Illegal Migration Act briefing [October 2023]

Introduction

1. The UK government has committed to further reforming the asylum system. In July 2023 the Illegal Migration Act was passed in Parliament, gaining Royal Assent on 20 July 2023. This briefing examines the Act, and its possible impact on individuals and communities.

In summary

2. In response to the small boats phenomenon, the government is seeking to implement further reform to the asylum system with new measures to deter illegal entry and facilitate removals for those who have entered the UK without permission.

3. The Act seeks to bring in changes to the asylum system by making anyone who arrives without permission to enter in the UK permanently inadmissible to the UK asylum system,

and unable to regularise their stay or access citizenship in the future.

4. The Act places a statutory duty on the government regarding removals for those who enter the UK illegally. There are further reforms around the detention of ‘illegal entrants’, including child detention and the family returns process. There are amendments to the National Transfer Scheme impacting unaccompanied asylum-seeking children, and the creation of entitlements to asylum support for inadmissible asylum seekers.

5. Concerns over the Act include reservations over the government’s ability to complete removals and the risk of many people being unable to access asylum or any form of leave to remain. Other concerns exist over the reversal of key safeguards around child detention and removals, and the accommodation of unaccompanied asylum-seeking children. There is also uncertainty over the impact on the asylum accommodation estate and whether these measures could result more people placed in asylum accommodation long-term.

Overview of policy background

6. The Nationality and Borders Act 2022 initiated significant reform of the asylum system and bringing in new measures to penalise illegal entry to the UK. However, since its passage, the number of arrivals across the Channel via small boats continued to rise in 2022, while government statistics revealed that the backlog of asylum claims had also steadily grown. [i]

7. In December 2022 the Prime Minster made an announcement stating that increasing small boats arrivals was placing further challenges on the asylum system. In January 2023, he announced five key priorities. Amongst these was passing new laws to stop small boats crossing the Channel.

8. On 7 March 2023 the Illegal Migration Bill had its first reading in Parliament. The Act completed its passage through parliament, gaining Royal Assent on 20 July 2023. Some provisions contained in the Act have come into effect immediately such as the prohibition on accessing leave to remain and citizenship for those impacted by the duty to remove. However, others like the duty to remove itself are not yet in force, and the Prime Minister has stated that we will likely see these reforms implemented in early 2024.

9. While the government has stated that it hopes the Illegal Migration Act will help put a stop to small boats arrivals, its reach is far wider, as it contains reforms covering removals, immigration detention, inadmissibility, unaccompanied asylum-seeking children and safe and legal routes.

Illegal Migration Act

Removals and inadmissibility

10. The Act contains two key measures:

- First, it places a legal duty on the Home Secretary to remove or at least make arrangements for the removal of anyone who enters the UK without permission to enter or who has obtained permission to enter by deception. The duty to remove applies to arrivals from on or after the date of Royal Assent (20 July 2023) but there is a further section which enables the government to change the date of application in the secondary regulations so it can be expected that this might be amended later before the provisions come into practice.

- The second main provision is to deny such people access to the asylum system. Anyone who enters the

UK ‘illegally’ will therefore be unable to obtain lawful status in the UK and will be treated as permanently inadmissible. This means that their asylum claim will not be considered in the UK but also that any human rights or trafficking claim will also not be considered. These provisions could apply retrospectively to anyone arriving on or after 20 July 2023.

11. Under the provisions, people declared inadmissible can only be removed to their country of origin if their country appears on a list of designated safe countries under Section 59 of the Act. Nationals of any other country who cannot be removed to their home country due to the risk of persecution can be removed to a country appearing on the list of designated safe third countries, which includes Rwanda. This is because the Home Office would be unable to remove them to their country of origin without having assessed their risk upon return. While third country removals to Rwanda have so far been blocked by ongoing litigation including a previous order from the European Court of Human Rights, Section 55 of the Act enables the government to override any interim measures from the European Court of Human Rights which could prevent removals.

12. The Act does not place a duty on the government to remove unaccompanied asylum-seeking children in this regard, but it does still give them powers to remove this group. The Act stipulates that removals of unaccompanied asylum-seeking children would only occur in specific cases such as where they come from a safe country of origin or family reunification is possible.

13. Previous legislation protecting victims of trafficking from removal during the 30-day recovery and reflection period has also been amended and potential survivors of trafficking can now be denied support and removed during this window. Since Albania is listed on the designated safe country list and there are a high number of trafficking claims made in the UK by Albanian nationals, it is possible that these powers could lead to some people - including children - who have claimed to be victims of trafficking being removed from the UK to Albania.

14. There is scope for some other people to be exempted from the duty to remove, with new powers enabling the government to create further exemptions in secondary regulations.

Detention and bail

15. The Act significantly expands detention powers, enabling the government to detain arrivals until removal or for up to 28 days, although unaccompanied children may apply for bail after eight days. Pregnant women can only be detained

for a period of up to 72 hours or seven days if ministerial approval is given. The Act is also designed to limit possibilities to challenge detention and removals, as well as enabling the Home Office to have more freedom to use different types of sites for immigration detention.

16. Of significance are changes to the ability to detain and remove families with children, reversing policies put in place by previous governments. There will no longer be a requirement for children to be held in ‘pre-departure accommodation’ and no longer a seven-day limit to hold children prior to removal. In essence this re-enables the detention of children. Connectedly, the family returns process to support the return of families with children is also being removed, no longer requiring family returns panel meetings with families prior to arranging departures.

Asylum support

17. The Act legislates a change to eligibility for asylum support for inadmissible asylum seekers. Currently, asylum seekers who receive an inadmissibility decision should in theory have their support discontinued. However, the Act creates entitlement to Section 4 support for those declared

inadmissible. The government has not confirmed its intentions regarding this provision, but it could be that this is to ensure that support is available to those where there is a duty to remove but who are not detained, and who would otherwise be destitute.

Unaccompanied children

18. There are a number of provisions relating to unaccompanied asylum-seeking children (UASC) including amendments to the National Transfer Scheme (NTS).

19. The Home Office is creating new powers enabling it to provide support and accommodation for unaccompanied children. This would not necessarily mean the Home Office will provide accommodation and support, but it now has the power to do so if necessary. There is no proposed time limit on how long the Home Office would accommodate a child, but the explanatory notes indicate the intent to provide accommodation until a transfer takes place under the NTS. The Act would also enable the use of third parties to accommodate unaccompanied children.

20. Some of the provisions make amendments to the transfer of children's care through the NTS. This includes:

- The power to direct local authorities to provide accommodation for unaccompanied children through the

NTS.

- Sections outlining a timeframe of five working days to complete transfers.
- Duties placed upon local authorities to share information with the Home Office about placements upon request.
- The ability to impose orders on local authorities who fail to comply to requests to complete transfers or provide information to the Home Office.
- Powers enabling the Home Office to end the provision of accommodation by local authorities to a ‘looked after’ child.
- Key changes around which children can be transferred from one local authority to another through the NTS. Transfers of unaccompanied children and not just unaccompanied asylum-seeking children will now be permitted through the NTS. This amendment has been made so that unaccompanied children who are declared inadmissible to the asylum system are eligible to be transferred through the NTS (this is enabled by changing the legal definition of a ‘relevant child’).

21. The Home Office has stated that it will not become a ‘corporate parent’ and clarified that the local authority will remain responsible for the care of unaccompanied asylum-seeking children. The Home Office has also reassured local authorities that powers to accommodate are intended to be used for short-term and temporary purposes in individual cases.

22. The government made further amendments during the Act's passage which could see some children automatically classed as adults should they refuse to allow scientific methods of assessing their age, and the removal of appeal rights against age-assessments where the Act's removal duty applies. Further, a person can be removed from the UK even while they have ongoing judicial review proceedings such as against an age-assessment decision.

Safe and legal routes

23. There are sections facilitating the introduction of an annual cap on the number of refugees who can be admitted to the UK through 'safe and legal routes'. The government must consult with local authorities over their capacity to accommodate and support refugee arrivals. However, they will not be required to consult to introduce an emergency humanitarian route. The explanatory notes state that annual caps may be applied for five years at a time. They also indicate that refugee resettlement schemes, including the Afghan schemes, will not be considered part of any cap.

Analysis and commentary

24. **Impacts go beyond small boats arrivals**. Whilst the messaging from government has been on targeting small boats arrivals, almost all asylum seekers will be impacted as

most arrive without permission to enter. Not all asylum seekers arrive by small boats and whilst some may have come to the UK on a valid visa route before applying for asylum, many will still arrive through other clandestine routes or arrive using false documentation. They would also be impacted by the duty to remove and inadmissibility sections.

25. **More returns might not be possible**. Critics have pointed out that removals to safe third countries are entirely dependent on bilateral agreements with other third countries. The Act is attempting to build on a system that, without agreements with EU countries regarding returns, could be ineffective in increasing removals. There is a limited number of third countries to which someone can be removed at present, based on the Home Office's published safe country list and even if the country is deemed generally safe by the Home Office, it might not be for the individual. The government's plans to remove asylum seekers to Rwanda has fuelled debate over whether it could be unsafe for some refugees and in breach of international law due the principle of non-refoulement.[ii]

26. **The provisions could be seen as undermining the UK's international obligations to protect refugees**. There are no time limits for how long someone can be inadmissible to the UK asylum system. Previous inadmissibility policy provided a guide of around six months for third countries to agree to admit an asylum seeker before the UK may have had to accept responsibility for

processing the claim. However, this new system could mean claimants are left permanently inadmissible. Critics have concerns about this and how compatible this is with international law as it could be denying access to asylum. The UN said it would undermine the whole international system of refugee protection and has called for the legislation to be repealed. Therefore, there could be a wider political and global impact of the Act and some countries might already be considering implementing similar dramatic solutions to responding to rising numbers of arrivals. Whilst internally, a system that leaves many asylum seekers permanently inadmissible and, in many cases, unremovable but unable to regularise their stay, could result in long-term problems for the Home Office but also the communities they live in. It is unclear what plans the government has to address such a problem.

27. **The asylum accommodation estate could become larger**. A key concern for local authorities will be the continued and growing demand for asylum accommodation. Separately, the government has made it a priority to move asylum seekers out of hotels by the end of 2023 (there were over 50,000 people accommodated in hotels nationally by June 2023)[iii]. However, with the prospect that many asylum seekers could find themselves permanently inadmissible, unremovable, and possibly entitled to asylum accommodation, there are fears that this will leave thousands effectively stuck in either immigration detention or asylum accommodation centres long term and with no

possible resolution in sight. The Home Office will need to source new large-scale accommodation sites and many of the recent proposals for such type of sites have been controversial and unpopular.

28. **Provisions could be expensive to enact**. Reports suggest the provisions could result in enormous costs to facilitate removals and provide accommodation for inadmissible asylum seekers, with the Refugee Council finding that it could cost up to £9 billion over the first three years of its implementation.[iv]

29. **The needs of vulnerable children may be compromised**. The UNHCR has criticised the Act for ignoring protections for children under the UN Convention on the Rights of the Child, by failing to exempt children from provisions such as those permanently denying access to legal status or citizenship, and safeguarding them from indefinite detention. Estimates suggest that as many as 45,000 children could find themselves inadmissible should these reforms come into force.

30. **More children could find themselves in precarious accommodation settings.**

    - Powers enabling the Home Office to accommodate children upon arrival have raised concerns from children's charities about the suitability of such an approach and the likelihood that more children are

placed in unstable, unsuitable, and unsafe settings like hotels, unverified by children's social care teams and from where children have gone missing in the past.

- The power to remove a child from the care of a local authority has raised eyebrows and some organisations have questioned whether the Home Office will use these powers to accommodate children in reception centres. The Association of Directors of Children's Services has said the reforms appear to undermine responsibilities from the Children Act 1989 as well as contradict the government's recent messaging about reforming the children's social care system.

- There are fears that the Act could provoke children to run away from social care, placing them further at risk of trafficking and exploitation. The Home Office has reassured local authorities that it intends to use these powers to accommodate children only temporarily and that local authorities remain responsible for the care of unaccompanied children.

31. **Efforts to increase foster placements for asylum-seeking children could be undermined**. Another possible impact of the Act could be on the willingness of foster carers to support children. There are worries that potential foster parents may be dissuaded from supporting unaccompanied asylum-seeking children due to fears that the children could be facing active efforts from Home Office

to remove them once they turn 18, despite still being in care. Negative government messaging towards asylum seekers, including children, could have an impact on public attitudes and undermine efforts to recruit potential foster carers, placing further burdens on local authorities to provide care as well as affecting the capacity to respond to the NTS.

32. **The Act could stoke further tensions and divisions within communities**. With anti-asylum seeker demonstrations at asylum hotel accommodation sites, there are fears from local authorities and anti-racism campaign groups over how the government's communications over the Act could further incite hate and hostility from receiving communities towards new arrivals. With asylum dispersal now mandatory across the country and increasing challenges faced by the public as a result of the cost-of-living crisis, many local authorities will be mindful of the risk to cohesion, crime and safety amongst their communities and the need to safeguard vulnerable refugees and asylum seekers.

33. **Consultation with local government must be meaningful**. Local authorities are likely to welcome the government's willingness to consult with them over their ability to respond to the needs of refugees through safe and legal routes. However, further details are needed about the extent of this consultation and what future funding and resources might be made available to help with key needs for new arrivals such as access to housing and integration

support. Local authorities will want assurances that any consultation will be a two-way process and ensure the concerns of local councils are listened to and will influence policy decisions.

Key information

Briefing on the Illegal Migration Bill. Public Law Project. March 2023.

Illegal Migration Act. UK Parliament. 25 May 2023.

Illegal Migration Act: Explanatory Notes. UK Parliament. 7 March 2023

The Illegal Migration Act 2023: what has changed? Free Movement. 28 July 2023.

The Illegal Migration Bill. UNHCR. 22 March 2023.

Illegal Migration Bill 2023 briefing. JCWI. April 2023.

Illegal Migration Bill Impact Assessment. Refugee Council. March 2023

Illegal Migration Bill: Overarching factsheet. Home Office. 11 May 2023.

PM statement on illegal migration. Prime Minister’s Office. 13 December 2023.

Quarterly Immigration Statistics. Home Office. 24 August 2023.

Statement on Illegal Migration Bill. ADCS. 24 March 2023.

UK policies to deter people from claiming asylum. Migration Observatory. 4 April 2023.

What is in the Illegal Migration Bill?. Free Movement. 8 March 2023.

About this briefing

This briefing was prepared by Stefan Robert in April 2023 and last updated in October 2023.
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[i] By the end of December 2022, the number of asylum claimants still awaiting a decision was over 160,000 whilst the asylum accommodation estate had grown by over 30% in the last year with 110,000 people supported in Home Office

accommodation. Meanwhile over 45,000 people crossed the Channel in small boats in 2022.

[ii] Non-refoulement refers to a principle in international law outlined in Article 33(1) of the Refugee Convention. It prohibits states from returning asylum seekers to countries where they are at risk of persecution.

[iii] Quarterly Immigration Statistics. Home Office. 24 August 2023.

[iv] Illegal Migration Bill Impact Assessment. Refugee Council. March 2023

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