

# The Anti Trafficking Monitoring Group

## 'Illegal Migration' Bill briefing – Committee Stage

27/28 March 2023

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## Summary

1. The Anti Trafficking Monitoring Group (ATMG) is a coalition established in 2009 to monitor the UK's implementation of the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT). It comprises of seventeen leading UK-based anti-trafficking organisations: Anti-Slavery International, Ashiana Sheffield, Bawso, ECPAT UK, Focus on Labour Exploitation (FLEX), Helen Bamber Foundation, Kalayaan, Law Centre (NI), the Snowdrop Project, the TARA service, Just Right Scotland, UNICEF UK, the Children's Law Centre (CLC), Flourish Northern Ireland, the East European Resource Centre, the Scottish Refugee Council and Hope for Justice.
2. We are deeply concerned about the Government's new proposed 'Illegal Migration Bill', which is unlawful, unworkable, costly and inhumane and will put the lives of victims of modern slavery and human trafficking and the wider migrant community at further risk. **We reject this Bill and we urge the Government to drop it in its entirety.**<sup>1</sup>
3. If the new legislation is enacted, many victims will not be identified and therefore supported under the National Referral Mechanism (NRM).<sup>2</sup> **Victims being trapped in exploitation will be denied their right to seek justice for the crimes they have endured and they will instead be criminalised, detained and will be under threat of being removed.**
4. It is clear that the Bill is incompatible with the Human Rights Act (HRA), the European Convention on Human Rights (ECHR) including Article 4 ECHR and the Council of Europe Convention on Action Against Trafficking in Human Beings (ECAT). This briefing analyses this in more detail and the repercussions on victims of trafficking and modern slavery. It is also important to note that ECAT must be read and interpreted in conjunction with other international treaties, which we will refer to in

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<sup>1</sup> Home Secretary (2023) Illegal Migration Bill. Available at: <https://bills.parliament.uk/bills/3429>

<sup>2</sup> The NRM is the system to identify, support and protect victims of human trafficking and modern slavery.

the course of this analysis. We have included relevant case law in the Annex to clarify the interaction between the HRA, ECHR and ECAT.

5. The Council of Europe Commissioner for Human Rights in a letter to all MPs and peers warned that “the Bill’s provisions create clear and direct tension with well-established and fundamental human rights standards”.<sup>3</sup>
6. **We also endorse the refugee sector’s concerns on the Bill, including the statement released by the UNHCR<sup>4</sup> on 7 March 2023, saying that the legislation, if passed, would amount to an asylum ban and it is a breach of the Refugee Convention.<sup>5</sup> This Bill poses a risk to everyone that comes to the UK to seek protection, victims and survivors of trafficking and modern slavery, to the wider migrant community, their families and to everyone’s human rights in general.**
7. We endorse ILPA’s in-depth [briefing](#)<sup>6</sup> ahead of the Bill’s second reading, analysing the repercussions of the Bill on anyone affected by it. We also endorse the Detention Task Force [briefing](#)<sup>7</sup> and the Refugee and Migrant Children’s Consortium [briefings](#).<sup>8</sup>
8. This Bill does not provide a solution to the current backlog in asylum and NRM decisions or to people being forced to undertake dangerous journeys to avail of their right of seeking asylum. Instead, these provisions will put more people in danger, will create a considerable risk of suffering and death, and will continue to harm those more vulnerable in our society by laying the ground for their exploitation and re-trafficking.
9. Below are some of the consequences of this Bill for victims and survivors of modern slavery and human trafficking. The Bill will unlawfully:
  - Remove ECAT protections for victims of trafficking and modern slavery who are subject to removal and detention arrangements.
  - Prevent critical and effective access to identification procedures under the NRM and deprive victims of support and protection.
  - Fuel trafficking and organised crime by driving anyone that is liable to be detained and/or removed underground and trap them in exploitation. The

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<sup>3</sup> Council of Europe Commissioner on Human Rights (27 March 2023) Letter: Parliamentarians should uphold the United Kingdom’s international obligations when scrutinising the “Illegal Migration Bill”. Available at: <https://www.coe.int/en/web/commissioner/-/parliamentarians-should-uphold-the-united-kingdom-s-international-obligations-when-scrutinising-the-illegal-migration-bill>

<sup>4</sup> United Nations High Commissioner for Refugees

<sup>5</sup> UNHCR (7 March 2023) Statement on UK Asylum Bill. Available at: <https://www.unhcr.org/uk/uk-immigration-and-asylum-plans-some-questions-answered-by-unhcr.html>

<sup>6</sup> ILPA (2023) Briefing on Illegal Migration Bill for second reading in the House of Commons on 13 March 2023. Available at: [ILPA Briefing on Illegal Migration Bill for Second Reading in the House of Commons on 13 March 2023 - ILPA](https://www.ilpa.org.uk/briefing-on-illegal-migration-bill-for-second-reading-in-the-house-of-commons-on-13-march-2023-ilpa)

<sup>7</sup> Detention Taskforce (10 March 2023) ‘Illegal Migration’ Bill Second reading briefing. Available at: [https://www.helenbamber.org/sites/default/files/2023-03/Detention%20Taskforce\\_Illegal%20Migration%20Bill\\_Second%20Reading%20Briefing\\_03.23.pdf](https://www.helenbamber.org/sites/default/files/2023-03/Detention%20Taskforce_Illegal%20Migration%20Bill_Second%20Reading%20Briefing_03.23.pdf)

<sup>8</sup> Refugee and Migrant Children’s Consortium - ‘Illegal Migration’ Bill briefings. Available at: <https://refugeechildrensconsortium.org.uk/briefings-on-the-illegal-migration-bill/>

Government must offer victims and survivors a humane rhetoric and functioning support and protection system. This will disenfranchise the traffickers' hold on victims, which in turn will offer them a better incentive to approach authorities.

- Contravene the ECAT non-punishment and penalisation principle by targeting victims for removal because of the way they arrived in the UK, including where they had no choice as a result of having been trafficked and therefore entering irregularly. They and their children will be banned from settling in the UK, undermining the ECAT obligations regarding the grant of leave to remain.
- Allow traffickers to go unpunished by removing victims and survivors who are witnesses or by not identifying or supporting them so that they are not able to cooperate with investigations and prosecutions.
- Increase the power to detain vulnerable groups, indefinitely, including victims and unaccompanied children, facilitating trafficking and restricting access to support and legal advice.
- Create a group of vulnerable people left in limbo, with no right to work, study or regularise their immigration status. People will be pushed into destitution, which will exponentially increase the risk of trafficking/re-trafficking.
- Remove effective access to judicial review and legal challenge, which essentially places unlawful decisions affecting victims and survivors beyond judicial scrutiny and the rule of law.

### **Bill's incompatibility with HRA and International Law**

10. The Home Secretary acknowledges that she cannot state that the Bill is compatible with Convention rights, but *"the Government nevertheless wishes the House to proceed with the Bill"*. This allows the Government to overturn international obligations that should safeguard everyone's human rights, causing considerable damage. Clause 1 expressly disapplies section 3 HRA, doing away with the rule that legislation must be read and given effect to in a way that is compatible with Convention rights.<sup>9</sup>

11. This Bill is incompatible with the HRA, ECHR, ECAT and the wider international law, including, but not limited to the Refugee Convention, the Palermo Protocol (United Nations Convention Against Transnational Organised Crime), the International Covenant on Civil and Political Rights<sup>10</sup> and UNCRC (UN Convention on the Rights of the Child).

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<sup>9</sup> Human Rights Act (1998). Available at: <https://www.legislation.gov.uk/ukpga/1998/42/section/3>

<sup>10</sup> United Nations Human Rights (1966). Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

12. ECAT emphasises the need to protect and support victims of trafficking and modern slavery, which is related to the prosecution of those responsible for trafficking.<sup>11</sup>

*The purposes of this Convention are:*

*a) to prevent and combat trafficking in human beings, while guaranteeing gender equality*

*b) to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution;*

*c) to promote international cooperation on action against trafficking in human beings.<sup>12</sup>*

13. **The basic principles to prevent and combat trafficking, protect victims, and ensure effective investigation and prosecution of traffickers, set down in Art 1 ECAT, lay the basis for the entire Convention. This stands in clear contrast with the Bill, which wrongly prioritises immigration control over safeguarding as the appropriate response to trafficking and modern slavery.** ECAT is not naïve to immigration- far from it - the protective measures of identification, protection from removal, support and assistance, and residence permits are specifically designed to protect against the risk of victims wrongly being treated as “illegal immigrants, prostitutes or illegal workers and being punished or returned to their countries without being given any help.”<sup>13</sup> The Bill prevents victims from accessing these basic protections.
14. Furthermore, it will not enable ECAT or ECHR to achieve its purposes in the identification, protection of victims and survivors and ensuring effective investigation and prosecution of traffickers. This Bill is in clear contrast with Article 31 of the Vienna Convention on the Law of Treaties,<sup>14</sup> which states that *a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*
15. This Bill discriminates between victims based on the way they arrive in the UK and will prevent them from being identified and supported contravening the obligations set by the ECAT. Individuals who are trafficked to the UK, with movement out of their control or those who were deceived or forced to arrive in the UK irregularly to seek protection, in the absence of safe routes, will be treated differently from other victims. Discrimination is prohibited by ECAT and ECHR.

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<sup>11</sup> Explanatory Report to Convention of Europe on Action Against Trafficking in Human Beings (ECATER)(2005). Available at: <https://rm.coe.int/16800d3812> - paragraph 57

<sup>12</sup> ECAT - Art 1

<sup>13</sup> ECATER paragraph 128

<sup>14</sup> United Nations (1969) Vienna Convention on the Law of Treaties. Available at: [https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)

16. The human rights memorandum<sup>15</sup> which accompanies the Bill acknowledges the Bill interferes with a number of rights enshrined under the Human Rights Act 1998.
17. The Home Secretary in the memorandum under “Modern slavery”, stated that because the Bill makes certain exceptions to disqualification from protection or removal arrangements, this will prevent the Bill from infringing Article 4 ECHR,<sup>16</sup>e.g:
- disqualification from protection will not apply for the period that a person is cooperating with an investigation or criminal proceedings in relating to their exploitation, if the Home Secretary considers it ‘necessary for the person to be present’ in the UK to provide that cooperation;
  - The potential for a suspensive claim provided a person makes a claim that they would face a real risk of serious and irreversible harm on removal;
  - Home Office assurances that receiving countries can investigate trafficking claims and provide support for victims.<sup>17</sup>
18. These narrow exceptions breach Article 4 ECHR and ECAT. We will analyse these provisions further against the ECHR and ECAT in the next sections.

## **Identification failures and disqualification from support: re-trafficking risk for victims of human trafficking and modern slavery and failure to prosecute traffickers**

### *Preventing identification – Breach of Articles 10, 12, 13, 16 and 18 ECAT*

19. The Bill at clause 2-10 would impose a duty on the Home Secretary to remove anyone that came to the UK irregularly on or after 7 March 2023, with some exemptions set in Clause 2(11). People will be able to be removed regardless of the fact they claim asylum or are a victim or survivor of trafficking and modern slavery (Clause 4(1)(a)-(c)). **This will prevent the identification of possible victims by disqualifying them from the NRM or from being referred altogether. It breaches all the principles underpinning ECAT and specifically Art 10, which imposes a duty on the Government to identify victims.**

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<sup>15</sup> Illegal Migration Bill, European Convention on Human Rights Memorandum (2023). Available at: [ECHR Memo Illegal Migration Bill-07323 \(parliament.uk\)](https://www.parliament.uk/bills/2022-23/illegal-migration-bill-2022-23/07323)

<sup>16</sup> European Convention on Human Rights (1950). Available at: [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf) - Article 4: Prohibition of slavery and forced labour.

<sup>17</sup> House of Commons Library (10 March 2023) Illegal Migration Bill 2022-23. Available at: <https://commonslibrary.parliament.uk/research-briefings/cbp-9747/#:~:text=The%20Bill%20would%20create%20two,place%20where%20they%20fear%20persecution.> - p.48

20. Art 10(2) ECAT<sup>18</sup> seeks to prevent victims and survivors from being *immediately removed from the country before they can be identified as victims*.<sup>19</sup> *Once there are reasonable grounds for believing a person might be a victim, that is “sufficient reason not to remove them until completion of the identification process establishes conclusively whether or not they are victims of trafficking”*.<sup>20</sup>
21. It also breaches the duty to complete the identification of status contained within **Articles 13(1) and 18 ECAT**.
22. There is no provision in ECAT that allows a signatory State to disqualify potential victims from the entire identification and protection mechanism. However, the Bill poses the real risk that people will not be able to enter the NRM at all if the usual screening mechanism carried out at borders is not going to be implemented. There is no clarity on this point, but the Home Secretary includes a provision stating that people will be removed to a supposedly “safe” third country for consideration of any asylum or humanitarian protection claim.<sup>21</sup> We note serious concerns, outlined below, regarding the Government’s selection of supposedly “safe” countries.
23. This is an unlawful measure under the UK’s domestic and international obligations to deal with those claims and it fails to appropriately protect victims in the absence of safeguarding measures.
24. If potential victims and survivors are not referred to the NRM or are disqualified from it, they will not receive a Positive Reasonable Ground Decision, which in turn will also prevent the Home Office from acknowledging that the individual is a vulnerable adult at level 2 of the Adult at risk policy. This assessment should inform the decision to release a vulnerable adult from detention in conjunction with immigration consideration and public order.<sup>22</sup>
25. Therefore, these provisions will create a very dangerous situation where victims and survivors could be removed to their country of origin or to a supposedly “safe” third country without a proper risk assessment taking into consideration their specific

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<sup>18</sup> *Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2.*

<sup>19</sup> ECATER paragraph 131

<sup>20</sup> ECATER paragraph 132

<sup>21</sup> Illegal Migration Bill Explanatory Notes (2023) Available at:

<https://publications.parliament.uk/pa/bills/cbill/58-03/0262/en/220262en.pdf>, - Paragraph 15, p. 6

<sup>22</sup> Home Office (30 January 2023) Adults at risk: Detention of potential or confirmed victims of modern slavery, v.3.0. Available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1132830/Adults\\_at\\_risk\\_Detention\\_of\\_victims\\_of\\_modern\\_slavery.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1132830/Adults_at_risk_Detention_of_victims_of_modern_slavery.pdf) - p.14

circumstances. It is deeply concerning that the Bill does not include Safeguarding provisions. This gap will put individuals at further risk of harm and re-trafficking.

26. This also implies a breach of **Art 16 ECAT**, regarding repatriations of victims of human trafficking and modern slavery, where returns should preferably be voluntary.<sup>23</sup> This is subject to **Art 16(2)**, which states that the return of a victim “shall be with due regard for the rights, safety and dignity of that person”. This applies to the sending and receiving State. The return of a victim shall also take into account the status of any legal proceedings related to the fact that the person is a victim, in order not to affect the rights that the victim could exercise in the course of the proceedings as well as the proceedings themselves.<sup>24</sup>
27. The explanatory Report to ECAT (ECATER) at paragraph 203, cites relevant Court judgements in respect to the deportation of victims. The case *Soering v. United Kingdom*<sup>25</sup> rules that the extradition of a person should be prevented if they will face a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the receiving country. This ruling was made on the basis that it would engage Art 3 of the ECHR. In the case *Cruz Varaz and Others v. Sweden* (20 March 1991, Series A, No. 201),<sup>26</sup> the European Court of Human Rights has decided that these principles also apply to deportation.
28. It also breaches the non-refoulement principle set out in Art 33 of the Refugee Convention,<sup>27</sup> which prohibits States from returning individuals to territories where they are at risk of persecution, torture, or other forms of serious or irreparable harm. The note on non-refoulement submitted by the High Commissioner explains that the principle of non-refoulement applies not only in respect of the country of origin but to any country where a person has reason to fear persecution.<sup>28</sup>
29. **We fully reject the plan to remove victims and survivors to any “safe” third country as they should be given support and protection in the UK in line with domestic and international obligations.**
30. The Bill is incompatible with **Article 40 ECAT**, which deals with the relationship between ECAT and other international instruments aimed at ensuring “greater protection and assistance” for victims. *This provision clearly shows, once more, the overall aim of this Convention, which is to protect and promote the human rights of*

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<sup>23</sup> ECAT - ART 16(2)

<sup>24</sup> ECATER - Paragraph 202

<sup>25</sup> European Court of Human Rights (7 July 1989) *Soering v. The United Kingdom*, 1/1989/161/217. Available at: <https://www.refworld.org/cases,ECHR,3ae6b6fec.html>

<sup>26</sup> European Court of Human Rights (20 March 1991) *Cruz Varas and Others v. Sweden*, 46/1990/237/307. Available at: <https://www.refworld.org/cases,ECHR,3ae6b6fe14.html>

<sup>27</sup> UNHCR (1951) Refugee Convention. Available at: <https://www.unhcr.org/uk/3b66c2aa10>

<sup>28</sup> UNHCR (1977) Note on non-refoulement (Submitted by the High Commissioner) EC/SCP/2. Available at: <https://www.unhcr.org/uk/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html>

*victims and survivors of trafficking and to ensure the highest level of protection for them.*<sup>29</sup>

31. Art 40(2) states that Parties can conclude bilateral and multilateral agreements in respect to the matters governed by ECAT. *However, the wording makes clear that Parties are not allowed to conclude any agreement which derogates from the Convention.*<sup>30</sup> Therefore, this Bill breaches **Art 40 ECAT** by making agreements with third party countries derogating the UK duty to identify, support and protect victims and survivors of modern slavery and human trafficking. Simply, there is no legal or evidential basis for externalised measures to identify and protect victims and survivors, ECAT demands the identification and protection of victims by the competent authority in the territory.

#### *Disqualification from removal protection and support – Breaches Articles 10, 12 and 13 ECAT*

32. The Bill disqualifies potential victims and survivors from the NRM as well as the protection from removal (Clauses 21-24). Therefore, the removal provisions are incompatible with **Art 10(2)** and **Art 13(1)-(2) ECAT**, which regulate the reflection and recovery period, during which victims cannot be removed from the UK.
33. Victims and survivors that receive a Positive Reasonable Ground Decision are also entitled to receive support as set out in **Art 12**, which makes provisions for the assistance of victims. Therefore, the disqualification from recovery and reflection period also means a breach of Art 12. Disqualifying potential victims and survivors from the NRM will mean that they won't be allowed to access the services to support their recovery.
34. The reflection and recovery period is primarily aimed at allowing victims and survivors to recover and escape the influence of traffickers.<sup>31</sup> This also allows them to make an informed decision about their cooperation in a trafficking investigation. The Home Secretary has justified the disqualification of victims from support with art 13(3) ECAT.<sup>32</sup> However, the Bill fails to interpret Art 13(3) provision in conjunction with the non-punishment principle set out in Art 26.<sup>33</sup>

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<sup>29</sup> ECATER - paragraph 373

<sup>30</sup> ECATER - paragraph 374

<sup>31</sup> ECATER - paragraph 173

<sup>32</sup> ART 13(3)ECAT: *"The Parties are not bound to observe this period if grounds of public order prevent it or if is found that victims status is being claimed improperly."*  
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/236093/8414.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/236093/8414.pdf)

<sup>33</sup> ART 26 ECAT: *"Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so."*

35. We will analyse this issue in more depth in the section on the non-punishment principle.

*Increased risk of re-trafficking and failures to prosecute traffickers - Breach of Articles 1, 5, 6 and 18-25 ECAT*

36. This Bill will strengthen traffickers' hold on victims and push a large cohort of people underground due to fear of being criminalised and removed from the UK. Victims will not have access to the protection afforded by the NRM leaving them completely vulnerable and dependent on their traffickers.

37. Withdrawing support from victims and survivors also brings extremely negative consequences for the prosecution of traffickers. As explained by ECATER in relation to the aim of the recovery and reflection period: *The other purpose of this period is to allow victims to come to a decision "on co-operating with the competent authorities. The period is likely to make the victim a better witness: statements from victims wishing to give evidence to the authorities may well be unreliable if they are still in a state of shock from their ordeal. Such a decision requires that the victim no longer be under the traffickers' influence."*<sup>34</sup>

38. If victims and survivors are not identified, they will not be able to avoid removal or to cooperate with authorities in investigations against their traffickers. This will also result in an inaccurate recording of crimes, which in turn will lead to fewer investigations and prosecutions of traffickers. **This Bill will allow traffickers to continue operating undetected and go unpunished, thereby empowering them.**

39. Even following the entry into force of the Modern Slavery Act 2015, in its most recent report on the UK in October 2021 GRETA remained concerned that "the number of prosecutions remains low compared to the number of identified victims."<sup>35</sup>

40. The provisions in this Bill will be used by traffickers to retain control over their victims and will prevent victims from seeking support from the authorities. The express or implied threat of detention, removal and disqualification from support and from ever settling in the UK will act to deter victims and survivors from coming forward and escaping their exploitation. This will be a clear failure to implement **Art 5 ECAT**, which sets out the principles underpinning the prevention of trafficking in human beings.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/236093/8414.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/236093/8414.pdf)

<sup>34</sup> ECATER paragraph 174

<sup>35</sup> GRETA (2021) Evaluation Report United Kingdom, Third Evaluation Round. Available at:

<https://www.coe.int/en/web/anti-human-trafficking/-/greta-publishes-its-third-report-on-the-united-kingdom>

## Criminalisation of victims

### Incompatibility with non-punishment principle – Breach of Article 26

41. The Bill, if enacted, will amend s.63 of the NABA<sup>36</sup> to include the arrival of people in the UK through an irregular route as a threat to public order.<sup>37</sup> This will allow the Home Secretary to disqualify victims from the NRM and therefore from the recovery and reflection period.<sup>38</sup>
42. This provision has purportedly been justified by the application of Art 13(3) ECAT. However, this is a misinterpretation of Article 13 ECAT. Also, Article 13 cannot be applied to convictions for activity the person was compelled to do as a victim of slavery or human trafficking as it would be a breach of Article 26 ECAT.
43. ECAT and its explanatory notes do not define “public order” in Article 13(3), but Art 13(1) and (2) clearly focus on the fact that the victim needs to be protected, whilst Art (3) does not make direct references to victims.
44. Furthermore, the protection from removal linked to the ‘Reflection and Recovery’ period, as well as the requirement to provide support all fall within the scope of Article 4 of the ECHR.<sup>39</sup> No exceptions can be made to these requirements because Article 4 is non-derogable under Article 15 of ECHR.<sup>40</sup>
45. The European Court of Human Rights in *CN v. the United Kingdom* held that:  
*together with Articles 2 and 3, Article 4 enshrines one of the basic values of the democratic societies making up the Council of Europe (Siliadin, cited above, § 82). Unlike most of the substantive clauses of the Convention, Article 4 § 1 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation.*<sup>41</sup>
46. The Bill pushes a very dangerous narrative where victims and survivors of trafficking and modern slavery that arrive in the UK through irregular routes (even if this is out of their control) are identified as foreign national offenders and dangerous criminals. **This is not only a speculative and un evidenced claim, but it also leads to the criminalisation of victims instead of their perpetrators.**

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<sup>36</sup> Nationality and Borders Bill Act 2022

<sup>37</sup> Illegal Migration Bill clause 27(9)

<sup>38</sup> Illegal Migration Bill clause 21

<sup>39</sup> Prohibition of slavery and forced labour

<sup>40</sup> European Court of Human Rights (2023) Guide on Article 15 of the European Convention on Human Rights. Available at: [https://www.echr.coe.int/documents/guide\\_art\\_15\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_15_eng.pdf)

<sup>41</sup> European Court of Human Rights (13 November 2012) *CN v. United Kingdom*. Available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-114518%22%5D%7D> – paragraph 65.

47. The removal of people from the UK in this instance breaches **Article 26 ECAT and Article 4 ECHR**, whilst failing to uphold UK obligations to prosecute traffickers as reported in the above section on the prosecution of traffickers.
48. Clause 14 of the EU Anti-trafficking Directive expands on the application of the non criminalisation principle by stating that *victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators. This safeguard should not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in.*<sup>42</sup>
49. The Bill is also incompatible with UNTOC and its Protocol against the smuggling of migrants by land, sea and air.<sup>43</sup> Article 5 of this Protocol makes it very clear that migrants who have been smuggled should not be criminalised.<sup>44</sup>

#### Mass detention - Breach of Article 12

50. The Government will have the power to detain adult and children, including unaccompanied children, for 28 days<sup>45</sup> (or more as it will be at the discretion of the Home Secretary rather than the Court).<sup>46</sup>
51. The new provision would allow detention ‘in any place that the Secretary of State considers appropriate’. There is no time limit to pre-departure accommodation under new powers.<sup>47</sup>
52. These powers cover the detention of unaccompanied children pending removal or pending a decision on whether to grant them leave to remain. They would not be subject to the 7-day time limit and other protections in the 2014 Act, and, therefore,

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<sup>42</sup> European Union (5 April 2011) Directive on preventing and combating trafficking in human beings and protecting it. Available at: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>

<sup>43</sup> United Nations (2000) Protocol against the smuggling of migrants by land, sea, air, supplementing the United Nations convention against transnational organised crime. Available at: [https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM\\_Protocol\\_English.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf)

<sup>44</sup> Article 5: Criminal Liability of Migrant: *Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.*

<sup>45</sup> Illegal Migration Bill - Clause 11

<sup>46</sup> Illegal Migration Bill - Clauses 12

<sup>47</sup> Illegal Migration Bill - Clause 11(2)

represent a significant expansion of detention powers in respect of unaccompanied minors, reversing the intention of the 2014 Act.<sup>48</sup>

53. This is a clear breach of article 12(1)(a) ECAT, which states that accommodation provided to victims must be appropriate and secure. The ECATER states that appropriate and secure should be understood in relation to what is necessary to 'assist victims in their physical, psychological and social recovery'. What is appropriate and secure will therefore differ depending on the multiple needs of individual victims. It also adds that victims of trafficking should be accommodated where staff would be able to provide specialist and around-the clock assistance. The purpose is to provide victims with surroundings in which they feel secure and to provide them with help and stability.<sup>49</sup>
54. **In regard to children, ECATER states that the placement of a child in a detention institution should never be regarded as appropriate accommodation.**<sup>50</sup>
55. Art 12 does not only impose a duty to accommodate individuals to prevent homelessness, but to also prevent re-trafficking and to assist victims in their physical, psychological and social recovery from their trafficking experiences. **This Bill will clearly fail to safeguard and protect victims and survivors and to support their recovery.**

## Failures to safeguard and protect children

56. The Bill states that unaccompanied children will be exempted from the duty to remove provisions, however the Secretary of State will have a duty to remove them when they turn 18 and the power to do so before they do.<sup>51</sup> These children will live in fear of their removal, unable to plan for their future or benefit from education. When most unaccompanied children were only granted limited leave to remain until age 18 a decade ago, the fear of removal forced many children to go underground and go missing, compounded by an extreme risk of exploitation, self-harm and suicide.<sup>52</sup> Should this Bill pass into law, we expect such instances to be replicated and worsened.<sup>53</sup> The Secretary of State will also expand her power to detain children in

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<sup>48</sup> Free Movement (13 March 2023) Detention provisions in the Illegal Migration Bill. Available at: <https://freemovement.org.uk/detention-provisions-in-the-illegal-migration-bill/>

<sup>49</sup> ECATER, paragraph 154

<sup>50</sup> ECATER, paragraph 155

<sup>51</sup> Illegal Migration Bill - clause 3

<sup>52</sup> Joint Committee on Human Rights (2013) Human Rights of unaccompanied migrant children. Available at: <https://publications.parliament.uk/pa/jt201314/jtselect/jtrights/9/9.pdf>

<sup>53</sup> Additional analysis on this issue can be found at Refugee and Migrant Children's Consortium (2023) Illegal Migration Committee Stage. Available at: <https://refugeechildrensconsortium.org.uk/wp-content/uploads/2023/03/RMCC-HOC-Committee-stage-briefing-Illegal-Migration-Bill-FINAL.pdf>

families and unaccompanied children with no time limit, which as seen above is incompatible with **Art 12 ECAT**.

57. The Home Office will also have the power to accommodate unaccompanied children and to remove them from the care of Local Authorities.<sup>54</sup> This conflicts with the duties and obligations of the Children's Act 1989 further extending the current practice of placing children in hotels. A number of Children's organisations have released a joint statement raising major concerns on the Bill and the impact it will have on children.<sup>55</sup>
58. As evidenced by the 200 children who remain missing from Home Office run hotels since 2021,<sup>56</sup> the Home Secretary has not been able to keep children safe and many of them have later been found in exploitative situations.<sup>57</sup> These hotels cannot become the norm nor be considered safe accommodations for children as they lack the specialist support and safe and stable environment described in paragraph 154 ECATER.
59. An additional issue has been the lack of safeguarding measures adopted to keep children safe. Local and national newspapers have published pictures of the hotels accommodating children, disclosing their location and therefore facilitating their access to traffickers. Irresponsibly and dangerously, a Tory MP during a television interview, named the hotel where adults and accompanied children will be relocated to, only a few days after the firebombs attack on the Manston centre hosting people including children.<sup>58</sup>
60. ECAT provides enhanced protection for children by virtue of **Art 5(5)**, which sets out the duty for the State to create a protective environment for children and of **Art 10(4)(a)** about the best interest of the child. These principles are clearly ignored under this Bill.

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<sup>54</sup> Illegal Migration Bill - Clause 15

<sup>55</sup> Joint Statement in response to the Illegal migration Bill (March 2023). Available at: [Care for every child: Duties to care for children must apply equally to all children | ECPAT UK](#)

<sup>56</sup> The Guardian (24 January 2023) UK Minister admits 200 asylum-seeking children have gone missing. Available at: <https://www.theguardian.com/uk-news/2023/jan/23/uk-minister-admits-200-asylum-seeking-children-missing-home-office>

<sup>57</sup> The Guardian (18th February 2023) *Revealed: UK's missing child refugees put to work for Manchester gangs*. Available at: <https://www.theguardian.com/uk-news/2023/feb/18/uk-missing-child-refugees-put-to-work-manchester-gangs>

<sup>58</sup> The Independent (1 November 2022) Tory MP names hotel where asylum seekers will stay 48 hours after firebomb attack. Available at: <https://www.independent.co.uk/news/uk/politics/jonathan-gullis-tory-mp-hotel-asylum-seekers-b2215096.html>

## The Bill introduces discriminatory provisions

61. **The Home Secretary did not produce and publish a Child rights and equality impact assessment on the Bill.**
62. The Bill is deeply discriminatory as it would create a cohort of individuals, who will be excluded from every type of protection, support and settlement route for the mere fact that they entered the UK irregularly. This also applies to victims and survivors of trafficking and modern slavery, who were brought here irregularly as part of their trafficking experience.
63. It also discriminates against unaccompanied children by removing the 'looked after' status when placed under the responsibility of the Home Office in unsafe hotel accommodation. As well as against those children who will be placed in detention with their family without conducting a risk assessment as a result of the disapplication of the duty to consult the Independent Family Returns Panel.<sup>59</sup>
64. The Bill seeks to include Albania in the safe country list, contradicting their own country guidance<sup>60</sup> case law and evidence that shows structural insecurities for some Albanian victims of domestic abuse, mistreatment related to sexual orientation and gender identity and expression, blood feuds, modern slavery. The Country guidance also details the presence of well established trafficking routes as a result of the influence of highly organised criminals operating in Albania and internationally.
65. The Trafficking in Persons report (TiP) for the year 2022 places Albania in Tier 2 because the Government did not meet the minimum standards for the elimination of trafficking and the protection and support of victims and survivors. Some of the issues identified were: official complicity in trafficking crimes and failures from the government to prosecute or convict officials despite serious allegations; inconsistent implementation of screening efforts for vulnerable populations - particularly undocumented migrants, asylum seekers, Romani and Balkan-Egyptian communities, and children; victim identification units (MIU) remained underfunded and understaffed. The government also lacked resources for long-term care, employment, and other reintegration efforts for survivors, and the government-run hotline continued to not function.<sup>61</sup>
66. Survivors will also be prevented from ever settling in the UK and applying for British citizenship. However, the Bill will also penalise their family members, including those that arrived in the UK before March 2023 and unborn children. This is a clear breach of Article 8 and 14 ECHR. Effectively, this will result in a cliff drop for a victim placing

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<sup>59</sup> Illegal Migration Bill - clause 14

<sup>60</sup> Home Office (2023) Country Policy and Information Note, Albania: Human Trafficking. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1135644/ALB\\_CPIN\\_Human\\_trafficking.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1135644/ALB_CPIN_Human_trafficking.pdf)

<sup>61</sup> Trafficking in Persons report(TiP) (2022). Available at: [20221020-2022-TIP-Report.pdf \(state.gov\)](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1135644/20221020-2022-TIP-Report.pdf)

them at risk of destitution, homelessness and risk of re-trafficking in breach of Articles 3 and 4 of ECHR and defeating the purposes of Article 12 and 13 ECAT.

67. All of the above points show how this Bill will create a second-class group of victims and survivors of trafficking and modern slavery, which will also penalise their families and the wider migrant community. **Articles 3 ECAT<sup>62</sup> and 14 ECHR<sup>63</sup> prohibit discrimination.**

## **Prevents survivors from ever settling in the UK**

68. **Articles 14 and 10(1) ECAT** requires states to issue a renewable residence permit to confirmed victims if the competent authority considers it necessary “owing to their personal situation”, as per Article 14 (1)(a), and/or for the purpose of cooperating in investigation of criminal proceedings, as per Article 14(1)(b). Article 12(2) further specifies “Each Party shall take due account of the victim’s safety and protection needs”. The personal situation requirement takes in a range of situations, depending on whether it is the victim’s safety, state of health, family situation or some other factor which has to be taken into account.<sup>64</sup>
69. Articles 12(7) and 14(2) ECAT refer specifically to the needs of children both in relation to their protection and when leave should be granted. Leave should be granted in the best interests of the child without the need to prove circumstances or any additional requirements.<sup>65</sup>
70. For an individual that fits the removal criteria under Clause 2, Clause 21 would make it so that there is no obligation to grant potential victims leave to remain.
71. The Home Office provides an exemption to removal if people are cooperating with authority in an investigation against their traffickers.<sup>66</sup> However, this is a narrower interpretation of Article 14 ECAT and as seen in the paragraph above, it’s impracticable if it is not preceded by effective identification.<sup>67</sup> This is likely to benefit a very small number of individuals, especially as the Home Office’s own statutory

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<sup>62</sup> Non-discrimination principle: The implementation of the provisions of this Convention by Parties, in particular the enjoyment of measures to protect and promote the rights of victims, shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

<sup>63</sup> Prohibition of discrimination: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

<sup>64</sup> ECATER - Paragraph 184

<sup>65</sup> ECATER - Paragraph 186

<sup>66</sup> Illegal Migration Bill, Clause 21(3)

<sup>67</sup> Illegal Migration Bill, Clause 21(3)(b).

guidance recognises that many victims do not feel safe enough to do so until they have had the time to recover from their exploitation.<sup>68</sup>

72. *“Immediate return of the victims to their countries is unsatisfactory both for the victims and for the law-enforcement authorities endeavouring to combat the traffic. For the law-enforcement authorities, if the victims continue to live clandestinely in the country or are removed immediately they cannot give information for effectively combating the traffic. The greater victims’ confidence that their rights and interests are protected, the better the information they will give. Availability of residence permits is a measure calculated to encourage them to cooperate”*.<sup>69</sup>

### **Lack of consultation with third sector organisations and avoidance of scrutiny**

73. ECAT puts a duty on States to set up an independent monitoring mechanism (Article 1(2)) and to involve third sector organisations and civil society in the prevention of trafficking and to support victims’ protection and assistance (Clause 5(6)). However, the Home Secretary has failed to appoint a new Anti-Slavery Commissioner since April 2022 and put the Modern Slavery Strategy and Implementation Group (MSSIG) on hold.

74. There is therefore clear evidence of the Home office failure to consult with the anti-trafficking sector at crucial times, such as the passage of the Nationality and Borders Bill (before it became Act) and this is happening again with the passage of the ‘Illegal Migration’ Bill. An example of this, it’s the motion of regret presented in the House of Lords during the debate around the Slavery and Human Trafficking (Definition of Victim) Regulations 2022. Lord Coaker asked to include that *the draft Regulations have not been subject to consultation, and give rise to concerns that the changes will narrow the ability of victims to be identified and to access support*”.<sup>70</sup>

75. Similarly to the above circumstances, there has been no public or otherwise consultation on this guidance or an impact and human rights assessment prior to the introduction of the Bill to Parliament. **This shows the intention of this Government to speed up the passage of this Bill through Parliament with as little public and parliamentary scrutiny as possible.**

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<sup>68</sup> Home Office, ‘Modern Slavery: statutory guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and non-statutory guidance for Scotland and Northern Ireland’ (updated 3 March 2023) page 144

<sup>69</sup> ECATER - paragraph 181

<sup>70</sup> House of Lords (20 July 2022) Slavery and Human Trafficking (Definition of Victim) Regulations 2022. Available at: [https://hansard.parliament.uk/lords/2022-07-20/debates/026A33BC-4895-4D08-86CB-19F01469AF84/SlaveryAndHumanTrafficking\(DefinitionOfVictim\)Regulations2022](https://hansard.parliament.uk/lords/2022-07-20/debates/026A33BC-4895-4D08-86CB-19F01469AF84/SlaveryAndHumanTrafficking(DefinitionOfVictim)Regulations2022)

## Practical implications of the Bill

76. **The Bill will deem virtually anyone that arrives irregularly in the UK (not just on small boats) inadmissible.** This means that people will not be able to claim asylum and they will be disqualified from accessing the NRM as well as any other immigration application to regularise their status in the UK forever. This will also affect their families that might arrive in the UK after them.
77. **The UK at the moment has only made return agreements with Albania and Rwanda, but the latter is currently on hold.** In the absence of safe third country agreements, those people whose cases have been identified as inadmissible will be unremovable (except for non-EEA/Swiss/Albanian) . This will create a cohort of people that won't be able to be returned to their country of origin if not included in the safe country list. An example of this is the low return rate under the inadmissibility provision already introduced by NABA 2022. Between 1 January 2021 to 30 June 2022, 17,222 asylum claims were considered for inadmissibility under existing laws, but only 21 of these people were eventually removed (all to EEA countries and Switzerland).<sup>71</sup>
78. **The Bill creates a large and permanent cohort of people, including children in families and unaccompanied children, living in limbo for the rest of their lives.** This population won't be able to work, study or to regularise their status and ever settle in the UK. The ECHR Memorandum attached to the Bill confirms that those individuals, whose cases will be deemed inadmissible, will still be entitled to housing and subsistence through immigration bail provisions. Children will be supported by local authorities under sections 17 and 20 of the Children Act 1989.<sup>72</sup> However, these provisions, which are often very limited, will be more costly than allowing people to settle and integrate, but even more worryingly, will push people into destitution and will trap victims and survivors in exploitative situations.
79. **The Government will have the power to detain thousands of people, including unaccompanied children.** This will create an unsustainable situation, which will put even further pressure on a very limited detention system. The current detention estate is just over 2,245 spaces.<sup>73</sup> As evidenced by a recent assessment of the Bill conducted by the Refugee Council, the Government might spend between £8.7bn and £9.6bn on detaining and accommodating people impacted by the bill in the first three years of its operation.<sup>74</sup> By stretching the detention estate even further, this Bill will create an explosive humanitarian crisis, on a wider scale than the one we

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<sup>71</sup> Home Office (2022) National Statistics: How many people do we grant asylum or protection to?. Available at: [How many people do we grant asylum or protection to? - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statistics/how-many-people-do-we-grant-asylum-or-protection-to)

<sup>72</sup> Illegal Migration Bill Explanatory notes - paragraphs 68 - 70, pp 15-16

<sup>73</sup> The Migration Observatory (2022) Immigration Detention in the UK. Available at: [Immigration Detention in the UK - Migration Observatory - The Migration Observatory \(ox.ac.uk\)](https://www.migrationobservatory.ox.ac.uk/publications/immigration-detention-in-the-uk)

<sup>74</sup> Refugee Council (22 March 2023) Assessment of impact of inadmissibility, removals, detention, accommodation and safe routes. Available at: [Refugee-Council-Asylum-Bill-impact-assessment.pdf \(refugeecouncil.org.uk\)](https://www.refugeecouncil.org.uk/wp-content/uploads/2023/03/Refugee-Council-Asylum-Bill-impact-assessment.pdf)

have already witnessed with the overflowing of the Manston immigration centre, which prompted the rapid visit of the Council of Europe's Prevention of Torture and Inhumane or Degrading Treatment or Punishment Committee.<sup>75</sup>

## Conclusion and recommendations

80. The Bill is in clear breach of ECAT, HRA and ECHR as well as many other international human rights treaties. In striking contrast with domestic and international law, **the Bill will fuel trafficking and organised crime by driving anyone that is liable to be detained and removed underground and trap them in exploitation.** The threat of criminalisation to victims and survivors by means of disqualification from support and subsequent detention and removal will be used as leverage by traffickers to coerce and control people and prevent them from escaping or reporting their trafficking experience. The Bill will not prevent trafficking and prosecute traffickers as suggested by the Government, but rather, it will instead increase the number of victims and reduce the number of prosecutions against traffickers.
81. The Bill will reduce the asylum and NRM backlog at the expense of thousands of human beings' lives. This will be the result of banning most people from the asylum and NRM rather than creating a more efficient and functioning system. The Bill will only achieve the Government failure to support and protect those in need, whilst pushing more people in exploitative situations.
82. We make the following practical recommendations to solve current issues:
- Scrap the 'Illegal Migration' Bill in its entirety
  - The Government and all political parties' should commit to improve the identification, support and protection of victims and survivors of trafficking and modern slavery.
  - Clear the asylum and NRM backlog by redirecting resources to develop a more efficient and functional decision-making system.
  - The Government must commit to ending their practice of accommodating unaccompanied children and ensure children's services have sufficient resources for their care.
  - Create and expand workable 'safe and legal' routes, including the expansion of family reunion routes.
  - Reform the Legal Aid provision to ensure early access to specialist legal advice.

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<sup>75</sup> The Guardian (30 November 2022) Conditions at Manston asylum centre prompt torture monitor visit. Available at: <https://www.theguardian.com/uk-news/2022/nov/30/manston-asylum-centre-torture-monitor-visit>

- Enable access to work for people seeking asylum and victims of trafficking and modern slavery while in the NRM to decrease dependency on state support and incentivise integration.

## Annex

### Interaction between domestic law, ECAT and ECHR

ECAT has not been entirely incorporated into UK law, but its obligations have been implemented by the Modern Slavery Act 2015 in respect of Article 10,12,13 and the immigration rules have been changed to reflect Article 14. In the New plan for Immigration's policy statement, the Secretary of State committed to consult on measures to *fulfil our obligations under the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) to continue to identify and protect genuine victims.*<sup>76</sup>

Furthermore, the Secretary of State has consistently accepted that the NRM should comply with ECAT. In *R (Atamewan) v Secretary of State for the Home Department*,<sup>77</sup> it was accepted that it would be a justiciable error of law if the NRM Guidance did not accurately reflect the requirements of ECAT and a decision based on that error would accordingly be unlawful (paragraph 55). The same was common ground appears in *R (PK (Ghana)) v Secretary of State for the Home Department*.<sup>78</sup>

In *Siliadin v France*,<sup>79</sup> the European Court of Human Rights recognised that article 4 ECHR imposes, not only negative, but also positive obligations upon the state.

However, the leading case on the relationship between ECAT and article 4 is *Rantsev v Cyprus and Russia*.<sup>80</sup> The Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention (Paragraph 282).

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<sup>76</sup> Home Office (29 March 2022) New Plan for Immigration: policy statement . Available at: [New Plan for Immigration: policy statement \(accessible\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/104444/new-plan-for-immigration-policy-statement-accessible.pdf)

<sup>77</sup> England and Wales High Court (2013) *R(Atamewan) v. the Secretary of State for the Home Department*. Available at: <https://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2013/2727.html&query=atamewan&method=boolean>

<sup>78</sup> England and Wales Court of Appeal (2018) *R (PK (Ghana)) v. the State Secretary for the Home Department*. Available at: <https://www.bailii.org/ew/cases/EWCA/Civ/2018/98.html>

<sup>79</sup> European Court of Human Rights (2006) *Siliadin v. France*. Available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-69891%22%5D%7D>

<sup>80</sup> European Court of Human Rights (2010) *Rantsev v Cyprus and Russia*. Available at: <https://hudoc.echr.coe.int/eng?i=001-96549>

This judgement entails that the safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims and potential victims, in criminal law, regulation of business and immigration rules.

The extent of the positive obligations arising under article 4 had to take account of the broader context of the Palermo Protocol and ECAT, which required not only punishment but prevention and protection (para 285).

As with articles 2 and 3, a positive obligation to take operational measures to protect an individual would arise where the authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that the individual had been or was at real and immediate risk of being trafficked or exploited within the meaning of the Palermo Protocol and article 4(a) of ECAT (para 286).

A more recent Supreme Court Judgement in the case of *MS (Pakistan) v Secretary of State for the Home Department*<sup>81</sup>, clarifies the effects of the interplay between the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) and the European Convention on Human Rights (ECHR). It is the first human trafficking case related to non-removal to reach the UK Supreme Court. This decision expands the right to remain for trafficked persons under Article 4 ECHR with reference to the obligation to investigate trafficking under the ECAT. Trafficked persons cannot be removed while their trafficking experience is being investigated and tribunals have the power to decide whether a person was trafficked.

### Potential impact of the Illegal Migration Bill in Scotland

The Bill allows the Secretary of State to make regulations which apply to Wales, Scotland and Northern Ireland, encroaching on these devolved nations' authority. It also removes powers from Scotland and Northern Ireland to support victims of human trafficking and modern slavery, putting them in breach of their international duties. The following clauses apply to Scotland:

#### *Clause 23: Provisions relating to support*

Where the Secretary of State for the Home Department (SSH) is required to remove a possible victim of trafficking and modern slavery from the UK who has a positive Reasonable Grounds decision (RGD):

- Scottish Ministers **no longer have a duty** to provide support and assistance to victims of trafficking under S.9(1) of the Human Trafficking & Exploitation (Scotland) Act 2015 ('HT&E(S) Act 2015') (during reflection and recovery period/until Conclusive Grounds decision (CGD) or end of period specified by Scottish Ministers);

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<sup>81</sup> Supreme Court (18 March 2020) *MS (Pakistan) (Appellant) v. Secretary of State for the Home Department (Respondent)*. Available at: <https://www.supremecourt.uk/cases/uksc-2018-0159.html>

- Scottish Ministers **no longer have any power** under S.9(3) of the HT&E(S)Act 2015 to provide support and assistance to that VOT (provision of support and assistance for pre-RGD period and post-CGD period);
- Scottish Ministers **no longer have any duty** or power under regulations under S.10(1) of the HT&E(S) Act 2015 (support and assistance to those who are victims of a trafficking offence as described in S.4 of HT&E(S)Act 2015) – which is as victims of the crime of Human Trafficking as defined in S.4 of HT&E(S)Act 2015).

C.21(8): The SSHD has the power to make regulations in consequence of regulations made under S.9(8)- power to modify S.9, - of HT&E(S)Act 2015) and

S9 of HT&E(S)Act 2015) provides Scottish Ministers to create a Scottish NRM as it allows for determining the circumstances in which there are reasonable grounds to believe an adult is a victim of trafficking, and/or there is a conclusive decision that an adult is or is not a victim of trafficking.

Essentially, this means that any powers to create a Scottish identification process which would be in compliance with their devolved victim care duties can be legislated against by the SSHD.

**Clause 21 provisions regarding exemption of victims of trafficking and modern slavery VOTs apply.**

#### *Impact on Scotland*

The provision of support and assistance to victims of trafficking and modern slavery is a devolved matter, under the victim care. Therefore, the Scottish government funds the support for anyone present in Scotland going through the NRM.

The above provisions of the Bill fetter the Scottish Minister's power to provide support and assistance to victims of trafficking who fall foul of the Bill's provisions regarding removal. Removing duties provides some leeway to continue providing support, however clauses removing the power to provide support (see above) mean that the Scottish Government cannot provide support to these individuals, meaning they are left destitute and homeless.

The SSHD also appears to be future proofing against a "Scottish NRM" which could have been created to ensure support to all victims of trafficking and modern slavery in Scotland, irrespective of whether they fall to be removed from the UK under the Bill. The purpose of creating such a devolved system would be for the Scottish Government to ensure compliance with human rights duties and obligations which the UK is signatory to, which binds Scotland.

The explanatory notes (see below) particularly at 30 and 31 state the Bill is not legislating on devolved matters, but this is not the case as set out above.

The SSHD also creates the right to create regulations in Scotland in relation to unaccompanied children (see below), which is another area that is a devolved competency.

While the Bill provides for the Modern Slavery clauses to expire after 2 years (subject to conditions), this does not apply to the power of the SSHD to regulate as a consequence of

the Scottish Ministers acting on their powers to set out the conditions relating to identification of victims of trafficking.

*Explanatory Notes*<sup>82</sup>

Territorial extent and application

25 Clause 56 sets out the territorial extent of the Bill, that is the jurisdictions in which the Bill forms part of the law. The extent of a Bill can be different from its application. Application is about where a Bill produces a practical effect.

26 Subject to the exceptions described below, the provisions in the Bill extend and apply to the whole of the UK.

27 Clauses 15 to 18, which makes provision for unaccompanied children, applies to England only but Clause 19 enables the Secretary of State to make regulations enabling those clauses to apply to Wales, Scotland or Northern Ireland.

28 Clauses 22 to 24 make separate provision in relation to the disapplication of legislation relating to support for potential victims of modern slavery that applies in England and Wales, Scotland and Northern Ireland.

Clause 24 amends the separate modern slavery legislation that applies in England and Wales, Scotland and Northern Ireland.

29 There is a convention (“the Sewel Convention”) that Westminster will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament, Senedd Cymru or the Northern Ireland Assembly without the consent of the legislature concerned. (In relation to Scotland and Wales, this convention is enshrined in law: see section 28(8) of the Scotland Act 1998 and section 107(6) of the Government of Wales Act 2006.)

30 In the view of the UK Government, the provisions in the Bill do not relate to matters within the legislative competence of the Scottish Parliament, Senedd Cymru or the Northern Ireland Assembly.

31 If, following introduction of the Bill, there are amendments relating to matters within the legislative competence of the Scottish Parliament, Senedd Cymru or the Northern Ireland Assembly, the consent of the relevant devolved legislature(s) will be sought for the amendments.

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<sup>82</sup> Illegal Migration Bill Explanatory Notes (2023). Available at: <https://publications.parliament.uk/pa/bills/cbill/58-03/0262/en/220262en.pdf> - p.10