

# **LIBERTY**

## **LIBERTY'S WRITTEN EVIDENCE TO THE PUBLIC BILL COMMITTEE FOR THE IMMIGRATION AND SOCIAL SECURITY CO- ORDINATION (EU WITHDRAWAL) BILL**

**JUNE 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](https://libertyhumanrights.org.uk/policy).

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# INTRODUCTION

1. Liberty welcomes the opportunity to provide written evidence to the Public Bill Committee for the Immigration and Social Security (EU Withdrawal) Bill 2020. 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”);<sup>1</sup> mounting evidence that the Home Office operates “in a continuous state of disaster management”;<sup>2</sup> and now the stark and disproportionate impact of the COVID-19 pandemic on migrant communities,<sup>3</sup> 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.
2. It is vital that the Bill Committee amends the Bill to remedy these deficiencies, so that the future immigration system is more compliant with fundamental rights and the rule of law than the “complicated mess of burning injustice and bureaucracy”<sup>4</sup> that defines the current system. Liberty has identified four key ends to which the Bill should be amended, namely:
  - Ending the hostile environment;
  - Limiting the power of the Secretary of State to make significant changes to immigration policy through the Immigration Rules;
  - Taking steps toward ending immigration detention; and
  - Restoring the vital safeguard of legal aid to the immigration system.

## SCOPE: BEYOND EEA NATIONALS

3. The effects of this Bill are not confined to EEA nationals, and as such, the effect of amendments to the Bill need not be confined to this group either. The end of free movement is not a policy change whose impact will be confined to EEA nationals, although

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<sup>1</sup> 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](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874022/6.5577_HO_Windrush_Lessons_Learned_Review_WEB_v2.pdf).

<sup>2</sup> 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-brexite-media-explosion-u-turns-government-a8612556.html>

<sup>3</sup> 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>.

<sup>4</sup> Stuart C McDonald, *Immigration and Social Security Co-ordination (EU Withdrawal Bill)*, Second Reading (Commons), Hansard, 18 May 2020, Vol. 676, Col. 407.

they will undeniably feel it keenly; it is a monumental change to the immigration system as a whole. It is very likely that that system – already chaotic and overly complex – will need to adjust in unforeseeable ways to accommodate millions more people, from EEA nationals already living in the UK to people yet to arrive.

4. Indeed, this is presumably the Home Office’s rationale for seeking the broad delegated powers set out at clauses 4 and 5 of this Bill. Had the Government put forward clear and tightly constrained delegated powers accompanied by appropriate sunset clauses, its claim that the Bill is concerned purely with EEA nationals and repeal of retained EU law as it relates to free movement would have been arguable. Given the breadth of the powers that this Bill seeks to enact, it is not.
5. Moreover, given the Government’s contention that the future immigration system will create a level playing field<sup>5</sup> that differentiates on the basis of skill rather than nationality, it is difficult to see how the effect of changes to that system as implemented by the exercise of the delegated powers in this Bill could foreseeably be limited to EEA nationals. Indeed, clause 4(1) states that those powers are very broad; they may be used ‘*in consequence of*’ or ‘*in connection with*’ part 1 of the Bill in whatever way the Secretary of State deems appropriate.
6. As clause 4(2)(a) stipulates, the Secretary of State may modify ‘*any*’ provision made by or under primary legislation passed before, or in the same Session as this Act. This very widely drawn power would clearly allow the Secretary of State to modify by regulations any piece of immigration legislation passed prior to 2020 or in this session of Parliament, not just the retained EU law relating to freedom of movement. It appears that all the Secretary of State would need to argue is that the change is in connection with the end of free movement – which essentially every change to immigration legislation for the immediate future arguably will be, and that the use of the powers set out under clause 4 of the Bill is appropriate for achieving these changes – a low threshold.
7. Moreover, clause 4(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 to almost every aspect of immigration law in the UK, with implications far beyond EEA nationals.

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<sup>5</sup> Priti Patel, Immigration and Social Security Co-ordination (EU Withdrawal Bill), Second Reading (Commons), Hansard, 18 May 2020, Vol. 676, Col. 400.

8. Finally, clause 4(5) sets out that regulations may *‘modify provision relating to the imposition of fees or charges which is made by or under primary legislation passed before, or in the same Session as, this Act’*. Again, this power could be used to implement changes to immigration fees that apply not only to EEA nationals, but to applicants of other nationalities too – something that is especially likely in light of the ‘level playing field’ between nationalities that Government ostensibly aims to create.
9. For these reasons, Liberty urges the Bill Committee to recognise that the scope, powers and impacts of this Bill extend far beyond EEA nationals, and as such, the impact of amendments to the Bill must not be confined to this group.

## **ENDING THE HOSTILE ENVIRONMENT**

### *Amendment*<sup>\*6</sup>

Clause 8, sub-clause (1), page 6, line 4, at end insert new subsections ( ):
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(NS1) Regulations under subsection (1) may not be made until the Government has brought forward legislative measures to repeal the hostile environment, specifically:

- (a) sections 20-47 of the Immigration Act 2014
- (b) sections 34-45 of the Immigration Act 2016
- (c) sections 15-25 of the Immigration, Asylum and Nationality Act 2006, and
- (d) schedule 2, paragraph 4 of the Data Protection Act 2018.

(NS2) Regulations under sub-clause (1) may not be made until the Government has brought forward legislative measures to ensure that all people subject to immigration control who are habitually resident as determined by the relevant local authority are able to access social security benefits, repeal provisions which restrict access to social security benefits, specifically:

- (a) section 3(1)(c)(ii) of the Immigration Act 1971
- (b) section 115 of the Immigration and Asylum Act 1999
- (c) any provision in subordinate legislation, which imposes a “no recourse to public funds” condition on grants of limited leave to enter or remain, and

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<sup>6</sup> At the time of writing, this amendment is not yet listed on the amendment paper. The amendment as tabled may be subject to minor changes.

(d) any other enactment or power exercised under any other enactment, which makes immigration status a condition to access social security benefits.

(NS3) Regulations under sub-clause (1) may not be made until the Government has made provision to ensure safe and confidential access to essential public services as follows:

(1) The Secretary of State, or any other individual or body on his behalf, must not process personal data, by any means, for the purposes of immigration control or enforcement, where that personal data has been collected in the course of the data subject accessing or attempting to access the public services identified in subsection (2).

(2) For the purposes of subsection (1), the relevant public services are:

(a) primary and secondary healthcare services;

(b) primary and secondary education; and

(c) the reporting of a crime by the data subject or, where the data subject is a witness to, or the victim of, the crime, any investigation or prosecution of it.

(3) The prohibitions contained in subsections (1) and (2) do not apply where the data subject has given his or her explicit and informed consent to the disclosure of the personal data, for the purposes of immigration enforcement.

### *Effect*

New sub-clauses 1-3 would prohibit the Secretary of State (SoS) from making regulations to commence the end of free movement until 1) the hostile environment has been repealed, 2) all migrants are able to access public funds, and 3) a prohibition on use of data collected or held by essential public services for immigration enforcement purposes, and specifically healthcare, education, and policing, has been established.

### *Briefing*

10. Clause 8(1) of the Bill sets out that the provisions of Part 1, which repeal the legal foundation for free movement between the UK and the EU, may be commenced by regulations laid by the SoS. New sub-clauses 1-3 would establish a series of sunrise

clauses on this power by requiring the SoS to fulfil a number of requirements to protect migrants' fundamental rights before commencing Part 1 of the Bill.

### **New sub-clause 1 (NS1)**

11. NS1 would require the SoS to repeal the hostile environment before ending free movement between the UK and the EU, and specifically:

#### *Sections 20-47 of the Immigration Act 2014*

12. These provisions establish the statutory basis for right to rent, the NHS health surcharge, the prohibition on opening bank accounts for people without regular immigration status, aspects of the workplace immigration check regime, and the prohibition on holding a driving licence for people without regular status.

#### *Sections 34-45 of the Immigration Act 2016*

13. These provisions establish the statutory basis for the criminal offence of working illegally, the criminal offence of letting a residential property to a person without regular immigration status; the offence of driving while unlawfully in the UK; a power for police to search for driving licences, and the requirement for banks to carry out quarterly immigration checks on all current accounts.

#### *Sections 15-25 of the Immigration, Asylum and Nationality Act 2006*

14. These provisions lay the foundation for workplace immigration checks.
15. The hostile environment 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.<sup>7</sup> Landlord immigration checks have facilitated discrimination against black and minority ethnic British citizens and trapped undocumented migrants in exploitative housing situations or made them destitute.<sup>8</sup> Both the High Court and Court of Appeal have now made factual findings of discrimination caused by the Right to Rent scheme.<sup>9</sup> People

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<sup>7</sup> 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>

<sup>8</sup> 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](http://jcw.org.uk/sites/default/files/2017-02/2017_02_13_JCW!%20Report_Passport%20Please.pdf)

<sup>9</sup> *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).



have been denied access to bank accounts in error.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

16. 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.
17. 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.<sup>13</sup> 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.<sup>14</sup> Undocumented people are dying from the virus because they are too afraid to seek medical help for fear of being reported to the Home Office.<sup>15</sup> Migrant women escaping domestic violence are facing barriers to accessing help.<sup>16</sup> 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.

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<sup>10</sup> 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](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)

<sup>11</sup> Liberty, *Care Don't Share*, December 2018, pages 26-39, Available at:

<https://www.libertyhumanrights.org.uk/issue/care-dont-share/>

<sup>12</sup> Liberty, *ibid.*, pages 42-54

<sup>13</sup> 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>.

<sup>14</sup> 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>.

<sup>15</sup> 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>.

<sup>16</sup> 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>.

18. An end to the hostile environment is a long overdue and vital move towards ensuring migrants' fundamental rights.

*Schedule 2, paragraph 4 of the Data Protection Act 2018*

19. This provision allows any entity processing personal data for immigration control purposes to set aside almost all data protection rights under the General Data Protection Regulation and Data Protection Act 2018 where fulfilment of those rights would prejudice immigration control. The exemption therefore allows the Home Office and other data processors to restrict a person's ability to access data held about them, despite subject access requests forming a vital aspect of access to justice for people making immigration claims. The exemption also facilitates the secret sharing and processing of data collected by essential public services with Home Office immigration enforcement, creating a deterrent to people accessing health and education, and reporting crimes to the police, all of which prevents fulfilment of people's basic rights.

20. The exemption is also likely to facilitate the development of the Status Checking Project. The Status Checking Project is essentially a population database that will enable automated immigration checks on everyone attempting to access essential goods and services. Given the quality of Home Office data management, the Project is likely to result in people being denied access to essential services, potentially in breach of their human rights; a concern recently referenced by the Windrush Lessons Learned Review report.<sup>17</sup> Repealing the exemption is therefore an important step towards ensuring safe access to essential services and maintaining safeguards against error and overreach in the immigration system.<sup>18</sup>

**New sub-clause 2 (NS2)**

21. NS2 would require the SoS to ensure that everyone subject to immigration control who is habitually resident can access social security benefits, including mainstream welfare benefits and social housing – from which they are currently excluded by a provision called 'No Recourse to Public Funds' – before ending free movement between the UK and the

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<sup>17</sup> Wendy Williams, *Windrush Lessons Learned Review*, March 2020, p. 130  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/876336/6.5577\\_HO\\_Windrush\\_Lessons\\_Learned\\_Review\\_LoResFinal.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876336/6.5577_HO_Windrush_Lessons_Learned_Review_LoResFinal.pdf)

<sup>18</sup> See: Liberty, *Written evidence submitted by Liberty (DPB02): Data Protection Bill*, March 2018, <https://publications.parliament.uk/pa/cm201719/cmpublic/dataprotection/memo/dpb02.pdf>

EU. The habitual residence test is well-established in social security law and is usually determined by the relevant local authority.<sup>19</sup> Specifically, this would require the repeal of:

*Section 3(1)(c)(ii) of the Immigration Act 1971*

22. This provision allows for No Recourse to Public Funds to be imposed as a condition of leave to enter and remain in the UK.

*Section 115 of the Immigration and Asylum Act 1999*

23. This provision establishes that anyone subject to immigration control who is not an EEA national is excluded from access to public funds unless they fall into a category or fulfil such conditions as established by the Home Office to exempt them from this exclusion.

24. Given the overwhelming complexity of immigration legislation and the Immigration Rules, parts c) and d) of NS2 require the SoS to repeal secondary legislation flowing from the 1971 and 1999 Acts and any other provisions excluding people subject to immigration control from public funds.

25. The detrimental effects of NRPF are well-established. People with NRPF may become destitute, with no access to the social safety net, causing significant distress and negative impacts on health and wellbeing. NRPF has specific impacts for children insofar as deprivation has a negative impact on their long-term growth and development. As a recent report from The Children’s Society sets out:

“Living in poverty has significant detrimental effects on children’s outcomes, both in childhood and later in life. Living on low income negatively affects children’s school attainment, cognitive and behavioural development, and their physical and mental health, even for short periods of time.”<sup>20</sup>

26. Indeed, the High Court recently found the NRPF policy is unlawful, holding that the relevant immigration rules, and the current instructions to Home Office caseworkers do not adequately account for human rights obligations.<sup>21</sup>

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<sup>19</sup> See: House of Commons Library, ‘The Habitual Residence Test’, Research Briefing (2011) <https://commonslibrary.parliament.uk/research-briefings/sn00416/> and ‘Measures to Limit Migrants’ Access to Benefits’, Briefing Paper (2015) <https://commonslibrary.parliament.uk/research-briefings/sn06889/>.

<sup>20</sup> The Children’s Society, *A Lifeline for All: Children and Families with No Recourse to Public Funds*, May 2020, <https://www.childrensociety.org.uk/sites/default/files/a-lifeline-for-all-summary.pdf>

<sup>21</sup> D Taylor, ‘Home Office’s denial of benefits to migrant families unlawful, court rules’ *The Guardian* (7 May 2020) <https://www.theguardian.com/society/2020/may/07/home-offices-denial-of-benefits-to-migrant-families-unlawful-court-rules#maincontent>.

27. In the context of a pandemic, the effects of NRPF are even more significant – people are forced to continue to work, even when doing so is not safe for them and their families. As Ayesha Mohsin, Solicitor at domestic worker advocacy organisation Kalayaan has set out:

“When people under the NRPF are dismissed from their jobs without cause or notice, or because they fall ill, they cannot benefit from the furlough scheme, they cannot claim statutory sick pay, and because of the NRPF condition, they cannot apply for universal credit, so they are at greater risk of becoming destitute.”<sup>22</sup>

28. Moreover, those already made destitute by the hostile environment are further gatekept from accessing support during the pandemic. There have been numerous reports of local authorities barring people from accessing the ‘Everybody In’ scheme because of NRPF status.<sup>23</sup> What is clear is that not only does NRPF force people into destitution – it keeps them there.

### **New sub-clause 3 (NS3)**

29. NS3 would require the SoS to ensure that prior to ending free movement, the Home Office is prohibited from processing for immigration enforcement purposes personal data collected or held by health and education services or police in the context of a person trying to access or accessing those essential services.

30. The sharing of personal data between essential public services, central Government departments, and the Home Office, is a cornerstone of the hostile environment. Data-sharing currently occurs in respect of health, education, banking, driving, welfare benefits, employment, homelessness, local authority support, and policing. It often occurs without the knowledge or consent of the data subject, and in some cases the trusted public servant who initially collected the data. Secrecy and non-consensual sharing are enabled in part by the aforementioned immigration exemption in the Data Protection Act 2018.

31. These data-sharing agreements and practices have significant implications. Data collected by frontline services that people should be able to trust is being passed to the Home Office, and then used by the Home Office to take immigration enforcement action against people.

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<sup>22</sup> Ayesha Mohsin, *Pandemic exacerbates situation for domestic migrant workers, many victims of modern slavery*, Thomson Reuters Foundation, 21 April 2020, <https://news.trust.org/item/20200421140121-crg0n>

<sup>23</sup> See: [https://www.project17.org.uk/media/99364/Briefing-NRPF\\_COVID-19.pdf](https://www.project17.org.uk/media/99364/Briefing-NRPF_COVID-19.pdf).

32. The data-sharing schemes also mean that people are being flagged to the Home Office for immigration enforcement when they attempt to access essential public services. Furthermore, the Home Office is telling public services when they should and should not allow a person to access services – sometimes on the basis of inaccurate data, leading to wrongful denial of services, as was the case for some Windrush citizens.
33. In combination, these measures deter people from accessing public services that are essential to the fulfilment of their human rights. They undermine important public policy objectives like safeguarding children and the protection of public health. They also undermine duties of care and confidentiality that are the core of public service provision in the UK. For these reasons, a prohibition on data-sharing, also known as a firewall, between public services and immigration enforcement is required.<sup>24</sup>

## A BLANK CHEQUE

34. 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.
35. 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:
- “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.”<sup>25</sup>
36. 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.
37. 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

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<sup>24</sup> For further information on the human rights case for a firewall, please see Liberty's *Care Don't Share* report, op. cit.

<sup>25</sup> *Ibid.*, clause 4 subsection (1)

broadly that it could theoretically apply almost every aspect of immigration law in the UK, potentially engaging a large variety of human rights issues.

38. 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.
39. 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.
40. 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).<sup>26</sup> 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 action brought by campaign group NELMA – was introduced through SI 1052/2016 (The Immigration (European Economic Area) Regulations 2016).<sup>27</sup>
41. 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.<sup>28</sup> 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).
42. **Liberty urges the Public Bill Committee to amend this Bill to protect fundamental rights by refusing to hand the Home Office a blank cheque in the making of**

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<sup>26</sup> Freddie Whittaker, *DfE: Schools ‘must no longer request’ pupil nationality data*, 28<sup>th</sup> June 2018 <https://schoolsweek.co.uk/dfe-schools-must-no-longer-request-pupil-nationality-data/>

<sup>27</sup> Gureckis, R (On the Application Of) v Secretary of State for the Home Department [2017] EWHC 3298 (Admin) (14 December 2017)

<sup>28</sup> Children’s Commissioner, *Skype Families*, 2017 <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/06/SkypeFamilies-CCO.pdf>

**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.

43. Liberty further urges the Public Bill Committee to amend 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.<sup>29</sup> However, apart from the very broad framework of the White Paper, there is currently a dearth of detail available on this system.
44. 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.

## **ENDING IMMIGRATION DETENTION**

*Liberty supports amendments NC1-NC8 introducing a 28-day time limit on immigration detention.*

45. 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.
46. 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.<sup>30</sup> 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

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<sup>29</sup> 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>

<sup>30</sup> 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/>

welcome trend that has seen a reduction in the numbers of individuals going through administrative immigration detention since 2015.

47. 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 a 2017 undercover Panorama documentary. There is also a pattern of poor decision making leading to vulnerable individuals being detained. £21 million was paid out in compensation between 2012 and 2017 as the Home Office wrongfully detained 850 people.<sup>31</sup> 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 Office's lack of progress protecting and stopping vulnerable individuals ending up in detention.<sup>32</sup>
48. 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.<sup>33</sup> 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.
49. The system has been criticised by the United Nations High Commissioner for Refugees (UNHCR) for its indefinite and systematic nature.<sup>34</sup> The Bar Council,<sup>35</sup> the British Medical Association,<sup>36</sup> the Independent Monitoring Board,<sup>37</sup> the Home Affairs Select Committee<sup>38</sup> and the Joint Committee on Human Rights<sup>39</sup> have also called for a time limit and reform

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<sup>31</sup> 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>

<sup>32</sup> 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>

<sup>33</sup> 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>

<sup>34</sup> UNHCR, *Global Strategy Beyond Detention: Progress Report*, August 2016 <https://www.unhcr.org/57b579e47.pdf>

<sup>35</sup> 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](https://www.barcouncil.org.uk/media/623583/171130_injustice_in_immigration_detention_dr_anna_lindley.pdf)

<sup>36</sup> 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>

<sup>37</sup> IMB National Annual Report for the Immigration Detention Estate 2018, <https://s3-eu-west-2.amazonaws.com/imb-production-1ocod6bqky0vo/uploads/2019/10/IMBIDE-Annual-Report-2018-FINAL-003.pdf>

<sup>38</sup> Home Affairs Select Committee, *Immigration Detention Inquiry*, March 2019

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

<sup>39</sup> 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/>



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.<sup>40</sup> 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.<sup>41</sup>

50. 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. 40% of those still detained were identified as ‘adults at risk’ by HM Chief Inspector of Prisons.<sup>42</sup> Reporting demonstrates the impossibility of social distancing within a detention centre,<sup>43</sup> the lack of adequate sanitation,<sup>44</sup> and the terror felt by those still held.
51. The World Health Organisation acknowledges that detention itself makes people more vulnerable to COVID-19 than those who are not detained.<sup>45</sup> 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.
52. 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 the Public Bill Committee to**

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<sup>40</sup> 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](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0309/amend/immigration_rm_rep_0829.1-7.html)

<sup>41</sup> Economic Impacts of Immigration Detention Reform, March 2019, [http://www.camecon.com/wp-content/uploads/2019/05/Immigration-detention-reform\\_Final-report.pdf](http://www.camecon.com/wp-content/uploads/2019/05/Immigration-detention-reform_Final-report.pdf)

<sup>42</sup> Report on Short Scrutiny Visits to Immigration Removal Centres by HM Chief Inspector of Prisons, June 2020, <https://www.justiceinspectorates.gov.uk/hmiprisoners/wp-content/uploads/sites/4/2020/06/IRC-SSVweb-2020.pdf>

<sup>43</sup> 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/>

<sup>44</sup> 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>.

<sup>45</sup> 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>

amend this Bill to move towards ending immigration detention, and especially in the context of COVID-19.

## **RESTORING VITAL SAFEGUARDS**

53. 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,<sup>46</sup> 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.
54. In the immigration context, legal aid assists people subject to immigration control in holding the Home Office to account, and therefore helps prevent that power from being wielded arbitrarily or unlawfully. As such, this safeguard functions 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.
55. 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, **the Public Bill Committee should amend the Bill to prohibit the delegation of any further powers to the Home Office until crucial safeguards, namely immigration legal aid, are restored to the immigration system.**

## **CONCLUSION**

56. Liberty is gravely concerned that Parliamentarians are seriously contemplating the prospect of handing Home Office ministers further powers to subject millions more people to exclusion from vital goods and services under the auspices of the hostile environment, the trauma of indefinite detention, and whatever measures might be introduced via the Immigration Rules and Henry VIII powers in this Bill as the future immigration system – the details of which are vanishingly thin – is designed and implemented. Policies on which people's lives, livelihoods, and fundamental rights depend

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<sup>46</sup> 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>

should not be subject to Ministerial or departmental fiat. The Government's failure to protect migrants' rights during the COVID-19 pandemic, and the human suffering and threat to public health this failure creates, can leave no doubt that the UK's immigration system must be overhauled before millions more are subjected to it. Liberty therefore strongly urges the Bill Committee to amend the Bill to:

- End the hostile environment;
- Limit the power of the Secretary of State to make significant changes to immigration policy through the Immigration Rules;
- Take steps toward ending immigration detention; and
- Restore the vital safeguard of legal aid to the immigration system.

**GRACIE MAE BRADLEY, SAM GRANT and NADIA O'MARA**

Policy and Campaigns Team