“the provisions”) create four new powers of search, as well as associated powers of seizure and retention and powers enabling access to and copying and use of information. These powers will be available in relation to relevant articles which are, or have

been, in the possession of people who are liable to detention under new paragraph 16(2C) of Schedule 2 to the Immigration Act 1971.

Article 8

32. The Government observes that if there is an interference with Article 8 rights, that interference must be justified under Article 8(2) and that this entails that provisions are in accordance with the law, pursue one or more legitimate aim, and are a proportionate means of achieving those aims. The Government accepts that searches under these new powers may interfere with an individual's Article 8 rights. The Government considers however that any interference with that right is capable of being justified under Article 8(2), and therefore not in breach.
33. The provisions allow for four search powers (of the person, vehicles, premises and property) to be exercised in a variety of situations and if relevant articles are found for those to be seized, retained and the information on them examined. The Government consider that the powers are in accordance with the law for the purposes of Article 8 and notes that, considered in all the relevant circumstances, they provide adequate safeguards against arbitrary use.
34. In *Gillan v UK*, application number 4158/05 and *Beghal v UK*, application number 4755/16, the European Court of Human Rights and in *R (on the application of Roberts) v Metropolitan Police Commissioner*, [2015] UKSC 79, the Supreme Court considered various UK search powers. The Courts found that in order for a power to be in accordance with the law, it not only had to have a basis in domestic law but also contain sufficient safeguards to prevent against arbitrary interference. In the above-mentioned cases, it was observed that an important safeguard was that officers should have to meet some form of threshold rather than simply being able to operate a power at their unfettered discretion.
35. In *R (on the application of Catt) v Commissioner of Police of the Metropolis and another*, [2015] UKSC 9, the Supreme Court considered whether information held by the police was held in accordance with Article 8. It decided that the safeguards that existed were sufficient to establish that the retention of information about an individual was "in accordance with law" and proportionate to the legitimate aim as required by article 8. The Courts, in that case and subsequent cases such as *YZ v Chief Constable of South Wales*, [2022] EWCA Civ 683, have held that safeguards include data protection law and guidance and that the requirements of data protection law and the requirements of Article 8 overlap.
36. The safeguards to the new powers include:
 - only immigration officers, and in the future any persons specified in regulations, will be authorised to use the powers;

- the Home Office will issue guidance in connection with the use of the powers, including in relation to items subject to legal professional privilege;
- the use of the powers will be subject to judicial review;
- there will be no intimate searches and where any clothing other than outer clothing is to be removed a search will be subject to a number of safeguards;
- any item seized will have to be returned when it is no longer necessary for an immigration officer or the Secretary of State to retain it, unless the Secretary of State has exercised her power to make regulations providing for items which might be evidence of an offence to be referred to an appropriate authority.

37. The Government considers that the provisions pursue the legitimate aims of the prevention of disorder or crime and the protection of the rights and freedoms of others. Those who cross the Channel illegally are facilitated in doing so by members of organised criminal groups. In crossing the Channel, whether by small boat or clandestinely, they endanger not only their own lives but also the lives of those who are forced to rescue them from highly dangerous situations.

38. The Government considers that these powers are proportionate. The powers are discretionary and when exercising them the immigration officer will be required to act in accordance with section 6 HRA, and therefore will be required to assess the necessity and proportionality of using the powers in each case. In doing so, the officer will need to consider whether other, less intrusive, methods of obtaining the item sought are available and could be used.

39. The Government considers that Article 8 could also be capable of being engaged by the new power of seizure if legally privileged material could be seized by those able to use the powers. The Government will issue guidance to immigration officers instructing them that relevant articles that contain legally privileged material must not be seized. Paragraph 10 of the Schedule creates a power enabling the Secretary of State to make regulations making provision about relevant articles that contain or may contain items subject to legal privilege. The Schedule defines item subject to legal privilege as having the meaning given by section 65(1) of the Criminal Justice and Police Act 2001. The provision that the Secretary of State may make includes modification of the Schedule and application of the 2001 Act (with or without modification).

40. The Government is satisfied that these provisions are capable of being applied compatibly with Article 8 ECHR. As has been previously set out, the Government has concluded that radical solutions are required to put a stop to the small boats crossing the Channel and the approach adopted in these provisions is therefore new and ambitious. Taking such an approach means,

however, that the Lords Minister is unable to make a statement under section 19(1)(a) of the 1998 Act.

Article 1 of Protocol 1

41. The Government considers that Article 1 of Protocol No.1 may be engaged by the new powers for immigration officers and other people of a description specified under regulations to seize and retain items which they find in the course of exercising the new search powers or where they see a relevant article in the possession of a relevant person or which appears to have been in their possession.
42. The powers of seizure and retention are in accordance with the law because they are expressly set out in the new Schedule and are formulated with sufficient precision to enable a person to know how and when they may be exercised. Any interference is justified by the public interest in the prevention of disorder or crime and protecting the rights of others. Property will only be seized and retained if there are no other less intrusive means of obtaining the information on the article sought and the article seized will only be retained for as long as necessary and in accordance with legislation. The Government considers that the powers are proportionate because the information which will be obtained from the articles seized could result in evidence being available for use in a criminal prosecution and could provide information useful for the processing of a person's immigration status and information which will assist the Home Office in taking steps to combat illegal migration thereby assisting in suppressing criminality and the risk of those crossing, and those who rescue them, being hurt. The Bill also includes a power for the Secretary of State to make regulations for the retention of seized articles, where that is necessary for the purpose of providing other law enforcement authorities with evidence on non-immigration offences so that those can be investigated and prosecuted.
43. The Government also recalls the various safeguards that are set out above when dealing with Article 8.
44. The Government is satisfied that these provisions are capable of being applied compatibly with Article 1 of Protocol 1. The Government is also satisfied for the same reasons as set out in relation to Article 8 (see paragraph 40 above) that the Lords Minister is unable to make a statement under section 19(1)(a) of the 1998 Act.

Article 14

45. To the extent that there is any difference in treatment between individuals in analogous circumstances within the meaning of Article 14 ECHR (in relation to which the Government reserves its position), the Government will ensure that any uses of the powers are made consistently with Article 14 ECHR, when read together with, for example, Article 8 and Article 1 of Protocol 1.

Interim Relief

46. The Government considers that the provisions in new clause 22 do not affect the analysis relating to the UK's obligations under the ECHR contained in its memorandum of 7 March 2023 at paragraphs 56 to 67.
47. The suspensive claim processes in the Bill are the correct route to use if a person wants to suspend removal. The Government considers that these processes are sufficient to ensure ECHR compliance.

Serious and Irreversible Harm

48. The Government considers that the provisions in new clause 17 do not affect the analysis relating to the test and the UK's obligations under the ECHR contained in its memorandum of 7 March 2023 at paragraphs 56 to 67.

Interim Measures of the European Court of Human Rights

49. New clause 26 provides that a Minister of the Crown may but need not determine that an interim measure indicated by the European Court of Human Rights does not affect the duty in clause 2 of the Bill to make arrangements for the removal of a person from the United Kingdom.
50. The new clause provides for discretion for a Minister of the Crown to suspend the duty to remove where the European Court of Human Rights has indicated an interim measure. The clause provides a broad discretion for the Minister to have regard to any factors when considering whether to disapply the duty. The clause also provides that where a Minister does not make a decision as to how to exercise their discretion regarding suspension of the duty, a person or body (as defined in subsection (7)) may not have regard to the interim measure in the circumstances set out in subsection (7). However, where an interim measure has been indicated, the person or body is not required to effect removal under the Act pending the discretionary decision.
51. The Government considers that the provision in general and the discretion in particular are capable of being operated compatibly with Convention rights, in the sense that they will not necessarily give rise to an unjustified interference of those rights, meaning that the legislation itself will not be incompatible.

Home Office
25 April 2023