BRIEFING ON THE ILLEGAL MIGRATION BILL FOR SECOND READING IN THE HOUSE OF COMMONS, MARCH 2023

1. The Illegal Migration Bill is an extraordinary and desperately cruel piece of legislation. Introduced on 7 March, the 66-page Bill will have its Second Reading fewer than four working days after publication – leaving barely any time for Parliamentarians to grapple with its implications for asylum as well as for our wider human rights framework. Both the United Nations High Commissioner for Refugees and the UN Special Rapporteur on Contemporary Forms of Slavery have already expressed deep concern over the ways that the Bill will deny protection to those in need of safety and protection, and called for the Government and Parliamentarians to rethink it.[1]

2. The Bill is a profound attack on the institution of asylum, and will block vast swathes of people seeking safety from ever being able to access protection, support, or justice. It will create a two-tiered system of human rights protection, so that laws will not need to be read in line with human rights for people solely on the basis of how they have entered the UK. It will confer vast powers to the Secretary of State to make secondary legislation, undermining the vital principle of Parliamentary sovereignty. It will also set the UK firmly on a collision course with the European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR), and undermine our human rights protections on the whole. **For the fundamental attack this Bill poses to asylum and its threat to our human rights framework, Liberty urges Parliamentarians to reject this legislation in its entirety.**

INCOMPATIBLE WITH HUMAN RIGHTS

3. The Illegal Migration Bill will prevent people who enter the UK without entry clearance from seeking asylum, applying for leave as a victim of trafficking or making any other kind of immigration application. It creates a new duty on the Secretary of State to make arrangements to remove from the UK people who meet four conditions: that they have arrived in the UK without leave to enter, on or after 7 March 2023, they did not come directly from a country in which their life and liberty were threatened by reason of their race, religion, nationality, social group or political opinion, and that they require leave to enter or remain in the UK but do not have it. Where the person is a child, the Secretary of State is not required to remove them, but still retains the power to. Through a complex web of changes to already-limited appeal procedures, the Bill will force people to which the duty applies into a permanent state of limbo, unspecified durations of detention, with extremely limited access to subsistence support.

4. That this is an extraordinary Bill is apparent from the Home Secretary's statement on the first page: "I am unable to make a statement that, in my view, the provisions of the Illegal Migration Bill are compatible with the Convention rights." Section 19 of the Human Rights Act 1998 (HRA) confers upon Ministers in charge of bills in either House of Parliament a duty to make a statement, either to the effect that in their view the provisions of the bill are compatible with the Convention or that, although they are unable to make a statement of compatibility, the Government nevertheless wishes the House to proceed with the Bill.

5. This is an option that is open to Ministers, but one that is very rarely taken. A section 19(1)(b) statement is more often attached to a Bill on its passage from one House to another to signal that the

[1] UNHCR, Statement on UK Asylum Bill, 7 March 2023, https://www.unhcr.org/uk/news/press/2023/3/6407794e4/statement-on-uk-asylum-bill.html.

Government believes an amendment may be incompatible with the Convention – most notably one was added to the Local Government Bill 2000 after the Labour Government's attempt to repeal the notorious 'Section 28' prohibition on 'promoting homosexuality' was blocked by the House of Lords. It is far rarer that a Minister will present a Bill to the House that they believe and openly state is more likely than not to breach the Convention – the House of Lords Reform Bill 2012[2] was withdrawn after second reading, while the Communications Bill 2003, which potentially infringed upon freedom of expression due to a ban on political advertising, was eventually ruled compatible with the Convention a full ten years after it was passed in a 9-8 decision of the European Court.[3]

6. **This Bill is a completely different proposition. What is proposed is not a failure to correct a historic wrong or a restriction on where a person may spend their money in search of influence. It instead is the removal of vital protections for people who have been trafficked or are victims of modern slavery.**
7. The Government's ECHR memorandum identifies clauses 21-24 as the most legally contentious. These clauses would disqualify potential victims of slavery or human trafficking from support and protection from removal. The Government recognises that these proposals would likely infringe on Article 4 ECHR which prohibits slavery and servitude (including trafficking) and establishes obligations on the state to put in place systems of protection and support for victims, but asserts that the provisions are "capable" of being applied compatibly with Article 4. The Government justifies this rejection of our obligation to victims of slavery and trafficking by stating that "radical solutions are required", and "the approach adopted in these provisions is therefore new and ambitious".[4]
8. This language is reminiscent of the Ministry of Justice's consultation into HRA reform, in which it argued that removing section 19 would allow Government to "move away from the simplistic binary" of breaching or not breaching Convention rights, remove the "stigma" attached to making a section 19(1)(b) statement, and "encourage innovative and creative policy making."[5] Presenting breaching human rights as "innovative" is perverse – not only does it demonstrate the Government's lack of regard for its obligations under human rights law, but it also displays a fundamental misunderstanding of one of the functions of a section 19 statement. Ensuring that a Bill is compatible with the Convention is not only a basic moral requirement for governing, but a practical necessity too. The Government has been clear about how important they consider this Bill, and it appears set to be fast tracked through Parliament, but they have presented it with clauses they believe more likely than not to be ruled unlawful by the courts. MPs should consider whether the Government's aims are what they say they are, or whether a fight with the courts is the point.

TWO-TIERED SYSTEM OF HUMAN RIGHTS PROTECTION

9. Section 3 of the Human Rights Act (HRA) requires courts and public authorities to interpret legislation compatibly with human rights. It is an essential mechanism through which courts can correct human rights violations and individuals access justice. As recognised by the Independent Human Rights Act Review (IHRAR), the courts have been cautious in their approach to s.3 HRA, using it to address narrow and specific rights violations. For example, in *Ghaidan,* the House of Lords used s.3 HRA to interpret a provision in the Rent Act 1977 so as to give equal protection to gay couples as heterosexual couples, on the basis that the purpose of the provision was to protect widows' (regardless of gender) security of tenure in a property. The abortive Bill of Rights Bill contained a proposal to repeal s.3 HRA

[2] Believed incompatible with A3P1 ECHR due to its blanket ban on prisoners voting for a new elected House of Lords.
[3] *Animal Defenders International v United Kingdom* [2013] ECHR 362
[4] ECHR Memorandum to Illegal Migration Bill, [47].
[5] Government response to Ministry of Justice consultation, "Human Rights Act Reform: A Modern Bill of Rights", 12 July 2021, [88].

– which was widely criticised for being misguided, unpopular, and unevidenced, and rejected both by IHRAR and the overwhelming majority of respondents to the Government's consultation on the Bill of Rights.[6]

10. While the BORB has been shelved, the Government's vendetta against s.3 HRA now appears to have made a return in the Illegal Migration Bill. Clause 1(5) of the Illegal Migration Bill provides that s.3 HRA "does not apply in relation to provision made by or by virtue of this Act". This means that courts and public authorities will no longer be required to interpret the Bill itself, nor consequent secondary legislation, compatibly with human rights. Instead, the Bill is to be read in line with the principle set out in clause 1(1) to "prevent and deter unlawful migration," which makes no reference to human rights. This would mean that if a person sought to challenge the Secretary of State's expansive and likely unlawful duty to remove people the court would not be able to read the relevant clause compatibly with human rights in making their decision on the challenge.

11. **Clause 1(5) is a highly extraordinary clause that will disapply the protections of the HRA to people subject to this Bill. Disapplying the HRA in this way will create a two-tiered system of human rights protection, whereby laws will not be required to be read compatibly with human rights for certain people, solely on the basis of how they have entered the UK.** This will not only have the effect of closing off a key route of legal challenge, but will also stop public authorities from operationalising the Bill in a way that respects human rights.

12. The Illegal Migration Bill does not propose to disapply s.4 of the HRA. Section 4 HRA operates where courts cannot read legislation in line with human rights using s.3 HRA, but decide that it is incompatible with the Convention. In such cases, the court will make a declaration of incompatibility (DOI), which simply states its opinion that the legislation does not comply with the Convention. Incompatible legislation will then stay in force until the Government and Parliament take action to address the incompatibility. One of the key implications of the Bill's disapplication of s.3 HRA and its retention of s.4 HRA may be that the courts, unable to read legislation in line with human rights, may be forced to make multiple declarations of incompatibility in relation to the Bill and consequent secondary legislation. This will put the UK in an invidious position whereby incompatible legislation could remain in force, affecting more and more people and resulting in more and more human rights violations over time, with the Government having the power to decide whether and when to bring forward a resolution (if any). The more DOIs that are issued and the fewer that are adequately resolved in a timely manner could eventually diminish the seriousness with which DOIs are taken.[7]

13. Section 3 HRA is an elegant and practical tool for helping maintain legislation in line with human rights. Disapplying it in relation to this Bill will not only increase the likelihood of the rights of relevant persons being breached, but also add to the risk of more significant and disruptive legal battles down the line. Indeed, when faced with a more general proposal to repeal s.3 HRA, the Joint Committee on Human Rights warned that this could force more victims of human rights violations to have to take claims to the ECtHR to enforce their rights.[8] As with the open adoption of a policy that the Government admits is more likely than not to be found incompatible with the European Convention, this appears set to create conflict between the Government and the European Court and to throw more fuel on the fire

[6] The proposal to repeal the interpretative duty of section 3 of the Human Rights Act received the support of only 4% of respondents against the 79% who advocated no change. See: Human Rights Act Reform: A Modern Bill of Rights, Government Consultation Response, [69].
[7] Joint Committee on Human Rights, Legislative Scrutiny: Bill of Rights Bill, January 2023, https://committees.parliament.uk/publications/33649/documents/183913/default.
[8] Joint Committee on Human Rights, Legislative Scrutiny: Bill of Rights Bill, January 2023, https://committees.parliament.uk/publications/33649/documents/183913/default.

of those Members of Parliament – such as the Home Secretary – that advocate our leaving the ECHR all together.

INTERIM MEASURES

14. Interim measures, or Rule 39 orders, are orders issued by the European Court of Human Rights "on an exceptional basis, when applicants would otherwise face a real risk of serious and irreversible harm". They are a vital tool that allows the Court in extreme circumstances to place a temporary stop on an action likely to produce a significant breach of human rights to allow time for a full judgment to take place. Applications for interim measures are most often rejected. When they are granted, it is on the basis of serious need, and contracting states are under an obligation to comply with them. To do otherwise would be a breach of our Article 34 ECHR responsibility not to hinder the effective exercise of individual application to the Court.[9]

15. Clause 49(1) of the Bill gives the Secretary of State the power "to make provision about interim measures indicated by the European Court of Human Rights as they relate to the removal of persons from the United Kingdom under this Act." Clause 49 provides that this may include regulations relating to the duty to make arrangements for removals (including of family members) and any claims (e.g. legal challenges on the basis that such a removal would be unlawful) made by a person in relation to their removal from the UK under the Bill.

16. This in itself hands a great deal of power to the Secretary of State to make laws that may put us in breach of our international obligations, circumventing parliamentary scrutiny to do so. However, the supporting documents to the Bill state that clause 49 is designed as "a placeholder for a substantive clause which will make provision about interim measures", with "the expectation that it will be replaced by way of Government amendment during the passage of the Bill".[10] There is no explanation or justification for why the substantive clause is absent from the Bill, and there is no indication as to when this will be forthcoming.

17. In the debate on the introduction of the Bill, the Home Secretary stated that the Government would be "closely specifying the details of what [they] are going to propose".[11] With second reading following just four working days after the Bill's introduction and committee stage expected to follow soon after, it appears that MPs are being denied the information they need to scrutinise how the UK will approach binding orders of the European Court.

CIRCUMVENTING SCRUTINY

18. The status of the United Kingdom's treatment of interim measures is far from the only area in which MPs will be kept in the dark as they begin to scrutinise this legislation. Four clauses are identified as 'placeholder' or 'marker' clauses, included with the expectation that they will be replaced via Government amendment during the passage of the Bill. Among these is clause 38, which allows the Secretary of State to define "serious and irreversible harm" for the purposes of this Bill. This is an extremely important provision, as the only legal challenges which would suspend removal pending the outcome of the challenge would be either a question of fact (whether the person meets the four conditions for removal in clause 2) or whether they would face a "real risk of serious and irreversible harm" if removed.

---

[9] See *Mamatkulov and Askarov v Turkey* (46827/99, 46951/99) 2005.
[10] Explanatory Notes to the Illegal Migration Bill, [19].
[11] Suella Braverman MP, HC Debate, vol. 729, col. 177.

19. This use of placeholder clauses echoes the drafting of the Nationality and Borders Act 2022, which was brought to Parliament with six placeholders in its text, not replaced until committee stage was already underway. The House of Lords Constitution Committee stated in its report on the Bill, "while on occasion the use of placeholder clauses is understandable, the delayed introduction of so many significant clauses, the legal implications of which are in some cases far from clear, is unacceptable. This must not become a normal way of legislating".[12] That the Government has brought another Bill on the same subject just one year later that attempts to circumvent parliamentary scrutiny in the same way shows that they have paid the Committee's warning no heed.

20. Among the many delegated powers in the Bill is clause 25, which empowers the Secretary of State to suspend or revive the powers in clauses 21-24 to disqualify potential victims of slavery and trafficking from the support and protection from removal to which they should be entitled. This disqualification is achieved by asserting that potential victims of slavery and trafficking who satisfy the four conditions in clause 2 are a threat to 'public order' for the purposes of Article 13(3) of the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT).[13] The Government is aware of how extreme this is: it is these clauses that have kept them from being able to make a statement of compatibility with the ECHR, and the clauses contain a two-year sunset provision, and yet clause 25 allows the Secretary of State to resurrect these powers at any time under the reduced scrutiny of the made affirmative procedure. It is an extraordinary and extreme step to so openly infringe upon human rights protections as this Bill does. It is deeply callous to make operating these powers so routine.

21. It is important to consider the relationship between the Bill's extensive delegated powers and the disapplication of s.3 HRA, and what that means for parliamentary scrutiny of secondary legislation. Currently, if a court is unable to read secondary legislation – which unlike primary legislation is made by a Minister rather than by Parliament – in line with human rights using s.3 HRA, it has the power to strike down that legislation. This is to give effect to the general principle that it is the will of Parliament for legislation for laws to respect human rights – thus, far from a challenge to the role of Parliament or the separation of powers, it is an example of the separation of powers in action. While this power is used infrequently,[14] it remains a vital check on secondary legislation. IHRAR found that the courts use this power in a "nuanced" way that exhibits "judicial restraint."[15]

22. Multiple Parliamentary committees have argued that the increasingly frequent use of delegated powers in legislation in the past few years has established a "Government by diktat" that has been corrosive of Parliamentary sovereignty.[16] It is widely agreed that there needs to be *more* scrutiny of secondary legislation, not less, to ensure that there are adequate checks and balances on the Executive. The consequence of having a wide array of delegated powers within the Bill and disapplying s.3 HRA in respect of them will be to remove the ability of courts to read secondary legislation - that

[12] Constitution Committee, Nationality and Borders Bill, 11th Report of Session 2021-22, 21 January 2022.

[13] With limited exceptions for those cooperating with law enforcement agencies in the investigation or prosecution of an offence relating to the circumstances of their modern slavery or human trafficking.

[14] The Independent Human Rights Act Review quoted the Public Law Project's finding that since 2014 only fourteen successful challenges to subordinate legislation based on the HRA were recorded in the UK Supreme Court and the Courts of England and Wales. Of those fourteen, the Courts only quashed or otherwise disapplied provisions in the legislation in four instances. Independent Human Rights Act Review, July 2021 [7.14]

[15] Independent Human Rights Act Review, July 2021 [7.32]

[16] Delegated Powers and Regulatory Reform Committee, Democracy Denied? The urgent need to rebalance power between Parliament and the Executive, House of Lords, 24 November 2021, https://publications.parliament.uk/pa/ld5802/ldselect/lddelreg/106/106.pdf; Secondary Legislation Scrutiny Committee, Government by Diktat: A call to return power to Parliament, 24 November 2021, https://publications.parliament.uk/pa/ld5802/ldselect/ldsecleg/105/105.pdf.

has not had the benefit of full Parliamentary scrutiny – in line with human rights. In turn, this will undermine the courts' role within the UK's separation of powers.

OUSTER CLAUSES

23. In addition to severely restricting the ability to appeal to the Immigration and Asylum Tribunal against asylum and human rights decisions, the Bill also limits the supervisory jurisdiction of the High Court, often the last safeguard against a breach of fundamental rights, in two ways. Firstly, over decisions of the Upper Tribunal to refuse 'suspensive claims', which are the only, and extremely limited, procedure available to an individual subject to removal to a third country (clauses 40 and 41). And secondly, over the detention of individuals in the first 28 days of their detention, with the effect of blocking almost any means to challenge unlawful detention (clause 13).

24. The first case concerns 'suspensive claims', which are essentially an extremely limited backstop on the removal of individuals to third countries. The Bill provides that where people cannot safely be removed to their country of origin, there is a duty to remove them to another, third country. The *only* opportunity to halt this removal is to make a suspensive claim on the grounds that either removal to that country would amount to "serious and irreversible harm" (clause 40), or that the conditions for removal had not in fact been met (clause 41). A decision to refuse a suspensive claim can be appealed to the Upper Tribunal, but a decision of the Tribunal is final (clause 48(2)). This creates a legal fiefdom insulated from the influence of other courts, in cases where the stakes – the possible removal of an individual to a country where they may face serious and irreversible harm – could not be higher. As set out above, "serious and irreversible harm" is left to be defined by the Secretary of State under delegated legislation; the subsequent interpretation of that definition will fall to the Upper Tribunal, without any possibility of further judicial interpretation by the higher courts. Clauses which entirely oust the jurisdiction of the High Court over other courts and tribunals have routinely been found to be unlawful, and in cases where the consequences of error are so potentially catastrophic, there is particular importance in ensuring that errors made by the Upper Tribunal can be judicially corrected.

25. In the second case, the Bill attempts to remove the jurisdiction of the High Court over the Secretary of State's decisions to detain individuals during the initial 28 days of detention (clause 13(4)). This is a straightforward attempt to avoid legal scrutiny of decisions which interfere with the fundamental liberty of individuals, and provides the Secretary of State with almost total impunity to detain people. For example, it would no longer be possible to challenge detention which had been authorised in error, in the absence of full information, or on the basis of a misunderstanding of the law. Removing legal oversight of these kinds of decisions at the same time as removing the ability of the First Tier Tribunal to grant immigration bail (clause 13(3)) hands the Secretary of State a free rein to detain individuals for up to a month, immune from the threat of legal challenge.

EXPANSION OF THE DETENTION ESTATE

26. The Illegal Migration Bill marks a drastic expansion of the already-heaving detention estate. Clause 11 confers wide new powers of detention to immigration officers, who will be able to detain a person they suspect that a person meets the conditions for being removed under the Secretary of State's duty, pending a decision as to whether that decision applies, pending the person's removal from the UK, or in the case of an unaccompanied child, pending their removal or the granting of limited leave in certain narrow circumstances. Immigration officers will also have the power to detain family members of those falling under the above criteria (including children).

27. The Secretary of State will have the power to detain people in any place they consider appropriate – the Explanatory Notes provide this could include pre-departure accommodation, a removal centre, or a short-term holding facility. Short-term holding facilities include places like Manston processing centre, where one person died and potentially thousands of people were detained in severely overcrowded and inappropriate accommodation with lack of access to catering and medical facilities, amidst multiple outbreaks of infectious diseases such as diphtheria, claims of drug-selling by guards, and allegations of mistreatment.[17]

28. The length of time for which persons may be detained under the powers in the Bill is such period as, in the opinion of the Secretary of State, is reasonably necessary to enable the relevant decision to be made, removal action to be carried out, or examination to be conducted. The Explanatory Notes provide that this clause is explicitly designed to overturn the established common law principle that it is for the court to decide whether there is a reasonable or sufficient prospect of removal within a reasonable period of time. The Notes contain an extraordinary statement that "the powers to detain… apply irrespective of any impediment to those statutory purposes for the time being."[18] This is a highly unusual – and disturbing – way to describe measures that have been designed to ensure minimum safeguards for when people's liberty is taken away.

29. The existing system of immigration detention is already out of line with time limits in our criminal law and infringes on people's right to liberty, dignity and fair treatment. Expanding powers of detention – including for people who cannot be removed to their country of origin (clause 5(4)) – and giving the Secretary of State the power to determine what is a reasonable timeframe for detaining someone, while limiting people's ability to challenge their detention and apply for bail (see above), is a staggering development that could result in tens of thousands of people languishing in detention for longer periods of time.[19] Not only does this directly contradict the Government's previous commitments to reduce the detention estate, it will also entrench the harms of a fundamentally draconian and inhuman system that tears families and communities apart, devastates people's mental and physical health, and exacerbates people's existing vulnerabilities.

CONCLUSION

30. The Illegal Migration Bill is a shameful and dangerous document. Cruel and callous, it attempts to stem migration by placing this country outside of the world it inhabits – one that in the wake of World War II agreed upon certain minimum standards and principles to adhere to for the good of us all. Disapplying human rights, openly breaching the ECHR, undermining the Refugee Convention, ignoring the European Court, denying access to justice, eroding parliamentary sovereignty, and making victims of slavery and human trafficking the enemy amounts to a matter of great shame. The Government should never have brought this Bill forward. Parliamentarians should let it go no further.

For more information, please contact Jun Pang (junp@libertyhumanrights.org.uk), Charlie Whelton (charliew@libertyhumanrights.org.uk) and Ruth Ehrlich (ruthe@libertyhumanrights.org.uk).

[17] Chairs of the Committees on Home Affairs, Women and Equalities, Justice and the Joint Committee on Human Rights, Letter on small-boat Channel crossings and conditions at Manston asylum processing centre, 2 November 2022: https://committees.parliament.uk/publications/31471/documents/176592/default.

[18] Explanatory Notes to Illegal Migration Bill, [89].

[19] Home Secretary statement on immigration detention and Shaw report, 24 July 2018: https://www.gov.uk/government/speeches/home-secretary-statement-on-immigration-detention-and-shaw-report.