

LIBERTY

LIBERTY'S BRIEFING ON THE IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHDRAWAL) BILL FOR SECOND READING IN THE HOUSE OF COMMONS

MAY 2020

ABOUT LIBERTY

Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at libertyhumanrights.org.uk/policy.

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INTRODUCTION

1. The Immigration and Social Security Co-ordination Bill repeals the retained EU law that grants free movement rights to European Economic Area (EEA) nationals and their family members, making it possible for the Government to bring them under the domestic immigration regime. It grants sweeping powers to the Secretary of State, including Henry VIII powers, to make regulations modifying primary or secondary legislation in connection with or as a consequence of this aim, or indeed for different purposes.¹
2. In combination with existing powers to make Immigration Rules such as those contained in section 3 of the Immigration Act 1971, the Bill represents a blank cheque to Home Office ministers. If enacted, it will further diminish the role of Parliament in an area of policy that is already urgently in need of far greater scrutiny, not less.² Worse still, it will subject a further three million people to the overly complex, chaotic and cruel system that has ridden roughshod over the fundamental rights of thousands already, including the Windrush generation.
3. The ongoing COVID-19 pandemic exposes the true cost of the hostile environment and the UK's harsh immigration system. COVID-19 has shown that migrants classed as 'low-skilled' by the Government – shorthand for underpaid and undervalued – are 'key workers' and essential to our society. Many are facing a disproportionate burden on two fronts, risking their lives to help the UK get through this public health crisis while still subject to hostile and unjust immigration policies.³ Now is not the time to take steps towards implementing an immigration system that would jeopardise the rights of millions more migrants. Indeed, given the stark disproportionate vulnerability of Black, Asian and minority ethnic (BAME) people to COVID-19, now is instead the time to establish better rights protections for all migrants.⁴

¹ Immigration and Social Security Co-ordination Bill 2018, clause 4 subsection (3)

² A point made clear in the Windrush Lessons Learned Review (March 2020)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874022/6.5577_HO_Windrush_Lessons_Learned_Review_WEB_v2.pdf.

³ Amelia Hill, 'Many key workers fear pay falling below Home Office income requirement' *The Guardian* (7 May 2020) <https://www.theguardian.com/uk-news/2020/may/07/migrant-key-workers-fear-income-falling-below-home-office-minimum>.

⁴ BAME people are disproportionately affected by COVID-19. Analysis using data by the NHS and the Office of National Statistics shows that of 12,593 patients who died in hospital up to 19 April, 19% were BAME even though these groups make up only 15% of the general population of England. Barr, C., Kommenda, N., McIntyre, N. and Voce, A., 2020. Ethnic Minorities Dying Of Covid-19 At Higher Rate, Analysis Shows. [online] the Guardian. Available at: <<https://www.theguardian.com/world/2020/apr/22/racial-inequality-in-britain-found-a-risk-factor-for-covid-19>>. Given the racialised nature of the UK's immigration laws, a significant proportion of people subject to immigration control in the UK are BAME and these groups are disproportionately represented in precarious and underpaid work.

4. Liberty urges Parliamentarians to use the opportunity presented by this Bill to remedy serious deficiencies in the immigration system, and prevent the exacerbation of those deficiencies that will result from the policy changes enacted by this Bill, by:
 - i) Supporting an end to the hostile environment
 - ii) Taking steps towards ending immigration detention
 - iii) Supporting the restoration of crucial safeguards to the immigration system, namely data protection rights and legal aid, and
 - iv) Opposing overreliance on regulations made by the Secretary of State in creating immigration policy that risks negatively affecting fundamental rights.

TOWARDS AN IMMIGRATION SYSTEM THAT RESPECTS FUNDAMENTAL RIGHTS AND THE RULE OF LAW

5. Taken together, this Bill and the White Paper that accompanies it represent one of the most significant changes to UK immigration policy in decades. In the wake of the Windrush Lessons Learned Review (which concluded the “scandal was foreseeable and avoidable”);⁵ mounting evidence that the Home Office operates “in a continuous state of disaster management”;⁶ and now the stark and disproportionate impact of the COVID-19 pandemic on migrant communities,⁷ Government should have seized on this opportunity to remedy deep-seated deficiencies in the functioning of the immigration system, rather than granting itself the power to subject three million more people to it with minimal scrutiny.

ENDING THE HOSTILE ENVIRONMENT

6. The extent of this missed opportunity becomes clearer in light of the ECHR memorandum accompanying the Bill, which explicitly states that it does not consider the human rights impacts of the future immigration system.⁸ That memorandum further sets out that the

⁵ Windrush Lessons Learned Review: An Independent Review by Wendy Williams (March 2020), p. 7 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874022/6.5577_HO_Windrush_Lessons_Learned_Review_WEB_v2.pdf.

⁶ May Bulman, *Home Office in ‘continuous state of disaster management’ amid surge in immigration U-turns*, 6 November 2018, <https://www.independent.co.uk/news/uk/home-news/home-office-immigration-uk-eu-brex-it-media-explosion-u-turns-government-a8612556.html>

⁷ Free Movement, ‘Coronavirus and the UK Immigration System’ (May 2020) <https://www.freemovement.org.uk/coronavirus/> and Maya Goodfellow, ‘The hostile environment is creating a coronavirus crisis for Britain’s migrants’, *The Guardian* (30 March 2020) <https://www.theguardian.com/commentisfree/2020/mar/30/hostile-environment-covonavirus-crisis-britain-migrants>.

⁸ ECHR memorandum, op. cit., paragraph 7

Government's approach to the rights to private and family life (Article 8 ECHR), and non-discrimination (Article 14 ECHR), as set out when the Immigration Acts 2014 and 2016 were introduced, has not changed.⁹

7. However, the hostile environment as implemented by those Acts has indisputably had a hugely detrimental impact on the rights of undocumented migrants and migrants with regular status, as well as British citizens. People have died after they were unable to pay healthcare charges levied on immigration grounds.¹⁰ Landlord immigration checks have facilitated discrimination against BME British citizens and trapped undocumented migrants in exploitative housing situations or made them destitute.¹¹ Both the High Court and Court of Appeal have now made factual findings of discrimination caused by the Right to Rent scheme.¹² People have been denied access to bank accounts in error.¹³ Children have been deterred from accessing education as sharing of pupil records between the Department for Education and the Home Office has turned teachers into immigration officers.¹⁴ Victims and witnesses of serious crime have been deterred from reporting to the police, or worse still, on reporting, have been subject to enforcement action, as opposed to their perpetrators.¹⁵
8. The injustice suffered by the Windrush generation exemplifies the human impact of the hostile environment in harrowing detail. These citizens have lost long-term employment, been made destitute, charged tens of thousands of pounds for healthcare, and in some cases exiled from friends, families and homes in which they have lived in the UK for decades, sometimes until the end of their lives.
9. The injustice that the Windrush generation have faced is not, as has been claimed, the result of inadequate documentation on their part.¹⁶ As early as 2014, the Home Office was warned that this group of Commonwealth citizens were at serious risk of being affected

⁹ ECHR memorandum, op. cit., paras 16 and 17

¹⁰ Chaminda Jayanetti, *NHS denied treatment for migrants who can't afford upfront charges*, 13 November 2018

<https://www.theguardian.com/society/2018/nov/13/nhs-denied-treatment-for-migrants-who-cant-afford-upfront-charges>

¹¹ Joint Council for the Welfare of Immigrants, *Passport Please: The impact of the Right to Rent checks on migrants and ethnic minorities in England*, February 2017, page 7 http://jcw.org.uk/sites/default/files/2017-02/2017_02_13_JCW%20Report_Passport%20Please.pdf

¹² *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542 and *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2019] EWHC 452 (Admin).

¹³ Independent Chief Inspector of Borders and Immigration, *An inspection of the 'hostile environment' measures relating to driving licences and bank accounts*, January to July 2016, para 6.29

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/567652/ICIBI-hostile-environment-driving-licences-and-bank-accounts-January-to-July-2016.pdf

¹⁴ Liberty, *Care Don't Share*, December 2018, pages 26-39

https://www.libertyhumanrights.org.uk/sites/default/files/Care%20Don%27t%20Share%20Report%20-%20December%202018_0.pdf

¹⁵ Liberty, *ibid.*, pages 42-54

¹⁶ See, for example, question 1 of the Windrush Lessons Learned Review call for evidence

<https://www.gov.uk/government/publications/windrush-lessons-learned-review/windrush-lessons-learned-review>

by hostile environment measures.¹⁷ When people furnished evidence demonstrating decades of long residence in the UK, it was in certain cases ignored,¹⁸ while other evidence that would have helped people demonstrate lawful residence in the UK had been destroyed by the Home Office.¹⁹ The Windrush scandal therefore was not the product of inadequate documentation; it was the product of a series of deliberate decisions taken by the Home Office. “Let us be under no illusion: the cause of the Windrush scandal was the hostile environment. If we are to avoid a repeat of Windrush for EU citizens, the hostile environment must end.”²⁰

10. These conclusions are supported by Wendy Williams’ ‘Windrush Lessons Learned Review’, which identified “organisational factors in the Home Office which created the operating environment in which these mistakes could be made, including a culture of disbelief and carelessness when dealing with applications”, all of which led to the Windrush generation being “failed when they needed help most”.²¹ Home Office corrective reforms introduced since the Windrush scandal have been largely cosmetic, the Review concluding that these “do not sufficiently address the fundamental problems that exist”.²² The Review makes 30 recommendations for change and improvement in the Home Office to avoid a similar scandal ever happening again, none of which are served by this Bill which simply subjects ever greater numbers of people to the hostile environment.
11. The ongoing COVID-19 pandemic brings the hostile environment into further stark relief, not only in terms of the human suffering it causes but also the real threat it poses to public health.²³ A family has been left facing destitution after the father died from COVID-19, but with no recourse to public funds cannot access state support.²⁴ Undocumented people are dying from the virus because they are too afraid to seek medical help for fears of being reported to the Home Office.²⁵ Migrant women escaping domestic violence are

¹⁷ Legal Action Group, *Chasing Status*, October 2014

<https://www.lag.org.uk/Resources/javascript/pdfs/web/viewer.html?file=?fileid%3d-17369>

¹⁸ Joint Committee on Human Rights, *Windrush generation detention*, 29 June 2018, page 15

<https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1034/1034.pdf>

¹⁹ Amelia Gentleman, *Home Office destroyed Windrush landing cards, says ex-staffer*, April 2018

<https://www.theguardian.com/uk-news/2018/apr/17/home-office-destroyed-windrush-landing-cards-says-ex-staffer>

²⁰ Stuart C McDonald MP, Immigration Bill Second Reading – Col. 521.

²¹ Windrush Lessons Learned Review, p. 7.

²² Windrush Lessons Learned Review, p. 130.

²³ Guppi Bola, ‘I’m a public health expert. I know the hostile environment is making the coronavirus outbreak far worse’ *The Independent* (13 April 2020) <https://www.independent.co.uk/voices/coronavirus-covid19-outbreak-deaths-bame-hostile-environment-immigration-a9462221.html>.

²⁴ May Bulman, ‘We are lost’: Their father died from coronavirus – now this family fears they could be forced to leave UK’ *The Independent* (13 May 2020) <https://www.independent.co.uk/news/uk/home-news/coronavirus-home-office-family-uk-honduras-nrpf-a9510841.html>.

²⁵ May Bulman, ‘Undocumented migrants dying of coronavirus because they’re too afraid to seek help, MPs and charities warn’ *The Independent* (17 April 2020) <https://www.independent.co.uk/news/uk/home-news/coronavirus-undocumented-migrants-deaths-cases-nhs-matt-hancock-a9470581.html>.

facing barriers to accessing help.²⁶ During a public health emergency, the hostile environment is not only compounding the tragedy of COVID-19 for migrants, but also putting the health of the wider public at risk as migrants do not trust that they can seek medical assistance or stop working to self-isolate.

12. COVID-19 also shows how migrant workers usually described by the Government as ‘low-skilled’ are not only essential to our society,²⁷ but also how they are exposed to greater harm due to structural inequalities exacerbated by the immigration system.²⁸ The Government should use this Bill as an opportunity to level-up for all migrants, rather than expanding the current system to the detriment of millions more people.
13. If the purpose of the hostile environment is to force undocumented people to leave the UK, recent evidence suggests that it is failing on its own terms. A study carried out by academics at the University of Oxford published in 2018 found:

“[L]ittle evidence suggesting that immigration enforcement brings down numbers of irregular immigrants. Instead, immigration enforcement seems to have (unintended) side-effects; it increases human suffering whilst offering opportunities to criminals and giving rise to criminal practices and pushes irregular immigrants further underground.”²⁹
14. Given the ongoing commitment to the hostile environment expressed in the White Paper,³⁰ it is very difficult to trust the assertion in the ECHR memorandum that “close consideration will be given to Convention rights in relation to the future immigration system, and social security co-ordination system, as they are developed in order to ensure that policies are compatible with Convention rights and other obligations.”³¹
15. As held by the Court of Appeal in the recent ‘Right to Rent’ judgment, it is for Parliament to decide whether the discriminatory outcomes of hostile environment policies are within

²⁶ Sian Norris, ‘Lost in the Covid emergency: Migrant women escaping domestic violence blocked from help’ *Politics.co.uk* (13 May 2020) <https://politics.co.uk/comment-analysis/2020/05/13/lost-in-the-covid-emergency-migrant-women-escaping-domestic>.

²⁷ CNN, ‘Coronavirus may force the UK to rethink its relationship with migrant workers’ (17 April 2020) <https://edition.cnn.com/2020/04/17/europe/migrant-workers-uk-coronavirus-gbr-intl/index.html>.

²⁸ Amelia Gentleman, ‘Calls grow to scrap NHS surcharge for migrant healthcare workers’ *The Guardian* (3 May 2020) <https://www.theguardian.com/society/2020/may/03/calls-grow-scrap-nhs-surcharge-migrant-healthcare-workers-coronavirus> and The New York Times, ‘Eight UK Doctors Died from Coronavirus: All Were Immigrants’ (8 April 2020) <https://www.nytimes.com/2020/04/08/world/europe/coronavirus-doctors-immigrants.html>.

²⁹ Franck Duvell, Myriam Cherti, Irina Lapshyna, *Does Immigration Enforcement Matter?*, October 2018, page 5 <https://www.compas.ox.ac.uk/wp-content/uploads/DIEM-Irregular-Immigrants-and-Control-Policies-in-the-UK.pdf>

³⁰ HM Government, *The UK’s future skills-based immigration system*, December 2018, chapter 12 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766465/The-UKs-future-skills-based-immigration-system-print-ready.pdf

³¹ ECHR memorandum, op. cit., para 19

the boundaries of what is acceptable.³² This Bill is Parliament's opportunity to end the harm caused by the hostile environment. Rather than handing the Home Office a blank cheque to subject three million people to the inhumanity of its existing policy approach, Parliamentarians should use this Bill to set right the wrongs of the Windrush scandal and recognise the critical role which migrants play in our society, and end the hostile environment.

ENDING IMMIGRATION DETENTION

16. One of the most draconian tools of the UK immigration system is immigration detention. This Bill would bring millions of people under domestic immigration policies which will likely result in an increase in the use of detention.
17. A response from the Ministry of Justice to an FOI request suggests that at least 26,000 EEA nationals per year could now be liable to deportation proceedings and as such could be detained under immigration powers.³³ For contrast, in 2019, the Government returned 5,110 foreign nationals with convictions from the UK. An increase in people subject to deportation orders will lead to an increase in people being held in detention, reversing a welcome trend that has seen a reduction in the numbers of individuals going through administrative immigration detention since 2015.
18. This is especially concerning considering the indisputable evidence of human rights abuses that occur within detention. There is an ongoing public inquiry into abuse claims at Brook House Detention Centre as a result of an undercover 2017 Panorama documentary. There is also a pattern of poor decision making leading to vulnerable individuals being detained. 21 million pounds was paid out in compensation between 2012 and 2017 as the Home Office wrongfully detained 850 people.³⁴ In April of this year, the Independent Chief Inspector of Borders and Immigration, David Bolt, expressed disappointment in the Home Office's response to his report on the Home's Office lack of progress protecting and stopping vulnerable individuals ending up in detention.³⁵

³² *R (Joint Council for the Welfare of Immigrants) v Secretary of State for the Home Department* [2020] EWCA Civ 542.

³³ Free Movement, *Leaked immigration document suggests huge rise in European criminal deportation after Brexit*, 13 September 2017, <https://www.freemovement.org.uk/leaked-immigration-document-suggests-huge-rise-european-criminal-deportation-brexit/>

³⁴ The Guardian, *Home Office pays out £21m after mistakenly detaining 850 people*, June 2018, <https://www.theguardian.com/uk-news/2018/jun/28/wrongful-detention-cost-21m-as-immigration-staff-chased-bonuses>

³⁵ ICIBI, *Inspection report published: Annual inspection of 'Adults at Risk in Immigration Detention' (2018-19)*, April 2020, <https://www.gov.uk/government/news/inspection-report-published-annual-inspection-of-adults-at-risk-in-immigration-detention-2018-19>

19. In 2019, 24,443 people were subject to immigration detention. It is already one of the largest operations of its kind in Europe and the only one without a time limit.³⁶ Without a time limit, indefinite and prolonged detention will proliferate. Those in detention include survivors of torture, pregnant women and children. No judge authorises detention. While the indefinite nature of detention must be rectified with a time limit, it is only one part of the detention system that needs fixing.
20. The system has been criticised by the United Nations High Commissioner for Refugees (UNHCR) for its indefinite and systematic nature.³⁷ The Bar Council,³⁸ the British Medical Association,³⁹ the Independent Monitoring Board,⁴⁰ the Home Affairs Select Committee⁴¹ and the Joint Committee on Human Rights⁴² have also called for a time limit and reform of the system. When the Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2017-19 was laid, 88 MPs across every party supported an amendment that would have ended indefinite detention and implemented a strict 28-day time limit.⁴³ Not only has a time limit been recommended by numerous bodies, it has also been shown that implementing a time limit would save tens of millions of pounds every year.⁴⁴
21. The continued use of detention during the COVID-19 pandemic in particular exacerbates all of the above concerns. Although legal action saw many released from detention and bail is being granted at unprecedented rates, around 700 people remain held indefinitely under immigration powers in detention centres and prisons. Reporting demonstrates the

³⁶ Home Office National Statistics, *Home many people are detained or returned*, 27 February 2020 <https://www.gov.uk/government/publications/immigration-statistics-year-ending-december-2019/how-many-people-are-detained-or-returned>

³⁷ UNHCR, *Global Strategy Beyond Detention: Progress Report*, August 2016 <https://www.unhcr.org/57b579e47.pdf>

³⁸ Dr Anna Lindley, *Injustice in Immigration Detention: Perspectives from legal professionals*, research report commissioned by the Bar Council, p.3

https://www.barcouncil.org.uk/media/623583/171130_injustice_in_immigration_detention_dr_anna_lindley.pdf

³⁹ All Party Parliamentary Group on Refugees and the All Party Parliamentary Group on Migration, *The Report of the Inquiry into the Use of Immigration Detention in the United Kingdom*, March 2015, page 4

<https://detentioninquiry.files.wordpress.com/2015/03/immigration-detention-inquiry-report.pdf>

⁴⁰ IMB National Annual Report for the Immigration Detention Estate 2018, <https://s3-eu-west-2.amazonaws.com/imb-prod-storage-1ocod6bqky0vo/uploads/2019/10/IMBIDE-Annual-Report-2018-FINAL-003.pdf>

⁴¹ Home Affairs Select Committee, *Immigration Detention Inquiry*, March 2019

<https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/913/91302.htm>

⁴² Joint Committee on Human Rights, *Immigration Detention Inquiry*, February 2019,

<https://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2017/inquiry10/>

⁴³ Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2017-19

https://publications.parliament.uk/pa/bills/cbill/2017-2019/0309/amend/immigration_rm_rep_0829.1-7.html

⁴⁴ Economic Impacts of Immigration Detention Reform, March 2019, http://www.camecon.com/wp-content/uploads/2019/05/immigration-detention-reform_Final-report.pdf

impossibility of social distancing within a detention centre,⁴⁵ the lack of adequate sanitation,⁴⁶ and the terror felt by those still held.

22. The World Health Organisation acknowledges that detention itself makes people more vulnerable to COVID-19 than those who are not detained.⁴⁷ Immigration detention's lawfulness depends on the imminence of removal from the country. Given the widespread bans on international travel, removal is an unlikely prospect, and there are strong grounds to argue on that basis alone that in the majority of cases ongoing detention is unlawful. Combined with barriers to legal support and the ongoing health risk, to which people in detention are exposed, in Liberty's view those still held in immigration detention should be released in a safe and managed process and supports the use of this Bill to achieve this end.

23. This Bill would see a proliferation of people subjected to immigration detention, creating enormous pressure on the Home Office to rely on detention as a means to cope with the large influx of people subject to deportation. Liberty urges Parliamentarians to use this Bill to move towards ending immigration detention, and especially in the context of COVID-19.

RESTORING VITAL SAFEGUARDS

24. At the same time as the hostile environment has implemented a sprawling web of immigration controls in the heart of our communities and public services,⁴⁸ vital checks and balances in the immigration system have been stripped away, increasing the likelihood that people will be wrongly refused access to essential goods and services, detained, or removed, and decreasing the likelihood that they will be able to access an effective remedy in that event. The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 removed the vast majority of immigration claims from the scope of legal aid, leaving huge numbers of people attempting to navigate our labyrinthine immigration system without access to a lawyer.

⁴⁵ Rose, E., 2020. "I can't sleep": Covid-19 fears inside immigration detention centres. [online] Liberty Investigates. Available at: <https://libertyinvestigates.org.uk/articles/i-cant-sleep-covid-19-fears-inside-immigration-detention-centres/>

⁴⁶ Kelly, N., 2020. "We share everything": coronavirus fears inside a UK detention centre. [online] the Guardian. Available at: <https://www.theguardian.com/uk-news/2020/mar/29/inside-the-detention-centre-where-inmates-fear-coronavirus>.

⁴⁷ World Health Organization, 2020. Prevention and control of Covid-19 in prisons and other places of detention. [online] Available at: <http://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19/novel-coronavirus-2019-ncov-technical-guidance/coronavirus-disease-covid-19-outbreak-technical-guidance-europe/prevention-and-control-of-covid-19-in-prisons-and-other-places-of-detention>

⁴⁸ Liberty and others, *The Border Controls Dividing Our Communities: A Guide to the Hostile Environment*, April 2018 <https://www.libertyhumanrights.org.uk/sites/default/files/HE%20web.pdf>

25. Similarly, despite increasing reliance on automated data-sharing and matching schemes to implement the hostile environment,⁴⁹ and a clear policy commitment to rely increasingly on automated data processing in the immigration context more broadly,⁵⁰ the Data Protection Act 2018 allows any entity processing data for immigration control purposes to set aside a person's data protection rights in a broad range of circumstances.⁵¹ The Home Office is also developing a 'status checking project', a database that could provide quick immigration checks to outside organisations, a system that will make it easier to deny people access to essential goods and services.⁵²
26. In the immigration context, legal aid and data protection rights assist people subject to immigration control in holding the Home Office to account, and therefore help prevent that power from being wielded arbitrarily or unlawfully. As such they function not only to protect the people that make use of them, but also to ensure that the immigration system is run in a way that is compatible with the rule of law.
27. Given the significant increase in the number of people who will be subject to the Home Office's power after the UK leaves the EU, **Parliamentarians should reject the delegation of any further powers to the Home Office until crucial safeguards, namely immigration legal aid and data protection rights, are restored to the immigration system.**

A BLANK CHEQUE

28. Clause 1 implements Schedule 1 of the Bill. This schedule repeals the retained EU law framework that establishes the free movement rights of EU and Swiss nationals and their family members. Repeal of this framework would therefore bring this group under the purview of domestic immigration law, as is the case for other nationalities at present.
29. Clause 4 of the Bill establishes a sweeping Henry VIII power allowing the Secretary of State to make regulations as a consequence of or in connection with Part 1 of the Bill. Subsection (1) of that clause reads:

⁴⁹ As comprehensively outlined in Liberty's Care Don't Share report, op. cit.

⁵⁰ Immigration White Paper, op. cit., para 12.15

⁵¹ Liberty, *Care Don't Share*, op. cit. pages 70-73

⁵² Sarah Marsh, 'Government immigration database 'deeply sinister' say campaigners' *The Guardian* (10 April 2019) <https://www.theguardian.com/uk-news/2019/apr/10/government-immigration-database-deeply-sinister-say-campaigners> and see Windrush Lessons Learned Review, p. 261.

“The Secretary of State may by regulations made by statutory instrument make such provision as the Secretary of State considers appropriate in consequence of, or in connection with, any provision of this part.”⁵³

30. Subsection (2) of that clause sets out that this power may be used to modify any primary or secondary legislation passed before or in the same session as this Bill, as well as retained EU legislation.
31. Subsection (4) provides that the power in subsection (1) can apply to *anyone* who doesn't currently reside in the UK under EU free movement law, the intention being that it would apply to EU citizens who aren't technically compliant with EU free movement law, for example because they do not have health insurance. However, the clause is drafted so broadly that it could theoretically apply almost every aspect of immigration law in the UK, potentially engaging a large variety of human rights issues.
32. Subsections 6-8 of Clause 4 set out the scrutiny procedures for regulations made under subsection (1). Subsection (7) establishes that when that delegated power is used as a Henry VIII power, i.e. to amend primary legislation, those regulations – bar the first set of regulations created under this power – will be subject to the affirmative parliamentary scrutiny procedure. Subsection (8) establishes that when the power is otherwise used, regulations will be subject to the negative resolution procedure.
33. **In conjunction with the power to make Immigration Rules contained at section 3 of the Immigration Act 1971, clause 4 of this Bill represents a blank cheque that the Home Office alone should not be permitted to fill.**
34. Immigration policy as set out under Immigration Rules or other secondary legislation all too often puts fundamental rights at risk. For example, the controversial policy introducing a requirement on schools to request nationality and country of birth data from pupils, now ended thanks to a campaign led by Against Borders for Children and Liberty, was introduced by SI 808/2018 (The Education (Pupil Information) (England) (Miscellaneous Amendments) Regulations 2016).⁵⁴ The policy that set out that EEA nationals who were rough sleeping could be removed from the UK for 'misusing/abusing' their treaty rights, now revoked after being ruled discriminatory and unlawful following

⁵³ Ibid., clause 4 subsection (1)

⁵⁴ Freddie Whittaker, *DfE: Schools 'must no longer request' pupil nationality data*, 28th June 2018 <https://schoolsweek.co.uk/dfе-schools-must-no-longer-request-pupil-nationality-data/>

action brought by campaign group NELMA, was introduced through SI 1052/2016 (The Immigration (European Economic Area) Regulations 2016).⁵⁵

35. Similarly, the minimum income threshold of £18,600 required for people wishing to sponsor a non-EEA spouse to come to the UK, which has created countless ‘Skype families’, was introduced via Immigration Rules Appendix FM and FM-SE.⁵⁶ In the health context, NHS charging regulations which risk pricing migrants out of vital care are given a statutory basis by SI 238/2015 (The National Health Service (Charges to Overseas Visitors) Regulations 2015).
36. **Liberty urges Parliamentarians to protect fundamental rights by refusing to hand the Home Office a blank cheque in the making of immigration policy.** As a bare minimum, exercise of the delegated powers at Clause 4(1) should be made conditional on the resolution of deep systemic problems within the immigration system as it applies to non-EEA nationals.
37. **Liberty further urges Parliamentarians to use this Bill to restrict the power delegated to the Secretary of State by section 3 of the Immigration Act 1971, which enables the Secretary of State to make immigration policy by way of Immigration Rules.** The Government intends to use this power to create the future immigration system to which EEA nationals will be subject.⁵⁷ However, apart from the very broad framework of the White Paper, there is currently a dearth of detail available on this system.
38. The Immigration Rules are already used to introduce significant policy changes, including some of those referenced above, with entirely inadequate levels of scrutiny, resulting in a severely negative impact on the human rights of the people subject to those rules. As such, the power at section 3 of the Immigration Act 1971 should be circumscribed to prevent the Secretary of State from using the Immigration Rules to enact immigration policies that risk a significant negative impact on the fundamental rights of people subject to immigration control or those associated with them.

⁵⁵ Gureckis, R (On the Application Of) v Secretary of State for the Home Department [2017] EWHC 3298 (Admin) (14 December 2017)

⁵⁶ Children’s Commissioner, *Skype Families*, 2017 <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/06/SkypeFamilies-CCO.pdf>

⁵⁷ Home Office, *Policy paper: ECHR memorandum*, 21 December 2018 <https://www.gov.uk/government/publications/immigration-and-social-security-co-ordination-eu-withdrawal-bill/echr-memorandum>

CONCLUSION

39. Liberty firmly believes that as three million more people are brought within the ambit of domestic immigration law, this Bill is an opportunity to restore respect for fundamental rights and the rule of law to the heart of the UK's immigration policy. As the unequal impacts of this public health emergency are laid bare and in light of the stark findings of the Windrush Lessons Learned Review, nothing short of root and branch reform of the UK immigration system can be justified.

40. We therefore urge Parliamentarians to:

- i) Support an end to the hostile environment
- ii) Take steps toward ending immigration detention
- iii) Support the restoration of crucial safeguards to the immigration system, namely data protection rights and legal aid, and
- iv) Oppose overreliance on regulations made by the Secretary of State in creating immigration policy that risks negatively affecting fundamental rights.

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