

Legal Analysis of the Human Rights Compatibility of the Modern Slavery Clauses in the Illegal Migration Bill (Clauses 21-28)

By Marija Jovanovic, University of Essex

28 March 2023

This legal analysis of the modern slavery clauses in the Illegal Migration Bill has been conducted by Dr Marija Jovanovic from the University of Essex. She is the author of *State Responsibility for 'Modern Slavery' in Human Rights Law* (Oxford University Press, 2023).

The analysis has been commissioned by the Modern Slavery and Human Rights Policy and Evidence Centre (Modern Slavery PEC), which in turn is funded and supported by the UK Arts and Humanities Research Council (AHRC).

The Modern Slavery PEC has actively supported the production of this Legal Analysis. However, the views expressed in this document are those of the author.

Executive Summary

This Note contains an analysis of the human rights compatibility of the modern slavery clauses in the Illegal Migration Bill currently before Parliament. Clauses 21-28 of the Bill, in their current form, are incompatible with the UK's obligations under Article 4 of the European Convention on Human Rights (ECHR), which are also part of UK law through the Human Rights Act 1998 (HRA). Article 4 ECHR obligations draw expressly on the Council of Europe Convention on Action Against Trafficking in Human Beings (ECAT), which came into force in respect of the United Kingdom on 1 April 2009. Therefore, Clauses 21-28 of the Bill would, if enacted in their current form, contravene both the UK's domestic human rights law and its international obligations under both the ECHR and ECAT.

Under Article 4 ECHR, states have three core obligations. First, an obligation to put in place a legislative and administrative framework providing real and effective protection of the rights of victims.' This duty extends to the general legal and administrative framework, including the adequacy of immigration policy. In addition to this general obligation, states have two specific obligations which are owed to any potential victim of 'modern slavery' (a term used in the Modern Slavery Act 2015 to encompass human

trafficking, slavery, servitude and forced labour): a duty to take operational measures to protect victims, or potential victims and a procedural obligation to investigate potential situations of modern slavery and punish the perpetrators. The last two obligations do not depend on a victim's report – the authorities must act of their own motion once the matter has come to their attention.

The obligation to protect victims, or potential victims, of modern slavery established under Article 4 ECHR includes 'facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery.'¹ Article 4 ECHR draws expressly on Article 10 ECAT which stipulates that such victims 'shall not be removed from its territory until the identification process as victim (...) has been completed by the competent authorities'. While the obligation to protect victims, or potential victims, is not unlimited – the appropriate measures required from national authorities must be within the scope of their powers and must not be interpreted to impose 'an impossible or disproportionate burden' on them²– it must be acknowledged that the right not to be held in slavery or servitude in Article 4 ECHR is one of the 'absolute' rights in the Convention, which does not allow for any limitations or balancing against the broader public interest and cannot be derogated from even in times of emergency.

Clauses 21-28 of the Bill are incompatible with all three core obligations in Article 4 ECHR mentioned above. They automatically exclude from protection any potential victim of modern slavery who has arrived in the UK irregularly. Under Clause 21, an individual with a 'positive reasonable grounds decision' – a decision made when a competent authority finds that there are reasonable grounds to believe that the person is a victim of modern slavery – will be automatically removed (subject to a very narrowly defined exception) before the victim identification process has been completed (ie. before the competent authority has reached a 'conclusive grounds decision' which is a final decision on one's victim status in the UK). This would violate an express obligation to identify every victim of modern slavery, before their return to the country of origin could be considered. Removal of potential victims would also likely lead to a breach of an obligation to investigate and prosecute the perpetrators of this offence because without the victim's cooperation it would be difficult to gather relevant evidence to prove the offence of modern slavery.

The Bill permits a very narrow exemption from the automatic disqualification from the victim identification process and access to assistance and support for people cooperating with law enforcement authorities. Still, potential victims would need to make a decision on such cooperation without benefiting from a 30-day recovery and reflection period guaranteed by Article 13 ECAT, which is intended to allow potential victims some time to recover and come to a decision on cooperating with the law-enforcement authorities in a prosecution of the traffickers.

¹ *Chowdury and Others v Greece*, para 110.

² *Zoletic and Others v Azerbaijan*, para 188.

Legal Analysis of the Human Rights Compatibility of Clauses 21-28 (Modern Slavery)

This analysis primarily focuses on Clauses 21-24 of the new Bill, which give rise to serious implications for the human rights of victims of modern slavery under both the UK's Human Rights Act and international law currently binding on the UK. Clauses 25-28 contain procedural provisions, which are ancillary to those contained in Clauses 21-24, and do not on their own raise the issue of incompatibility with the UK's international human rights obligations.

Clause 21 of the Illegal Migration Bill contains provisions relating to removal of an individual with a 'positive reasonable grounds decision' – a decision made by a competent authority that there are reasonable grounds to believe that the person is a victim of slavery or human trafficking – when such a person meets the conditions in Clause 2 (1). Such conditions relate to a person's entry into the UK without legitimate leave to enter or remain and the fact that they did not arrive in the United Kingdom directly from a country in which they face persecution on the grounds of their race, religion, nationality, membership of a particular social group or political opinion. When these conditions are met, a potential victim may be removed from the UK before the victim identification process has been completed (before a 'conclusive grounds decision' by a competent authority).

Subject to the same conditions contained in Clause 2 (1), Clauses 22-24 in addition exclude individuals with a 'positive reasonable grounds decision' from assistance and support measures granted by the modern slavery legislation throughout the UK, including the devolved jurisdictions.³

These exclusions apply even if a person entered or stayed in the UK illegally against their will, because they were trafficked and exploited, unless they are immediately prepared to cooperate with law enforcement authorities, their presence for that purpose is deemed necessary, and 'the public interest in the person providing that cooperation is outweighed by any significant risk of serious harm to members of the public which is posed by the person' (Clauses 21 (3) – (6), 23 (3) – (5), and 24 (3) – (5) discussed further in section III).

These provisions disregard the UK's international obligations under the European Convention on Human Rights (ECHR) and the Council of Europe Convention on Action Against Trafficking in Human Beings (ECAT). Notably, the obligations contained in the ECHR are embedded in domestic British law through the Human Rights Act 1998 (HRA). Therefore, Clauses 21-28 of the Bill, in their current form, would contravene both domestic and international human rights law currently binding on the UK.

³ The Modern Slavery Act 2015; The Human Trafficking and Exploitation (Scotland) Act 2015; The Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.

1. Obligation to identify and protect victims of modern slavery

The first such obligation is an obligation to identify a victim of modern slavery contained in Article 4 ECHR and Article 10 ECAT.

According to Article 4 ECHR, the obligation to identify a victim falls under a broader duty 'to take operational measures to protect victims, or potential victims, of trafficking.'⁴ Protection measures required by Article 4 ECHR include 'facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery.'⁵

The duty is triggered from the moment when the State authorities become 'aware, or ought to have been aware, of *circumstances giving rise to a credible suspicion* that an identified individual had been, or was at real and immediate risk of being subjected to treatment in breach of Article 4 of the Convention.'⁶ The same 'credible suspicion' triggers a procedural obligation to investigate potential situations of trafficking and exploitation.⁷ These obligations do not depend on a victim's report – 'the authorities must act of their own motion once the matter has come to their attention.'⁸ However, if an individual does raise a claim of being a victim of modern slavery, the ECtHR requires that such claims 'as a whole were taken seriously'.⁹

In addition to Article 4 ECHR, the obligation of states to identify and protect victims of trafficking is expressly established in Article 10 (2) of the Council of Europe Anti-Trafficking Convention ECAT), which came into force in respect of the United Kingdom on 1 April 2009. It contains the following requirement:

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 (...) 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 2.¹⁰

Arguably, 'reasonable grounds to believe' standard contained in Article 10 (2) ECAT corresponds to 'credible suspicion' that triggers State's positive obligations under Article 4 ECHR.

⁴ *VCL and AN v United Kingdom*, paras 152 – 153.

⁵ *Ibid*, para 153. See also *Chowdury and Others v Greece*, para 110.

⁶ European Court of Human Rights, 'Guide on Article 4 of the European Convention on Human Rights: Prohibition of slavery and forced labour' (updated on 31 August 2022) para 60 (emphasis added). See also *VCL and AN v the United Kingdom*, para 152; *Rantsev v Cyprus and Russia*, para 286.

⁷ *Rantsev v Cyprus and Russia*, para 288; *CN v the United Kingdom*; *SM v Croatia* [GC], para 307.

⁸ *CN v the United Kingdom*, para 69; *Chowdury and Others v Greece*, para 116; *J and Others v Austria* para 107; *Zoletic and Others v Azerbaijan*, para 185.

⁹ *J and Others v Austria*, paras 110 and 111.

¹⁰ Council of Europe Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series 197 (16 May 2005) (emphasis added).

Like the Strasbourg Court, the Council of Europe expert body tasked with monitoring compliance with ECAT (GRETA)¹¹ has emphasized the importance of proactively investigating any allegation of trafficking in human beings because ‘many trafficked people do not always identify themselves as “victims” and are not aware of the legal meaning behind the term. Therefore, the onus of identification lies on the authorities.’¹² This position is reinforced in the UK’s Statutory Guidance which notes that ‘[v]ictims may not be aware that they have been exploited or may be unwilling to self-identify for another reason.’¹³

In the UK, an obligation to identify a victim is discharged through the National Referral Mechanism (NRM) – the mechanism for identification and support of survivors of human trafficking and modern slavery.¹⁴ The process is governed by the Statutory Guidance.¹⁵ The identification process is comprised of two stages – a reasonable grounds decision and conclusive grounds decision.

A reasonable grounds decision is made on the basis of a low standard of proof – reasonable grounds to believe (credible suspicion) about a person’s status¹⁶ on the basis of ‘objective factors’, which include the universally endorsed indicators of modern slavery, expert reports, or the information provided by law enforcement agencies and support organisations.¹⁷ Reasonable grounds decision is not the final decision about the potential victim’s status. It is made ‘where possible’ within five working days since the referral to the NRM according to current guidance. Positive reasonable grounds decision requires competent authorities to conduct further enquiries to establish ‘on the balance of probabilities’ whether a person is a victim of modern slavery and make a conclusive grounds decision, which is a final decision on a person’s status.

Clauses 21-24 of the Illegal Migration Bill however stipulate that despite a positive reasonable grounds decision, the Secretary of State is entitled to remove such a person from the United Kingdom and deny them access to support and assistance measures if the conditions in clause 2(1) are satisfied (a person is in the UK without legitimate leave to enter or remain and they did not arrive to the United Kingdom directly from a country in which they face persecution). In essence, these provisions allow the authorities to

¹¹ Group of Experts Against on Action Against Trafficking in Human Beings.

¹² GRETA, ‘4th General Report on GRETA’s Activities’, GRETA(2015)1(March 2015) 40. See also GRETA, ‘Evaluation Report United Kingdom’ GRETA(2021)12 (20 October 2021), para 49 (4th GRETA Report).

¹³ 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 (version 3.1, 3 March 2023) Section 6.2. See also Section ‘Victims who are reluctant to self-identify’.

¹⁴ The National Referral Mechanism was established in 2009 but the adoption of the MSA 2015 has put it on a statutory footing. See: <https://www.gov.uk/government/publications/human-trafficking-victims-referral-and-assessment-forms/guidance-on-the-national-referral-mechanism-for-potential-adult-victims-of-modern-slavery-england-and-wales>.

¹⁵ 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 (version 3.1, 3 March 2023).

¹⁶ This standard of proof, which serves to trigger states’ protective obligations is low because it is the beginning rather than the end of the victim identification process, which ECAT states is ‘often tricky, and necessitates detailed enquiries’ while (presumed) victims have immediate protection needs. See Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings (16 May 2005) paras 127 and 131 (ECAT Explanatory Report).

¹⁷ 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 (version 3.1, 3 March 2023) paras 14.58 – 14.61.

circumvent the UK's international obligation to identify *every* victim of human trafficking prescribed by Article 4 ECHR and Article 10 ECAT.¹⁸

GRETA¹⁹ has made it clear that 'identification of victims is one of the key obligations of the Convention'²⁰ and that states must not remove potential victims until the identification process is completed:

Identifying a trafficking victim is a process which takes time; therefore the Convention provides that when the competent authorities have reasonable grounds to believe that a person has been a victim of trafficking, he/she *must not be removed from the country until the identification process is completed* and must receive the assistance required by the Convention.²¹

Moreover, an obligation to identify and protect victims of human trafficking contained in Article 4 ECHR and Article 10 (2) ECAT is not qualified. Article 4 ECHR is one of the 'absolute' rights, which cannot be derogated from and does not contain any limitations.²² Absolute rights protect against serious violations of individual autonomy such as the right to life, freedom from torture, and the prohibition of slavery; they are said to enshrine one of the 'basic values of the democratic societies making up the Council of Europe'.²³ Accordingly, in contrast with obligations arising out of rights contained in Articles 8 – 12 ECHR known as 'qualified' rights,²⁴ state obligations that stem from 'absolute' rights carry a considerable weight. While such obligations are not unlimited – the appropriate measures required from national authorities must be within the scope of their powers and must not be interpreted to impose 'an impossible or disproportionate burden' on them²⁵– they cannot be simply balanced out by a vague reference to public order.

In sum, the obligation to identify and protect potential victims of human trafficking, which includes a duty not to remove them from their territory until this process is completed discussed further in the following section, is established under both ECAT and Article 4 ECHR and represent duties that states ought to discharge *ex officio* without any input or assistance from a victim.

¹⁸ *Chowdury and Others v Greece*, para 110; *J and Others v Austria*, para 109; *VCL and AN v United Kingdom*, para 160.

¹⁹ Group of Experts Against on Action Against Trafficking in Human Beings.

²⁰ 4th GRETA Report, 6.

²¹ *Ibid*, 40 (emphasis added).

²² The term 'absolute rights' refers to rights contained in Articles 2, 3, 4(1) and 7 of the ECHR. See Jacobs, Ovey and White, *The European Convention on Human Rights* (7th edition, OUP 2017) 219. See also Mavronicola, 'What is an "Absolute Right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) *Human Rights Law Review* 723-758. Webber, 'Proportionality and Absolute Rights', in V Jackson and M Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2016).

²³ *Siliadin v France*, paras 82 and 112; *CN v The United Kingdom*, para 65.

²⁴ Right to respect for private and family life (Article 8 ECHR), Freedom of thought, conscience and religion (Article 9 ECHR) and Freedom of assembly and association (Article 11 ECHR), Right to marry (Article 14 ECHR).

²⁵ *Zoletic and Others v Azerbaijan*, para 188; *J and Others v Austria*, para 107; *CN v the United Kingdom*, para 68; *Rantsev v Cyprus and Russia*, para 287; *Osman v the United Kingdom*, para 116.

2. The recovery and reflection period of a minimum 30 days

The Explanatory Report to ECAT acknowledges that the identifying a trafficking victim is a process which takes time, and is 'often tricky and necessitates detailed enquiries'.²⁶ Because of that, ECAT stipulates that:

Even though the identification process is not completed, as soon as competent authorities consider that there are reasonable grounds to believe that the person is a victim, they will not remove the person from the territory of the receiving State (...) Paragraph 2 [of Article 10] seeks to avoid their being immediately removed from the country before they can be identified as victims. Chapter III of the Convention secures various rights to people who are victims of trafficking in human beings. Those rights would be purely theoretical and illusory if such people were removed from the country before identification as victims was possible.²⁷

It is therefore clear that any removal of the victims unlawfully present in a State Party could only be done after a person has been identified as a victim. In the UK context, this requires a conclusive grounds decision.²⁸

By allowing a removal of a person with a positive reasonable grounds decision, envisaged by Clause 21 of the Illegal Migration Bill, such an individual is denied not only a final decision on their status as a victim of human trafficking, but also a 'reflection and recovery period' guaranteed by Article 13 ECAT, which entitles them to a range of support and assistance measures stipulated in Articles 10 (2) and 12 (1) and (2) ECAT.

Namely, Article 13 (1) ECAT provides for a recovery and reflection period 'of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim.' The purpose of the recovery and reflection period is two-fold. First, it allows victims to recover and escape the influence of traffickers. The Explanatory Report notes that '[v]ictims recovery implies, for example, healing of the wounds and recovery from the physical assault which they have suffered. That also implies that they have recovered a minimum of psychological stability.'²⁹ The second purpose of this period is to allow victims to come to a decision on cooperating with the law-enforcement authorities in any? prosecution of the traffickers.

The Explanatory Report to ECAT expressly notes that '[i]mmediate return of the victims to their countries is unsatisfactory both for the victims and for the law-enforcement authorities endeavouring to combat the traffic.'³⁰ It suggests that:

²⁶ ECAT Explanatory Report, paras 131 and 127.

²⁷ Ibid, para 131.

²⁸ GRETA has however noted in its 'Second General Report on GRETA's Activities' GRETA(2012)13 (4 October 2012) para 45 (emphasis added) that '[a]ny person *showing signs* that he/she has been subjected to (...) trafficking in human beings (...) should be considered as a victim of trafficking.' Such 'signs' are based on 'operational indicators of trafficking in human beings (as designed by several international organisations, such as ILO, IOM, UNODC and ICMPD).' This suggests that a bar for a final decision on victim status is low, comparable to the UK's reasonable ground decision.

²⁹ ECAT Explanatory Report, para 173.

³⁰ ECAT Explanatory Report, para 182.

[T]he 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. ‘Informed decision’ means that the victim must be in a reasonably calm frame of mind and know about the protection and assistance measures available and the possible judicial proceedings against the traffickers. Such a decision requires that the victim no longer be under the traffickers’ influence.³¹

Notwithstanding this, Article 13 (3) ECAT allows states to not observe this period ‘if grounds of public order prevent it or if it is found that victim status is being claimed improperly.’ This provision appears to have directly informed Section 63 of the Nationality and Borders Act 2022, which provides that a person with a reasonable grounds decision may be disqualified from protection if the Competent Authority is satisfied that the person is a ‘threat to public order’ or has claimed victim status in ‘bad faith’. In both instances, such a person loses the protection from deportation and entitlement to assistance and support mandated by Articles 10, 12, and 13 ECAT. Moreover, any ongoing process of identification is terminated and a person is not entitled to have a final decision (conclusive grounds decision) on their status as a victim of modern slavery.³² The Illegal Migration Bill takes these exceptions even further, by interpreting a ‘threat to public order’ to include victim’s illegal presence in the UK.

At the time when Section 63 was proposed in the Nationality and Borders Bill, it was heavily criticised by the three UN Special Rapporteurs,³³ the UN High Commissioner for Refugees,³⁴ the UK’s Independent Anti-Slavery Commissioner,³⁵ the UK Parliamentary Joint Committee on Human Rights (JCHR),³⁶ and civil society.³⁷ In particular, in a confidential letter to the Home Office when these provisions were proposed, GRETA explained that permissible restrictions contained in Article 13 (3) relate ‘solely to the recovery and reflection period’.³⁸ However, GRETA noted that the relevant clause ‘purports to exempt the Competent Authority from making a conclusive

³¹ Ibid, 174.

³² Statutory Guidance, paras 14.236, 14.288 and 14.289.

³³ Communication from the Mandates of the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (GBR 11/2021), 5 November 2021 <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=26788>.

³⁴ UNHCR Observations on the Nationality and Borders Bill, October 2021 <https://www.unhcr.org/publications/legal/615ff04d4/unhcr-legal-observations-nationality-and-borders-bill-oct-2021.html>; UNHCR Updated Observations on the Nationality and Borders Bill, as amended, January 2022 <https://www.refworld.org/pdfid/61e529af4.pdf>.

³⁵ Independent Anti-Slavery Commissioner, Letter to the Home Secretary (7 September 2021) <https://www.antislaverycommissioner.co.uk/media/1668/iasec-letter-to-the-rt-hon-priti-patel-mp-home-secretary-march-2021.pdf>.

³⁶ House of Commons, House of Lords, Joint Committee on Human Rights ‘Legislative Scrutiny: Nationality and Borders Bill (Part 5) - Modern Slavery’ (15 December 2021) paras 50-53.

³⁷ Anti-Slavery International ‘The Nationality and Borders Bill will harm victims of modern slavery’, <https://www.antislavery.org/nationality-and-borders-bill-will-harm-victims-of-modern-slavery/#:~:text=The%20Bill%20would%20therefore%20block,allow%20traffickers%20to%20evade%20justice>.

³⁸ The letter has not been made public but the authors of the study have had an opportunity to read and permission to cite it.

grounds decision in respect of certain categories of potential victims, thereby making it harder for victims to be identified, and hindering investigations and prosecutions.³⁹

Overall, whereas countries are not obliged to grant a residence permit to every victim of modern slavery and are allowed to return them to their country of origin, as will be shown in section IV, this can only be done once the identification process is complete.⁴⁰ Article 13 ECAT envisages minimum 30 days for a recovery and reflection period during which any potential victim is entitled to support and assistance as well as a deportation ban until the identification process is complete. While this period may not be observed if it turns out that a person has claimed a victim status improperly or if grounds of public order prevent it – either assessment presupposes a final decision on one’s victim status. In other words, while Article 13 that guarantees a reflection and recovery period is qualified, the previous section has shown that the obligation to identify every victim of human trafficking guaranteed by Article 10 ECAT and Article 4 ECHR is not.

In addition to being incompatible with the UK’s clear obligation to complete the identification of victims under Article 4 ECHR and Article 10 ECAT, the provisions in the Bill are also incompatible with the UK’s obligations under Article 13 ECAT to provide a recovery and reflection period, including support and protection against removal, because the “public order” disqualification in Article 13(3) cannot be interpreted as applying automatically to all irregular migrants as a category.

The purpose of the recovery and reflection period provided for in Article 13 of ECAT is explained in the ECAT Explanatory Report paras 172-173:

172. Article 13 is intended to apply to victims of trafficking in human beings who are illegally present in a Party’s territory or who are legally resident with a short-term residence permit. Such victims, when identified, are, as other victims of trafficking, extremely vulnerable after all the trauma they have experienced. In addition, they are likely to be removed from the territory.

173. Article 13, paragraph 1, accordingly introduces a recovery and reflection period for illegally present victims during which they are not to be removed from the Party’s territory. ... Paragraph 3 of Article 13 allows Parties not to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly. This provision aims to guarantee that victims’ status will not be illegitimately used.

The purpose of the provision in Article 13(3) ECAT, permitting States not to observe the recovery and reflection period “if grounds of public order prevent it”, is clear: to prevent abuse in the sense of victims’ status being illegitimately used. However, the scope of that exception must be interpreted in the context of the purpose of Article 13 as a whole. As the Explanatory Report makes clear, the whole purpose of the recovery and reflection period is to ensure protection for victims of trafficking who are also “illegally present” in a State’s territory and therefore vulnerable to being removed.

Read in that context, the public order disqualification in Article 13(3) cannot be interpreted as extending to all people who are illegally present in the State’s territory,

³⁹ Ibid.

⁴⁰ See Articles 14 and 16 ECAT discussed in Section IV.

because that would be to defeat one of the very purposes of the recovery and reflection period provided for in Article 13. But that is what clause 21 of the Bill purports to do, by automatically disapplying the recovery and reflection period on the basis that all irregular migrants are a threat to public order.

Such an expansive interpretation of Article 13(3) ECAT would not only frustrate the purpose of Article 13 of ECAT, it would also inevitably lead to breaches of Article 4 ECHR because it would lead to people who are recognised to be potential victims of trafficking being detained and deported and thereby possibly even subjected to the risk of re-trafficking.⁴¹ The UK would not be able to rely on its contentious interpretation of Article 13(3) ECAT in response to claims that it has breached its obligations to victims under Article 4 ECHR. Article 40(4) ECAT provides:

“Nothing in this Convention shall affect the rights, obligations and responsibilities of States and individuals under international law, including ... international human rights law.”

3. The procedural obligation to investigate and prosecute the perpetrators of modern slavery

In addition to creating exceptions to the obligation to identify every victim of modern slavery, established under both Article 4 ECHR and Article 10 ECAT, which is not qualified by public order grounds like the duty to provide a recovery and reflection period from Article 13 ECAT, Clause 21 of the Bill can lead to a breach of an obligation to investigate and prosecute the perpetrators of this offence. The latter obligation is also triggered by the existence of a ‘credible suspicion’ (reasonable grounds to believe) that a person is a victim of modern slavery.⁴² Moreover, like the obligation to identify a victim, the obligation to investigate and prosecute a criminal offence(s) of modern slavery does not depend on a complaint from the victim or next-of-kin: ‘once the matter has come to the attention of the authorities they must act of their own motion.’⁴³

Significantly, a positive obligation to conduct an investigation into the allegations of human trafficking under Article 4 ECHR also includes a duty to prevent deportation of potential victims while the investigation is ongoing. This requirement is illustrated in the recent judgement of the UK Supreme Court (UKSC) in *MS (Pakistan) v Secretary of State for the Home Department*.⁴⁴ The UKSC considered whether, having decided that the appellant was indeed a victim of trafficking, his removal from the UK would amount to

⁴¹ In *M v the United Kingdom* (Application No. 16081/08) (1 December 2009, strike-out decision) the applicant alleged that she had been trafficked and forced into prostitution in her country of origin, Uganda. She alleged that there was a risk she might be found by the traffickers and subjected once again to sexual exploitation if she was deported. In this case the Court decided to apply Rule 39 of the Rules of Court, requesting the Government of the United Kingdom to refrain from deporting the applicant pending the outcome of the proceedings before it. The application was ultimately struck out after the Government and the applicant reached a friendly settlement. The Government have agreed to grant the applicant three years’ leave to remain in the United Kingdom.

⁴² European Court of Human Rights, ‘Guide on Article 4 of the European Convention on Human Rights: Prohibition of slavery and forced labour’ (updated on 31 August 2022) paras 60 and 69.

⁴³ *Ibid.* See also *Chowdury v Greece*, para 116.

⁴⁴ [2020] UKSC 9.

a breach of any of the positive obligations in Article 4 of the ECHR. Having summarised the relevant ECHR jurisprudence, the UKSC concluded that:

The police took no further action after passing him on to the social services department. It is not the task of the NRM to investigate possible criminal offences, although the competent authority may notify the police if it considers that offences have been committed (...) The authorities are under a positive obligation to rectify that failure. And it is clear that an effective investigation cannot take place if the appellant is removed to Pakistan: the [Upper Tribunal (Immigration and Asylum Chamber)] rightly held that 'it is inconceivable that an effective police investigation and any ensuing prosecution could be conducted without the full assistance and cooperation of the appellant. Realistically this will not be feasible if he is removed to Pakistan' (para 64).⁴⁵

Notably, Clause 21 (3) provides an exception from a nearly automatic removal of individuals who satisfy the conditions required by section 2(1) (a person is in the UK without legitimate leave to enter or remain and they did not arrive to the United Kingdom directly from a country in which they face persecution). Namely, according to Clause 21 (3) removing a person from, or requiring them to leave, the UK could be set aside if the Secretary of State is satisfied that the person is cooperating with authorities an investigation or criminal proceedings in respect of their trafficking experience. Even this possibility is circumscribed by further requirements that their presence in the UK is 'necessary' and that 'the public interest in the person providing that cooperation is outweighed by any significant of serious harm to members of the public which is posed by the person.'

However, because Clause 21 (2) (a) denies a reflection and recovery period to anyone illegally present in the UK, this means that potential victims of modern slavery need to decide whether to cooperate with law enforcement authorities immediately, without benefiting from the reflection and recovery period of 30 days. This directly contradicts the express instruction in the Explanatory Report to ECAT that the reflection and recovery period aims 'to enable victims to recover and escape the influence of traffickers and/or to take an informed decision on co-operating with the competent authorities, the period, in itself, is not conditional on their co-operating with the investigative or prosecution authorities.'⁴⁶

⁴⁵ Ibid, para 36.

⁴⁶ ECAT Explanatory Report, para 175. See also GRETA, '4th General Report on GRETA's Activities', GRETA(2015)1(March 2015) 47.

4. Victims with Irregular Immigration Status

It must be noted that neither the ECHR nor ECAT provide an automatic entitlement to residence permit or an absolute protection against deportation. Article 14 (1) ECAT instructs states to issue renewable residence permits to victims of human trafficking either in exchange for cooperation with the law-enforcement authorities or on account of the victim's needs. This however presupposes that a person has been first identified as a victim (equivalent to a UK's conclusive grounds decision) and afforded a recovery and reflection period in order to decide whether or not to cooperate with law enforcement authorities.

The Illegal Migration Bill confuses the reflection and recovery period provided for in Article 13 ECAT with the issue of the residence permit under Article 14 (1) ECAT despite the ECAT's express instruction to the contrary.⁴⁷ The Bill first creates a public order exception to the state's obligation to provide a reflection and recovery period based solely on their irregular immigration status (which may well be a direct consequence of having been trafficked) in Clause 2 (1). This paves the way for their removal from the UK before a final decision on their victim status is made and disqualification from assistance and support measures according to Clauses 21 and 22-24 respectively. The Bill then carves out an exception to such a removal for individuals who cooperate with law enforcement authorities in Clause 21 (3) – (6), despite the fact that according to Article 14 ECAT such cooperation could only serve as a basis for granting them 'renewable residence permits' after they have been identified and offered a reflection and recovery period.

Furthermore, while ECAT does not prevent the removal of victims without lawful residence, Article 16 ECAT contains important limitations to the states' ability to return such victims to their country of origin. Namely, before returning an identified victim of trafficking to their country of origin, a state ought to evaluate how such return may impact on 'the rights, safety and dignity of that person'. The Explanatory Report to ECAT clarifies that '[s]uch rights include, in particular, the right not to be subjected to inhuman or degrading treatment, the right to the protection of private and family life and the protection of his/her identity.'⁴⁸ These restrictions draw expressly on the ECtHR jurisprudence pertaining to Article 3 ECHR,⁴⁹ although the risk of re-trafficking may give rise to the same prohibition on returns under Article 4 ECHR. In addition, the returning state ought to consider how such return may impact '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.'⁵⁰ As already noted, the UK Supreme Court recently expressed a similar view in *MS (Pakistan) v Secretary of State for the Home Department*⁵¹ where it ruled that an effective criminal investigation, which is a state obligation under both ECAT and ECHR, could not take place if the appellant was removed to Pakistan.

⁴⁷ Ibid.

⁴⁸ ECAT Explanatory Report, para 202.

⁴⁹ Ibid, para 203.

⁵⁰ Ibid, para 202.

⁵¹ [2020] UKSC 9.

5. Obligation to establish legislative and administrative framework

Beyond obligations to identify and protect victims of modern slavery and to investigate and prosecute the perpetrators of these crimes, states have a general obligation under Article 4 ECHR to put in place 'a legislative and administrative framework providing real and effective protection of the rights of victims.'⁵² Such a duty does not refer solely to criminal legislation but includes the general legal and administrative framework including the adequacy of immigration policy.⁵³ In *Chowdury and Others v Greece*, the European Court of Human Rights emphasised that 'States' domestic immigration law must respond to concerns regarding the incitement or aiding and abetting of human trafficking or tolerance towards it.'⁵⁴ This general duty overall requires states to establish a domestic legal and administrative framework which makes the rights of victims of this serious crime practical and effective in line with the Court's view that '[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.⁵⁵

The regime created by the 2023 Illegal Migration Bill, the 2022 Nationality and Borders Act, and recent changes in the Statutory Guidance⁵⁶ results in human rights of victims of modern slavery being theoretical and illusory for those victims without lawful residence in the UK whose access to assistance and support guaranteed by international human rights law depend on the discretion of the Secretary of State.

⁵² *Chowdury and Others v Greece*, para 87; *Rantsev v Cyprus and Russia*, para 285; *J and Others v Austria*, para 106.

⁵³ *Rantsev v Cyprus and Russia* paras 290-293.

⁵⁴ *Chowdury and Others v Greece* (n 12) [87].

⁵⁵ *Airey v Ireland*, para 24.

⁵⁶ [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 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1141417/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.pdf).

The Modern Slavery and Human Rights Policy and Evidence Centre was created by the investment of public funding to enhance understanding of modern slavery and transform the effectiveness of law and policies designed to address it. The Centre is a consortium of six academic organisations led by the Bingham Centre for the Rule of Law.



The Modern Slavery and Human Rights Policy and Evidence Centre is funded and actively supported by the Arts and Humanities Research Council (AHRC), part of UK Research and Innovation (UKRI), from the Strategic Priorities Fund.