Written evidence submitted by JUSTICE (BSAIB16)

Border Security, Immigration and Asylum Bill

House of Commons Committee Stage Briefing

Introduction

1. JUSTICE is a cross-party law reform and human rights organisation working to strengthen the UK justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. This Bill is an important opportunity to reset the UK's approach to immigration and asylum policy. We acknowledge the significant, complex challenges which the Government is looking to address. However, policy issues such as tackling the people smuggling gangs which operate across Europe requires international cooperation, which will not be possible unless we are steadfast in our commitment to international legal instruments such as the European Convention on Human Rights 'ECHR', the Refugee Convention and the Council of Europe Convention on Action Against Trafficking ('ECAT').[1]

Support for Measures in the Bill

3. We welcome the Government's decision to fully repeal the Safety of Rwanda (Asylum and Immigration) Act. That Act set a concerning Parliamentary precedent to legislate a legal fiction by overturning a Supreme Court decision on a finding of fact and undermined the UK's proud reputation for upholding our domestic and international legal obligations. [2]

4. We also welcome the decision to repeal many of the provisions of the Illegal Migration Act. That legislation was unworkable, breached our international law obligations and contained deeply unfair retrospective powers.[3]

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[1] For example, the UK-EU Trade and Cooperation Agreement allows the EU to unilaterally terminate international law enforcement and judicial cooperation in criminal justice if the UK withdraws from the ECHR. EU – UK Trade and Cooperation Agreement, Article 524

[2] JUSTICE briefings on the 'Safety of Rwanda (Asylum and Immigration) Act'

[3] JUSTICE briefings on the 'Illegal Migration Act'

Concerns about Measures in the Bill

5. Despite the above, we have concerns about certain aspects of this Bill which we have set out in this briefing, in particular: (a) provisions from the Illegal Migration Act and Nationality and Borders Act which have not been repealed; (b) new immigration powers on deportation, seizure of mobile phones and retrospective powers; (c) the impact of expanding Serious Crime Prevention Orders ('SCPOs') and the rule of law and procedural fairness ; and (d) the scope and disproportionately high sentences of the new proposed criminal offences

Illegal Migration Act and Nationality and Borders Act

Illegal Migration Act ('IMA')

6. Whilst we welcome the decision to repeal most of its provisions, we are concerned that the following provisions from the IMA will remain and call on the Government to also repeal them:

   a. **Section 12 IMA** provides that it is for the Home Secretary to determine what a reasonable period of immigration detention is rather than for our independent courts and tribunals as was the case before. There are serious questions about whether this approach to detention is compatible with Article 5 ECHR (the right to liberty); as the Court of Appeal has previously found that it is *'the objective approach of the courts which reviews the evidence available at that time that removes any question that the period of detention can be viewed as arbitrary in terms of Article 5'.*[4]

      Clause 41 of the Bill would also extend deportation powers for those who have received an initial decision to deport (stage 1) but not yet a deportation order (stage 2). We are concerned that extending detention powers, coupled with the retention of section 12 IMA, will lead to an expensive and ineffective extension of the use and length of detention powers, and risks breaching Article 5 ECHR. We observe that a majority of those who leave immigration detention are released on bail.[5] There are practical improvements to the deportation casework of foreign national offenders which should be prioritised. For example, the previous Independent Chief Inspectors of Borders and Immigration highlighted the *'insufficient information to effectively identify which FNOs can be*

[4] *Fardous v. Secretary of State for the Home Department* [2015] EWCA Civ 931.

[5] Home Office, 'Accredited official statistics: How many people are detained or returned?' (13 June 2024)

removed from the country today' and that casework teams are *'often unable to progress cases'* for the Early Removal Scheme.[6]

b. **Section 29 IMA** significantly lowers the 'public order' exemption from trafficking and modern slavery protections. This means that any non-British citizen sentenced to *any* period of imprisonment will not be granted limited leave to remain as a victim of trafficking and can be removed even when they had a pending conclusive grounds decision[7], irrespective of their personal circumstances. This is concerning as many victims of trafficking and modern slavery are exploited into committing criminal offences. A previous Independent Anti-Slavery Commissioner said, in 2021, that limiting the public order exemption would *'severely limit our ability to convict perpetrators and dismantle organised crime groups'* and increase genuine victims *'vulnerability to further exploitation'.*[8]

c. **Section 59 IMA –** prior to the IMA, asylum claims from people from EU countries were automatically deemed inadmissible so an individual requires 'exceptional circumstances' to challenge their removal. Section 59 IMA extends this so that asylum claims by individuals from some non-EU countries (including countries with significant human rights concerns such as Albania [9]) as well as human rights claims by people from those countries are also deemed inadmissible. Human rights claims are not based exclusively on risk abroad. They may include, for example, family circumstances in the UK so should not be excluded solely on nationality. The test requiring exceptional circumstances is a very high threshold for such claims and there would be no appeal of this decision; only a narrow route by judicial review of the Home Secretary's decision. This risks decisions which breach our obligations under the Refugee Convention and ECHR.

7. We therefore urge the Bill committee to amend the Bill as follows:

Clause 38(1), page 30, line 34, replace "11" with "12".

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[6] Independent Chief Inspector of Borders and Immigration, 'An inspection of the Home Office's operations to effect the removal of Foreign National Offenders' (October 2022 – February 2023), p2 and p6.

[7] The National Referral Mechanism process for identifying victims of modern slavery is a two-stage process; an initial 'reasonable grounds' decision identifying if someone is a potential victim before a final 'conclusive grounds' decision is made on whether the individual is a victim of trafficking/ modern slavery.

[8] This was in relation to a less restrictive proposal in NABA, to lower it to those with a 12-month sentence of imprisonment or more. Joint Committee on Human Rights, 'Legislative Scrutiny: Nationality and Borders Bill' (21 December 2021)

[9] US State Department reports have found *'significant human rights issues'* in Albania such as problems with corruption and the independence of the judiciary, and the Government does not *'fully meet the minimum standards for the elimination of trafficking'.*

Clause 38(1), page 31, line 1, replace "28" with "29".

Clause 38(1), page 31, line 3, replace "58" with "59".

Nationality and Borders Act ('NABA')

8. The Bill does not repeal any provisions from NABA. At the time, JUSTICE raised concerns that the legislation risked creating a system where people with a legitimate basis to be in the UK could be removed without effective access to justice. We highlighted the importance of proper safeguards to strike the balance between a fair system, where those in need of asylum and trafficking protections were supported, and facilitating the removal of those with no such claim.

9. For example, the differentiation between Group 1 and Group 2 refugees in **Section 12 (in force),** a key component of the Bill, was abandoned by the previous Government in June 2023 though it remains on the statute book.[10] This sought to only grant temporary refugee permission to those who did not arrive directly from the country they fled from, though in reality most of these individuals would remain in the UK but require multiple applications to renew their permission to remain in the UK.[11] As the barrister Colin Yeo observed, *'what it does do is make more work for officials, thereby worsening the backlogs in the appeal system…it is actually counterproductive'.*[12]In light of the urgent need to address the asylum backlog, acknowledged rightly by the new Government, it is surprising that this provision has not been repealed; it should be.

10. NABA also brought in significant changes to modern slavery/ trafficking protections, which this Bill is a timely opportunity to repeal. **Section 59 (not in force)** requires a decision-maker to hold late disclosure of information as damaging to credibility, despite the well-known difficulties many will have disclosing traumatic incidents. **Section 63 (in force)** excludes certain victims from modern slavery / trafficking protection by significantly extending the public order exception to anyone with a criminal conviction of 12 months imprisonment.

11. As set out above in relation to the IMA, many victims are trafficked into criminal activity. A joint report by the British Institute of International and Comparative Law, Human Trafficking Foundation and Anti-Trafficking Monitoring Group found that, in early 2023, 70% of disqualified individuals under the public

[10] UK Parliament, 'Illegal Migration Update: Statement made on 8 June 2023'

[11] Colin Yeo, 'Detailed policy on differential treatment of refugees announced' (Free movement, 28 June 2022)

[12] Ibid.

order exemption had an element of criminal exploitation in their case.[13] Following a legal challenge, the previous Government's policy on interpreting section 63 had to be updated to require an assessment of the risk of re-trafficking.[14] However, we remain concerned that section 63 casts its net too wide when assessing public order exemption.

12. Such provisions risk undermining the UK's reputation as a world-leader in the fight against modern slavery and non-compliance with our international obligations under the Council of Europea Convention on Action against Trafficking ('ECAT'). As the then Victims' Commissioner and Independent Anti-Slavery Commissioner said at the time, NABA *'risks us failing to identify victims of modern slavery and providing them with the protection they need. Ultimately, this will only hinder us in stopping these criminals and preventing the victimisation of others.'*[15] The Government should repeal section 59 and section 63.

13. We would highlight the following further provisions which we are particularly concerned about from an access to justice point of view and which we warned about during the passage of NABA [16]:

    a) **Accelerated detained appeals (section 27, in force for making regulations).** In 2015, the Court of Appeal found that the then Detained Fast Track appeal process was unlawful because it created an unfair system for asylum and human rights appeals.[17] The Court of Appeal found that the timetable would be *'so tight that it is inevitable that a significant number of appellants will be denied a fair opportunity to present their case'.*[18] This clause requires the independent Tribunal Procedure Committee to set up an equivalent provision for detained appeals, which it has begun work on though accelerated appeals have not begun.[19] Whilst we acknowledge the need to address the appeal backlog, a fast-track detained appeal process is not the way to address this. The previous attempt led to hundreds of cases having to be reconsidered by the Home Office as they were unfairly rushed, and any new rules are likely to be subject to further litigation. Clause 24 should be repealed to demonstrate the Government's commitment to fair rules that protect access to justice.

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[13] Naoemi Magugliani, John Trajer and Dr Jean-Pierre Gauci, 'Assessing the Modern Slavery Impacts of the Nationality and Borders Act: One Year On' (June 2024)

[14] Matrix Chambers, 'Secretary of State for the Home Department withdraws public order disqualification policy' (22 January 2024)

[15] Dame Vera Baird and Dame Sara Thornton, 'The Nationality and Borders Bill fails to grasp what being a victim of slavery means' (11 January 2022)

[16] See JUSTICE's briefings on the Nationality and Borders Act.

[17] 'Fast-track asylum appeal system suspended by Court of Appeal' (BBC News, 26 June 2015)

[18] Lord Chancellor v Detention Action [2015] EWCA Civ 840 at [38].

[19] Sonia Lenegan, 'Tribunal Procedure Committee minutes disclose government progress on accelerated detained appeals' (Free Movement, 22 April 2024)

b) **Priority removal notices (sections 20 – 25, not in force).** Priority removal notices will give individuals liable for removal or detention a set period to access legal advice and provide any further grounds or evidence in support of a claim to the Home Office. After the 'cut-off' date, new claims will be subject to presumptions of damaged credibility (section 22), minimal weight of evidence (section 26). We stress the importance of ensuring individuals have adequate time to access legal advice to prepare legitimate challenges to removal. We also object to the attempt to bind the judiciary to the Home Office's approach on credibility for late claims; our independent judiciary can assess credibility objectively. Sections 23 and 24 provide for expedited appeals in the Upper Tribunal, with no onward appeal to the Court of Appeal; curtailing appeal rights in this way is an affront to access to justice. Such limited appeals will be for either initial claims, or fresh claims which have a realistic prospect of success, and risk being rushed with no mechanism to correct judicial error. Sections 20 – 25 should be repealed.

c) **Late provision of evidence in asylum or human rights claim (section 26, not yet in force).** This clause requires decision-makers to give minimal weight to late evidence unless there are good reasons. We disagree with an automatic burden on individuals to show such good reasons before their evidence can be properly assessed and the extensions of these presumptions to the judiciary being a concerning restriction on judicial independence. Late disclosure is already a factor in determining the credibility of evidence.[20]

d) **Removals: notice requirements (section 46, in force).** Whilst it was welcome that section 46 clarified in legislation that an individual would usually require 5 working days' notice of their proposed removal date, there were exceptions which could lead to 'no notice' removals. Such removals are contrary to access to justice and the rule of law. 10B creates an exemption when a planned removal fails including adverse weather conditions and disruption (which is widely interpreted by the Home Office). 10E is especially problematic as it applies when a planned removal does not take place due to an individual taking judicial review action. Whilst removal must take part within 21 days of the court's decision, the clause runs the risk of an individual being removed before they can seek legal advice on the outcome. 10B and 10E should be repealed.

14. We urge the Bill committee to amend the Bill as follows:

New Clause 39: Repeal of certain provisions of the Nationality and Borders Act 2022

[20] Home Office, 'Assessing credibility and refugee status in asylum claims lodged on or after 28 June 2022' (28 September 2023)

(1) The following provisions of the Nationality and Borders Act 2022 are repealed –

(a) section 12;

(b) sections 20 – 27;

(c) section 46(7), paragraphs 10B and 10E;

(d) sections 59 and 63;

New immigration powers

Seizure of electronic devices

15. Clauses 19 to 26 would allow for the seizure, without permission, of 'relevant articles' (likely mobile phones or electronic devices) to access information about the facilitation of illegal immigration. The High Court previously found that the blanket seizure of mobile phones of small boats arrivals was unlawful and the Home Office conceded it was a breach of the Data Protection Act and Article 8 ECHR.[21] However, despite a requirement for the power to be used only where there are reasonable grounds of suspicion that a person has a relevant article, the definition of 'relevant article' is very broad and we are concerned that in practice this power may be used for the blanket seizure of mobile phones from anyone who arrives irregularly.

16. We therefore urge the Bill committee to:

Amend the Bill to narrow the definition of "relevant article" to ensure it is not, in practice, a blanket seizure of the electronic devices of asylum-seekers. At the very least, an amendment should be added to make clear that these powers can only be used compatibly with the Data Protection Act 2018 and UK General Data Protection Regulations.

[21] *HM v Secretary of State for the Home Department* [2022] EWHC 695 (Admin) and Sealed Order

Retrospectivity

17. Legal certainty requires individuals to know their rights and how they can be enforced. This is an important part of the UK's legal system and our common law traditions. The Attorney General has spoken of the *'restoration of our reputation as a country that upholds the rule of law at every turn'* and *'the strengthening of Parliament's role in upholding the rule of law'.*[22] Lord Bingham emphasised that his first principles of the rule of law was that it was *'accessible and so far as possible intelligible, clear and predictable'.*[23] This means that that retrospective legislation should only be passed in *'very exceptional circumstances'.*[24] There are a couple of retrospective provisions in this Bill which we do not think are properly justified:

a. **Clause 41** would change the detention rules (see above) but also states that they *'are to be treated as always having had effect'.* This is a significant retrospective power and limited information has been provided by the Home Office as to why it is required. It would be inappropriate to use this legislation to retrospectively authorise the unlawful detention of individuals, if this is the intention.

b. **Clause 51** would retrospectively permit the Home Office to charge certain fees (for UK visa qualification and English language assessment services) which it has admitted it collected without proper legal authorization.[25] We note the potential financial Home Office liability if such a change is not made, but query if that is sufficient to justify significant retroactive legislation which potentially engages Article 1 Protocol 1 of the ECHR.

18. Unless adequate, exceptional explanations for these provisions are provided by the Government, we urge Parliament to amend the legislation to remove their retrospectivity. There has been a growing trend in the use of retrospective powers by successive UK governments which sets a dangerous precedent for the rule of law in this country. We urge the Bill committee to amend the Bill as follows:

Remove Clause 41(17) from the Bill.

Remove Clause 51 from the Bill.

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[22] Attorney General, '2024 Bingham Lecture on the rule of law' (15 October 2024)

[23] Lord Bingham, ''The Rule of Law' Sir David Williams Lecture' (16 November 2006)

[24] House of Lords Constitution Committee, 'Nationality and Borders Bill' (21 January 2022), para 22

[25] Hansard, 'Immigration and Nationality (Fees) (Amendment) Order 2024' (11 November 2024)

The impact and efficacy of expanding Serious Crime Prevention Orders

What are Serious Crime Prevention Orders?

19. Serious Crime Prevention Orders ("SCPOs") are a type of civil Behavioural Control Order, introduced by the Serious Crime Act 2007 ("the 2007 Act") which can impose onerous conditions upon a person subject to them.[26] Breach of a condition or requirement is a criminal offence, punishable by up to 5 years imprisonment.[27] Currently, SCPOs are available on complaint to the High Court ("SCPOs on Complaint")[28] or following a conviction at the Crown Court ("SCPOs on Conviction").[29]

20. SCPOs can be imposed upon any person aged 18 or over, on the basis that the person a) has committed, (b) facilitated the commission by another person or c) has conducted himself in a way that was likely to facilitate the commission, of a serious offence in England and Wales.[30] A non-exhaustive list of offences which could constitute a *"serious offence"* is set out in Schedule 1 of the 2007 Act.[31]. However, the High Court and Crown Court can also exercise their discretion in deciding that an offence is *"sufficiently serious"* to merit an SCPO.[32] The court must also consider that there are *"reasonable grounds"* to believe that an order would protect the public by "p*reventing, restricting or disrupting a persons involvement"* in serious crime, before imposing an order. SCPOs can last up to 5 years at a time, although they are subject to renewal.[33]

Changes proposed by the Bill

21. The Bill contains provisions to expand the scope and availability of SCPOs. This will have wider implications for the criminal justice system beyond the asylum and immigration space. In particular, the Bill makes the following changes:

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[26] This includes prohibitions on a person's movements and travel; their ability to associate with other people; where they can live; where they can work what items they can have in their possession as well as requirements to provide certain information on request, Serious Crime Act 2007, s5

[27] Serious Crime Act 2007, s16(2)

[28] Serious Crime Act 2007, s1

[29] Serious Crime Act 2007, s19

[30] Serious Crime Act 2007, s2(1) and s6

[31] It includes fraud; money laundering; computer misuse; environmental crimes; child sex and prostitution and drug trafficking. Serious Crime Act 2007, Schedule 1.

[32] Serious Crime Act 2007, s2(2)(b)

[33] Serious Crime Act 2007, s16(5)

a. *Inclusion of electronic monitoring* – Section 46 of the Bill makes it possible for the courts to impose electronic monitoring requirements / tagging on individuals who are subject to SCPOs across the United Kingdom.[34]

b. *Creation of Interim SCPOs* – Section 47 of the Bil creates a new type of "Interim SCPO", where an application for a full order, has been made but not yet determined and the court considers it 'just' to impose one.[35]Applications for Interim SCPOs would be able to take place without notice being given to the person who is to be subject to it, "*where notice of the application is likely to prejudice the outcome sought by the applicant."*[36]

c. *Extending the list of parties that can apply for a SCPO on complain*t - Currently only the Director of the Serious Fraud Office and the Director of Public Prosecutions can make an application to the High Court for an SCPO.[37] The Bill would expand this to the National Crime Agency, Her Majesty's Revenue and Customs; the Police; the British Transport Police and the Ministry of Defence Police to apply for SCPOs on Complaint and Interim SCPOs.

d. *Inclusion of Notification Requirements* – Section 49 provides that a person subject to any type of SCPO must provide the police or applicant authorities with certain information within 3 days of an order coming into force.[38] Notifiable information includes not only name, address and contact details, but also social media and gaming usernames, vehicle information, financial information and employment details.[39] Failure to provide the required information within the required timeframe without reasonable excuse; knowingly providing false information or not updating the applicant body to changes to the information is a criminal offence. The maximum penalty is a fine; imprisonment up to 6 months or 5 years depending on whether it is summary conviction or indictment.[40] It is unclear whether a breach of a notification requirement will also constitute a breach of an order and if so, how this will affect the punishment.

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[34] Inserts new section 5B-5D into the Serious Crime Act 2007. This change will affect all types of SCPOs in England and Wales, and "terrorist-related" SCPOs in Scotland and Northern Ireland.

[35] Inserts new section s.5E into the Serious Crime Act 2007

[36] Inserts new Section 5F into Section 47 of the Serious Crime Act 2007.

[37] Unless it is a terrorist-related SCPO in which case a chief officer of the police can apply but only after they have consulted with the Director of Public Prosecutions.

[38] See Section 1(1) of new Schedule 1A which is inserted into the Serious Crime Act 2007 by section 49 of the Bill

[39] The list of notifiable information can be extended by way of regulations made by the Secretary of State under section 49(5)(j)

[40] See sub-section (3) of new Schedule 1A which is inserted into the Serious Crime Act 2007 by section 49 of the Bill.

e. *Creation of SCPOs on Acquittal or during Appeal in the Crown Court* - Section 50 increases the powers of the Crown Court to impose SCPOs.[41] In particular, the Crown Court will be able to impose an SCPO on a person following their acquittal or when allowing an appeal provided that it is a) *"satisfied"* that the person has been involved in serious crime (whether in England and Wales or elsewhere) and b) when the court has *"reasonable grounds"* to believe that an SCPO would protect the public by preventing, restricting, or disrupting involvement by the person in serious crime in England and Wales. This is in spite of a jury finding a person innocent of an offence. As with any other type of SCPO, the Crown Court will be able to impose conditions including restrictions and requirements; they last 5 years and breach is punishable by up to 5 years imprisonment.

Our concerns

22. Our report on Behavioural Control Orders identified significant concerns about the efficacy of orders like SCPOs and how they were operating in practice.[42] We consider that the expansion of SCPOs, without a thorough review and consultation, will only frustrate existing pressures within the Behavioural Control Order regime, as follows:

    a. ***No evidence or data to show that SCPOs are working*** - There has been no official review of the way that SCPOs are functioning currently. Data relating to their use is not published centrally and, therefore, it is impossible to confirm whether SCPOs are a successful or proportionate and cost effective measure to "*prevent, restrict or disrupt"* a person's involvement in a serious criminal offence.

    b. ***Inconsistent use of orders across the country*** - There is significant variation in the use of SCPOs, across the country, and the types of conditions and requirements they impose.[43] This is problematic for the rule of law and undermines the effectiveness of the measures. This is due, in particular, to:

        i) A lack of resourcing, training and infrastructure to monitor and enforce orders properly. It is difficult to understand how applicants and enforcement bodies will have the capacity to deal with the addition of two new types of SCPO, let alone facilitate the extra demands caused by electronic monitoring and notification requirements. As stated in the Government's Impact Assessment, only 13 out of 43 police forces have clear arrangements in place relating to the use of SCPOs and

[41] by inserting a new Section 19A into the Serious Crime Act 2007.

[42] JUSTICE, 'Lowering the Standard: a review of Behavioural Control Orders in England and Wales' (November 2023).

[43] Ibid.

monitoring and enforcement.[44] This will be further complicated by the fact it is envisaged that an individual might be subject to more than one SCPO at a time, particularly given that poor communication infrastructure between different courts and police forces often leads to current breaches of orders going unnoticed. [45]

ii) Overlap with other orders and offences: conduct covered by a Behavioural Control Order often falls within the remit of several other offences and Behavioural Control Orders. This causes confusion in determining when to pursue a criminal offence, when to impose an order and which order to use. The type of offence that can lead to an SCPO is extremely broad. As currently drafted, it has the potential to overlap with Labour Market Enforcement Orders, Sexual Risk Orders, Sexual Harm Prevention Orders, Serious Violence Reduction Orders; Female Genital Mutilation Orders; Slavery and Trafficking Prevention Order; Slavery and Trafficking Risk Orders, Violent Offender Order, amongst others. We are also concerned that SCPOs overlap with the new orders proposed by the Crime and Policing Bill due to the broad range of behaviours captured by each order.

The situation is chaotic and untenable. Rather than introducing two further types of SCPO, the Government should be working to streamline and simplify the range of orders currently in existence.

c. ***Setting people up to fail*** – Breaches of conditions within orders are common.[46] Often, this is because individuals lack adequate support to comply with the restrictions and requirements imposed by the orders and/or do not fully understand the rules that they were expected to abide by. This is worsened in situations where individuals are neurodivergent, have intellectual disability and/or language barriers. All too often, insufficient screening is available to ascertain whether this is the case. The Government must therefore ensure sufficient safeguards and support is in place to ensure that an individual understands the terms of the order and is supported to comply with it.

d. ***Impact on Human Rights and Privacy*** – Being subject to an SCPO is a serious and life-changing event, particularly given the duration of the SCPO and the punishment for breach. Individuals are subject to restrictions and requirements that can impact on their rights under the ECHR.[47] The introduction of

[44] Home Office Draft Impact Assessment Rationale for Intervention (B), 2 April 2024

[45] JUSTICE 'Lowering the Standard: a review of Behavioural Control Orders in England and Wales' (September 2023)

[46] Albeit, difficult to assess situation fully due to lack of data.

[47] In particular, Article 5 right to liberty and security; Article 6 right to a fair trial, Article 8 right to private and family life; their ability to associate with other people in respect of Article 10 and Article 1 Protocol 1 right to peaceful enjoyment of their possessions.

electronic monitoring and notification requirements make the impact even more severe. We have graver concerns about the proportionality of the measures, including the fairness of someone being subject to an SCPO and electronic monitoring and notification requirements despite them being acquitted of an offence.

23. Procedural safeguards inherent within the criminal law must not be usurped by allowing courts to impose SCPOs and determine someone's involvement in crime, upon a weaker standard of proof and using evidence that would be otherwise inadmissible in a criminal trial. For example, it is unclear how a court will determine that it is "satisfied" that a person has been involved in serious crime in the context of that person having just been acquitted by a jury in the Crown Court or how it can ever be reasonable for it to do so. This would amount to criminalisation by the backdoor. Furthermore, the test for refusing to provide notice for an Interim SCPCO is also set unduly low and is at odds with fair trial principles. Finally, and considering these impacts, we do not consider that there is adequate support to individuals to challenge an application for an SCPO or a condition contained therein; to vary an SCPO or seek to get it discharged.

24. Before any expansion of SCPOs, the must be a thorough review of how SCPOs and related orders are functioning currently. In particular, the Government must streamline the existing orders within this space to avoid duplication and wasted resource. Any review must identify how bodies are currently monitoring for equality and human rights impacts when applying for, imposing and enforcing orders. Significant investment is also required to ensure that applicants and enforcement bodies have the right resources to safely use SCPOs.

25. We therefore urge the Bill committee to:

Remove clauses 46 to 50 from the Bill.

New criminal offences

26. The Bill creates four new criminal offences: Supplying articles for use in immigration crime (**section 13**); Handling articles for use in immigration crime (**section 14**); Collecting information for use in immigration crime (**section 16**); and endangering another during sea crossing to United Kingdom (**section 18**). Our concerns in relation to these provisions are as follows.

<u>Defences: lack of specific protection for those providing legitimate legal services</u>

27. It is to be welcomed that the defence of 'reasonable excuse' applies to each of the new offences: in other words, if a person has a reasonable excuse for engaging in the relevant conduct, they will not be guilty of the offence. The burden lies on the defence to adduce sufficient evidence of a reasonable excuse such that it is placed in issue. If they have done so, it is for the prosecution to prove beyond reasonable doubt (i.e. to the usual criminal standard) that the person charged did *not* have a reasonable excuse.

28. In respect of each offence under sections 13, 14 and 16, the Bill sets out a (non-exhaustive) list of circumstances in which the defence of 'reasonable excuse' will apply. Under section 13, for example, a person will have a reasonable excuse if their action was for the purposes of carrying out a rescue of a person from danger or serious harm. They will also have a reasonable excuse if they were acting on behalf of an organisation which aims to assist asylum seekers and does not charge for its services.

29. However, whilst we welcome the inclusion of those examples already contained within the Bill, we consider there to be a notable and concerning omission, namely an exception for those providing legitimate legal advice and preparing legitimate legal claims. Those who represent asylum-seekers in the UK, provide legal advice about their rights and publicise their work should be confident they will not be included, given the wide drafting of the Bill. Although the Bill does not necessarily preclude a defence for such individuals, in our view they should be specifically exempt from prosecution. Uncertainty for those providing legal services to vulnerable individuals risks an unjustified risk to access to justice and the rule of law.

30. We urge the Bill committee to insert a provision affording explicit protection from prosecution for those providing legitimate legal services by amending the Bill as follows:

Clause 16(8), page 10, line 22, insert –

(d) the person was carrying out a legal activity, as defined in section 12(3) Legal Services Act 2007.

<u>Maximum sentences</u>

31. The maximum sentences for each of the new offences are as follows:

a. Section 13: 14 years' imprisonment

b. Section 14: 14 years' imprisonment

c. Section 16: 5 years' imprisonment

d. Section 18: 4 years' imprisonment

32. The maximum sentence for the section 13 and 14 offences, in particular, are in our view disproportionately high. To place these in context, the offence of possession of articles for use in terrorism has a maximum sentence of 15 years.[48] In the context of the overcrowding crisis currently impacting the prison estate - which last summer reached '*near collapse*' in the words of the Lord Chancellor[49] - we strongly encourage the Government to take an evidence-based approach to determining the appropriate maximum sentences for any new offences. There is a notable lack of robust evidence that lengthier custodial sentences achieve a deterrent effect or a reduction in reoffending.[50] This is explicitly acknowledged within the Impact Assessment to the Bill itself with regard to the section 18 offence: *'There is limited understanding of the behavioural impact of this intervention, so the deterrence effect on dangerous behaviour may not be realised as intended'.*[51]

33. With regard to the Bill's likely impact on the prison population, the Impact Assessment estimates that between four and six prison places will be required per year in relation to the section 13 and 14 offences.[52] On the other hand, it notes that there is *'significant uncertainty regarding the volume of offences/ offenders each year [including] regarding how law enforcement and the courts will use this offence in practice [as well as the rates of convictions leading to immediate custody]'.*[53] The recently published Independent Sentencing Review was critical of how *'too often the knee-jerk response has been to increase sentence lengths as a demonstration of government action',* leaving the UK prison population very high by historic and international standards.[54]

34. We also note that the Bill is deliberately widely drafted with a low threshold for prosecution so as to *"deliberately catch those acting at too much distance from the people smuggling to be prosecuted under section 25 of the Immigration Act 1971 and where there is insufficient evidence of belief or intention to prosecute an individual under the Serious Crime Act 2007... or for conspiracy."*[55] In this regard we note,

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[48] Terrorism Act 2000, sections 57(4)(a) and 58(4)(a)

[49] Press release: Lord Chancellor sets out immediate action to defuse ticking prison 'time bomb', July 2024

[50] See, e.g., Sentencing Council, *Reconceptualising the effectiveness of sentencing: four perspectives*, (2024); Sentencing Council, *The Effectiveness of Sentencing on Reoffending*, (2022)

[51] Bill Impact Assessment, p. 77

[52] *Ibid*., p. 58

[53] *Ibid*., p. 78

[54] 'Independent Sentencing Review: History and Trends in Sentencing', p8 (February 2025)

[55] Bill Impact Assessment., p. 30

first, that the possibility that the Bill will contribute to the severe prison overcrowding crisis cannot be discounted.

35. Second, the lesser culpability of those whom the Government intends to criminalise under the new offences ought to be more accurately reflected in the corresponding maximum sentences. In this regard, it is worth noting that the money laundering offences under sections 330, 331 and 332 of the Proceeds of Crime Act 2002 have a mental element of 'knows or suspects' or, in the case of the offences under sections 330 and 331, 'has reasonable grounds for knowing or suspecting' and a maximum sentence of 5 years.[56]

The Bill Committee should scrutinise whether the proposed sentences for these offences are proportionate and what the potential impact for the prison population would be.

Conclusion

36. We welcome the repeal of the Safety of Rwanda (Asylum and Immigration) Act and much of the Illegal Migration Act. However, as set out in this briefing, we have concerns about aspects of this Bill, in particular: (a) provisions from the Illegal Migration Act and Nationality and Borders Act which have not been repealed; (b) new immigration powers on deportation, seizure of mobile phones and retrospective powers; (c) the impact of expanding Serious Crime Prevention Orders ('SCPOs') and their efficacy; and (d) the scope and disproportionately high sentences of the new proposed criminal offences. We urge the Bill Committee to amend the legislation as suggested in this briefing.

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[56] Proceeds of Crime Act 2022, sections 330(2). 331(2), 332(2), 334(2)(b)