

Briefing Note - The Illegal Migration Act: Impacts on the land border July 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. CAJ shares the concerns raised regarding the devastating impacts of the Illegal Migration Act 2023 and opposed the passing of this legislation.¹
3. This briefing note highlights in particular, the potential impacts of this legislation 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 Act or the explanatory notes.² The application of this legislation on the land border is deeply concerning, with some elements requiring urgent clarification.
4. Section 2 of the Act provides that the Secretary of State has a duty to make arrangements for the removal of a person from the United Kingdom (UK) (duty to remove) 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 the day on which this Act was passed.
- 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 [Civil society statement against the passage of the Illegal Migration Bill, July 2023](#)

² [Illegal Migration Bill Explanatory Notes](#)

Visa Nationals

6. On the face of it, the duty to remove under Section 2, would seem to capture any visa national resident in the Republic of Ireland (ROI), who enters Northern Ireland (NI) and meets the four conditions. This includes people with legal residence in ROI but who require a visa to enter the UK (and therefore NI) and enter without the correct visa.
7. The UK government has asserted that visa nationals entering NI via the land border have always been required to comply with UK immigration requirements. This is not disputed; the reason that the application of the Illegal Migration Act to the land border is concerning is the extremity of the penalties associated with it. This includes sweeping powers for unlimited detention based on suspicion by immigration officers, limitations on the ability to judicially review detention, and limitations on the right to apply for bail. There is no provision for a person who is legally resident in ROI, to ensure they are returned to their home in ROI if they are subject to the duty to remove under Section 2. Instead, they may face indefinite detention in Great Britain (GB) and removal to a third country.
8. Given the nature of cross border life on the island of Ireland, it is particularly disproportionate for a person who is legally resident in ROI to be subject to these measures if they cross the border without the correct visa. 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 GB without proper recourse to the courts, and potentially removed to a third country that is not ROI.
9. 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.³ This has been described as a ‘racist hard border’. The application of the Illegal Migration Act to the land border, without exception, will exacerbate these issues and further harden the border for some in our communities.

Electronic Travel Authorisation and Deemed Leave

10. Separate from the issues facing visa residents resident in ROI, there remain concerns that the provisions of the Illegal Migration Act could apply to non-visa national visitors who do not obtain Electronic Travel Authorisation (ETA) and cross the land border.
11. ETA requirements have been exempted for for non-visa nationals with legal residence in ROI. However, non-visa nationals who are not legally resident in ROI, such as tourists, will be required to obtain ETA in order to cross the land border.
12. Arriving in the UK without ETA, triggers the first of the four conditions under Section 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 1972.⁴ This implies that the fourth condition

³ [Common Travel Area – North West Migrants Forum](#)

⁴ 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.

of requiring leave and failing to hold it would not be triggered. If all four conditions under Section 2 are not met, the duty to remove does not apply – at least until such deemed leave expires.

13. 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 ETA, being subject to the penalties of the Illegal Migration Act.
14. 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 Act, this needs urgently clarified.

15. During the Act's passage in the House of Lords, Baroness Suttie raised this issue,

“Finally, can the Minister clarify whether non-visa nationals entering Northern Ireland and the UK from the Republic of Ireland without an ETA will impact the validity of deemed leave, as set out under Article 4 of the Immigration (Control of Entry through Republic of Ireland) Order 1972? If he does not know the answer to that one immediately, I will be happy to receive a letter if it could be placed in the Library.”⁵

As far as we are aware, no response has been received to this request.

Conflict with Article 2 of the Windsor Framework

16. 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 Act 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

17. Stephen Farry MP tabled an 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.⁶ 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 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

⁵ [Illegal Migration Bill - Hansard - UK Parliament](#)

⁶ Amendment 1 Report Stage [Amendment Paper Report Stage 26 04 23](#)

risks potential detention, deportation to a third country or their home country, and even a ban on ever returning.”⁷

18. In response to a similar amendment tabled in the House of Lords by Baroness Ritchie of Downpatrick, the UK government acknowledged the concerns raised regarding the application of the duty to remove at the land border.⁸ During a Motion to Regret debate regarding ETA, Parliamentary Under Secretary of State for Migration and Borders, Lord Murray of Blidworth stated,

“We have made it clear that prosecutions for illegal entry offences will focus on egregious cases and not accidental errors.”⁹

This statement was referenced again in Lord Murray’s response to Baroness Ritchie’s amendment during Committee Stage in the House of Lords,

“I recognise the issue she has raised and accept that some individuals may, entirely unwittingly, enter the UK without leave via the Irish land border, as I said yesterday...We are examining this issue further. I would point the noble Baroness to the regulation-making power in Clause 3, which will enable us to provide for exceptions to the duty to remove where it would be appropriate to do so.”

19. At Report stage Lord Murray further stated,

“Amendment 7 in the name of the noble Baroness, Lady Ritchie, deals with entry into the United Kingdom via the Irish land border. As is currently the case, tourists from countries which require visas for them to come to the UK as visitors should obtain these before they travel. That said, I recognise the issue and accept that some individuals may inadvertently enter the UK without leave via the Irish land border. We are examining this issue further. I point the noble Baroness to the regulation-making power in Clause 3, which would enable us to provide for exceptions to the duty to remove where it would be appropriate to do so.”¹⁰

20. Notwithstanding our broader concerns regarding the Illegal Migration Act, we welcome this commitment by the UK government to examine this issue and consider exceptions to the application of this legislation on the land border. There is recent precedent for an exception provided through the exemption of legal residents of ROI from the ETA scheme. This exemption was welcomed across the island of Ireland and demonstrated an awareness of the unique impact of the ETA scheme on the land border and the Common Travel Area. This exception serves as a template for an exception to the Illegal Migration Act for land border crossings.
21. We note that the Illegal Migration Act as passed contains powers to provide for exceptions to the Duty to Remove under Section 4(7) which empowers the UK government to act to address this issue.

CAJ, July 2023

⁷ [Stephen Farry MP](#); Hansard HC Illegal Migration Bill Volume 730 Clm 925, Tuesday 28 March 2023.

⁸ Amendment 12 Committee Stage, Amendment 7 Report Stage

⁹ [Contribution by The Parliamentary Under-Secretary of State for Migration and Borders \(Lord Murray of Blidworth\) \(Con\)](#)

¹⁰ [Contribution by Lord Murray of Blidworth \(Con\)](#)

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