

ILLEGAL MIGRATION BILL

EXPLANATORY NOTES ON LORDS AMENDMENTS

What these notes do

- 1 These Explanatory Notes relate to the Lords Amendments to the Illegal Migration Bill as brought from the House of Lords on 10 July 2023 (Bill 347).
- 2 These Explanatory Notes have been prepared by the Home Office in order to assist the reader of the Bill and the Lords Amendments, and to help inform debate on the Lords Amendments. They do not form part of the Bill and have not been endorsed by Parliament.
- 3 These Explanatory Notes, like the Lords Amendments themselves, refer to HL Bill 133, the Bill as first printed for the Lords.
- 4 These Explanatory Notes need to be read in conjunction with the Lords Amendments and the text of the Bill. They are not, and are not meant to be, a comprehensive description of the Lords Amendments.
- 5 Lords Amendments 3 to 5, 10, 11, 13 to 19, 21, 24 to 29, 68 to 72, 75 to 89, 91, 92, 94, 96 to 101, 105, 106 and 108 to 114 were tabled in the name of the Minister, Lord Murray of Blidworth.
- 6 Lords Amendments 1 and 90 were tabled by Baroness Chakrabarti, and were opposed by the Government.
- 7 Lords Amendment 2, 12, 20, 22, 39 to 49, 57 and were tabled by Lord Carlile of Berriew, and were opposed by the Government.
- 8 Lords Amendments 6, 30, 32, 34, 51 to 55, 58 to 60 and 63 to 67 were tabled by Lord Hunt of Kings Heath, and were opposed by the Government.
- 9 Lords Amendments 7, 23, 73 and 74 were tabled by Lord Etherton, and were opposed by the Government.
- 10 Lords Amendment 8 was tabled by Lord Dubs, and was opposed by the Government.
- 11 Lords Amendment 9 was tabled by Lord German, and was opposed by the Government.
- 12 Lords Amendments 31, 33, 35 and 36 were tabled by Baroness Mobarik, and were opposed by the Government.
- 13 Lords Amendments 37 and 38 were tabled by Baroness Lister of Burtsett, and were opposed by the Government.
- 14 Lords Amendments 50 and 93 were tabled by the Bishop of Durham, and were opposed by the Government.

- 15 Lords Amendment 56 was tabled by Lord Randall, and was opposed by the Government.
- 16 Lords Amendments 61 and 62 were tabled by Lord Morrow, and were opposed by the Government.
- 17 Lords Amendment 95 was tabled by Lord Hope of Craighead, and was opposed by the Government.
- 18 Lords Amendment 102 was tabled by Baroness Stroud, and was opposed by the Government.
- 19 Lords Amendment 103 was tabled by Lord Coaker, and was opposed by the Government.
- 20 Lords Amendments 104 and 107 were tabled by the Archbishop of Canterbury, and were opposed by the Government.
- 21 In the following Commentary, an asterisk (*) appears in the heading of any paragraph that deals with a non-Government amendment.

Commentary on Lords Amendments

*Lords Amendments 1 and 7: Introduction

- 22 Lords Amendment 1 would replace Clause 1 of the Bill with provision requiring compliance with specified international obligations engaged by the Bill. Lords Amendment 7 is consequential on Lords Amendment 1, it would remove Clause 4(1)(d) which provides that the duty to make arrangements for removal of a person applies notwithstanding that the person makes an application for judicial review in relation to their removal from the United Kingdom ("UK").

*Lords Amendments 2, 12, 20 and 22: Duty to make arrangements for removal

- 23 Clause 2 provides that the Secretary of State is under a duty to make arrangements for the removal of a person from the UK if the person meets the four conditions set out in that clause. The second condition is that the person entered or arrived in the UK without the necessary authorisation (as specified in Clause 2(2)) on or after 7 March 2023. Lords Amendment 2 would change the 7 March date to the date Clause 2 comes into force. Lords Amendments 20 and 22 are consequential on Lords Amendment 2.

Lords Amendments 3, 5, 10, 13, 71, 97 and 106: References to a person's home country

- 24 The Bill, including the amendments to section 80A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") in Clause 57, alternatively refers to a country of which a person is a national or to a country of which a person is a national or citizen. For consistency, these amendments would provide that throughout the Bill (and section 80A of the 2002 Act) a reference to a national, includes a citizen.

Lords Amendment 4: Power to provide for exceptions

- 25 Lords Amendment 4 would provide that regulations made under Clause 3(7) specifying other exceptions from the removal duty under Clause 2 are subject to the made affirmative procedure. This would give effect to a recommendation of the Delegated Powers and Regulatory Reform Committee.

*Lords Amendments 6, 30, 32, 34, 51 to 55 and 58 to 67: Modern slavery claims

- 26 Lords Amendment 6 would omit Clause 4(1)(c) which provides that the duty to make arrangements for removal of a person applies notwithstanding that the person claims to be a victim of slavery or human trafficking. Lords Amendments 12, 30, 32, 34, 51 to 55 and 58 to 67 are consequential on Lords Amendment 6. Amongst other things, these amendments would remove Clauses 22 to 24 (Lords Amendments 60 to 62) which disapply certain provisions relating to the provision of support to potential victims of modern slavery in England and Wales, Scotland and Northern Ireland respectively. Taken together, these amendments, in the words of the member's explanatory statement, "seek to amend the Bill so that potential and recognised victims of trafficking will not be detained or removed before they get the opportunity to submit an application to the NRM and have it duly considered". The National Referral Mechanism or NRM is the system by which potential victims of modern slavery are identified and supported.

*Lords Amendments 8 and 9: Inadmissibility of asylum and certain human rights claims

- 27 Clause 4(2) provides that if a person meets the four conditions in Clause 2 makes a protection claim or a human rights claim in relation to their home country, the Secretary of State may refuse to grant asylum to that person. These Explanatory Notes relate to the Lords Amendments to the Illegal Migration Bill as brought from the House of Lords on 10 July 2023 (Bill 347).

of State must declare the claim inadmissible. Lords Amendment 8 would make any such claims by an unaccompanied child admissible in the UK asylum system. Similarly, Lords Amendment 9 would make any such claim admissible within the UK asylum system where a person has not been removed from the UK within six months of the claim being declared inadmissible.

Lords Amendment 11: Meaning of "application for judicial review"

- 28 Lords Amendment 11 to Clause 4(6) would expand the definition in the Bill of the term "application for judicial review" to cover an application to the judicial review jurisdiction of the Upper Tribunal or the Special Immigration Appeals Commission.

Lords Amendments 14 to 19 and 21: Removal for the purpose of clauses 2 and 3

- 29 Clause 5 determines the country to which an illegal migrant may be removed to having regard to the bar on refoulement under the Refugee Convention.
- 30 Clause 5(4) provides that a national of a country listed in new section 80AA of the 2002 Act (the list covers EU and EEA countries plus Albania and Switzerland) who has made a protection or human rights claim may not be removed to their home country (that is, the country of which they are either a national or have a passport or other identity document), and exceptional circumstances prevent their removal there. In such a case, they may instead be removed to the country from which they embarked or to a safe country where they will be admitted. These amendments would apply the same approach to a person who holds a passport or identity document in respect of a section 80AA country. In other words, a person who holds such a passport or identity document would be subject to removal to that section 80AA country unless they make a protection or human rights claim and exceptional circumstances prevent their removal there. The amendments would enable, for example, an Indian national with a French identity document to be returned to France notwithstanding that they make a protection claim in relation to France and there are no exceptional circumstances that prevent their removal there.
- 31 Lords Amendment 15 would supplement the reference to a country in subsection (4)(b) of Clause 5 with a reference to a territory, for consistency with the earlier reference in subsection (4) to a country or territory within subsection (3)(a) or (b) of that clause.

*Lords Amendment 23: Restrictions on removal destinations: LGBT persons

- 32 Lords Amendment 23 would prevent LGBT people being removed to the countries specified in the amendment and prevent the removal of any person to a country which is subject to proceedings under Article 7 of the Treaty on European Union (which sets out the mechanism to suspend certain rights of a Member State where there is a clear risk of a serious breach by the Member State of the values of the European Union referred to in Article 2 of the Treaty).

Lords Amendments 24 to 27: Further provisions about removal

- 33 Lords Amendments 24 to 27 would supplement the reference to the Secretary of State in clause 7(8) and (9) with a reference to an immigration officer.

Lords Amendments 28 and 29: Other consequential amendments relating to removal

- 34 The Bill provides that captains of ships and aircraft, train managers or drivers of vehicles must prevent a person who is being removed from disembarking in the UK before their removal, and extends the criminal offence under section 27 of the Immigration Act 1971 ("the 1971 Act") for those who knowingly permit a person to disembark. Under current provisions in the 1971 Act it is an offence under section

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24(1)(f) of that Act for a person to disembark, and this then allows for the use of reasonable force under section 3 of the Criminal Law Act 1967 (which enables a person to use reasonable force to prevent a crime). To bring the removal provisions in the Bill into line with those under the 1971 Act, these amendments would apply the existing criminal offence under section 24(1)(f) of the 1971 Act to persons being removed under this Bill.

***Lords Amendments 31, 33 and 35 to 38: Powers to detain unaccompanied children, families and pregnant women**

- 35 Clause 10 provides that an unaccompanied child may only be detained in circumstances specified in regulations. There is also a power for the regulations to specify time limits which are to apply in relation to the detention of unaccompanied children where they are being detained for the purposes of removal. Lords Amendment 31 would remove these provisions and apply the limitations on the detention of unaccompanied children in paragraph 18B of Schedule 2 to the 1971 Act. Amongst other things, those limitations place a 24-hour time limit on the detention of an unaccompanied child. Lords Amendments 35 and 36 are consequential on Lords Amendment 31.
- 36 Lords Amendment 33 would omit Clause 10(4) of the Bill. The effect of this amendment would be to retain the 72-hour time limit on the detention of (accompanied) children and their families (the 72-hour time limit may be extended to a maximum of seven days on the authorisation of a Minister of the Crown).
- 37 Lords Amendment 37 would omit Clause 10(10). The effect of this amendment would be to retain the 72-hour time limit on the detention of pregnant women (the 72-hour time limit may be extended to a maximum of seven days on the authorisation of a Minister of the Crown). Lords Amendment 38 is consequential on Lords Amendment 37.

***Lords Amendments 39 to 49: Period for which persons may be detained**

- 38 Clause 11 replaces in part the common law principles governing the period for which a person may be detained under immigration detention powers with a codified statutory version of the second and third principles. The four principles, which apply with necessary modification to all immigration detention powers, are as follows:
- (i) the Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
 - (ii) the deportee may only be detained for a period that is reasonable in all the circumstances;
 - (iii) if, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period, they should not seek to exercise the power of detention;
 - (iv) the Secretary of State should act with reasonable diligence and expedition to effect removal.
- 39 As well as codifying, in part, the Hardial Singh principles, this clause also overturns the common law principle established in *R(A) v SSHD* [2007] EWCA Civ 804 (and later authorities) that it is for the court to decide, for itself, whether there is a reasonable or sufficient prospect of removal within a reasonable period of time.
- 40 Lords Amendments 39 to 49 would preserve the Hardial Singh principles in their current form.

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*Lords Amendment 50: Transfer of children from the Secretary of State to a local authority and vice versa

- 41 Clause 16 facilitates the transfer of an unaccompanied child from accommodation provided by the Secretary of State to a local authority and also enables the Secretary of State to direct a local authority to transfer a child into accommodation provided by the Secretary of State. Lords Amendment 50 would limit this “vice versa” power such that it could only be exercised where it was in the best interests of the child.

*Lords Amendments 56 and 57: Modern slavery: provisions relating to removal and leave

- 42 The Council of Europe Convention on Action against Trafficking in Human Beings (“ECAT”) provides that once there are reasonable grounds to believe that a person is a victim of trafficking, states have certain obligations to that person (such person being a “potential victim”). Part 5 of the Nationality and Borders Act 2022 (“the 2022 Act”), which came into force on 30 January 2023, placed a number of the provisions of ECAT into domestic law. Section 61 of the 2022 Act provides for a minimum 30-day recovery and reflection period for potential victims of modern slavery during which, subject to section 63, the victim must not be removed from the UK; section 62 provides that only one recovery period will be provided to a potential victim, unless the Secretary of State considers it appropriate to provide a further period of protection from removal in the particular circumstances of the case, or unless the further instance of exploitation occurred after the previous reasonable grounds decision; section 63 sets out disqualifications to providing a recovery period, support or temporary leave to a potential victim of modern slavery based on grounds that the individual is a threat to public order or has claimed to be a victim in bad faith (“the public order disqualification”); section 64 (which inserts section 50A into the Modern Slavery Act 2015) sets out obligations to provide potential victims with assistance and support to aid their recovery during the recovery period; and section 65 sets out the circumstances in which the Secretary of State must grant temporary, limited leave to remain to confirmed victims of modern slavery. The public order disqualification may currently be applied to the category of persons listed in section 63(3), including certain foreign national offenders. Clause 21 extends the operation of the public order disqualification such that the consequences listed in section 63(2) of the 2022 Act also automatically applies to an illegal migrant if the Secretary of State is required under Clause 2(1) to make arrangements for their removal from the UK, and a decision (known as a reasonable grounds decision) has been made by the relevant Home Office competent authority that they are a potential victim of modern slavery.
- 43 Clause 21(2) and (3) provide for an exception to the automatic application of the public order disqualification, namely where the Secretary of State is satisfied that a person is cooperating with a public authority in connection with an investigation or criminal proceedings in respect of the conduct or alleged conduct resulting in the positive reasonable grounds decision or which was relevant to any subsequent conclusive grounds decision. In order for the exception to apply, the Secretary of State must consider it necessary for that person to be present in the UK to provide that cooperation and must consider the public interest in the person providing that cooperation to outweigh any significant risk of serious harm to members of the public posed by that person.
- 44 Clause 21(5) sets out that for the purposes of the exception to disqualification on the

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basis of the person's cooperation with an investigation, the Secretary of State must assume that it is not necessary for the person to be present in the United Kingdom to provide the cooperation in question. This presumption applies unless the Secretary of State considers that there are compelling circumstances which require the person to be present in the United Kingdom for that purpose. Clause 21(6) provides that in determining whether there are compelling circumstances, the Secretary of State must have regard to guidance.

- 45 Lords Amendment 56 would provide that the public order disqualification does not apply to a person if they have been exploited in the UK.
- 46 Lords Amendment 57 would omit Clause 21(5) and (6) and instead confer a power on the Secretary of State, by regulations, to make provision about the circumstances in which it is necessary for a person to be present in the UK to provide cooperation of the kind mentioned in Clause 21(3).

Lords Amendments 68 to 70 and 75 to 87: Factual suspensive claims

- 47 The Bill, as introduced in the House of Lords, provided for a person to challenge their removal on the basis that the Secretary of State had made a mistake of fact in deciding that the person met the removal conditions in Clause 2 (for example, a person may argue that they entered the country illegally before 7 March 2023 rather than after that date). These Lords amendments would replace "factual suspensive claims" with what would become a "removal conditions suspensive claim" which will enable a person issued with a removal notice to make any claim that they do not meet the removal conditions; as now, there would be an avenue of appeal to the Upper Tribunal if the claim was refused.

Lords Amendments 72 and 108. Power to amend the definition of "working day"

- 48 Clauses 37 contain definitions which apply for the purposes of clauses 37 to 51 (legal proceedings). These include a definition of the expression "working day". The term is defined in Clause 37(8) as any day other than a Saturday, Sunday, Christmas Day, Good Friday or a bank holiday. The expression "working day" is used in Clauses 47 and 48 in three contexts; to set a period within which action must be taken by the Secretary of State to consent to new matters being raised on an appeal; to set the period within which appeals or applications must be made by the affected person; and to set the period in which the Upper Tribunal must determine appeals and applications. Clause 37(9) confers a power on the Secretary of State by regulations to amend the definition of "working day". Lords Amendment 72 would remove this regulation-making power. This would give effect to a recommendation of the Delegated Powers and Regulatory Reform Committee. Lords Amendment 108 is consequential on Lords Amendment 72.

*Lords Amendments 73 and 74: Serious harm suspensive claims: interpretation

- 49 Clause 38 defines a "serious harm suspensive claim". Such a claim arises where a person would face a real, imminent and foreseeable risk of serious and irreversible harm within the "relevant period" (as defined in Clause 38(9)) were they to be removed to the country or territory specified in the removal notice given under Clause 7(3)(b). Lords Amendment 73 would replace Clause 38 with an alternative version which (a) removes any reference to the "relevant period"; (b) removes any reference to irreversibility of harm; and (c) removes examples of harm that do not constitute or are unlikely to constitute serious and irreversible harm. Lords Amendment 74 would omit Clause 39 which confers a power, by regulations, to amend Clause 38.

Lords Amendments 88 and 89: Tribunal procedure rules

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- 50 The Bill provides time limits for the consideration of an appeal in relation to suspensive claims and for these time limits to be set out in Tribunal Procedure Rules. Such Rules are made by the Tribunal Procedure Committee ("TPC") which must follow certain procedures, including consultation; this typically takes a period of months. Given the current scale of illegal entry via these dangerous and unnecessary Channel crossings in small boats, the Government is working to implement the scheme in the Bill as soon as practicable after Royal Assent. To support this, it will be necessary for the Tribunal Procedure Rules to be in place from the date of commencement. To enable this to happen, Lords Amendment 88 would provide for the first set of Tribunal Procedure Rules to be made by the Lord Chancellor, rather than the TPC. Before making such Rules, the Lord Chancellor would be required to consult the Senior President of Tribunals, the Lord Chief Justices of England and Wales and Northern Ireland, and the Lord President of the Court of Session. These Rules would be subject to the made affirmative procedure (rather than, as now, the negative procedure). The power to make rules would then immediately revert to the TPC.
- 51 As a corollary to this, Lords Amendment 89 to Clause 51 would provide for the first set of procedural rules for the Special Immigration Appeals Commission (which would hear appeals in relation to certain cases such as those where open proceedings would be damaging to national security) to be made via the made affirmative procedure (rather than, as now, the draft affirmative procedure).

*Lords Amendment 90: Interim remedies

- 52 Lords Amendment 90 would remove Clause 52 which prevents a domestic court granting an interim remedy that prevents or delays, or that has the effect of preventing or delaying, the removal of a person from the UK under the Bill.

Lords Amendments 91 and 92: Legal aid

- 53 Amongst other things, Clause 54 provides that where there is a right of appeal to the Upper Tribunal relating to a suspensive claim under the Bill, legal aid for advocacy at the Upper Tribunal will be available. Lords Amendment 91 to this clause would ensure that the relevant amendment made to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 cross refers to the appropriate clauses of the Bill.
- 54 The Bill makes provision for persons who receive a removal notice in England and Wales to have access to free legal advice. Lords Amendment 92 would ensure analogous provision for Northern Ireland.

Lords Amendments 93*, 94, 95* and 96: Age assessment legal challenges

- 55 Clause 55 provides that any legal challenge to an age assessment of those who meet the four conditions in Clause 2 will be via a judicial review (removing the right of appeal provided for in the uncommenced section 54 of the 2022 Act) and can only be quashed if there is an error of law (such as on rationality or procedural fairness grounds) and not if there is an error of fact. Such challenges would not suspend removal. Clause 56 enables regulations to be made to provide for an automatic assumption that a person is an adult if they refuse to consent to a scientific age assessment without reasonable grounds to do so. Lords Amendment 96 would ensure that these two provisions properly dovetail. The amendment would ensure that Clause 55 applies to any decisions following regulations made under Clause 56 to automatically assume someone to be an adult following their refusal to consent to a scientific age assessment, including a decision as to whether an individual has reasonable grounds to refuse consent to a scientific age assessment.

- 56 Lords Amendment 93 would remove subsections (2) to (4) of Clause 55 (and so preserve

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the right of appeal in section 54 of the 2022 Act and provide for any judicial review to be suspensive of removal). The amendment would also apply the limitations on judicial review in Clause 55(5) as amended (see below).

- 57 Clause 55(5) provides the basis on which a court can consider a decision relating to a person's age in judicial review proceedings. It provides that a court can quash a decision only on the basis that it was wrong in law and may not quash the decision on the basis that it was wrong as a matter of fact. The intention is to ensure that the court cannot make its own determination on age, which should properly be reserved for those qualified and trained to assess age, but instead only consider a decision on age on conventional judicial review principles. Lords Amendment 94 would make it clear that a court must determine a judicial review on the basis that the person's age is a matter of fact to be determined by the relevant decision maker. This amendment would also amend Clause 55 to supplement references to the court and applications to the court for judicial review with references to the tribunal and applications to the tribunal for judicial review. Lords Amendment 95 would provide that a court may grant relief only on the basis that it was wrong in law or that the decision proceeded on information about the person's age which was incomplete, misleading or otherwise so seriously misinformed that no reasonable authority would have relied on it.

Lords Amendments 98 to 101: Cap on number of entrants using safe and legal routes

- 58 Clause 58 provides for the Secretary of State to make regulations specifying the maximum number of persons who may enter the UK annually using safe and legal routes. Before making such regulations, the Secretary of State is required to consult such representatives of local authorities, and such other persons or bodies as the Secretary of State considers appropriate. These amendments would replace the requirement to consult such representatives of district councils in Northern Ireland as the Secretary of State thinks appropriate with a requirement to consult the Executive Office in Northern Ireland.

*Lords Amendment 102: Duty to establish safe and legal routes

- 59 Clause 59 requires the Secretary of State, within six months of Royal Assent, to prepare and publish a report on safe and legal routes by which persons may enter the UK. The report must, amongst other things, contain details of any proposed additional safe and legal routes. This amendment would require the Secretary of State, within two months of the publication of the Clause 59 report, to make regulations specifying additional safe and legal routes.

*Lords Amendment 103: Organised immigration crime enforcement

- 60 This amendment would amend section 1 of the Crime and Courts Act 2013 so as to confer on the National Crime Agency a specific function of tackling cross-Channel organised immigration crime and require the Agency to maintain a "Cross-Border People Smuggling Unit".

*Lords Amendments 104 and 107: Ten-year strategy on refugees and human trafficking

- 61 Lords Amendment 104 would require the Secretary of State to prepare a ten-year strategy for tackling refugee crises affecting migration by irregular routes, or the movement of refugees, to the UK and for tackling human trafficking to the UK. Lords Amendment 107 is consequential on Lords Amendment 103.

Lords Amendment 105: Transitional regulations

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- 62 Clause 66(5) contains a standard power, by regulations, to make transitional or saving provision in connection with the commencement of any provision of the Bill. Lords This amendment would enable such regulations to make consequential, supplementary and incidental provision and different provision for different purposes.

Lords Amendments 109 to 114: Electronic devices etc

- 63 Schedule 2 to the Bill requires that the search of a person under 18 in which that person is required to remove any clothing other than an outer coat, jacket or glove must be in the presence of an appropriate adult. These amendments would amend the definition of an appropriate adult to ensure that the definition works across the UK and add further definitions of terms used in Schedule 2.

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