

Briefing Note - The Illegal Migration Bill Impacts on the land border May 2023

1. The Committee on the Administration of Justice (CAJ) is an independent human rights organisation with cross community membership in Northern Ireland and beyond. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.
2. The content of this briefing note refers to the Illegal Migration Bill as introduced to the House of Lords.¹ The clauses and content detailed below are subject to change as the bill progresses.
3. This bill has the potential to cause severe impacts on the land border and on the island of Ireland. It is not clear if the UK government considered these unique impacts before pressing ahead with the legislation. The Common Travel Area and the land border are not mentioned in the bill or the explanatory memorandum. The application of this legislation on the land border is deeply concerning, with some elements requiring clarification.
4. Clause 2 of the Bill provides that the Secretary of State has a duty to make arrangements for the removal of a person from the United Kingdom (UK) if the person meets **all** of four conditions:
5. The **first** of the four conditions concerns how the person entered or arrived in the UK. A person meets condition 1 if any of the following apply:
 - They require leave to enter the UK, but entered the country without this (this includes non-visa nationals)
 - They obtained leave to enter by means which include deception by any person
 - They entered in breach of a deportation order
 - They entered at a time when they were an 'excluded person'
 - They require entry clearance but have arrived at the UK without entry clearance (a visa national)
 - They require Electronic Travel Authorisation (ETA) for travelling to the UK, but have arrived in the UK without ETA
- The **second** condition is that the person entered or arrived in the UK on or after 7 March 2023.
- The **third** condition is that the person did not come directly to the UK from a country in which the person's life and liberty were threatened.
- The **fourth** condition is that the person requires leave to enter or remain but does not have it.

¹ [Illegal Migration Bill as of 03 05 23](#)

Visa Nationals

6. On the face of it, these conditions would seem to capture any visa national resident in the Republic of Ireland (ROI), who enters Northern Ireland (NI) without the correct leave. This includes people with legal residence in ROI but who require a visa to enter the UK (and therefore NI).
7. Visa nationals entering NI via the land border have always been required to comply with UK immigration requirements despite there being no checks on the land border. There have therefore always been penalties for entering unlawfully if a person crosses the land border without obtaining the correct leave. However, the reason that the application of this legislation is particularly concerning is the extremity of the penalties associated with it.
8. A person liable for removal due to meeting the conditions under Clause 2 cannot challenge the decision to detain them by judicial review (Clause 12(4)). This severely limits recourse to justice.
9. There is no permission to apply for bail until 28 days in detention have passed (Clause 12(3)(b)). The immigration detention facility in NI is a short term holding facility. This means that a person can only be detained in NI for a maximum of seven days. Due to the 28-day delay, it will not be possible for a person to apply for bail before being moved from NI to long term detention facilities in Great Britain. This could effectively make obtaining bail in NI impossible. Once removed from NI, a person could potentially lose access to their legal advice, legal aid provision, and will be separated from any community and family supports.
10. Clause 10 states that detention can be on the basis that an immigration officer ‘suspects’ a person meets the four conditions, and they can be detained until a decision is made on whether or not Clause 2 and the ‘four conditions’ applies to them. These detention powers will not be subject to the same statutory limitations as existing detention powers, with a person liable to be detained ‘for as long as the Secretary of State deems necessary’. There is no clarity on how immigration officers will make these decisions based on suspicion and there is a very high risk of racial profiling and discriminatory practices occurring.
11. A person subject to Clause 2 may be removed from the UK to their home country (where it is deemed safe) or a safe third country. This includes for example, Rwanda. Legal residence in ROI, does not guarantee that a person will be returned to ROI.
12. It appears that that this new legislation could result in, for example, a Kenyan national residing legally in Donegal, who travels to Derry to go shopping without obtaining the correct visa, being detained indefinitely in Great Britain without proper recourse to the courts, and potentially removed to a third country that is not the Republic of Ireland.
13. Migrant led organisations like North West Migrant’s Forum have been raising the existing impact of visa requirements on the land border on the island of Ireland. They have highlighted the disproportionate impacts on black, minority ethnic and migrant

people, who are prevented from living cross border lives.² This has been described as a ‘racist hard border’. The application of the Illegal Migration Bill to the land border, without exemptions, will exacerbate these issues and further harden the border for some in our communities.

Electronic Travel Authorisation and Deemed Leave

14. It is also at best unclear whether a person who enters the UK via the land border without Electronic Travel Authorisation (ETA) will ultimately be captured by the four conditions. ETA has been exempted for British and Irish citizens, people who already hold a UK visa and for non-visa nationals with legal residence in ROI. However, non-visa nationals who are not legally resident in ROI, e.g. tourists, will be required to obtain ETA in order to cross the land border, under the UK government’s current plans.
15. Arriving in the UK without ETA, triggers the first of the four conditions under Clause 2. However, non-visa nationals currently enter NI from ROI, on the basis of ‘deemed leave’, which means they automatically hold leave under Article 4 of the Immigration (Control of Entry through Republic of Ireland) Order 1972.³ This implies that the fourth condition of requiring leave and failing to hold it would not be triggered. If all four conditions under Clause 2 are not met, the duty to remove does not apply – at least until such deemed leave expires.
16. However, it is not clear whether entering the UK without ETA impacts the validity of deemed leave. If a failure to hold ETA ultimately voids deemed leave, this could result in, for example, a Brazilian or American (non-visa) national visiting ROI, who travels to NI for a day trip, without obtaining Electronic Travel Authorisation, being detained indefinitely in Great Britain, without proper recourse to the courts and potentially removed to a third country.
17. Even if deemed leave is not impacted, a person holding it does not have any physical evidence of leave, as they cross via the land border. It is therefore not clear how deemed leave can be evidenced if a non-visa national is encountered by immigration enforcement. Given the sweeping powers of detention granted by the Illegal Migration Bill, this needs urgently clarified.

Conflict with the Belfast/Good Friday Agreement and Article 2 of the Windsor Framework

18. The Belfast/Good Friday Agreement commits to the full incorporation into Northern Ireland law of the ECHR. The Illegal Migration Bill undermines the application of those ECHR rights in Northern Ireland, in direct conflict with this commitment.
19. The Belfast/Good Friday Agreement created a duty on the UK Government to incorporate the ECHR into NI law with direct access to the courts and remedies for breach of the ECHR.⁴ Measures within the Illegal Migration Bill such as the limitation on

² [Common Travel Area – North West Migrants Forum](#)

³ Persons eligible for deemed leave arriving from the Republic of Ireland have leave to enter automatically, subject to the provisions of the Immigration (Control of Entry through Republic of Ireland) Order 1972.

⁴ 1998 Agreement, first section titled ‘Rights, Safeguards and Equality of Opportunity’. paragraph 2, ‘The British Government will complete incorporation into Northern Ireland law of the European Convention on

judicial review, disapplication of Section 3 of the Human Rights Act⁵ and restrictions on adherence to interim measures issued by the ECHR⁶, conflict with these commitments, as well as with substantive rights such as the right to a fair hearing.

20. Article 2 of the Windsor Framework (nee Protocol) commits the UK government to ensure no diminution of protections in the 'Rights, Safeguards and Equality of Opportunity' chapter of the Belfast/Good Friday Agreement, as a result of the UK's withdrawal from the EU. The UK government has confirmed that Article 2 applies to everyone who is "subject to the law in Northern Ireland".⁷ The NI Human Rights Commission has asserted that this includes asylum seekers in NI, which has not been disputed by the UK government.⁸
21. The NI Human Rights Commission has raised concerns about a range of potential breaches of Article 2 of the Windsor Framework within the Illegal Migration Bill. They have set out a series of recommendations to the Human Rights (Joint Committee) which seek to clarify whether the Bill complies with Article 2 of the Windsor Framework. These recommendations include asking what steps the Secretary of State has taken to ensure that the Bill complies with Article 2, and that the Human Rights Memorandum to the Bill be amended to set out in detail an assessment of the compliance of the Bill with Article 2.⁹
22. The rights protections of the Belfast/Good Friday Agreement have a north-south dimension and the Windsor Framework commits to maintaining north-south cooperation, avoiding a hard border and protecting the Belfast/Good Friday Agreement, as key objectives. In this context, it seems likely that the wholesale application of the provisions of the illegal migration bill to land border crossings, could constitute a breach of Article 2 and, more broadly, conflicts with the objectives of the Windsor Framework.

Parliamentary Response to Land Border Impacts

23. Stephen Farry MP tabled a probing amendment at Committee and Report stages in the House of Commons, which would provide an exemption from the duty to remove for people who arrive in the UK from the Republic of Ireland via the land border with Northern Ireland.¹⁰ This amendment was not tabled for division.
24. Mr Farry stated during a debate in the House of Commons:

Once again, Home Office legislation fails to take into account the realities of the common travel area and particularly movements on the island of Ireland. Although there is an

Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency

⁵ Clause 1(5) provides that Section 3 of the Human Rights Act 1998 (interpretation of legislation) does not apply in relation to provision made by or by virtue of this Act.

⁶ Clause 53 "Interim measures of the European Court of Human Rights" provides that, where the European Court of Human Rights makes an interim measure, only a Minister of the Crown in person may decide to obey it.

⁷ III (8) [Explainer UK Government commitment to no diminution of rights safeguards and equality of opportunity in Northern Ireland](#)

⁸ 2.17 [NIHRC written evidence to Human Rights \(Joint Committee\)](#)

⁹ [NIHRC written evidence to Human Rights \(Joint Committee\)](#)

¹⁰ Amendment 1 Report Stage [Amendment Paper Report Stage 26 04 23](#)

*open border with no routine immigration checks, UK immigration law continues to apply, and people who cross into the UK, particularly on the island of Ireland, remain at risk of immigration enforcement and legal jeopardy if they are found to be in breach of any immigration rules. Under clause 2, someone who enters the UK via Northern Ireland risks potential detention, deportation to a third country or their home country, and even a ban on ever returning.*¹¹

25. Claire Hanna MP tabled an amendment at Report stage requiring the Secretary of State to give automatic limited leave to remain to persons entering the United Kingdom from ROI to Northern Ireland for the purposes of tourism, and to those residing in ROI accessing goods or services in NI.¹² This amendment was not called.
26. Claire Hanna MP tabled an amendment regarding compliance with Article 2 of the Windsor Framework. This amendment was intended to prevent the direct breach of the Good Friday Agreement and commitments within the Windsor Framework by testing the disregard of certain claims against those international obligations. This amendment was not called.

May 2023

¹¹ [Stephen Farry MP](#); Hansard HC Illegal Migration Bill Volume 730 Clm 925, Tuesday 28 March 2023.

¹² Amendment 190 at Report Stage [Amendment Paper Report Stage 26 04 23](#)