



Illegal Migration Bill Briefing – Amendments on Retrospectivity

House of Lords Committee May 2023

Introduction

1. JUSTICE is a cross-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.
2. JUSTICE is supporting the amendments at Committee tabled by Lord Carlile to end the Illegal Migration Bill ('**the Bill**') being retrospective in effect, which is contrary to legal certainty and the principles that underpin the rule of law. These are the amendments of Lord Carlile in **Clauses 2, 3, 5, 15** and **21**. For more information, please see JUSTICE's detailed [briefings](#) on the Bill.

The retrospective provisions of the Bill

3. JUSTICE would highlight the following provisions of the Bill which are retrospective (i.e. they would have legal effect on the rights of individuals from before the date the Bill becomes law):
 - a. Clause 2(3) means that the duty to deport would apply to any individual who entered or arrived in the United Kingdom on or after 7 March 2023;
 - b. Clause 4(7) would disapply asylum or human rights claims which were made on or after 7 March 2023 but were awaiting a decision;

- c. Clause 5(12) and (14) would extend the removal provisions to apply to those who made an asylum or human rights claim on or after 7 March 2023 but were awaiting a decision;
- d. Clause 15(4) would give the Home Secretary retrospective power over the accommodation of unaccompanied migrant children; and
- e. Clause 21(8) to (10) would allow the Home Secretary to retrospectively revoke limited leave to remain granted lawfully to victims of modern slavery/ human trafficking.

Why JUSTICE are opposed to the Bill being retrospective

4. Legal certainty requires that individuals know what their rights are and how they can be enforced. This is especially important when the UK's international law obligations are at stake and when the fundamental rights of individuals will be affected. The importance of legal certainty in the UK's legal system and our common law traditions has been stressed by senior judiciary over the years.
5. Lord Mance said that *'the principle of certainty also precludes retrospective changes in the law. The law must be certain at the time when the subject has to act by reference to it.'*¹ Lord Justice Laws said that it was *'a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public.'*² This is an important part of the UK's common law tradition.
6. Lord Bingham emphasised that his first principle of the rule of law was that it was *'accessible and so far as possible intelligible, clear and predictable'*. This was important so that individuals bound by the law could *'without undue difficulty...find out what it is, even if that means taking advice (as it usually will), and the answer when given should be sufficiently clear that a course of action can be based on it.'*³ As it stands, and given the considerable asylum backlog, any individual who arrived without leave and claimed asylum will have no legal certainty about their rights and whether their asylum claim will even be considered by the Government.
7. Retrospective law can also breach an individual's right to a fair trial per Article 6 of the European Convention on Human Rights ('ECHR'). In *Reilly v SSWP*, the Court of Appeal

¹ Lord Mance, ['Should the law be certain? The Oxford Shrieval lecture'](#) (11 October 2011)

² *Nadarajah & Ors v SSHD* [2005] EWCA Civ 1363, para 68

³ Lord Bingham, ['The Rule of Law' Sir David Williams Lecture'](#) (16 November 2006)

concluded that retrospective legislation would breach Article 6 ECHR unless there were '**compelling grounds of the general interest**' (emphasis added).⁴

8. The House of Lords Constitution Committee has raised concerns with retrospective legislation. They have set out that '*from a constitutional point of view, it [retrospective legislation] should wherever possible be avoided, since the law should so far as possible be clear, accessible and predictable. This applies to civil penalties as well as criminal offences*'.⁵ They have also emphasised that retrospective legislation should only be passed in '*very exceptional circumstances*'.⁶
9. JUSTICE would submit that no such justification and exceptional circumstances have been set out in relation to the wide-ranging retrospective powers in the Bill. The Prime Minister's statement about retrospectivity provided little detail about why it was required, beyond it being '*tough*' and that '*this Bill provides the legal framework needed to deliver this in a way that no other legislation has done before*'.⁷ No such compelling justification was provided during the House of Commons stage by either the Home Secretary or the Immigration Minister.
10. We note that the Government justification is likely to be that the situation in the Channel necessitates retrospective legislation as a deterrent. However, first, the Nationality and Borders Act 2022, which was passed less than a year ago and had the intention of addressing the same policy issue, was predominantly not retrospective.⁸ It is unclear why this legislation therefore requires retrospectivity.
11. Second, there is no evidence that the date on which immigration legislation comes into force has any impact on the number of small boat crossings of the English Channel. The number of Channel crossings actually rose following the Nationality and Borders Act

⁴ [Reilly & Ors v SSWP](#) [2016] EWCA Civ 413, para 78

⁵ House of Lords Constitution Committee, '[Jobseekers \(Back to Work Schemes\) Bill](#)' (20 March 2013), para 14

⁶ House of Lords Constitution Committee, '[Nationality and Borders Bill](#)' (21 January 2022), para 22

⁷ Prime Minister, '[PM Statement on the Stop the Boats Bill: 7 March 2023](#)' (7 March 2023)

⁸ It came into force two months after receiving Royal Assent. An individual who lodged an asylum claim before 28 June 2022 (the commencement date), or who registered their claim but had not yet had their asylum interview, are to have their claims considered under the previous legal regime. See Home Office, '[Refugee and humanitarian protection leave in asylum claims lodged before 28 June 2022](#)' (28 June 2022)

coming into force in June 2022.⁹ There is also no evidence that the announcement of this legislation on 7 March 2023 has drastically impacted on the number of crossings.¹⁰

12. This does not justify such broad and sweeping legislation which is seeking to apply penalties to those who cross the Channel to claim asylum to be retrospective in its entirety. It is also extraordinary that the Government are seeking to apply the retrospective provisions to the Home Secretary's powers over unaccompanied migrant children and the ability to retroactively cancel limited leave to remain granted to victims of modern slavery and human trafficking.
13. Legal certainty is fundamental to the UK's reputation as a country that upholds the rule of law. Retrospective legislation is dangerous and should be used cautiously. Were the Bill to pass with retrospective effect, it would set a dangerous precedent that the Government can retroactively overhaul its immigration/ asylum system altering the basic protections of individuals who arrived whilst the legislation was still being amended and debated in Parliament. Hundreds of individuals, likely many with considerable vulnerabilities, are unable to know even if the Government will consider their asylum or human rights claim.
14. JUSTICE supports the amendments of Lord Carlile which would end the Bill's retrospective effect and would urge Peers to make their voices heard on this important constitutional issue at Committee.

For more information, please contact:

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⁹ Home Office, '[Official Statistics: Irregular migration to the UK, year ending December 2022](#)' (23 February 2023)

¹⁰ Home Office, '[Migrants detected crossing the English Channel in small boats](#)' (2023)