



Illegal Migration Bill Briefing – Amendments on Retrospectivity

House of Lords Report Stage

June 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 to the Illegal Migration Bill ('**the Bill**') at Committee, tabled by Lord Carlile, to end its retrospective effect pursuant to **Clauses 2, 4, 5, 15 and 21**. This is because such provisions are contrary to legal certainty and the principles that underpin the rule of law. For more information on the Bill more widely, please see JUSTICE's detailed [briefings](#).

The retrospective provisions of the Bill

3. JUSTICE refers to 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 await 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 await 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 opposes the Bill's retrospective effect

- 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.

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)

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 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 JUSTICE would further add that it should have a strong evidential basis.

The Government's inadequate and limited justification for retrospectivity

9. The Government has failed to offer any convincing argument, evidence, or explanation as to how the present circumstances are exceptional so as to justify the Bill's wide-ranging retrospective powers. This is unacceptable, given the fact that the proposals represent a complete retroactive overhaul of our asylum law.
10. The Government's proposals rest solely on an alleged deterrent effect. Lord Murray, Minister of State at the Home Office, ('**the Minister**') argued in Committee that the Bill was '*critical*' because, without it, there '*would likely [be] an increase in these unnecessary and dangerous small boat crossings*' which '*could even place more pressure on not only our asylum system, but our health, housing, educational and welfare services, not to mention our services for saving lives at sea*'.⁷ The difficulty with this is the lack of evidence for the alleged deterrent effect, the seriously detrimental consequences for those individuals affected by the Bill and that such a justification could be used to set a precedent for broad retrospective legislation in all kinds of areas that affect our daily lives.
11. On the evidence for a deterrent, first, the Minister raised the fact that Channel crossings were '*down on this time last year*' as potential evidence of the impact of the retrospective announcement of the legislation. This was largely speculative as he also conceded that

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 Hansard, '[House of Lords: Illegal Migration Bill](#)' (24 May 2023)

the *'weather has facilitated a good measure of that'*. It was, in the Minister's own words, *'conjecture'* that numbers would have been higher without the retrospective provisions of the Bill.⁸

12. Whilst it is true that Channel crossings are slightly lower so far this year compared to last year, the evidence does not make a compelling argument that the announcement of retrospective legislation played a key role. Hundreds more individual were detected crossing the Channel in April 2023 than in March 2023, when the Bill (and its retrospective effect) was announced to Parliament.⁹ Numbers arriving in April this year were largely the same as in April 2022. In June 2023, so far 2908 individuals have travelled across the Channel which is very similar to the 3140 individuals who arrived in June 2022.¹⁰ The evidence of a deterrent has limited evidential backing.
13. The Minister argued that there was a direct link between the announcements of government policy and reduction in Channel crossings. There is limited evidence that Home Office announcements of policy or immigration legislation have much impact on the number of small boats crossings across the English Channel. The number of Channel crossings rose following the announcement of the Rwanda policy¹¹ and after the Nationality and Borders Act came into force in June 2022.¹²
14. The Minister also said that Government announcements around Albanian asylum-seekers had directly led to a *'very significant dropping off of that cohort in the small boats'*.¹³ By contrast, the Home Affairs Select Committee report last month said *'it is too early to tell whether a slight reduction in the number of Albanian arrivals between January and March heralds a longer-term reduction'*.¹⁴ Other factors have been cited by Border Force officials for the reduced numbers, such as a change in policy by the social media platform TikTok.¹⁵

⁸ Hansard, ['House of Lords: Illegal Migration Bill'](#) (24 May 2023)

⁹ 2153 individuals in April 2023 compared to 840 individuals in March 2023. Home Office, ['Migrants detected crossing the English Channel in small boats – time series'](#) (2023)

¹⁰ Home Office, ['Migrants detected crossing the English Channel in small boats – time series'](#) (2023) and [Home Office, 'Official Statistics: Irregular migration to the UK, year ending December 2022'](#) (23 February 2023)

¹¹ Home Office, ['Official Statistics: Irregular migration to the UK, year ending December 2022'](#) (23 February 2023)

¹² Home Office, ['Official Statistics: Irregular migration to the UK, year ending December 2022'](#) (23 February 2023)

¹³ Hansard, ['House of Lords: Illegal Migration Bill'](#) (24 May 2023)

¹⁴ House of Commons Home Affairs Select Committee, ['Asylum and migration: Albania'](#) (12 June 2023)

¹⁵ Matt Dathan, ['TikTok advert ban slows Albanian migrant Channel crossings'](#) (The Times, 11 June 2023)

15. Second, the Minister did not adequately answer why the Nationality and Borders Act 2022 ('NABA') was not retrospective when it was addressing the same public policy issue. The Minister argued that the 'structure' of NABA was 'very different' because it did not focus on a duty to remove and disincentivising individuals crossing the Channel.¹⁶ However, as Priti Patel MP (then Home Secretary) said in the Second Reading debate for NABA, the intention was that '*anyone who arrives in the UK via a safe third country may have their claim declined and be returned to a country they arrived from or a third safe country*'.¹⁷ The policy intention was the same but the vast majority of its provisions were not retrospective.
16. Third, the Minister noted that the Government had announced the legislation on 7 March 2023 and that it would apply from this date so there was '*no uncertainty*' about the scheme. It was compared to the announcement of changes to tax law with the subsequent legislation being backdated to the date of the announcement. However, there is plainly a difference between making a well-publicised, specific tax change to a domestic audience and overhauling large swathes of asylum law applying to individuals crossing the Channel for safety, often under the control of people traffickers and smugglers.
17. Finally, the Minister acknowledged correctly that the Home Secretary would retain a discretion to determine the asylum claims of those that arrived on/ after 7 March 2023 before the Bill comes into force. This is in practice unlikely given the considerable asylum caseload backlog. However, even if some such claims were determined, it is completely unacceptable that the relevant legal regime which would apply to two asylum claims of individuals made on the same date would be entirely at the discretion of the Home Secretary.

Conclusion

18. At the conclusion of the committee debate, the Minister admitted that announcing that the Bill applied from 7 March 2023 '*may not have had a decisive impact*'. The evidence 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 would

¹⁶ Hansard, '[House of Lords: Illegal Migration Bill](#)' (24 May 2023)

¹⁷ Hansard, '[House of Commons: Nationality and Borders Bill](#)' (19 July 2021)

set a dangerous precedent that the Government could legislate retrospectively based on anecdotal evidence and conjecture.

19. 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 revoke limited leave to remain granted to victims of modern slavery and human trafficking.
20. 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.
21. JUSTICE supports the amendments of Lord Carlile to Clauses 2, 4, 5, 15 and 21 of the Bill which would end its retrospective effect and would urge Peers to vote for these amendments at report stage.

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