Rt Hon Robert Jenrick MP
Minister of State for Immigration

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Stephen Kinnock MP
House of Commons

24 April 2023

Dear Stephen,

ILLEGAL MIGRATION BILL

I am writing to let you have details of the Government amendments that we have tabled for Report stage on Wednesday. References to new clause and amendment numbers correspond to those on the amendment paper at: illegal_migration_rep_rm_0424.pdf (parliament.uk).

Unaccompanied children (amendments 134 to 137 and 174 to 180)

Under the provisions of the Bill, the duty to make arrangements for removal does not apply to unaccompanied children who arrive illegally from safe countries until they reach adulthood, but there is a power to remove them. In line with current policy and existing legal powers, we have been clear that we only intend to exercise this power in very limited circumstances, principally for the purposes of family reunion or removal to a safe country of origin. Amendment 174 makes this clear by listing those circumstances on the face of the Bill. We need to be alert to the people smugglers changing their tactics to circumvent the Bill. Therefore, the amendment also provides a power, by regulations, to extend the circumstances in which it would be possible, on a case-by-case basis, to remove an unaccompanied child. Such regulations will be subject to the affirmative procedure so would need to be debated and approved by both Houses.

I recognise that at Committee stage there were particular concerns from colleagues about the application of the Bill's detention powers to unaccompanied children. While the power to detain children already exists in legislation, amendments 134 and 136 therefore also provides that unaccompanied children may only be detained for purposes prescribed in regulations made by the Secretary of State subject to the negative procedure, such as for the purposes of removal to effect a family reunion (as is currently the case) or for the purposes of age assessment. It also allows the Secretary of State to make regulations specifying time limits to be placed on the detention of unaccompanied children for the purpose of removal if required.

Modern slavery: clarifying the circumstances in which it is necessary for a person to be present in the UK for the purposes of cooperating with a law enforcement agency (amendments 95 to 102)

The duty to make arrangements for removal applies regardless of whether a person claims to be a victim of slavery or human trafficking. As such, the Bill automatically applies to an illegal migrant who meets the conditions in clause 2 the public order disqualification provided for in the Council of Europe Convention on Action against Trafficking in Human Beings. The effect of this is that they do not benefit from certain protections available to potential victims of modern slavery, including the bar on removal during the minimum 30-day recovery and reflection period, the provision of support and the requirement to grant leave to remain in certain circumstances. The Bill provides for an exception to the automatic application of the public order disqualification, namely where a person's presence in the UK is necessary for the purpose of cooperation with a law enforcement agency in respect of an investigation into or prosecution of a slavery or human trafficking offence where the person was the alleged victim. The Bill includes provision at clause 21(5) which enables regulations to make provision specifying the circumstances in which it is necessary for a person to remain in the UK to provide such cooperation. These amendments replace this regulation-making power with provision on the face of the Bill that sets out a presumption that it is not necessary for a person to be in the UK in order to cooperate with an investigation and/or prosecution unless there are compelling circumstances. Provision is also made for the Secretary of State to issue statutory guidance to which she must have regard when deciding whether there are compelling circumstances, and we intend that this guidance would require the Secretary of State to have regard to the views of the public authority conducting the investigation or prosecution.

Foreign National Offenders (amendments 111 to 121)

Under section 63 of the Nationality and Borders Act 2022, individuals with specific serious criminal convictions, terrorism offences and measures, or those who have been assessed as otherwise posing a national security risk to the UK, may not benefit from certain protections available to potential victims of modern slavery including receiving a recovery and reflection period. The public order disqualification currently applies to FNOs given a custodial sentence of 12 months or more.

The Bill includes a marker clause (clause 28(3) and (4)) to strengthen the application of the public order disqualification to FNOs. The amendments to clause 28 replace the marker clause so that there is a statutory presumption that the public order disqualification applies to FNOs sentenced to an immediate custodial sentence of any length.

Ban on re-entry, settlement and citizenship (amendments 92, 103 to 105, 122, 123 and 164 to 171)

Under the provisions of the Bill, those who meet the conditions for the duty to make arrangements for removal are also subject to permanent bans on settlement and, following removal, re-entry. A person who meets those conditions will also be prevented from registering or naturalising as a British citizen. As part of these provisions, the Bill provides the Secretary of State with powers to waive each of the bans in certain limited circumstances. Our amendments tighten the operation of these

provisions by narrowing the circumstances in which a waiver of the bans can be sought or provided for. In turn they, therefore, increase the provisions' deterrent effect.

For the settlement and citizenship bans, the amendments narrow the circumstances in which someone can seek a waiver so that it is only available in instances where applying the ban would result in a breach of the United Kingdom's obligations under the European Convention of Human Rights (removing the existing reference to other international agreements). We think the power to waive the settlement and citizenship bans on the basis of the United Kingdom's international obligations is unnecessary: the amended provision will still allow us to grant citizenship in exceptional cases where the person meets the statutory requirements and failure to do so would contravene our ECHR obligations.

In respect of the ban on re-entry, the amendments provide that the Secretary of State may grant re-entry if there are "exceptional circumstances" which mean that it is appropriate to do so, instead of "compelling circumstances". The amendments also remove the express power to waive the ban to comply with the United Kingdom's obligations under international agreements. This is unnecessary, as the existing power to waive the ban on the basis of exceptional circumstances is sufficient to also provide for circumstances where to apply such a ban would be contradictory to our international obligations. Examples of where the Secretary of State may seek to waive the ban to comply with international obligations include, but are not limited to, where the decision engages the UN Convention on the Rights of the Child and it is in the best interests of the child or where, under relevant maritime or aviation conventions[1], a member of crew, particularly seafarers, seeks entry for urgent medical treatment or for welfare purposes. We will make this point clear in published guidance to Home Office staff.

Amendment 105 to clause 29 also narrow the circumstances in which someone can seek or be provided with a waiver in respect of the ban on granting limited leave to remain. They do this in two ways. First, by requiring that there be "exceptional circumstances" rather than "compelling circumstances" for a grant of limited leave to remain, where this ground is available. Second, by restricting the ability to seek or be granted a waiver based in exceptional circumstances so that only those who have previously been removed, but their circumstances have meant it is appropriate for them to return, can benefit. The amendments retain the ability for individuals to seek or be granted a waiver on the basis of the United Kingdom's obligations under the European Convention on Human Rights or another international agreement that the UK is party to regardless of whether they are yet to be or have been removed from the UK.

The Bill currently specifies (in new sections 8AA(6) of the Immigration Act 1971 inserted by clause 29(3)) that the Home Office will treat any application for leave to enter, remain or settlement from an individual subject to the bans as void. Amendment 92 removes this provision. After further consideration, we have concluded that it is more appropriate for the Immigration Rules to specify how applications are to be treated, which is in line with existing practice.

[1] The International Labour Organisation's Seafarers' Identity Documents Convention 1958; the International Maritime Organization Convention on Facilitation of International Maritime Traffic; and the International Civil Aviation Organisation's Convention on International Civil Aviation.

Amendment 164 to remove section 30(4) will mean that a child born in the UK to a parent who meets the four conditions in clause 2 will not be barred from citizenship where they meet the other statutory requirements. (Although we recognise children of such illegal entrants will rarely qualify for citizenship, as the relevant legislative provisions are for children whose parents have become settled, or who have lived in the UK for 10 years.) This is reflected in consequential amendments 165 to 171 to sections 31, 32 and 36.

Amendment 103 to clause 59 provides for the bans on re-entry, settlement and citizenship in clauses 29 to 36 to come into force on Royal Assent.

Age assessments (NC24 and NC25)

Given that unaccompanied children will be treated differently to adults under the Bill, and the obvious safeguarding risks of adults purporting to be children being placed with children in the care system, it is important that we do not create an incentive for adults to make spurious claims that they are children so as to delay their removal. Between 2016 and September 2022, there were around 8000 asylum cases where age was disputed and an age assessment was conducted, with around half assessed to be adults.

Our age assessment process seeks to mitigate against the risk that adults are accommodated alongside children and ensure that genuine children can swiftly access the appropriate support. Where there are reasons to doubt age, immigration officers make an initial decision to determine whether an individual is significantly over 18. The threshold is set deliberately high in recognition of the difficulty in assessing age based on appearance and demeanour. Where there remains any doubt they are referred for a comprehensive assessment, and until this assessment is completed they will be accommodated as a child with all the appropriate safeguards. The comprehensive assessment includes social worker led interviews, which must adhere to standards that have been set out by the court. The Nationality and Borders Act 2022 provides powers to use scientific methods to broaden the evidence base available to social workers and for the decision maker to take a refusal to consent to scientific methods as damaging to that person's credibility.

New clause 25 will introduce a regulation-making power which would, in certain circumstances, enable (contingent on a robust scientific justification) an automatic assumption of adulthood where an individual refuses to undergo scientific age assessment. For context, we understand that similar policies, are applied by some ECHR signatory countries including the Netherlands, Luxembourg and the Czech Republic.

New clause 24 will also disapply the right of appeal for age assessments established in section 54 of the Nationality and Borders Act 2022 for those subject to the Bill's removal duty. Instead, those wishing to challenge a decision on age assessment will be able to judicially review the decision, but this challenge will be 'non-suspensive', which means it will be able to continue after the individual has been removed.

Restricting interim relief (NC22, NC26 and amendments 185 to 189)

One of the core aims of the Bill is to prevent late and repeated legal challenges to removal. The Bill does this by providing for two kinds of suspensive claims – factual suspensive claims and serious harm suspensive claims – and by making it clear that all other legal challenges to removal, including by way of judicial review, are non-suspensive. Given this approach, courts would be unable to grant interim relief temporarily blocking removal pending a judgment on the substantive judicial review.

As Sir William Cash, Danny Kruger and others indicated in Committee, this intention could be made clearer on the face of the Bill. We are therefore pleased to support new clause 22 tabled by Danny Kruger which makes it clear that interim relief, including injunctions, is not available and the only way of preventing removal is by making a "suspensive claim" as defined in the Bill itself.

We have also tabled new clause 26 regarding interim measures of the European Court of Human Rights including under Rule 39 of its Rules of Court. Interim measures blocked the Government from removing individuals to Rwanda last summer. The Government is currently engaged in constructive dialogue with the Strasbourg Court on possible reforms to the process by which it considers requests for interim measures. The new clause will create a discretion for a Minister of the Crown to suspend the duty to remove a person where an interim measure has been indicated. That discretion must be exercised personally by a Minister of the Crown. This means the Minister may suspend removal in response to a Rule 39 interim measure but is not required to as a matter of UK law. The new clause provides a broad discretion for the Minister to have regard to any factors when considering whether to disapply the duty. The new clause provides a non-exhaustive list of considerations that the Minister may have regard to when considering the exercise of that discretion.

<u>Clarifying the meaning of "serious and irreversible harm" (NC17 and amendments 33 to 43)</u>

One of the suspensive claims provided for in the Bill is where a person claims that they would be at real risk of serious and irreversible harm were they to be removed to a specified third country. The Bill enables the Secretary of State, by regulations, to make provision about the meaning of "serious and irreversible harm". To limit the ability of individuals to delay removal with spurious claims we have tabled new clause 17 to augment this regulation-making power with substantive provision on the face of the Bill which sets out non-exhaustive and amendable lists of matters which would or would not constitute serious and irreversible harm. The new clause also make it clear that the serious and irreversible harm must be "imminent and foreseeable", which will bring the provision more closely into alignment with relevant Strasbourg practice.

<u>Legal aid (NC20)</u>

It is important that those persons who received a removal notice under the Bill have access to appropriate legal services. New clause 20 provides for the provision of legal aid in relation to removal notices under the Bill. The new clause will bring certain civil legal services for recipients of removal notices under the Bill into the scope of legal aid, enabling them to access legal services in relation to the removal notice, without the application of the merits criteria. These provisions will help ensure appropriate access to justice is in place within the timeframes set by the Bill. The new clause

applies to England and Wales only. We will discuss with the Scottish Government and Northern Ireland Department of Justice the making of similar provision for Scotland and Northern Ireland.

Safe and legal routes for those needing protection (NC8 and amendment 11)

The UK has a proud history of providing protection for those who need it through safe and legal routes. Since 2015, we have offered a safe and legal route to the UK for close to half a million people from all over the world via our global routes and our country-specific routes. This includes around 50,000 who have come to the UK on routes open to people from any country in the world, 25,000 on our country-specific routes for Afghanistan and 20,000 from Syria, over 100,000 Hong Kongers, and close to 200,000 from Ukraine.

Clause 53 enables Parliament to set the number of individuals admitted to the UK each year via safe and legal routes with regard to the capacity of local authorities and other local services to provide the necessary accommodation and support.

Having listened to the debate in Committee, I know many colleagues are keen for both greater clarity on our existing safe and legal routes and for quick progress toward the establishment of the regime envisaged by Clause 53.

The Government is therefore happy to support the amendments tabled by Tim Loughton MP which requires the Home Office to launch, within three months of Royal Assent, the consultation on the regulations to be made under clause 53(1) setting the maximum number of persons to be admitted each year using safe and legal routes. In addition, these amendments will require the Home Secretary to lay a report before Parliament within six months of Royal Assent setting out current and any proposed additional safe and legal routes for those in need of protection, to be implemented as soon as practicable and, in any event, by the end of 2024.

New powers in relation to electronic devices and identity documents (NC19, NC23, NS1 and amendments 77, 78 and 133)

Alongside the core provisions in the Bill, it is important to ensure that we have the necessary powers to tackle illegal migration more broadly. Mobile phones and other electronic devices may contain a wealth of information which can directly or indirectly facilitate the confirmation of a person's identity and an understanding of their activities. This can assist in determining a person's immigration status or right to be in the UK, as well as in developing the intelligence picture on illegal migration and providing evidence which could be used in criminal prosecutions.

We have therefore brought forward new clause 23 and new Schedule 1 to confer new powers on immigration officers to search for, seize and retain electronic devices (such as mobile phones) from illegal migrants, which appear to contain information relevant to the discharge of their functions, including but not limited to a criminal investigation.

New clause 19 also amends section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 to put beyond doubt that a person's credibility should be damaged where they make an asylum or human rights claim but refuse to disclose information, such as a passcode, that would enable access to their mobile phone or other electronic device; or fail to produce, destroy, alter or dispose of any identity document without reasonable explanation, or produce a document which is not a valid identity document as if it were.

Except where indicated, these amendments apply UK-wide.

The attached annex details various technical and other second order amendments.

I will publish a supplementary ECHR memorandum ahead of Report.

I am copying this letter to Yvette Cooper MP, Alison Thewliss MP, Dame Diana Johnson MP (Chair, Home Affairs Committee), Joanna Cherry MP (Chair, Joint Committee on Human Rights), Sir Williamd Cash MP, Danny Kruger MP, Tim Loughton MP, David Simmonds MP, Lord Coaker, Lord Ponsonby of Shulbrede and Baroness Ludford. I am also placing a copy in the library of the House and on the Bill page on gov.uk.

Rt Hon Robert Jenrick MP
Minister of State for Immigration

Annex

Other amendments

Duty to make arrangements for removal: definition of cohort subject to removal (amendment 89)

Clause 2 sets out the four conditions defining an illegal migrant for the purpose of the duty on the Home Secretary to make arrangements for removal. The first condition relates to the lawfulness of a person's entry or arrival in the UK. This amendment ensures that the first condition also covers a person who has entered the UK despite being subject to a travel ban imposed by the United Nations or the UK. Travel bans restrict the movement of identified individuals associated with regimes or groups whose behaviour is considered unacceptable by the international community.

Duty to make arrangements for removal: power to make provision for exceptions (amendments 106 to 110)

Clause 3(5) of the Bill enables the Secretary of State to make regulations providing exceptions to the duty on the Home Secretary to make arrangements for removal of illegal migrants. The Bill generally has retrospective effect, and the policy intention is to apply the duty to anyone who arrived illegally, having not come directly to the United Kingdom from a country in which their person's life and liberty were threatened, on or after 7 March 2023. The purpose of this approach is to prevent a 'fire sale' of migrants seeking to enter illegally before the Bill is enacted. Although that remains the intention, it is important that we create some flexibility for the Secretary of State exceptionally to exempt groups from the duty, to allow the Home Office to deal with cases under existing powers if a large caseload accrues before Royal Assent. Amendment 107 therefore makes it clear that any regulations made under clause 3(5) can apply to people who arrived between 7 March 2023 and the date on which the regulations come into force.

Regulations made under clause 3(5) may provide for UK Parliament enactments to apply with modifications in relation to a person to whom an exception applies. Amendment 110 extend this so that, where necessary, regulations may also make consequential modifications the application of devolved legislation.

Provision about removal (amendments 79 to 82)

Clause 7 makes further provision about removal. A person may not be removed from the UK until they have been served with a removal notice and the eight-day period for submitting a suspensive claim has expired. This provision would prevent the immediate removal of a person who does not wish to make a suspensive claim. Currently at the Border where a person does not make a protection claim, they may be refused entry and returned without delay to their country of origin where it is safe to do so. The amendments to this clause will enable removals to take place before the expiry of the claims period where a person confirms, either orally or in writing (and having had the opportunity to receive legal advice), that they do not wish to make a suspensive claim.

Removal of family members (amendments 83 and 139 to 173)

Where removal directions are given to a person who meets the conditions in clause 2, clause 8 provides that they may also be given in respect of a member of that person's family where certain conditions are met. Clause 8(7) applies certain provisions (including the modern slavery provisions) of the Bill to such family members. Any family member who entered the UK unlawfully on or after 7 March 2023 will automatically be subject to the duty to make arrangements for removal in clause 2. That being the case, on further reflection, we do not consider it necessary to capture other family members in the Bill. Such persons may, for example, include those who entered the UK lawfully and subsequently overstayed. Appropriate enforcement action would continue to be taken against such persons under existing powers. The removal of clause 8 necessitates a number of consequential amendments across the Bill.

Duty to make arrangements for removal: application of offences relating to removal (amendments 90 and 91)

The Bill imposes duties on the captain of a ship or aircraft, a train manager or the driver of a vehicle in respect of the removal of a person under the powers in the Bill. These amendments apply relevant existing criminal offences in section 27 of the Immigration Act 1971, which currently apply to carriers who fail to act under instructions to remove a person under that Act, to instructions to remove a person under the powers set out in this Bill.

Detention: period for which persons may be detained (amendment 86)

Clause 12 codifies, in part, the common law (*Hardial Singh*) principles governing immigration detention. New paragraph 17A inserted into Schedule 2 to the Immigration Act 1971 provides that a person liable to detention under paragraph 16 of that Schedule may be detained for such period as, in the opinion of the Secretary of State, is reasonably necessary to enable the examination, decision, removal or directions to be carried out, made or given. Amendment 86 to clause 12 clarifies that the reasonable detention period includes any detention on board a ship or aircraft for the purpose of removing them from either from the ship or aircraft or removing them to another country as the case may be.

Powers to grant immigration bail (amendments 85, 87 and 88)

Amongst other things, clause 13 prevents the First-tier Tribunal granting immigration bail to a person detained under the powers conferred by the Bill. The subsection (5) of clause 13 ensures that the restriction on when bail can be granted by the First-tier Tribunal also applies where a bail application falls to be considered by the Special Immigration Appeals Commission.

The technical amendment 85 to clause 13(4) provides that a person may not challenge their detention during the first 28 days by way of judicial review in "any court **or tribunal**".

Detention: disapplication of duty to consult Independent Family Returns Panel (amendment 84)

Clause 14 disapplies the duty on the Secretary of State to consult the Independent Family Returns Panel (which provides advice on the safeguarding and welfare plans on the removal of families with children) in cases where the proposed removal and detention of families with children is (amongst other things) under the powers conferred by clause 2 or 7. Amendment 84 to clause 14 similarly disapplies the duty to consult the Panel where an unaccompanied child is to be removed under clause 3(2).

Transfer of unaccompanied children from the Secretary of State to a local authority and vice versa (amendments 124 to 131)

Clause 16 facilitates the transfer of an unaccompanied migrant child from Home Office provided accommodation to a local authority in England. Various technical and drafting amendments are required so that it is clear that the Secretary of State's direction to a local authority is for the local authority to provide accommodation to the child under section 20 of the Children Act 1989. The amendments also make it clear that in cases where an unaccompanied child is being accommodated by the Home Office or received by the relevant local authority it retains its responsibilities in respect of the child under Part 3 of the Children Act 1989.

Legal proceedings: Upper Tribunal consideration of new matters (amendments 18 to 32)

Clause 46 provides for the consideration of new matters by the Upper Tribunal where it was not made available to the Secretary of State. New matters can only be considered where the Secretary of State has given consent for the Upper Tribunal to do so; consent may be given if the Secretary of State considers there are compelling reasons for the matter not to have been provided within the claim period. The Bill provides for strict time limits for the consideration of an appeal or application for permission to appeal and we need to ensure that the process for considering new matters does not reduce the overall time for deciding an appeal. These amendments therefore provide for the time limits for determining an appeal or permission to appeal application to be paused for a period of up to three days where a new matter has been provided. The amendments also remove the requirement for a separate application to be made to the Upper Tribunal after the Secretary of State has refused to give consent; instead, the Upper Tribunal would proceed to consider whether to allow the new matter when determining the appeal. This would allow for a more efficient process.

Application to Crown Dependencies (amendments 93 and 94)

In line with the usual practice, the Bill provides for the citizenship provisions to apply directly to the Crown Dependencies. With the agreement of Jersey, Guernsey and the Isle of Man, the amendments to clause 58 add a standard permissive extent clause enabling other provisions of the Bill to be extended to the Crown Dependencies.