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BRIEFING ON THE ILLEGAL MIGRATION BILL: NEW GOVERNMENT AMENDMENT ON INTERIM MEASURES, APRIL 2023

1. The Illegal Migration Bill will have its Report Stage and Third Reading in the House of Commons on Wednesday 26 April. Just days before, the Government tabled dozens of new amendments, including replacements for what were previously placeholder clauses. This briefing focuses on Gov NC26, concerning interim measures. **Liberty urges MPs to oppose NC26.** More widely, we continue to oppose the Illegal Migration Bill in its entirety and urge MPs to vote it down at Third Reading - our most recent full briefing on the Bill is available [here](#).

Gov NC26: Interim measures of the European Court of Human Rights

2. NC26 replaces clause 51, originally a placeholder clause for the treatment of interim measures of the European Court of Human Rights (ECtHR). It is an unusual clause, which takes a strange and circuitous route to the blocking of interim measures. It provides that in cases where the ECtHR has indicated an interim measure in proceedings relating to the intended removal of a person from the UK under the Bill, a Minister has a discretion to decide whether or not to disapply the duty on the Secretary of State to remove that person. If the Minister decides that the duty continues to apply, then courts, tribunals, the Secretary of State, and immigration officers may not have regard to the interim measure and must enact the removal. In other words:

Step 1: The Bill imposes a duty on the Home Secretary to remove people in certain circumstances.

Step 2: NC26 applies where the European Court of Human Rights indicates an interim measure to the UK to stop the removal of Person A.

Step 3: A Minister of the Crown may (but need not) determine that the duty does not apply to the Home Secretary in relation to Person A, taking into account various factors relating to the procedure by which the interim measure was made.

Step 4: If the Minister decides that the Home Secretary's duty does continue to apply notwithstanding the interim measure, then relevant bodies may not have regard to the interim measure. The Home Secretary must remove Person A.

3. NC26 amounts to a significant delegation of power to a Minister of the Crown to decide whether or not the UK should comply with its international obligations. **In and of itself, this is a highly concerning shift of power away from Parliament and towards the Executive.** In considering whether to disapply the duty to remove a person, the Minister may have regard 'in particular' to "the procedure by reference to which the interim measure was indicated", including in particular whether the Government was given an opportunity to present observations and information before the measure was made, the form of the decision, whether the ECtHR will take account of any representations from the Government seeking reconsideration, and the likely duration of the measure and timing of substantive determination.
4. **Considering press reports of the negotiations currently underway between the UK Government and ECtHR over the procedure for deciding interim measures, this subsection appears to be more politics than law.** With the likely result of a Minister finding Strasbourg's procedure unacceptable on these points being to ignore the interim measure, this clause appears to be included as a signalling exercise at best and at worst a threat: either the ECtHR must change its approach, or the UK will stop complying, and the rest of the Council of Europe could follow suit. This is a provocative step, and not one that appears wise if open and good faith negotiation on procedural reform is the aim.

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5. **The introduction of NC26 would not only hinder discussions on procedural reform, it also makes the broader conflict with the ECtHR all but inevitable.** Interim measures are issued only “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. Notwithstanding this, 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.¹
6. While the Government has been reluctant to fully acknowledge our obligations imposed by interim measures, the unusual construction of this clause (providing a discretion to disapply a duty) demonstrates that there is a level of awareness of this fact. Whether the United Kingdom adheres to international law does not come down to a matter of drafting. If there is dissatisfaction with procedures in the European Court, the solution is to pursue reform on a European level, not to unilaterally refuse to comply with our obligations. The UK’s interests are better served by remaining, in the Foreign Secretary’s words, “a serious player on the world stage”, than undermining its own influence.² **We urge MPs to oppose NC26 at Report Stage.**

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

¹ See *Mamatkulov and Askarov v Turkey* (46827/99, 46951/99) 2005.

² Crerar, P. and Syal, R., *James Cleverly defies Tory right’s push to leave ECHR*, The Guardian, 20 April 2023: https://www.theguardian.com/uk-news/2023/apr/20/james-cleverly-defies-tory-rights-push-to-leave-echr?CMP=Share_iOSApp_Other