

LIBERTY

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

JANUARY 2019

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.

CONTACT

Gracie Mae Bradley

Policy and Campaigns Manager

020 7378 3654 | gracieb@libertyhumanrights.org.uk

Sam Grant

Acting Policy and Campaigns Manager

020 7378 5258 | samg@libertyhumanrights.org.uk

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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. 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. 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) Opposing overreliance on regulations made by the Secretary of State in creating immigration policy that risks negatively affecting fundamental rights
 - ii) Supporting an end to the hostile environment
 - iii) Supporting a 28-day time limit on immigration detention, and
 - iv) Supporting the restoration of crucial safeguards to the immigration system, namely data protection rights and legal aid.

A BLANK CHEQUE

4. 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

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

under the purview of domestic immigration law, as is the case for other nationalities at present.

5. 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.”²
6. 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.
7. 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.
8. **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.**
9. 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).³ 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,

² Ibid., clause 4 subsection (1)

³ Freddie Whittaker, *DfE: Schools ‘must no longer request’ pupil nationality data*, 28th June 2018 <https://schoolsweek.co.uk/dfe-schools-must-no-longer-request-pupil-nationality-data/>

was introduced through SI 1052/2016 (The Immigration (European Economic Area) Regulations 2016).⁴

10. 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.⁵ 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).
11. **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, further detail of which is set out below.
12. **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.⁶ However, apart from the very broad framework of the White Paper, there is currently a dearth of detail available on this system.
13. 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.

⁴ Gureckis, R (On the Application Of) v Secretary of State for the Home Department [2017] EWHC 3298 (Admin) (14 December 2017)

⁵ Children’s Commissioner, *Skype Families*, 2017 <https://www.childrenscommissioner.gov.uk/wp-content/uploads/2017/06/SkypeFamilies-CCO.pdf>

⁶ 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>

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

14. 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 scandal, and indeed, mounting evidence that the Home Office now operates “in a continuous state of disaster management”⁷, Government should have seized 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 TO THE HOSTILE ENVIRONMENT

15. 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 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
16. 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 People have been denied access to bank accounts in error.¹² Children have been deterred from accessing education as sharing of pupil records between

⁷ 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>

⁸ ECHR memorandum, op. cit., paragraph 7

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://jcwi.org.uk/sites/default/files/2017-02/2017_02_13_JCWI%20Report_Passport%20Please.pdf

¹² 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

the Department for Education and the Home Office has turned teachers into immigration officers.¹³ 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.¹⁴

17. 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.
18. The injustice that the Windrush generation have faced is not, as has been claimed, the result of inadequate documentation on their part.¹⁵ As early as 2014, the Home Office was warned that this group of Commonwealth citizens were at serious risk of being affected by hostile environment measures.¹⁶ When people furnished evidence demonstrating decades of long residence in the UK, it was in certain cases ignored,¹⁷ while other evidence that would have helped people demonstrate lawful residence in the UK had been destroyed by the Home Office.¹⁸ 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.
19. 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.”¹⁹

¹³ 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

¹⁴ Liberty, *ibid.*, pages 42-54

¹⁵ 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>

¹⁶ Legal Action Group, *Chasing Status*, October 2014

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

¹⁷ Joint Committee on Human Rights, *Windrush generation detention*, 29 June 2018, page 15

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

¹⁸ 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>

¹⁹ Franck Duveill, 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>

20. Given the ongoing commitment to the hostile environment expressed in the White Paper,²⁰ 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.”²¹
21. 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 end the hostile environment.

ENDING INDEFINITE DETENTION

22. One of the most draconian tools of the UK immigration system is indefinite detention. This Bill would bring millions of people under domestic immigration policies which will likely result in an increase in the use of detention.
23. 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.²² For contrast, in the year ending September 2018, the Government returned 5485 foreign nationals with convictions. An increase in people subject to deportation orders will lead to an increase in people being held in detention.
24. This is especially concerning considering the indisputable evidence of the human cost of detention. In the year ending June 2018, 26 215 people were subject to indefinite administrative detention. It is already one of the largest operations of its kind in Europe and importantly – the only one without a time limit.²³ Without a time

²⁰ 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

²¹ ECHR memorandum, op. cit., para 19

²² 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/>

²³ Home Office, *Home many people are detained or returned*, 23 August 2018 <https://www.gov.uk/government/publications/immigration-statistics-year-ending-june-2018/how-many-people-are-detained-or-returned>

limit, indefinite and prolonged detention will proliferate unless Parliament uses this Bill to create a time limit. Those in detention include survivors of torture, pregnant women and children. No judge authorises detention. The system has been criticised by the United Nations High Commissioner for Refugees (UNHCR) for its indefinite and systematic nature.²⁴ The Bar Council²⁵ and the British Medical Association²⁶ have also called for a time limit. Recently, Tulip Siddiq MP received cross party support for her 10-minute rule bill which would introduce a 28-day time limit.²⁷

25. This Bill would see a proliferation of people subjected to indefinite 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 introduce a 28-day time limit on immigration detention and end the scandal of an ineffective and inhumane policy.

RESTORING VITAL SAFEGUARDS

26. 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,²⁸ 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.

²⁴ UNHCR, Global Strategy Beyond Detention: Progress Report, August 2016 <https://www.unhcr.org/57b579e47.pdf>

²⁵ 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

²⁶ 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>

²⁷ Tulip Siddiq, *Immigration (Time Limit on Detention)*, Hansard, House of Commons, Volume 650, 5 December 2018

[https://hansard.parliament.uk/commons/2018-12-05/debates/FE0E3770-454D-4815-B2AD-3BA26FEC115A/Immigration\(TimeLimitOnDetention\)](https://hansard.parliament.uk/commons/2018-12-05/debates/FE0E3770-454D-4815-B2AD-3BA26FEC115A/Immigration(TimeLimitOnDetention))

²⁸ 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>

27. Similarly, despite increasing reliance on automated data-sharing and matching schemes to implement the hostile environment,²⁹ and a clear policy commitment to rely increasingly on automated data processing in the immigration context more broadly,³⁰ 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.³¹
28. 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.
29. 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.**

CONCLUSION

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. **We therefore urge Parliamentarians to:**

- i) **Oppose overreliance on regulations made by the Secretary of State in creating immigration policy that risks negatively affecting fundamental rights**
- ii) **Support an end to the hostile environment**
- iii) **Support a 28-day time limit on immigration detention, and**
- iv) **Support the restoration of crucial safeguards to the immigration system, namely data protection rights and legal aid.**

GRACIE MAE BRADLEY & SAM GRANT

Policy and Campaigns Managers

²⁹ As comprehensively outlined in Liberty's Care Don't Share report, op. cit.

³⁰ Immigration White Paper, op. cit., para 12.15

³¹ Liberty, *Care Don't Share*, op. cit. pages 70-73