LIBERTY’S WRITTEN EVIDENCE TO THE PUBLIC BILL COMMITTEE FOR THE IMMIGRATION AND SOCIAL SECURITY CO-ORDINATION (EU WITHDRAWAL) BILL

FEBRUARY 2019
ABOUT LIBERTY

Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at libertyhumanrights.org.uk/policy.

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INTRODUCTION

1. Liberty welcomes the opportunity to provide written evidence to the Public Bill Committee for the Immigration and Social Security (EU Co-ordination) Bill 2019. Taken together, this Bill and the White Paper that accompanies it represent one of the most significant changes to UK immigration policy in decades. In the wake of the Windrush scandal, and indeed, mounting evidence that the Home Office now operates “in a continuous state of disaster management”, Government should have seized this opportunity to remedy deep-seated deficiencies in the functioning of the immigration system, rather than granting itself the power to subject millions more people to it with minimal scrutiny.

2. It is vital that the Bill Committee amends the Bill to remedy these deficiencies, so that the future immigration system is more compliant with fundamental rights and the rule of law than has unfortunately been the case in recent years. Liberty has identified four key ends to which the Bill should be amended, namely:
   - Limiting the power of the Secretary of State to make significant changes to immigration policy through the Immigration Rules,
   - Ending the hostile environment,
   - Ending indefinite detention, and
   - Restoring vital safeguards to the immigration system, namely data protection and legal aid.

SCOPE: BEYOND EEA NATIONALS

3. The effects of this Bill are not confined to EEA nationals, and as such, the effect of amendments to the Bill need not be confined to this group either. The end of free movement is not a policy change whose impact will be confined to EEA nationals, although they will undeniably feel it keenly; it is a monumental change to the immigration system as a whole. It is very likely that that system – already chaotic and overly complex - will need to adjust in unforeseeable ways to accommodate millions more people, from the EEA nationals already living in the UK, to people yet to arrive.

4. Indeed, this is presumably the Home Office’s rationale for seeking the incredibly broad delegated powers set out at clauses 4 and 5 of this Bill, and the emphasis placed on flexibility by the Secretary of State during the second reading debate.² Had the Government put forward clear and tightly constrained delegated powers

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accompanied by appropriate sunset clauses, its claim that the Bill is concerned purely with EEA nationals and repeal of retained EU law as it relates to free movement would have been arguable. Given the stunning breadth of the powers that this Bill seeks to enact, it is not.

5. Moreover, given the Government’s contention that the future immigration system will create a level playing field that differentiates on the basis of skill rather than nationality, it is difficult to see how the effect of changes to that system as implemented by the exercise of the delegated powers in this Bill could foreseeably be limited to EEA nationals. Indeed, clause 4(1) states that those powers are very broad; they may be used in consequence of or in connection with part 1 of the Bill in whatever way the Secretary of State deems appropriate.

6. As clause 4(2)(a) stipulates, the Secretary of State may modify any provision made by or under primary legislation passed before, or in the same Session as this Act. This very widely drawn power would clearly allow the Secretary of State to modify by regulations any piece of immigration legislation passed prior to 2019, not just the retained EU law relating to freedom of movement. It appears that all the Secretary of State would need to argue is that the change is in connection with the end of free movement – which essentially every change to immigration legislation for the immediate future arguably will be, and that the use of the powers set out under clause 4 of the Bill is appropriate for achieving these changes – a low threshold.

7. Moreover, clause 4(5) sets out that regulations may modify provision relating to the imposition of fees or charges which is made by or under primary legislation passed before, or in the same Session as, this Act. Again, this power could be used to implement changes to immigration fees that apply not only to EEA nationals, but to applicants of other nationalities too - something that is especially likely in light of the ‘level playing field’ between nationalities that Government ostensibly aims to create.

8. Last, the impact of repeal of the retained EU law framework as it relates to freedom of movement is not, as is often suggested, limited to EEA nationals, as Stuart C. McDonald pointed out during the Bill’s second reading. At present, people from outside the EEA exercise rights derived from EU law. The Government has not made provision for all of those groups to re-regularise their status once the

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retained EU law providing for free movement and EU law-derived rights are repealed. Once that framework is repealed, it is unclear what rights non-EEA nationals currently in the UK by virtue of EU law-derived rights will have, and it is highly likely that in future those who would have come to the UK via those routes will fall under the domestic immigration regime – not as EEA nationals, but as third country nationals.

9. For these reasons, Liberty urges the Bill Committee to recognise that the scope, powers and impacts of this Bill extend far beyond EEA nationals, and as such, the impact of amendments to the Bill must not be confined to this group.

NO BLANK CHEQUE

Amendment

Clause 7, subsection (8), page 5, line 39, at end insert new subsection (1):

Regulations under subsection (8) may not be made until the Government has amended section 3 of the Immigration Act 1971 to specify that:

(a) Rules under that section may not be made in circumstances where the proposed Rules risk a significant negative impact on human rights.

(b) Alongside any Rules published under section 3 of the Immigration Act 1971, the Secretary of State must publish a human rights impact assessment setting out that they are satisfied that the proposed Rules do not risk a significant negative impact on human rights, and the reasons for that assessment.

Effect

This amendment would prevent the Government from bringing into force those parts of the Bill that subject EEA nationals to the domestic immigration system until the Government has amended section 3 of the 1971 Immigration Act to constrain the power to make Immigration Rules to exclude use of that power to make Rules that risk a significant negative impact on the human rights of people subject to them and those associated with them.

Briefing

10. Please see pages 1-3 of Liberty’s Second Reading Briefing on the Bill.6

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ENDING THE HOSTILE ENVIRONMENT

Amendment

Clause 7, subsection (8), page 5, line 39, at end insert new subsection (8):

Regulations under subsection (8) may not be made until the Government has brought forward legislative measures to repeal the hostile environment, namely:
(a) sections 20-47 of the Immigration Act 2014
(b) sections 34-45 of the Immigration Act 2016, and
(c) sections 15-25 of the Immigration, Asylum and Nationality Act 2006.

Effect

This amendment would prevent the Government from bringing into force those parts of the Bill that subject EEA nationals to the domestic immigration system until the Government has taken legislative measures to repeal the hostile environment.

Briefing

11. Please see pages 4-6 of Liberty’s Second Reading Briefing on the Bill.7

ENDING INDEFINITE DETENTION

Briefing

12. One of the most draconian tools of the UK immigration system is indefinite detention. This Bill would bring millions of people under domestic immigration policies which will likely result in an increase in the use of detention.

13. A response from the Ministry of Justice to an FOI request suggests that at least 26000 EEA nationals per year could now be liable to deportation proceedings and as such could be detained under immigration powers.8 For contrast, in the year ending September 2018, the Government returned 5485 foreign nationals with convictions. An increase in people subject to deportation orders will lead to an increase in people being held in detention.

7 Liberty’s briefing on the Immigration and Social Security Co-ordination (EU Withdrawal) Bill for Second Reading in the House of Commons, January 2019, p.4-6.
14. A Parliamentary Question on January 25 asked what assessment the Home Office had made of the potential effect of the Bill on (a) the number of people detained under immigration powers and (b) the number of Immigration Removal Centres required in the UK. The Minister’s response suggested that no specific assessment had been made on the impact this Bill would have on the detention estate.\textsuperscript{9}

15. This is especially concerning considering the indisputable evidence of the human impact of detention. In the year ending June 2018, 26 215 people were subject to indefinite administrative detention. It is already one of the largest operations of its kind in Europe and importantly – the only one without a time limit.\textsuperscript{10} Without a time limit, indefinite and prolonged detention will proliferate unless Parliament uses this Bill to create a time limit. Those in detention include survivors of torture, pregnant women and children. No judge authorises detention. The system has been criticised by the United Nations High Commissioner for Refugees (UNHCR) for its indefinite and systematic nature.\textsuperscript{11} The Bar Council\textsuperscript{12} and the British Medical Association\textsuperscript{13} have also called for a time limit. Recently, Tulip Siddiq MP received cross party support for her 10-minute rule bill which would introduce a 28-day time limit.\textsuperscript{14}

16. Second reading of the Bill demonstrated – once again – cross party support for ending indefinite detention. Members of all parties stood up to urge the Home Secretary to implement a time limit. On February 7, the Joint Committee on Human Rights published the results of their inquiry into immigration detention which reiterated the call for a 28-day time limit and the potential for using this Bill to implement it.\textsuperscript{15}

17. This Bill would see a proliferation in the number of people at risk of indefinite immigration detention, creating enormous pressure on the Home Office to rely on detention as a means to cope with a potentially large influx of people subject to deportation. Liberty urges Parliamentarians to use this Bill to introduce a 28-day

\textsuperscript{10} Home Office, Home many people are detained or returned, 23 August 2018 https://www.gov.uk/government/publications/immigration-statistics-year-ending-june-2018/how-many-people-are-detained-or-retumeded
\textsuperscript{11} UNHCR, Global Strategy Beyond Detention: Progress Report, August 2016 https://www.unhcr.org/57b579e47.pdf
\textsuperscript{12} Dr Anna Lindley, Injustice in Immigration Detention: Perspectives from legal professionals, research report commissioned by the Bar Council, p.3 https://www.bar council.org.uk/media/623583/171130_injustice_in_immigration_detention_dr_annalindley.pdf
\textsuperscript{14} Tulip Siddiq, Immigration (Time Limit on Detention), Hansard, House of Commons, Volume 650, 5 December 2018 https://hansard.parliament.uk/commons/2018-12-05/debates/FE03770-454D-4816-B2AD-3BA28FCC115A/Immigration(TimeLimitOnDetention)
time limit for all on immigration detention and end the scandal of an ineffective and inhumane policy.

RESTORING VITAL SAFEGUARDS

Amendment

Clause 7, subsection (8), page 5, line 39, at end insert new subsection ():
Regulations under subsection (8) may not be made until the Government has brought forward legislative measures to repeal schedule 2, paragraph 4 of the Data Protection Act 2018.

Effect

This amendment would prevent the Government from bringing into force those parts of the Bill that subject EEA nationals to the domestic immigration system until the Government has taken legislative measures to reinstate data protection rights in the immigration context.

Amendment

Clause 7, subsection (8), page 5, line 39, at end insert new subsection ():
Regulations under subsection (8) may not be made until the Government has brought forward legislative measures to amend Schedule 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 to bring all immigration matters back into the scope of civil legal aid.

Effect

This amendment would prevent the Government from bringing into force those parts of the Bill that subject EEA nationals to the domestic immigration system until the Government has taken legislative measures to reinstate legal aid entitlements in the immigration context.

Briefing

18. Liberty notes that since the Bill’s second reading, a report by the Independent Chief Inspector of Borders and Immigration has made public further detail of the Home Office’s intentions for use of data for immigration enforcement purposes. That report, which focused on Home Office’s collaborative working with other
Government departments and agencies, reveals the existence of a ‘Status Checking’ Project within the Home Office’s Digital, Data and Technology directorate.

19. The report goes on to outline that:

“BICS [Borders, Immigration and Citizenship System] management told inspectors that their longer-term ambition was to combine multiple APIs to establish a system that obtains and shares an individual’s immigration status in real time with authorised users, providing proof of entitlement to a range of public and private services, such as work, rented accommodation, healthcare and benefits. The work is being taken forward by the Home Office’s Digital, Data and Technology (DDaT) directorate and is known internally as the ‘Status Checking’ Project.”

20. It is striking, and indeed worrying, that the existence of this project was not mentioned during parliamentary debates on the Data Protection Bill in late 2017 and spring 2018, despite repeated questions as to what purpose the immigration control exemption now set out at Schedule 2, paragraph 4 of that Act might be put. Nevertheless, Liberty discerned from what was in the public domain at that time that such a ‘Status Checking’ Project was precisely what that exemption aimed to facilitate, warning Parliamentarians that the exemption:

“[C]ould ostensibly be used by those services to facilitate the sharing of personal data of any individual interacting with public services between those services, or intermediary Government departments, and the Home Office to check their entitlement to access those services in real time, amounting in effect to a digital ID card.”

21. Now that the existence of the ‘Status Checking’ Project is in the public domain, and given that its existence was not shared by Ministers with other Parliamentarians during the passage of the Data Protection Act (DPA) 2018, it is absolutely vital that this Bill is amended to require Government to repeal the immigration control exemption at Schedule 2, paragraph 4 of DPA.

22. The Project is highly likely to increase the amount of personal data passed between processors for immigration control purposes, and to increase the harmful impact of

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87 ibid at 5.26.
errors in that processing, as well as of exclusions from essential goods and services based on that processing. Data protection rights, including the rights to know when data is shared, and to access personal data, are vital, minimum safeguards against the potentially catastrophic consequences of arbitrary and unfettered Government use of data in the immigration enforcement context.

23. For further background, including on immigration legal aid, please see pages 7-8 of Liberty’s Second Reading Briefing on the Bill.\(^{19}\)

CONCLUSION

24. As one Parliamentarian rightly put it, “for such a short Bill, it risks remarkable damage”.\(^{20}\) Liberty is gravely concerned that Parliamentarians are seriously contemplating the prospect of handing Home Office ministers further powers to subject millions more people to exclusion from vital goods and services under the auspices of the hostile environment, the trauma of indefinite detention, and whatever measures might be introduced via the Immigration Rules and Henry VIII powers in this Bill as the future immigration system - the details of which are vanishingly thin - is designed and implemented. Policies on which people’s lives, livelihoods, and fundamental rights depend should not be subject to Ministerial or departmental fiat. Liberty therefore strongly urges the Bill Committee to amend the Bill to:

- Limit the power of the Secretary of State to make significant changes to immigration policy through the Immigration Rules,
- End the hostile environment,
- End indefinite detention, and
- Restore vital safeguards to the immigration system, namely data protection and legal aid.

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\(^{19}\) Liberty’s briefing on the Immigration and Social Security Co-ordination (EU Withdrawal) Bill for Second Reading in the House of Commons, January 2019, p. 7-8.