

**Written Evidence by Modern Slavery and Human Rights Policy and Evidence Centre
(IMB0011)**

12. The Bill disapplies various modern slavery provisions to those who enter or arrive in the UK irregularly in accordance with the four conditions set out in clause 2:

a. Would the removal of potential victims of slavery or trafficking from the UK be compatible with the UK's obligations under Article 4 ECHR and the Council of Europe Convention Against Trafficking (ECAT)?

- The removal of victims of modern slavery without lawful residence to the country of their nationality or permanent residence is not prohibited, but before doing so states must observe their clear obligations to identify and protect every victim of modern slavery regardless of their immigration status (Articles 14 and 4 ECHR and Articles 3, 10, and 12 ECAT) and to investigate and prosecute the perpetrators of this crime (Article 4 ECHR and Article 27 ECAT).
- States must make an individualised assessment of the impact of such return on 'the rights, safety and dignity of that person' (Article 16 ECAT).

b. Is the removal of support provisions for potential victims of slavery or trafficking currently available under the Modern Slavery Act 2015 and equivalent provisions in Scotland and Northern Ireland compatible with the UK's obligations under Article 4 ECHR and ECAT?

- The removal of support provisions for potential victims of slavery or trafficking is incompatible with Articles 3, 10 (2), 12 (1) and (2), and 13 ECAT as well as Articles 4 and 14 ECHR, which oblige states to identify and protect all victims of trafficking or slavery, without discrimination and without exception.
- States must provide assistance and support to any potential victim of modern slavery as soon as there are reasonable grounds to believe (credible suspicion) that a person is a victim (Article 12 (1) and (2) ECAT and Article 4 ECHR). Such protection is owed to any potential victim regardless of their immigration status or their cooperation with the law enforcement authorities during a minimum 30-day reflection and recovery period (Article 13 ECAT).
- Article 3 ECAT guarantees non-discrimination in the enjoyment of measures to protect and promote the rights of victims' including on the grounds of 'national or social origin'. The same guarantee is contained in Article 14 ECHR.

c. Is the removal of the duty to grant limited leave to victims of slavery or trafficking who have received a positive conclusive grounds decision compatible with the UK's obligations under Article 4 ECHR and ECAT?

- States are afforded a wide discretion in complying with the obligation 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 (Article 14 (1) ECAT).
- However, this does not set aside their obligation to identify every victim of modern slavery and offer a recovery and reflection period in order to enable them to decide whether or not to cooperate with law enforcement authorities, save in the circumstances where a victim identification process reveals that a victim's status is used illegitimately.

- Moreover, granting of a residence permit according to Article 14 ECAT is without prejudice to the right to seek and enjoy asylum.

13. The Government justifies the disapplication of various modern slavery provisions on the basis that persons who meet the four conditions in clause 2 are a “threat to public order” and therefore the obligations arising under Article 13 of the Council of Europe Convention Against Trafficking (ECAT) do not apply. To what extent is this extension of the public order disqualification compatible with Article 4 and ECAT?

- Victims of modern slavery may be denied a 30-day recovery and reflection period and resulting access to assistance and support measures on “public order” grounds.
- However, public order grounds must be interpreted narrowly – if it is shown that a victim’s status is used illegitimately. This in line with the object and purpose of Article 13 ECAT which is specifically designed to protect victims who are illegally present in a State’s territory.

A blanket exclusion from the recovery and reflection period for anyone arriving in the UK ‘illegally’, and a sweeping exception from an express obligation to identify and protect every victim of modern slavery contradict both Article 13 ECAT and Article 4 ECHR, which is not qualified and could not be balanced out by a reference to public interest.

Introduction to the Modern Slavery PEC

The Modern Slavery and Human Rights Policy and Evidence Centre (Modern Slavery PEC) 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.¹ The Modern Slavery PEC is an impartial organisation that funds research to provide policymakers and law-makers with independent and authoritative insight and analysis on modern slavery.

The Modern Slavery PEC’s approach to this submission

The Illegal Migration Bill raises the issue of the UK’s compliance with several international treaties. This analysis focuses in particular on the obligations arising out of the European Convention on Human Rights (ECHR) and the Council of Europe Convention on Action Against Trafficking in Human Beings (ECAT) with a view to answering questions 12 and 13 of the Call for Evidence. These questions concern the Bill’s proposed disapplication of various modern slavery provisions contained in domestic legislation for victims with irregular migration status (Clauses 21-28 of the Bill) and the compatibility of such disapplication with the UK’s obligations under Article 4 ECHR and ECAT. The term ‘modern slavery’ encompasses human trafficking, slavery, servitude and forced labour, which have been defined in international law. This submission identifies and summarises the relevant provisions of the ECHR and ECAT before proceeding to address questions 12 and 13 in turn. This submission was drafted by Dr Marija Jovanovic, an expert in modern slavery and human rights law at the University of Essex, with input from the core PEC team. It builds on the Modern Slavery PEC’s Explainer of the modern slavery provisions in the Illegal Migration Bill, which was underpinned by legal analysis of the Bill’s human rights compatibility undertaken by Dr Jovanovic.

The Relevant Provisions in ECHR and ECAT and the Relationship Between the Two Instruments

The relevant ECHR provisions

1. Several provisions of the ECHR are directly engaged by **Clauses 21-28** of the Illegal Migration Bill, although **Article 4** ECHR (the prohibition of slavery, servitude, forced labour and human trafficking) is the most relevant of these and will therefore be covered in greater detail. In addition to Article 4, **Article 1** (the obligation to secure the ECHR rights to everyone within a state’s jurisdiction), **Article 3** (the prohibition of torture and inhuman or degrading treatment or punishment), **Article 8** (the right to respect for private and family life), **Article 13** (the right to an effective remedy), **Article 14** (the right to non-discrimination in the enjoyment of Convention rights including on grounds of national origin) and **Article 34** (the right to petition the European Court of Human Rights claiming to be the victim of a violation) are all engaged by the Bill’s proposed automatic removal of potential victims of modern slavery who entered or arrived in the UK

¹ The Centre is a consortium of six research organisations led by the Bingham Centre for the Rule of Law and is funded by the Arts and Humanities Research Council on behalf of UK Research and Innovation (UKRI). This response has been prepared by the Modern Slavery PEC’s core team and does not necessarily represent the views of all partners making up the Modern Slavery PEC consortium.

irregularly after 7 March 2023 in accordance with the four conditions set out in clause 2 of the Bill.

2. When it comes to Article 4 ECHR, which is given effect in domestic law by the Human Rights Act 1998 (HRA), the following positive obligations have crystallised in the Court's case law to date:
 - An **obligation to put in place 'a legislative and administrative framework providing real and effective protection of the rights of victims.'**² This duty extends to the general legal and administrative framework including the adequacy of immigration policy.³
 - An **obligation to take 'operational measures to protect victims, or potential victims'**.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 Importantly, even when an individual is not a victim of exploitation in a specific ECHR Member State, all State Parties are under a positive obligation to identify and support any potential victim – not just those exploited in the country in which they are discovered.⁶
 - A **procedural obligation to investigate potential situations of modern slavery and punish the perpetrators.**⁷
3. The last two obligations are triggered by a 'credible suspicion' (reasonable grounds to believe) that a person is s a victim of modern slavery.⁸ 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.'⁹ 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'.¹⁰
4. The prohibition of slavery and forced labour in Article 4 ECHR is one of the four unqualified and non-derogable rights in the Convention.¹¹ This means that even in situations of extreme crisis ('in time of war or other public emergency threatening the life

² *Chowdury and Others v Greece*, para 87; *Rantsev v Cyprys and Russia*, para 285; *J and Others v Austria*, para 106.

³ *Rantsev v Cyprus and Russia* paras 290-293.

⁴ *VCL and AN v United Kingdom*, paras 152 – 153; *J and Others v Austria*, paras 109-111.

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

⁶ *J and Others v Austria*, paras 110 - 111.

⁷ *Rantsev v Cyprus and Russia*, para 288; *CN v the United Kingdom*; *SM v Croatia* [GC], para 307. 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 69.

⁸ 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. See also *VCL and AN v the United Kingdom*, para 152; *Rantsev v Cyprus and Russia*, paras 286 and 288; *CN v the United Kingdom*; *SM v Croatia* [GC], para 307.

⁹ 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. *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.

¹⁰ *J and Others v Austria*, paras 110 and 111.

¹¹ These are: the right to life (Article 2 ECHR); the prohibition of torture and inhuman or degrading treatment (Article 3 ECHR), the prohibition of slavery and servitude (Article 4 ECHR), and the prohibition on retrospective criminal law (Article 7 ECHR).

of the nation’ (Article 15(1) ECHR)) states are not permitted to limit, modify, or suspend their obligations arising out of such ‘absolute’ rights in pursuit of any competing public interests. The language used by the UK Government in the explanatory notes accompanying the Illegal Migration Bill to justify the modern slavery provisions refers to ‘radical’ measures and ‘exceptional circumstances relating to the illegal entry into the UK’.¹² Such language is similar to the language used in the ECHR jurisprudence on Article 15, which allows for some flexibility for States dealing with crises by derogating from certain Convention obligations. However, no such derogation is allowed from Article 4 obligations. As the European Court has made clear:

‘together with Articles 2 and 3, Article 4 enshrines one of the basic values of the democratic societies making up the Council of Europe ... Unlike most of the substantive clauses of the Convention, Article 4 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’.¹³

The relevant ECAT provisions

5. The key ECAT provisions engaged by Clauses 21-28 of the Illegal Migration Bill are:
- a. **Article 3 (Non-discrimination principle)**, which requires that 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 including national origin.
 - b. **Article 10 (Identification of victims)**, which contains the following requirement in Article 10(2):

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 2.¹⁴

- c. **Article 12 (Assistance to victims)**, which includes access to specialist support such as accommodation, legal representation, and access to healthcare.
- d. **Article 13 (Recovery and reflection period)** which requires states to provide in their domestic law a “recovery and reflection period” of at least 30 days which applies to any potential or confirmed victim including and especially those with irregular migration status. During this period, states must authorise the persons concerned to stay in their territory as well as access to the measures contained in Article 12 (1) and (2).¹⁵

¹² HM Government (2023) ‘Illegal Migration Bill: European Convention on Human Rights Memorandum’ paras 45, 47; HM Government (2023) ‘Illegal Migration Bill Explanatory Notes’ para 135.

¹³ *Rantsev v Cyprus and Russia*, para 283.

¹⁴ Council of Europe Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series 197 (16 May 2005) (emphasis added).

¹⁵ Articles 12 (3) and (4) contain a more extensive set of measures that apply to those individuals who have been formally identified as victims of human trafficking by competent authorities and are lawfully resident within its territory. They include medical or other assistance for victims without adequate resources, and access to the

- e. **Article 14 (Residence permit)**, which requires states to issue renewable residence permits to identified victims of human trafficking either in exchange for cooperation with the law-enforcement authorities or on account of the victim's needs.
- f. **Article 16 (Repatriation and return of victims)**, which requires that repatriation/return programmes are conducted with due regard for the rights, safety and dignity of identified victims of trafficking, is preferably voluntary and complies with the obligation of non-refoulement.¹⁶
- g. **Article 27 (Ex parte and ex officio applications)**, which requires that states ensure that investigations into or prosecution of offences established in accordance with this Convention shall not be dependent upon the report or accusation made by a victim, at least when the offence was committed in whole or in part on its territory.
- h. **Article 40 (Relationship with other international instruments)**, which confirms in Article 40(1) that ECAT shall not affect the rights and obligations derived from other international instruments which contain provisions on matters governed by it and which ensure greater protection and assistance for victims of trafficking (i.e. the 1951 Refugee Convention) and in Article 40(4) that nothing in ECAT shall affect the rights, obligations and responsibilities of States and individuals under international law, including international human rights law.

The relevance of ECAT to the ECHR

6. When explaining and elaborating the obligations imposed by Article 4 ECHR, the European Court of Human Rights ('the Court') draws heavily on the provisions of ECAT. The Court has explained that the extent of the positive obligations arising under Article 4 have to take account of ECAT, which requires not only the punishment of traffickers but prevention and protection of victims.¹⁷ This is in line with the Court's general approach that the ECHR cannot be interpreted in a vacuum and should as far as possible be interpreted in harmony with other rules of international law of which it forms part. In interpreting Article 4, the Court has therefore relied on Articles 10,¹⁸ 13,¹⁹ 15,²⁰ and 26 of ECAT,²¹ which will be explained further below. A useful example of this cross pollination between the two Council of Europe mechanisms is the significant 2021 judgement against the UK in *V.C.L. and A.N.*, the first case in which the Court considered the prosecution of victims of modern slavery. The Court's judgment referred to the 'non-punishment principle' enshrined in Article 26 ECAT noting that the prosecution of victims, or potential victims, of trafficking could be at odds with the State's obligation to take operational measures to protect them where they are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual has been trafficked.²²

labour market, to vocational training and education.

¹⁶ GRETA, 2nd report on Norway, GRETA(2017)18, para 148.

¹⁷ *Rantsev v Cyprus and Russia*, para 285; *Chowdury and Others v Greece*, para 110; *J and Others v Austria*, para. 106;

¹⁸ *Chowdury and Others v Greece*, para 110.

¹⁹ *Chowdury and Others v Greece*, para. 121.

²⁰ *Ibid*, para. 126.

²¹ *VCL and AN v United Kingdom*.

²² *V.C.L. and A.N. v United Kingdom*, para. 159.

This shows the vital role of ECAT in the interpretation of Article 4 ECHR by the Strasbourg Court.

Question 12: The Bill disapplies various modern slavery provisions to those who enter or arrive in the UK irregularly in accordance with the four conditions set out in clause 2:

- a. **Would the removal of potential victims of slavery or trafficking from the UK be compatible with the UK's obligations under Article 4 ECHR and the Council of Europe Convention Against Trafficking (ECAT)?**
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7. **Summary: Removal of potential victims of modern slavery from the UK before the victim identification process is completed would be in breach of the UK's obligations under Articles 4 and 14 ECHR and Articles 3, 10, 12, 13, 16, and potentially 27, ECAT. International law does not preclude removal of victims of modern slavery and human trafficking who do not have lawful residence. On the contrary, Article 16 of ECAT expressly envisages such repatriation/removal of victims. However, before returning such individuals to the country of their nationality or permanent residence, states must observe their clear obligations to complete the victim identification process and protect every potential victim of modern slavery regardless of their immigration status, and to investigate and prosecute the perpetrators of this crime stipulated by Article 4 ECHR and Articles 10, 12, and 27 ECAT. Article 3 ECAT expressly guarantees non-discrimination in the implementation of the Convention by States 'in particular the enjoyment of measures to protect and promote the rights of victims' including on the grounds of 'national or social origin'. The same guarantee is contained in Article 14 ECHR in relation to the enjoyment of Convention rights. Finally, before returning an identified victim of modern slavery to their country of nationality or permanent residence, Article 16 ECAT requires states to make an individualised assessment of the impact of such return on 'the rights, safety and dignity of that person'.**
 8. The return of identified victims of human trafficking to their country of origin is not prohibited per se by either ECHR or ECAT. It is governed by Article 16 ECAT explained below. However, such a return is predicated upon a state's complying with a range of obligations that arise from both Article 4 ECHR and ECAT (as well as from other Articles of the ECHR such as 3 and 8 and other international instruments binding on the UK, such as the 1951 UN Convention Relating to the Status of Refugees).
 9. Clause 21 of the Bill allows for immediate removal of an individual with a 'positive reasonable grounds decision' – a decision made when the Home Office finds that there are reasonable grounds to believe that the person is a victim of modern slavery – *before* the victim identification process has been completed (i.e. before a 'conclusive grounds decision', which is a final decision on one's victim status in the UK).²³ Such an immediate removal would violate the express obligations in Articles 10, 12 and 13 of

²³ The thresholds for a 'reasonable grounds decision' and 'conclusive grounds decision' are confirmed in primary legislation in Section 60 of the Nationality and Borders Act 2022.

ECAT as well as in Article 4 ECHR to identify and protect every victim of modern slavery without discrimination (as required by Article 3 ECAT and Article 14 ECHR), before their return to the country of origin could be considered. It would also likely be in breach of the obligation to investigate and prosecute the perpetrators of this offence contained in Article 27 of ECAT and Article 4 ECHR because without the victim's cooperation it would be difficult to gather relevant evidence to prove the offence of modern slavery.

10. As already explained, obligations arising out of Article 4 ECHR are non-derogable and could not be set aside even 'in time of war or other public emergency threatening the life of the nation'. 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 them.²⁴ This limitation is however carefully construed and does not allow balancing the obligation to identify and protect all victims of modern slavery with a broad reference to public interest. Similarly, Article 4 ECHR contains a procedural obligation to investigate potential situations of modern slavery as soon as 'there is a credible suspicion that an individual's rights under that Article have been violated.'²⁵ This duty requires, among others, that the authorities 'must take whatever reasonable steps they can to collect evidence and elucidate the circumstances of the case'.²⁶ It is clear that immediate removal of individuals whom the Home Office deems as potential victims of modern slavery is likely to breach this procedural obligation too.
11. Article 16 ECAT governs the repatriation and return of victims without lawful residence to their country of nationality or permanent residence and contains important limitations to the states' ability to return such victims. Namely, before returning an *identified* victim, 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.'²⁷ These restrictions draw expressly on the Strasbourg jurisprudence under Articles 3 and 8 ECHR,²⁸ 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.'²⁹ The requirement in Article 16 to carry out such an evaluation of the risk faced by a victim if returned can only be met if there is individuated decision-making after a person has been conclusively identified as a victim.

²⁴ *Zoletic and Others v Azerbaijan*, para 188.

²⁵ *S.M. v. Croatia* [Grand Chamber], paras 309-311; *J and Others v Austria*, para 107.

²⁶ 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 69 and 70.

²⁷ ECAT Explanatory Report, para 202.

²⁸ *Ibid*, para 203.

²⁹ *Ibid*, para 202.

12. Instead of such individuated decision-making, the Illegal Migration Bill provides for *automatic* removal (subject to a very narrowly defined exception) of potential victims without lawful residence in the UK before the identification process has been completed. Moreover, a blanket provision for automatic removal of potential victims to a country listed in Clause 50 of the Bill as a ‘safe state’ clearly precludes any individualised decision-making, save in relation to the applicability of 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. Potential victims would also 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, as discussed further below in response to question 13.
13. It remains to be seen to what extent the ‘serious harm suspensive appeal’ provided for in Clause 37 of the Bill will operate as a safeguard to ensure individual consideration in cases where there is a risk of removal/return in breach of Articles 3, 4 or 8 ECHR. While the possibility of suspensive appeals could reduce the risk of incompatibility in some cases, there is too little detail on the face of the Bill to know whether it will do so, given that serious harm is not defined and is left to be defined by the Secretary of State in subsequent regulations.
- b. Is the removal of support provisions for potential victims of slavery or trafficking currently available under the Modern Slavery Act 2015 and equivalent provisions in Scotland and Northern Ireland compatible with the UK’s obligations under Article 4 ECHR and ECAT?**
14. **Summary: The removal of support provisions for potential victims of slavery or trafficking currently available under the Modern Slavery Act 2015 and equivalent provisions in Scotland and Northern Ireland is incompatible with Articles 3, 10 (2), 12 (1) and (2), and 13 ECAT as well as Articles 4 and 14 ECHR, which oblige states to identify and protect all victims of trafficking or slavery, without discrimination and without exception. States are obliged to provide assistance and support to any potential victim of modern slavery as soon as there are reasonable grounds to believe (credible suspicion) that a person is a victim (Articles 3 and 12 (1) and (2) ECAT and Article 4 ECHR). This ‘emergency package’ of measures is owed to any potential victim regardless of their immigration status or their cooperation with the law enforcement authorities during a minimum 30-day reflection and recovery period. Article 12 (3) and (4) ECAT contains more extensive measures of protection, which are owed after a person is formally identified as a victim and only if such a person is lawfully resident within the territory of a specific State.**
15. Article 12 ECAT contains a comprehensive set of assistance and support measures which are meant to assist victims in their physical, psychological, and social recovery. These provisions include two sets of measures: an ‘emergency package’ of assistance and

support measures and measures of ‘long-term assistance and support’.³⁰ Namely, victims usually need support and assistance much before the official identification process is completed. For that reason, some protection measures are owed as soon as there are reasonable grounds to believe (credible suspicion) that a person is a victim (Article 12 (1) and (2) ECAT) whereas other, more extensive measures of protection, are due only after a person is conclusively identified as a victim and only if such a person is lawfully resident within the territory of a particular state (Article 12 (3) and (4) ECAT).

16. Measures that belong to the ‘emergency package’ (Article 12 (1) and (2) ECAT) concern the provision of material assistance to potential victims such as accommodation, psychological and material assistance, access to emergency medical treatment, or translation and interpretation services, access to counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand, as well as access to education for children. These measures also include taking due account of safety and protection needs of potential or confirmed victims, which depend on victims’ personal circumstances, such as age or gender, the type of exploitation, the country of origin, the types and degree of violence suffered, isolation from his or her family and culture, knowledge of the local language, and his or her material and financial resources.³¹ For instance, the address of potential victims’ accommodation needs to be kept secret and such accommodation must be protected from any attempts by traffickers to recapture them.³²

17. Significantly, access to the ‘emergency package’ measures does not depend on a victim’s immigration status nor on their willingness to cooperate with the police or prosecution.³³ Namely, Article 13 ECAT guarantees to any potential victim – someone whom the authorities have ‘reasonable grounds to believe’ to be a victim – a reflection and recovery period ‘of at least 30 days’³⁴ during which they cannot be removed from the state where they are discovered and during which they are entitled to the ‘emergency package’ of assistance and support measures explained above. The goal of this period is to allow a potential victim ‘to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities’.³⁵ While the reflection and recovery period is available to *any* potential victim, it is primarily established to prevent the expulsion of victims who are ‘illegally present’ in the territory of a member state before they can be formally recognised as victims by the relevant authorities.³⁶ ECAT and its Explanatory Report use mandatory language when referring to assistance and support available to victims during the reflection and recovery period. For example, the Explanatory Report refers to the assistance measures which states ‘must provide’ for

³⁰ For a detailed assessment of these obligations see Marija Jovanovic, *State Responsibility for Modern Slavery in Human Rights Law* (OUP 2023) chapter 7.

³¹ ECAT Explanatory Report, para 164.

³² ECAT Explanatory Report, paras 154 and 164.

³³ ECAT Explanatory Report, para 175.

³⁴ Article 13 (1) ECAT. Such an entitlement to a 30-day recovery and reflection period is also guaranteed in Section 61 of the Nationality and Borders Act.

³⁵ ECAT Explanatory Report, para 175.

³⁶ ECAT Explanatory Report, para 172,

trafficking victims and which victims are ‘entitled to’,³⁷ emphasizing that the required assistance measures are minimum ones.³⁸ As already noted, neither of these measures depend on the victims’ willingness to cooperate with authorities nor on their immigration status.

18. Therefore, the Bill’s removal of support provisions for potential victims of slavery or trafficking currently available under the Modern Slavery Act 2015 and equivalent provisions in Scotland and Northern Ireland is incompatible with Articles 3, 10 (2), 12 (1) and (2), and 13 ECAT as well as Article 4 ECHR. While Article 13 (3) ECAT, discussed in question 13 below, allows States not to observe the recovery and reflection period if grounds of public order prevent it or if it is found that victim status is being claimed improperly, this provision ought to be interpreted narrowly, because of its express aim ‘to guarantee that victims’ status will not be illegitimately used.’³⁹ In light of that, 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, because that would defeat one of the very purposes of the recovery and reflection period provided for in Article 13. Yet, that is what Clauses 21-24 of the Bill purport to do, by automatically disapplying the recovery and reflection period and accompanying measures of assistance and support on the basis that all irregular migrants are a threat to public order. The only exception to this automatic exclusion from protection is allowed if potential victims cooperate with law enforcement authorities, which again defeats the express purpose of the recovery and reflection period allowing yet unidentified victims to take an informed decision on cooperating with the competent authorities.

19. What is more, the Bill’s removal of support provisions for potential victims of slavery or trafficking currently available under the Modern Slavery Act 2015 and equivalent provisions in Scotland and Northern Ireland is incompatible with the Article 4 ECHR obligation to identify, assist and protect all victims of trafficking or slavery, without discrimination and without exception, discussed in question 12 (b) above. As noted there, unlike Article 13 ECAT, the obligation to identify and protect victims or potential victims of modern slavery contained in Article 4 ECHR, which draws expressly on Articles 10 (2) and 12 ECAT, is unqualified and not capable of derogation.

20. Beyond protection and assistance provided during a recovery and reflection period, confirmed victims of modern slavery (those with a positive conclusive grounds decision) are entitled to a more extensive set of measures in Article 12 (3) and (4) ECAT, Access to these ‘post-identification measures’ is, nevertheless, limited to those identified victims who are lawfully resident in a particular state. As it will be shown below, access to such lawful residence may be dependent on the victims’ ability or willingness to assist in criminal investigations against the perpetrators. This ‘long term assistance and protection’

³⁷ ECAT Explanatory Report paras 146-147 and 149.

³⁸ ECAT Explanatory Report para 151.

³⁹ ECAT Explanatory Report, para 173.

includes access to necessary medical or other assistance to victims who do not have adequate resources and need such help as well as access to the labour market, to vocational training, and education.⁴⁰ Notably, ECAT does not specify the duration of the assistance owed to victims beyond the reflection and recovery period.

c. Is the removal of the duty to grant limited leave to victims of slavery or trafficking who have received a positive conclusive grounds decision compatible with the UK's obligations under Article 4 ECHR and ECAT?

21. **Summary: States have a considerable margin of discretion when it comes to issuing a residence permit to confirmed victims of modern slavery. Article 14 (1) ECAT requires 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. While states are afforded a wide discretion in complying with this requirement, this does not set aside their obligation to complete the identification process for every victim of modern slavery and offer a recovery and reflection period in order to enable them to decide whether or not to cooperate with law enforcement authorities, save in the circumstances where a victim identification process reveals that a victim's status is used illegitimately. Moreover, Article 14 ECAT is categorical that granting of a residence permit according to this provision is without prejudice to the right to seek and enjoy asylum.**
22. Neither the ECHR nor ECAT provide an automatic entitlement to a residence permit or an absolute protection against removal for identified victims of trafficking. 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 (a positive conclusive grounds decision) in accordance with Article 10 and afforded a recovery and reflection period in order to decide whether or not to cooperate with law enforcement authorities in accordance with Article 13. However, the obligation to issue residence permits in Article 14 ECAT is couched in weak language, leaving a wide margin of discretion to states.
23. According to the current regime in the UK, such individuals may be eligible to receive temporary permission to stay (a visa) to (1) assist in their recovery if they cannot do this in the country of which they are a citizen, (2) seek compensation for their exploitation if they cannot do this outside of the UK, or (3) cooperate with the authorities investigating or prosecuting their case.⁴¹ Of the 6,066 people who applied for it between April 2016 and June 2021 only 447 (7%) confirmed victims of modern slavery have been granted leave to remain.⁴²

⁴⁰ Articles 12 (3) and (4) ECAT.

⁴¹ Section 65 of the Nationality and Borders Act 2022. See also UK Home Office (2023) 'Immigration Rules Appendix Temporary Permission to Stay for Victims of Human Trafficking or Slavery'.

⁴² The Guardian (2022) 'Revealed: just 7% of trafficking victims given leave to remain in UK'.

24. In its most recent report on the UK's compliance with ECAT, GRETA⁴³ expressed concern that:

[R]esidence permits ('Discretionary Leave to remain') are granted only in a small number of cases and for a short period, which does not ensure the needed stability and does not provide victims of trafficking, especially children, with a durable solution. GRETA urges the UK authorities to ensure that all victims of human trafficking who have received a positive Conclusive Grounds decision and whose immigration status and personal situation require it are issued a renewable residence permit, in accordance with Article 14(1) of the Convention. GRETA also urges the UK authorities to review the victim return and repatriation policies in order to ensure compliance in law and practice with Article 16 of the Convention.⁴⁴

25. Any consideration of issuing a residence permit is relevant only after a person has been granted a recovery and reflection period of at least 30 days (discussed in relation to Question 13 below), which ensures that potential or identified victims of modern slavery have had time to recover and make an informed decision about cooperating with law enforcement authorities. Article 13 therefore guarantees a ban on removal of victims during the recovery and reflection period and Article 10(2) prohibits removal before the identification process is completed, while Article 14 concerns 'renewable' residence permits to victims who are *already* identified (i.e. in respect of whom a 'conclusive grounds decision' has been made). While states do have some discretion in both instances (see below), such discretion is considerably wider in the case of Article 14.

26. Furthermore, while ECAT clearly leaves it largely to states to decide whether to issue residence permits in exchange for cooperation with law enforcement authorities, GRETA has noted that

[D]ifficulties arise when a country chooses to make the residence permit conditional on the victim's co-operation, which in practice undermines the unconditional nature of assistance to victims. There are situations in which victims might be afraid to cooperate in the investigation because of threats from the traffickers. Granting a residence permit on account of the personal situation of the victim takes in a range of situations, such as the victim's safety, state of health and family situation, and tallies with the human rights-based approach to combating trafficking in human beings. GRETA has therefore invited State Parties to consider granting temporary residence permits to victims of human trafficking on the basis of their personal situation, in addition to the residence permit on the basis of the victim's co-operation in the investigation or criminal proceedings.⁴⁵

Importantly, Article 14 (5) stipulates that states must ensure that granting of a permit according to this provision shall be without prejudice to the right to seek and enjoy asylum.

Question 13: The Government justifies the disapplication of various modern slavery provisions on the basis that persons who meet the four conditions in clause 2 are a "threat to public order" and therefore the obligations arising under Article 13 of the

⁴³ Group of Experts on Action Against Trafficking in Human Beings.

⁴⁴ GRETA, 'Evaluation Report United Kingdom' GRETA(2021)12 (20 October 2021) 5.

⁴⁵ GRETA, '9th General Report on GRETA's Activities' (March 2020) para 161.

Council of Europe Convention Against Trafficking (ECAT) do not apply. To what extent is this extension of the public order disqualification compatible with Article 4 and ECAT?

27. Summary: Contrary to the obligation to grant a recovery and reflection period of at least 30 days and provide assistance and support during this period to any potential victim of modern slavery contained in Article 13 ECAT, the Illegal Migration Bill creates a blanket exclusion from these protections for anyone arriving in the UK ‘illegally’. In doing so, the Bill also creates a sweeping exception from an express obligation to identify and protect every victim of modern slavery, guaranteed by Article 4 ECHR, which is not qualified and could not be balanced out by a reference to public interest. According to Article 13 (3) ECAT, potential or identified victims of modern slavery may be denied a recovery and reflection period and resulting access to assistance and support measures on “public order” grounds. However, such public order grounds must be interpreted narrowly – if it is shown that a victim’s status is used illegitimately. This is in line with the object and purpose of Article 13 ECAT which is specifically designed to protect victims without lawful residence..

28. According to Article 13 ECAT, any potential victim, that is people for whom the Home Office has determined that there are reasonable grounds to believe they are a victim of modern slavery, is entitled to a recovery and reflection period of at least 30 days. The aim of this period is two-fold. It first allows potential or identified victims to recover and escape the influence of traffickers. It also allows potential or identified victims to come to a decision on cooperating with the law-enforcement authorities in any prosecution of the traffickers. Importantly, during this period, states are not allowed to remove potential victims from their territory and are required to provide assistance and support measures guaranteed in Article 12 (1) and (2). These include access to specialist support such as accommodation, legal representation, or access to healthcare and are owed to all potential victims, regardless of their immigration status. Article 13 ECAT provision is especially designed to protect victims without lawful residence. This is explained in the ECAT Explanatory Report paras 172-173 (emphasis added):

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.

29. The purpose of the exception contained 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 well as the overarching purpose of ECAT which seeks to ‘protect the human rights of the victims of trafficking’. As the Explanatory Report makes clear, one of the main purposes 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. Accordingly, any exceptions to the duty to provide for a reflection and recovery period must be narrowly construed in a way which does not defeat the very purpose of the protection. On the contrary, the Illegal Migration Bill creates a blanket exclusion from the recovery and reflection period for virtually all irregular migrants, solely on the basis of their irregular immigration status. That is a very wide interpretation of the scope of the public order disqualification in Article 13(3) of ECAT, that is not compatible with the purpose and objects of Article 13 or ECAT as a whole. According to GRETA, no other signatory to ECAT has sought to give the public order exception in Article 13(3) such a wide interpretation, emphasizing that ‘the recovery and reflection period must not be revoked without taking due account of an individual’s personal circumstances and examining them in-depth.’⁴⁶
30. Moreover, by adopting such a wide interpretation of the public order disqualification in Article 13(3), the UK is effectively seeking to derogate from an express obligation to identify every victim of modern slavery, guaranteed by Article 4 ECHR and Article 10 (2) ECHR. As explained above, these provisions are not qualified and failures to comply therefore cannot be justified by reference to competing public interests. Article 40 (4) ECAT makes clear that nothing in ECAT affects the rights of individuals or the obligations of States under international human rights law. The UK cannot therefore rely on its wide interpretation of Article 13(3) of ECAT as a justification for any breach of its obligations under the ECHR.

Conclusion

31. As explained in paragraph 2, 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.’⁴⁷ Such a duty does not refer solely to criminal legislation but includes the general legal and administrative framework including the adequacy of immigration policy.⁴⁸ In *Chowdury and Others v Greece*, the European Court of Human Rights emphasised that ‘States’

⁴⁶ Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Luxembourg, GRETA(2013)18 (15 January 2014) para. 111; Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Malta, GRETA(2017)3 (16 March 2017) para. 110.

⁴⁷ *Chowdury and Others v Greece*, para 87; *Rantsev v Cyprus and Russia*, para 285; *J and Others v Austria*, para 106.

⁴⁸ *Rantsev v Cyprus and Russia* paras 290-293.

domestic immigration law must respond to concerns regarding the incitement or aiding and abetting of human trafficking or tolerance towards it.⁴⁹ 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'.⁵⁰ Similarly, one of the purposes of ECAT expressed in Article 1 is 'to design a comprehensive framework for the protection and assistance of victims and witnesses' while Article 3 ECAT guarantees non-discrimination in the implementation of the Convention by States 'in particular the enjoyment of measures to protect and promote the rights of victims' including on the grounds of 'national or social origin'.

32. The legal regime that would be created for victims of modern slavery by the relevant clauses in the Illegal Migration Bill contradicts both the letter and spirit of these provisions. As a result, the human rights of those victims of modern slavery without lawful residence in the UK are effectively rendered theoretical and illusory because they will be denied their entitlement to assistance and support guaranteed by international human rights law.

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⁴⁹ *Chowdury and Others v Greece* (n 12) [87].

⁵⁰ *Airey v Ireland*, para 24.