

**CALL FOR EVIDENCE RESPONSE**

# **LEGISLATIVE SCRUTINY: ILLEGAL MIGRATION BILL**

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“Every life should be valued equally and everyone should be treated with decency, dignity and respect underpinned by laws and rights which uphold our values. Human rights are a vital part of the safety net that we all need to make sure that standards don't slip below what we think is acceptable as a nation.”

- Ian, Family Carer & [RITES Committee](#) member

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## Summary

As a human rights organisation at the forefront of supporting human rights practice for over twenty years, we at the British Institute of Human Rights (BIHR) have serious human rights concerns about the Illegal Migration Bill, better known as the Refugee Ban Bill.

We have set out our [detailed concerns with the Bill in this guide](#), including our concerns around democratic process, the undermining of fundamental human rights principles of universality and accountability, and a right-by-right analysis based on the Human Rights Act and European Convention on Human Rights of the risks linked to specific provisions in the Bill.

Should the Refugee Ban Bill continue to be fast-tracked through Parliament under the guise of emergency legislation, we will see some of the most dangerous elements of the paused Rights Removal Bill (the Government's "Bill of Rights Bill") become law in the UK. This will mean a removal of vital human rights protections for people in the most vulnerable situations, pulling the UK backwards from our domestic and international human rights duties which protect us all.

### This Call for Evidence

We have answered nine questions from the Call providing evidence for our concerns and links to the wider legislative and operational context this Bill exists within.

- Q2) Clause 1 – Section 3 of the Human Rights Act
- Q4) Clause 4 – Inadmissibility
- Q5) Clause 5 – Safe countries
- Q6) Clause 8 – Family members
- Q7) Retrospective effect
- Q8) Clause 11 – Detention
- Q10) Clause 13 – Bail
- Q12) Survivors of trafficking and modern slavery
- Q15) Clause 30 – Children's citizenship

2. Clause 1(5) provides that section 3 of the Human Rights Act does not apply in relation to provisions made by or by virtue of this Act. Section 3 HRA requires courts and\* public authorities to read legislation in a way which is compatible with Convention rights, so far as it is possible to do so. What are the implications of the disapplication of section 3 HRA?

\*We emphasise the “and” here, because it is too often forgotten or ignored in policy debates; yet this duty on the everyday public bodies people interact with is a vital safety-net for everyone, especially those in vulnerable situations at risk of human rights abuses.



“Section 3 is there to make sure other laws uphold human rights and vice versa, any changes to this can't be good. It ensures safeguarding and protection.” – [Quote from BIHR's Human Rights Act Reform Survey](#)

[Section 3 of our Human Rights Act](#) says all UK laws must be applied in a way that respects human rights wherever possible. The Refugee Ban Bill disapplies Section 3 to one group of people, based on how they arrived in the UK ([Clause 1\(5\), Page 2 – Line 28](#)). This is not how human rights work; no government gets to pick and choose who is deserving of rights and who is not.

## The implications of the disapplication of Section 3 of the Human Rights Act are:

- 1 It undermines the [principle of universality](#), that human rights apply to us all equally, regardless of who we are or what has happened in our lives. By disapplying Section 3 to anyone who falls within the scope of this Bill, the Government are creating a two-tier system of access to rights and access to justice.
- 2 It creates uncertainty. Section 3 ensures courts and public bodies interpret other laws consistently and compatibly. By saying this law, unlike all others, doesn't have to comply with human rights law, the Bill would lead to uncertainty for courts and public body workers and inequality for the people it affects.

- 3 It prevents effective remedy and accountability. Section 3 means people are able to challenge decisions that breach human rights both through everyday advocacy with public bodies and via legal action in the courts, such as through [judicial review](#). The European Court on Human Rights (ECtHR) found “[insufficient powers of judicial review exercised by the courts](#)” may violate the Article 13 right to an effective remedy.
- 4 It creates disparity between the way our human rights, as set out in the Convention and Human Rights Act, are protected in the UK system versus the authoritative levels of protection and application as set out by the ECtHR. By stopping people bringing challenges in UK courts, the Bill could lead to more people having to go to the ECtHR for justice.



## Unworkable

[CSM used judicial review to challenge the failure of Home Office staff to provide him with his HIV medication so the Home Office promised to improve staff training](#). If the Refugee Ban Bill was in place, the Home Office could have said they didn't have to apply their detention powers in ways that are compatible with human rights; there would be no legal lever to ensure positive change that protects people in the same way.



## Unoriginal

The Government is already trying to get rid of Section 3 for everybody through its [Rights Removal Bill](#) and for people in prison through its recently published [Victims and Prisoners Bill](#). This is indicating a worrying potential pattern in attempting to circumvent and reduce the level of protection for people's human rights. [Read our briefing on why Section 3 matters](#).



## Unevidenced

According to its own analysis, 79% of respondents to [the Government's public consultation on human rights reform](#) said there is no need for change to Section 3. The Independent Review of the Human Rights Act, set up by the Government, was clear that the issue with Section 3 is not the law but the damaging perceptions about it.

The Government has not explained why, if the Bill complies with the UK's international obligations (which include compliance with international human rights laws such as the European Convention), it would object to the Bill being interpreted compatibly with human rights.



“Many people who are vulnerable and disadvantaged find accessing the law very difficult as it is. I believe it would be unjust to add additional difficulty that does not apply to other areas of the law.” – [Quote from BIHR's Human Rights Act Reform Survey](#)

4. Clause 4 provides that any ‘protection claims’ (under the Refugee Convention or claims for humanitarian protection) and or ‘human rights claims’ (under section 6 HRA) made by persons who meets the conditions in clause 2 must be declared inadmissible. What are the human rights implications of clause 4?

[“When it comes to appeals, 48% of these are upheld – clear evidence of poor decision-making by the Home Office and why the right of appeal is so important.”](#) – Law Society of England and Wales.

Immigration appeals provide an essential safety net for people whose fundamental rights could be risked by a wrong decision. Similarly, judicial review protects ordinary people from bad decision-making by the state. The Refugee Ban Bill says people who meet the criteria will have their asylum claims declared “inadmissible” rather than “refused”. This is incredibly worrying because there is no way to appeal an inadmissibility decision ([Clause 4\(2\) and \(3\), Page 4 – Line 37](#)). It also says the Home Secretary has to make arrangements to remove people even if they have applied for judicial review ([Clause 4\(1\)\(d\), Page 4 – Line 35](#)). Although the Government's human rights memorandum says a risk to life would constitute an “exceptional circumstance” and would prevent people from being removed to their home country, it is difficult to see how such an assessment would be properly carried out if asylum claims are rejected at first instance. Further, while the person cannot be removed, their claim remains inadmissible – meaning they risk being trapped in the system with no clear resolution to their case.

## The implications of the disapplication of Clause 4 are:

- 1 It reduces the ways people can have their case heard in UK courts, making it harder for people to access justice and risking breaching the right to an effective remedy (Article 13 of the European Convention on Human Rights).
- 2 It removes judicial oversight and prevents people lodging their asylum claims even where their fundamental human rights are at risk.



### Unoriginal

The Government is already trying to make it harder for people to bring human rights claims through its [Rights Removal Bill](#), which would introduce an unnecessary and obstructive “permission stage” before a person could bring a case to court. [Read how this would impact people across the UK.](#)



“Quite simply, we cannot go backwards and the Government should absolutely not be the only decision makers. It is dangerous for our democratic society.” – [Quote from BIHR’s Plain Language Survey](#)

5. Clause 5 provides for the destinations to which individuals who are subject to the duty or power to be removed can be sent. Anyone who makes a protection or human rights claim can still be removed to a country on a list set out in the Schedule (which includes nations in Europe, Africa and Asia). If a protection or human rights claim is made by a national of an EU country, or Albania, Iceland, Liechtenstein, Norway and Switzerland, they can also be returned to their own country, unless the Secretary of State considers there are exceptional circumstances preventing it. What are the human rights implications of clause 5? Does the designation of states as safe for removal or return raise any additional human rights concerns?

[Article 14 of our Human Rights Act](#) says the state should not treat somebody's human rights with less respect than others' in the same situation because of a characteristic or status. Any difference in treatment must be objectively and reasonably justified. It helps ensure human rights and the [principle of universality](#) works in practice and that we can access our rights in a real and meaningful way. The Refugee Ban Bill says people from certain countries have to meet a higher bar to prevent removal ([Clause 5\(4\), Page 6 – Line 8](#)), creating differential treatment, with no evidence explanation of how this is objectively and reasonably justifiable.

### The human rights implications of Clause 5 are:

- 1 It risks discriminating against some people based on their nationality and putting them at higher risk of refoulement by requiring them to demonstrate there are “exceptional circumstances” that prevent them being removed to certain countries.
- 2 This in turn, calls into question the universality of human rights protections.
- 3 It prevents individual circumstances being looked at to keep a person safe from harm.
- 4 It risks creating more legal cases by trying to reintroduce an [“exceptional circumstances” test that has already been found inapplicable](#).



### Unworkable

As pointed out by Luke Pollard MP during [the Bill's introduction](#) and Joanna Cherry MP at [the Second Reading](#), LGBT+ people are not protected from discrimination in Rwanda (designated a “safe third country”). The Home Secretary said the High Court's judgment that the Rwanda policy is legal means this is not a concern (although this case is [subject to appeal](#)). However, the Court said, [“all relevant individual circumstances must also be considered”](#). The case did not involve anyone claiming protection based on gender identity or sexuality so can't provide an answer on this point. It did, however, find human rights were breached by a number of individual decisions.



## Unoriginal

The Government is already trying to create a two-tier system of human rights through its [Rights Removal Bill](#) by trying to reduce the damages people can receive for human rights breaches based on their “conduct” at any point, not only in relation to the situation in question. [Read more about how this undermines universal human rights.](#)



“The legal system is difficult enough for the average person to navigate as it is don't make things worse!” – [Quote from BIHR's Human Rights Act Reform Survey](#)

6. Clause 8 provides the Secretary of State with the power to remove a person's family members as long as they meet certain conditions, including that they do not have leave to enter or remain in the UK, are not British or Irish citizens, and do not have the right of abode in the UK. What are the human rights implications of clause 8?

[Article 8 of our Human Rights Act](#) says the state must respect private and family life, home and correspondence. It is [particularly important that the Government protects this right for children and other vulnerable people](#). The Refugee Ban Bill allows the Home Secretary to remove people based on how their partner, parent (if they're a child) or minor child arrived in the UK ([Clause 8, Page 9 – Line 26](#)). It also removes the obligation to consult an Independent Family Returns Panel (a panel set up to advise on how to best protect children's welfare in removal cases) before removing families ([Clause 14, Page 22, Line 12](#)).

### The human rights implications of Clause 8 are:

- 1 It risks breaching children's right to private and family life by removing important safeguards. It also risks breaching the [Article 14 right to be free from discrimination by association](#) (being treated unfairly based on a connection to someone else with a certain characteristic).
- 2 It denies people the chance to have their own case heard – instead judging them on the actions of family members that may have taken place even before they were born.

- 3 The Bill's human rights memorandum says, "P's family members may be removed along with P (clause 8) and so there is an argument that P's Article 8 rights in relation to family life may not be infringed" but this ignores that family members with leave or citizenship cannot be removed.



## Unworkable

[S came to the UK at age four](#). He was entitled to register as a British citizen after 10 years, but it was too expensive. In 2018, the Home Office wanted to deport him for a cannabis conviction, but the Court recognised the impact this would have on his younger siblings, who saw him as a father-figure, and his mother's mental health. If the Refugee Ban Bill is enacted, it will be harder for families like S's to stay together.



## Unoriginal

The Government is already trying to remove the right to private and family life of people at risk of removal through its [Rights Removal Bill](#). It completely removes the right for people being deported and sets the threshold incredibly high for their children and dependents. [Read what this would mean for people's lives](#).



## Unevidenced

According to its own analysis, 77% of respondents to the [Government's human rights consultation](#) said there is no need to change the way human rights claims work in relation to deportation.

7. The duty to make arrangements to remove persons who arrive in the UK irregularly will apply to persons who arrived on or after 7 March 2023 (the date of introduction of the Bill). Is the retrospective effect of the Bill compliant with the UK's human rights obligations?

[Article 7 of our Human Rights Act](#) says people cannot be punished for committing a criminal offence if it was not a crime at the time it was done. It also says people should not be subjected to a heavier penalty than was applicable at the time the crime was committed. [Whether something is being treated as a "criminal offence" or a "penalty" depends on the nature, purpose and severity of it](#) rather than just how it's defined in UK law.

The [Nationality & Borders Act 2022 \(NABA\)](#) made it a criminal offence to arrive to the UK without permission. The Refugee Ban Bill says it will require the removal of “persons...in breach of immigration control” – suggesting it will penalise people committing this new offence. [Clause 29\(3\) \(Page 34 – Line 1\)](#) says anybody who has ever met the conditions to be removed under the Bill and their family members can’t be given permission to enter the UK in the future, except in very limited circumstances.

NABA also says people who pass through a “safe third country” and could reasonably have been expected to have made a claim there but didn’t will have their asylum claim declared inadmissible. The Refugee Ban Bill is slightly different because it doesn’t consider whether somebody could reasonably have been expected to have made a claim in a “safe third country” – only whether they’ve passed through it ([Clause 2\(4\), Page 3 – Line 10](#)). This appears to retrospectively change the conditions for an act that is treated like a criminal offence.

The Bill says it applies from 7th March 2023 despite not being law then (and not even published at the start of that date) and imposes a significant burden on people based on how they arrive in the UK. **We do not see how the retrospective effect is compliant with the UK’s human rights obligations under Article 7.**

8. Do the powers to detain individuals contained in clause 11 comply with the UK’s human rights obligations, including the Refugee Convention and the prohibition on arbitrary detention under Article 5 ECHR? Is this affected by the powers to detain applying even though the detained person’s examination or removal is not possible “for the time being” (see clause 12(1)(b))?

## Clause 11

[Article 5 of our Human Rights Act](#) protects people’s personal freedom from being interfered with by unjustified detention. [Arbitrary \(groundless\) immigration detention is unlawful](#). Article 5 also contains a range of safeguards for justified detention; breaching these safeguards can make a detention which would otherwise be lawful unlawful. These safeguards are especially important for people in vulnerable situations, such as children and pregnant women. [Detaining vulnerable people will breach Article 5 if the same aim could be achieved through a less harmful measure](#).

Immigration detention can also constitute [inhuman or degrading treatment \(in breach of Article 3\)](#) – particularly where children and [pregnant women](#) are concerned. For example, [the ECtHR has previously found that the right to be free from inhuman and degrading treatment was breached when children were detained for a long time unsanitary, unorganised and unsafe conditions.](#)

The Refugee Ban Bill widens the type of place the Home Secretary can use to detain people to “any place [she] considers appropriate” ([Clause 11\(6\), Page 16 – Line 40](#)). It also says unaccompanied children ([Clause 11\(2\)\(d\), Page 13 – Line 19](#)) and family members ([Clause 11\(6\)\(2B\), Page 15 – Line 44](#)) can be detained in the same way as everyone else.

### The human rights implications of Clause 11 are:

- 1 Given [reports of the Home Office looking to use facilities such as empty military bases as asylum accommodation](#), giving the Home Secretary wide discretion on what type of accommodation to provide risks breaching the [right to be free from inhuman or degrading treatment](#).
- 2 It risks breaching the right to liberty, and in particular the safeguards on detention, and the [right to be free from discrimination](#) of people already in very vulnerable positions by failing to take into account individual circumstances.

### Clause 12(1)(b)

[UK courts have said the Home Office should only keep people in immigration detention if they intend to deport them and only for a reasonable period of time. Otherwise, the detention risks becoming arbitrary and therefore unlawful.](#)

The Refugee Ban Bill says the Home Secretary can detain people even where removal will not be carried out for as long as she considers reasonably necessary to arrange their release ([Clause 12\(4\) and \(5\), Page 18 – Line 35](#)).

By granting power to detain people even where there is no prospect of removing them, we do not see how the Bill complies with the prohibition on arbitrary detention under Article 5.

10. Clause 13 of the Bill would, for the first 28 days of detention, prevent the First-tier Tribunal granting immigration bail to a person subject to removal in accordance with clause 2. It also seeks to oust judicial review in connection with their detention for the same period, although habeas corpus applications could still be made. Are these changes compliant with the UK's human rights obligations, particularly Article 5 ECHR?



"Why should people potentially suffering human rights abuses have life made more difficult for them in terms of taking cases against anybody including the state...? This itself begins to sound like a human rights abuse." - [Quote from BIHR's Human Rights Act Reform Survey](#)

Safeguards in Article 5 say anyone detained has the right to bring a court case to decide if it's legal. UK courts have previously said, "[it is impossible to say that the ECHR organs neither could have nor should have any concern about a 28 day detention without judicial review](#)".

The new Refugee Ban Bill prevents courts from granting bail to people detained under the Bill for at least 28 days ([Clause 13\(3\)\(b\), Page 21 - Line 3](#)). It prevents judicial review of detention decisions except where they're made in "bad faith" or so fundamentally wrong they breach natural justice ([Clause 13\(4\)\(3\)\(b\), Page 21 - Line 31](#)). This is an incredibly high bar to meet.

As the Immigration Law Practitioner's Association points out, "[it is difficult to see how the writ of habeas corpus can assist – habeas corpus is traditionally a remedy for situations where there is no detention power; it does not generally assist where there is a power that is being used unlawfully.](#)"

By preventing bail or judicial review, we do not see how the Bill complies with Article 5 obligations as it risks removing important safeguards against potentially unlawful detentions.

12. The Bill disapplies various modern slavery provisions to those who enter or arrive in the UK irregularly in accordance with the four conditions set out in clause 2:

a. Would the removal of potential victims of slavery or trafficking from the UK be compatible with the UK's obligations under Article 4 ECHR and the Council of Europe Convention Against Trafficking (ECAT)?

Article 4 of our Human Rights Act says the Government must protect people from slavery forced labour and investigate cases of trafficking. It must have a legal framework in place to prevent trafficking and protect victims.

The UK's framework is the [National Referral Mechanism \(NRM\)](#). This is a system where specific public body workers and charities can refer people to the Home Office. If the Home Office thinks the person **might** be a survivor of trafficking or slavery, they will receive social and financial support and will not be made to leave the UK during this period until the Home Office decides whether they think the person is a survivor.

The Refugee Ban Bill says the Home Office can remove somebody even if they think they might be a survivor of trafficking (**Clause 21, Page 25 – Line 15**). Detention Taskforce says this "[will act to empower traffickers, who will have an additional weapon in their arsenal to coerce victims.](#)"

**We do not see how removing protection from survivors of slavery or forced labour is compatible with the Government's obligations to protect people under Article 4.**



### Unworkable

[Three women trafficked to the UK were abused and forced to work as unpaid servants.](#) Despite them trying to get help, police failed to investigate which the Courts found to be a breach under Article 4. If enacted, the Refugee Ban Bill would enable the Government to remove survivors of trafficking like these women before their claims are heard and survivors could be silenced due to fear of removal, granting more power to traffickers.

b. Is the removal of support provisions for potential victims of slavery or trafficking currently available under the Modern Slavery Act 2015 and equivalent provisions in Scotland and Northern Ireland compatible with the UK's obligations under Article 4 ECHR and ECAT?

Article 4 also means states have to “[assist victims in their physical, psychological and social recovery](#)”.

The Refugee Ban Bill says people will not get the normal NRM assistance and support even if the Home Office thinks they might be a survivor of trafficking (**Clause 22, Page 27 – Line 9**). This discriminatorily prevents some survivors from accessing the welfare support they are entitled to, which is protected under the [Article 1, Protocol 1 right to possessions](#) (as “possessions” can include access to welfare support).

**We do not see how removing support from survivors of slavery or forced labour is compatible with the Government’s duty to support people under Article 4.**

**15. Clause 30(4) provides that, if a child was born in the United Kingdom on or after 7 March 2023 and either of its parents, whether before or after their birth, have ever met the four conditions in clause 2, then the child is an ‘ineligible person’ for the purposes of applying for British citizenship. Is this prohibition compatible with the UK’s human rights obligations, particularly under Article 8 ECHR?**

The ECtHR has said “[arbitrary denial of citizenship](#)” can sometimes breach Article 8 because of the impact on a person’s private life.

**Clause 30(4) (Page 35 – Line 34)** denies children the chance to obtain citizenship based on how one of their parents entered the UK (even if the other parent later acquires citizenship).

**This risks breaching their right to private life and their right to be free from discrimination so it is, yet again, hard to see how this provision is compatible with the UK’s human rights obligations.**



“The experience of the last two years has been to witness a display of disturbing lack of both government accountability and extremely limited democratic process. The idea to change fundamental human rights is more evidence of this worrisome trend” – [Quote from BIHR’s Human Rights Act Reform Survey](#)