Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2019-21

House of Lords Second Reading

July 2020

Migrant Voice and Amnesty International are alarmed at the prospect of this Bill passing unamended. There are two principle reasons for this.

- Firstly, the Bill contains extraordinary and excessive powers in Clause 4 for the Home Secretary to make changes to immigration law without proper parliamentary process or scrutiny. People who come to this country to visit, work, study, join family or seek safety are as entitled as anyone else to respect before the law. It is as disrespectful to them to propose that the laws by which their entry and stay is regulated be made without proper process and scrutiny as it would be to propose making laws governing the lives of anyone in this country in such a way. That so many of the people subject to immigration laws have no right to vote in this country ought to emphasise the importance of proper process and scrutiny in the making of the laws affecting them. That is also emphasised by the development over recent years of policy through fees (both of immigration fees and the health surcharge) by successive governments that impose additional and increasingly punitive taxes upon such people.

- Secondly, the Bill is presented as foundational to the establishment of a new immigration system.[1] However, other than expanding the reach of the pre-existing system over a greatly expanded number of people in the UK or who may in future come or apply to come to the UK, the Bill does nothing to reform it. Moreover, all that has been said by the Government from the time that triggering Article 50 set in motion the UK's withdrawal from the EU has

[1] e.g. at Commons' Second Reading, the Home Secretary described the Bill as "*paving the way for our new points-based immigration system: a firmer, fairer and simpler system*" (*Hansard* HC, 18 May 2020 : Col 398)

confirmed there is no intention to do so. That absence of intention is most recently confirmed by the Ministerial written statement made to the House on 13 July 2020[2] and the 130-page Command Paper published by the Home Office on the same day.[3]

The current immigration system is founded upon the Immigration Act 1971 and the power there delegated by section 3(2) of that Act to the Home Secretary to make and change the rules governing who may come or stay in the UK and on what conditions they may do so. Over the last two decades, the degree and pace of change made to the rules and their consequent length and complexity has become so great that even the Home Office has lost track of the effect and meaning of its own rules.[4] Others – including judges in the UK's highest courts – have complained bitterly.[5] Undoubtedly, this is all a considerable burden to the courts, to employers, to educational institutions, to lawyers, to local authorities, even the Home Office and to many others. However, the people for whom this has been and continues to be the greatest calamity are the people whose lives are regulated and often turned upside down by these rules and the ways by which they are made and implemented.

The Government proposes various changes to the rules. But it proposes no fundamental change to this system. It seeks to retain precisely the same system under which it and its several predecessors have chopped and changed the rules, often with little if any effective notice to the people required to comply with them.

Yet, the impact of these changes upon people who have invested their lives and the lives of their families in coming to the UK to work, study or join family is often dramatic and sometimes catastrophic. The whole basis upon which someone may reasonably have understood whether or for how long they could stay and on what basis can be turned upside down. For some people, this happens with no opportunity whatsoever to adjust their lives – whether to meet whatever new rules have been imposed upon

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[2] *Hansard* HC, Immigration: Written statement – HCWS355, 13 July 2020

[3] *The UK Points-Based Immigration System: Further Details*, CP 258, July 2020 is available here: https://www.gov.uk/government/news/home-secretary-signals-britain-is-open-for-business

[4] e.g. in *R (Mirza & Ors) v Secretary of State for the Home Department* [2016] UKSC 63 it was recorded in the judgment of Lord Carnwath that in the course of the proceedings the Secretary of State's view of the meaning of immigration legislation had changed. Before the Court of Appeal, the Secretary of State advanced one interpretation that was different to her position in other cases only to revert to her earlier interpretation before the Supreme Court. Lord Carnwath said: "*It is particularly disturbing that the Secretary of State herself has been unable to maintain a consistent view of the meaning of relevant rules and regulations.*" Another example is provided by what has happened to immigration rules and policy concerning domestic violence. As Amnesty highlighted to the Law Commission in response to its *Simplifying the Immigration Rules* consultation, the domestic violence rules and policy have lost their coherence because changes to other rules and policy have been made that affect their meaning and application within recognising or addressing that impact upon them. This has removed protections from some domestic violence survivors and introduced barriers to protection for others.

[5] e.g. in *R (Alvi) v Secretary of State for the Home Department* [2012] UKSC 33, Lord Hope referred to observations of Longmore LJ in another case with which he agreed: "*…Longmore LJ lamented, with good reason, the absolute whirlwind which litigants and judges now feel themselves in due to the speed with which the law, practice and policy change in this field of law.*"

them; or to prepare to leave the UK and re-establish their lives in the country from which they came or elsewhere. For many people, after making so much financial, familial, emotional and other investment in moving to the UK, these apparent options – meeting new rules or leaving the country – are simply impossible or unrealistic.

Example

Amarjit came to the UK in 2008 to study at considerable cost. She did so in large part due to the attraction of the then current post-study work visa for which she anticipated she would be eligible and which would enable her to earn back the money she had invested in studying here. However, that visa was abolished only a few weeks before her studies were completed. Like many other students at the time, the opportunity in which she had invested when coming to the UK was, in her words, "*snatched away through no fault of my own* [and] *was a loss too hard to bear.*"

There are at least three further features of the immigration system that greatly exacerbate what has been set out above.

- Firstly, people who come to this country to work, study or join family are subjected to heavy additional taxation – in the form of fees for immigration applications that are set far above the cost to the Home Office and separately by what is known as the migrant health surcharge. These people pay the same taxes as everyone else, though generally without the right of representation through the ballot box. It is said this additional taxation is to pay for the immigration system; and it is said to be intended that this system should ultimately become fully self-funded. [6] This would appear to mean an overwhelming proportion of its costs to be directly paid for people subjected to it with other costs potentially passed onto those same people by employers and educational institutions that may also pay for sponsoring visas under the system. Why? The system is not designed by or in many ways even for these people. They have no say over it. Its myriad complications, delays, mistakes and worse cause them harm – either exclusively to them or to them far more than anyone else. Increasing the extent to which they must pay for this system has not in any way made it more accountable to them. All it has done is give the system ever greater liberty to continue to abuse and disregard their rights and interests, and then charge them for any additional expense that may be caused by any dysfunction or scandal that results. Moreover, much like changes to the rules, increases in fees can be and are imposed with very little if any warning and with no time for someone who has invested their life in moving to the UK to adjust to what is suddenly demanded of them to continue to do what they have expected to be able to do when previously granted permission to come to or stay in this country.

[6] e.g. HM Treasury's *Spending review and autumn statement 2015* included the projected ambition that the Home Office would produce a "*fully self-funded borders and immigration system*"

Examples

Jose submitted his and his wife's passport with his application to the Home Office. The department lost their passports and informed Jose that he and his wife must obtain and submit new ones. They did at their own cost. However, a minor error over a date in their application led to its refusal. He and his wife have been required to submit further applications at further cost to themselves because their minor mistake was treated as fatal to their application while also having to bear the financial cost of the Home Office loss of their passports.

Precious arrived from Zimbabwe in the 2000's. She spent many years lawfully in the UK on various visas, met her husband here and together they built their lives and started a family here. Several years later, close to their becoming eligible for indefinite to leave to remain and without them knowing still less being able to prepare, the fee to renew their leave to remain was sharply increased. Their applications were refused. It took years for them to resolve their circumstances, during which time they were made homeless and reliant on friends and family. When they were eventually able to regularise their status once more, around 2015, they were then only granted limited leave to remain for 30 months which they must now repeatedly renew to accumulate 10 years of such leave before becoming eligible for indefinite leave to remain.

- Secondly, the system is inflexible and insensitive to the unexpected and unpredictable events of life. For example, accident, illness or redundancy befalling someone or their family may greatly affect their capacity to meet rules or pay fees necessary to continue their stay in this country. Events such as a global pandemic and the measures taken by Government or employers in response may do the same. COVID-19 has dramatically exposed this;[7] and whereas the Home Office has taken some steps to address some of the adverse impact upon people subject to the immigration system, even these steps have failed to adequately address the uncertainty and hardship thrust upon people – for some people these steps have introduced new uncertainties or hardships; and the circumstances of others have simply been ignored or overlooked. Some of the worst aspects of this concern the position of people granted permission to stay on the basis that their futures and those of their partners and children are in this country because their or their families' lives are already long and well established here. Many people who previously would have been granted indefinite leave to remain are now permitted only to stay for periods of 30 months at a time requiring successive applications for renewal of permission to a department renowned for its incapacity to adequately manage its workload.[8] To what useful end is this other than to be oppressive and extend

[7] See for example the submissions made jointly by Migrant Voice and Amnesty to the Home Affairs and Human Rights Committees for their COVID-19 inquiries.

[8] Rt Hon Lord Reid of Cardowan was widely reported as referring to the department as unfit for purpose in 2006. In 2013, one of his successors, Rt Hon Theresa May, described the department as "*closed, secretive, defensive*" and as one that "*all too often focuses on the crisis in hand at the expense of*

the anxiety under which people live that any number of unforeseen events may upend their plans for getting on with their lives and those of their family?

Examples

Omar's limited leave to remain was to expire and he was to become eligible for indefinite leave to remain earlier this year subject to his passing his Life in the UK test. He had reached this point after five years leave to remain. However, he could not take the test as there was nowhere to sit it due to the COVID-19 'lockdown'. The Home Office demanded that Omar pay more than £2,000 to be granted further limited leave merely to await the possibility of taking the test.

Proposed Amendments:

Migrant Voice and Amnesty would support the following or similar new clause which would introduce some constraint on the making of rules and provide some security to people in the UK, particularly those granted permission on the basis of long residence or family life, as to their futures.

To move the following new clause –

*"**Immigration system: general principles***

(1) The Immigration Act 1971 is amended as follows.

(2) In section 1 insert –

"(5) The rules shall be so framed that –
(i) where leave to remain is given to a person on account of the person's long residence in the United Kingdom it is given for an indefinite period;
(ii) where leave to remain is given to a person whose continuous residence in the United Kingdom includes a period of five years residence during the person's childhood it is given for an indefinite period;
(iii) where leave to remain is given to a child who has lived in the United Kingdom continuously for a period of seven years residence it is given for an indefinite period.

(6) Where leave to enter or remain is granted to a person for the purpose of that person establishing or continuing family life in the United Kingdom –
(i) that leave shall not be subject to a condition under section 3(1)(c)(i) or (ii);
(ii) any application to extend that leave shall not be subject to requirements that are more restrictive than the requirements

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important work" and "*struggles with the volume of its casework*" (*Hansard* HC, 26 March 2013 : Cols 1500-1501)

for such an extension under the rules at the time leave was first given; and
(iii) such application to extend leave shall not be conditional upon a fee that is greater than the fee required for such an application at the time leave was first given.

(7) Sufficient public notice shall be given of any changes to the rules or any fee for an application for leave to remain affecting a person already in the United Kingdom with leave to enter or remain to ensure that person has a reasonable opportunity to adjust their circumstances or expectations before the change takes effect."

- Thirdly, the system wields enormous powers, which have increased over the years almost precisely in step with the removal or reduction of any safeguards against their being used excessively or abusively. The Home Office has been granted considerable licence to exercise these powers free from independent judicial scrutiny or the constraint of fundamental safeguards in equalities and data protection law. The department has long enjoyed wide exemptions from various equalities duties;[9] and only weeks after the eruption of the Windrush scandal, Parliament granted it an extraordinarily broad exemption from basic data safeguards in the Data Protection Act 2018.[10] As for the people who are at risk from and subject to its powers to take away their livelihoods, expel from them from the home, separate them from their family or detain them indefinitely, they have been steadily robbed of their eligibility for legal aid and appeal rights – most extensively by legislation passed in 2012[11] and 2014.[12] As Amnesty said to the Windrush Lessons Learned Review, it is difficult to understand how any of this can be thought to do other than encourage the Home Office to believe that it does not matter whether it abides by law or respects principles of justice and equality or to believe that Ministers or Parliament care whether it does so.

Example

In 2014, the Home Office accused tens of thousands of students of cheating on English language tests. It curtailed (removed) people's visas, exposing them to detention and removal, which many suffered, or incapacity to sustain themselves in the UK being suddenly without permission to be here. Most had no right of appeal against this decision. The National Audit Office,[13] APPG on TOEIC[14] and the Public Accounts Committee[15] have each investigated and found the Home Office to have

[9] Exemptions and exceptions are found in Schedule 3 and Schedule 18 to the Equality Act 2010
[10] Paragraph 4, Schedule 2 to the Data Protection Act 2018
[11] Legal Aid, Punishment and Sentencing of Offenders Act 2012 largely removed non-asylum immigration legal aid.
[12] Immigration Act 2014 removed all appeal rights except decisions to refuse an asylum or human rights claim or to revoke refugee leave.
[13] See https://www.nao.org.uk/report/investigation-into-the-response-to-cheating-in-english-language-tests/
[14] See https://www.migrantvoice.org/img/upload/Report_of_the_APPG_on_TOEIC-18_July_2019.pdf
[15] See https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/inquiries/parliament-2017/inquiry33/

made many decisions on no or flawed evidence. Yet many people remain unable to secure any remedy or restitution.[16]

Proposed Amendments:

Migrant Voice and Amnesty would support the following or similar amendment which would provide opportunity to scrutinise the propriety and impact of wide exemptions permitted to the Home Office from equalities and data protection laws; and the absence of rights of appeal against its decisions that may wrongly leave people in the UK without the permission they need and for which they are eligible.

Page 3, at the end of line 5 insert –

"and shall include provision to –

(a) repeal paragraph 4 of Schedule 2 to the Data Protection Act 2018;

(b) protect personal data given by a person for the purpose of requesting or receiving support or assistance from specified persons including the police, social services, a provider of healthcare and a provider of housing against use for the purpose of any immigration, asylum or nationality function without the express consent of the person to whom the data belongs;

(c) require the publication of any relevant authorisation given for the purposes of paragraph 15A of Schedule 3 to the Equality Act 2010 in advance of the authorisation taking effect;

(d) repeal paragraph 2 of Schedule 18 to the Equality Act 2010;

(e) provide persons in the United Kingdom a right of appeal to the First-tier Tribunal against any decision to refuse leave remain, to curtail leave to enter or remain or to make a deportation order."

This Bill – in giving effect to the UK's withdrawal from the EU and the rights to free movement that arose from membership – marks a critical moment in the history of the UK's immigration system. It does so because the system is becoming responsible for a vastly increased number of people and applications. Parliamentary committees have questioned whether the system is up to the task.[17] The Windrush scandal and now COVID-19 have exposed how badly the system is falling short even before this expansion of responsibility; and the terrible harms caused to people by the system's inadequacies. Over this same period, the Law Commission has laid bare the dreadful complexity and sometime inconsistency and arbitrariness of the immigration rules.[18] It is poignant that in response to the breaking of the scandal, the then Home Secretary's

[16] Migrant Voice's report *I want my future back*, July 2018 provides further information: https://www.migrantvoice.org/img/upload/I_want_my_future_back.pdf

[17] e.g. Home Affairs Committee, *Home Office delivery of Brexit: immigration*, Third Report of Session 2017-19, HC 421, February 2018

[18] *Simplifying the Immigration Rules*, HC 14, Law Com No 388, January 2020

apology included recognition that the system, and the department responsible for it, all too often give little if any thought to the people whose lives are so dramatically affected by its rules and its powers.[19] That is not a new condition. Worse, it has not changed. In the face of all this, any responsible Government should be looking to make fundamental change to this system – not ploughing on with the same system. In the absence of any Government willingness to make such reform, this Bill is a critical opportunity for Parliament to demand that reform.

[19] *Hansard* HC, 16 April 2018 : Col 28 *per* Rt Hon Amber Rudd