

## **RESPONSE FROM THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND TO COMMUNICATION OL GBR 11/2021**

### **The Nationality and Borders Bill**

The Nationality and Borders Bill is part of the UK Government's New Plan for Immigration – the most significant overhaul of our asylum system in over two decades. The principle behind the Bill – and the wider plan – is simple. Access to the UK's asylum system should be based on need, not on the ability to pay people smugglers. Illegal migration should be prevented and those with no right to be in the UK should be removed, while those in genuine need will be protected. It is only by taking these steps to tackle illegal migration that we can best help those in greatest need.

There are three major objectives for the reforms:

- Increase the fairness and efficacy of our system so that we can better protect and support those in genuine need of asylum.
- Deter illegal entry into the UK, breaking the business model of people smuggling networks and protecting the lives of those they endanger.
- Remove more easily from the UK those who do not hold a right to be here.

The Bill has now been passed by the House of Commons and is before the House of Lords. A copy of the Bill is available on the website of the UK Parliament at:

<https://bills.parliament.uk/publications/44307/documents/1132>

### **Detailed response to your Joint Communication**

The UK Government is committed to tackling the heinous crime of modern slavery and to supporting its victims, in line with our international obligations. The Bill will help us to do this more effectively. It puts important rights of victims of modern slavery into legislation, and it clarifies the UK's international obligations in UK domestic law. For example, the Bill is explicit in setting out that victims may be granted temporary leave to remain in the UK for the purpose of recovering from their ordeal and to support the authorities with criminal prosecutions. It will also reduce the risk of our system being misused.

#### **1. Compliance with international law**

- 1.1. Your Joint Communication raises concerns that the provisions within the Nationality and Borders Bill were not compliant with the international legal framework of human rights and refugee laws. I would like to assure you that the policies set out in the New Plan for Immigration and the Nationality and Borders Bill fully comply with all of our obligations – including the European Convention on Human Rights (ECHR), the 1951 Refugee Convention and the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT).

- 1.2. Noting your particular comments about the Refugee Convention, I would like to offer the following observations.
- 1.3. Where there is no specific provision within the Refugee Convention which defines a certain term or sets out a specific procedure, and where there is no supra-national body akin to the European Court of Human Rights for example, it is open to states to interpret the terms of the Refugee Convention. Limit is placed on that autonomy to interpret by way of the principles of treaty interpretation in the Vienna Convention on the Law of Treaties. The general rule of interpretation in Article 31(1) of the Vienna Convention, requires a treaty to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of its object and purpose. Account can be given in certain circumstances to other factors such as subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation or to preparatory work.
- 1.4. As many terms are left to the interpretation of states, there is often no unanimity of interpretation to the Convention terms. Council Directive 2004/83/EC of 29 April 2004 ('the Qualification Directive') sought to harmonise interpretation of certain Refugee Convention concepts for member states of the EU. Now the UK has left the EU, it is for the UK Government to interpret the terms within the Convention in accordance with the principles of the Vienna Convention.
- 1.5. Clauses 29-38 of the Nationality and Borders Bill outlines the Government's proposed definitions of some of the key concepts of the Refugee Convention. This updated approach will provide all interacting with the asylum system with greater clarity, in doing so driving accurate and efficient decision-making by the Home Office and the Courts.

## **2. Modern slavery in the Nationality and Borders Bill**

- 2.1. Your Joint Communication raises concerns about the inclusion of modern slavery measures in the Nationality and Borders Bill and recommends that a firewall be established between immigration enforcement and wider public services. However, we believe that understanding the interaction of the modern slavery system with the asylum and immigration systems is important. The crime of modern slavery has no borders. Therefore, there will inevitably be a relationship between individuals who enter both the immigration system and our National Referral Mechanism (NRM). Ensuring the systems work efficiently together will help us identify victims of modern slavery at the earliest opportunity and provide them with appropriate support. This approach also helps ensure that the protections our systems provide are not misused by those seeking to frustrate their removal from the UK.
- 2.2. As set out above, the Nationality and Borders Bill provides legislative clarity to victims and decision makers on victims' rights, including the entitlement to a recovery period and the circumstances in which confirmed victims may be granted temporary leave to remain. It further

supports the early identification of possible victims through the one stop process which is underpinned by the provision of legal aid.

- 2.3. These changes will ensure resources around decision-making and support are readily available to those who need it and will help close any potential avenues for misuse within the NRM.
- 2.4. I would however like to assure you that we continue to adopt a victim focussed approach to all potential victims of modern slavery, irrespective of their immigration status or nationality. The UK Government is committed to ensuring that all potential victims get the help and support they need as quickly as possible, to support their recovery.

### **3. Distinguishing adult and child victims of modern slavery**

- 3.1. The best interests of the child have been considered throughout the formulation of the policy underlying the Bill and will continue to be. You will know that under Section 55 of the Borders, Citizenship and Immigration Act 2009, the Secretary of State indeed has specific legal duties in respect of having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom.
- 3.2. While we do not create a specific carve-out for children in the modern slavery clauses in the Bill, we do recognise our duty to safeguard the welfare of children and the protection needs of children as set out in the international agreements referred to in your letter. We have assessed that these duties and requirements are factored into these legislative changes and will not be impacted.
- 3.3. We consider that it is appropriate that the modern slavery measures in the Bill apply to all individuals and are considered on an individual, case-by-case basis. The guidance underpinning these measures and the decision-making around them will be made by trained decision-makers and will consider the needs of children and specific safeguarding vulnerabilities. Indeed, our existing modern slavery statutory guidance provides for the specific vulnerabilities of children, and all decision-makers in the competent authorities receive specific training on children as potential victims, including distinct training on child criminal exploitation. As we proceed to operationalise the measures in the Bill, we will continue to engage with experienced professionals who work with child victims to ensure the specific vulnerabilities and needs of children are understood and considered throughout.
- 3.4. I would also like to assure you that we remain committed to the principle of acting in the best interests of the child and that this commitment continues to underpin our approach to the specific needs of children and young people. The UK Government recognises its statutory duties, and this is unchanged by the Bill.

### **4. Obligations arising under the Convention on the of Rights of the Child**

- 4.1. The UK Government upholds its duty to safeguard the welfare of children and will continue to do so as it operationalises these legislative changes. Central to this is Article 16.7 ECAT, which states that “[c]hild victims shall not be returned to a State, if there is indication, following a risk and security assessment, that such return would not be in the best interests of the child.” We remain committed to upholding our obligations under ECAT and the Palermo Protocol in the operationalisation of these measures, including when balancing the duty to safeguard the welfare of children with our duties to the wider population relating to protection of public order.
- 4.2. Nonetheless, potential and confirmed victims of modern slavery may have been convicted of serious criminal offences or been involved in terrorism offences, and this includes children. It is right that the Government should be able to withhold protections from those individuals who pose a threat to public order or national security.
- 4.3. However, any decision on this basis will be carefully considered to recognise the specific vulnerabilities of child victims and will be in line with our international obligations. We are particularly mindful of the need to carefully consider the circumstances of each child as an individual, noting that a child may have been coerced into committing a criminal offence as part of a wider pattern of exploitation and abuse.

**5. Clause 57 – Provision of information relating to being a victim of slavery or human trafficking**

**Clause 58 – Late compliance with slavery or trafficking information notice: damage to credibility**

- 5.1. For the avoidance of doubt, the ongoing duty on the State to identify and refer victims of slavery is unchanged by the Bill. All modern slavery and trafficking referrals will be considered fully, regardless of when they are made, to make sure that those who genuinely need protection are afforded it. The aim of Clause 58 of the Bill is to encourage comprehensive disclosure of information at the earliest stage so we can provide victims with direct support as early as possible, and to improve the efficiency of the process. Further details of how decision-makers should consider credibility as part of their overall consideration of whether an individual is a possible or confirmed victim of modern slavery, will be set out in guidance. We will continue to invite the insight and expertise of wide-ranging groups of operational partners and non-governmental organisations who work with victims as we develop the guidance and proceed to operationalise this measure. This engagement will help ensure the views of victims of modern slavery are reflected in Government decision making.
- 5.2. Your Joint Communication set out your concerns that Clauses 57 and 58 do not consider the barriers to identification and disclosure that victims who have disabilities or who have experienced trauma may face. However, we can reassure you that the UK Government understands that potential victims may not feel able to discuss relevant

information about their experience at an early point. We will therefore make sure that all referrals are appropriately considered on a case-by-case basis. We will set out our approach in published guidance, giving decision-makers the tools to understand the effect traumatic events or disabilities can have on people's ability to accurately recall, share, or recognise such events. This will give decision-makers the tools to recognise the possible effect of exploitation and trauma and ensure decisions are based on an understanding of modern slavery and trafficking.

- 5.3. The impact of information being provided late will not be seen as 'damaging' if there are 'good reasons' for this late disclosure. Examples of what may constitute 'good reasons' for late information may include: where the victim was still under the coercive control of the trafficker; where the individual did not recognise themselves as a victim at that point; or for reasons relating to their capacity to understand the requirement or proceedings. We will set out more details on what constitutes 'good reasons' for late information in published guidance. This will enable us to be agile and amend the guidance to reflect our ever-increasing understanding of modern slavery victims.
- 5.4. All referrals of modern slavery will be appropriately considered regardless of when they are brought to make sure that those who genuinely need protection are afforded it. Clause 25 (late provision of evidence in asylum or human rights claim: weight) does not apply to modern slavery decisions. I hope this provides assurance on this point.
- 5.5. We are also committed to facilitating fair access to justice and are providing legal aid to all potential victims who are also engaged in the asylum system early in the process. Legal aid is already available to victims of modern slavery who have received positive Reasonable Grounds (RG) decisions in the NRM. Clauses 65 and 66 (Civil legal services under section 9 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO); add-on services in relation to the NRM and civil legal services under section 10 of LASPO: add-on services in relation to NRM, respectively) build on existing legal aid provision, ensuring that individuals can receive advice on the NRM before entering it, allowing them to make an informed decision. The extension of legal aid provision in this way underlines the UK Government's commitment to supporting victims of modern slavery.

## **6. Clause 59 – Identification of potential victims of slavery or human trafficking**

- 6.1. To meet our ongoing duty to identify victims of modern slavery, the UK Government has an established system of First Responder Organisations (FROs) which are authorised to refer potential victims of modern slavery into the NRM. The list of FROs is set out in the Modern Slavery Statutory Guidance at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1031731/modern-slavery-statutory-guidance-ew-non-statutory-guidance-sni\\_v2.5-final.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1031731/modern-slavery-statutory-guidance-ew-non-statutory-guidance-sni_v2.5-final.pdf)

- 6.2. As part of the New Plan for Immigration, the Home Office further committed to improving the training given to FROs to support their identification of possible victims at the earliest opportunity. We are committed to working with FROs to ensure they have the right tools and guidance to identify potential victims.
- 6.3. The Joint Communication sets out concerns that the changes implemented by Clause 59 could prompt a lower rate of NRM referrals and prevent disclosure. However, Clause 59 does not seek to raise the Reasonable Grounds threshold but aims to align the Modern Slavery Act further with our international obligations under ECAT. It will bring England and Wales in closer alignment with the Scottish and Northern Irish definitions and will build on the language already set out in the Modern Slavery Statutory Guidance (under Section 49 of the Modern Slavery Act 2015) which uses the definition “is” a victim rather than “may be” a victim. It is important to note that we are not changing the threshold at which FROs refer individuals into the NRM; Clause 59 is focussed on the Reasonable Grounds threshold for decision-makers only. We do not therefore anticipate that this will have an impact on the willingness of potential victims to come forward.
- 6.4. The Bill also makes clear that the Conclusive Grounds test will be based on the currently applied “balance of probabilities”, in line with our obligations under ECAT and accepted by the domestic courts. By placing these thresholds into legislation, the aim is to bring clarity to decision-makers and victims, which we believe, will support effective decision-making.
- 6.5. In addition to these changes, we continue to take important steps to increase the efficiency of decision-making in the NRM and we are continuing our work to strengthen the identification system. We are recruiting significant numbers of new decision-makers, introducing the digital referral and casework system and piloting alternative decision-making structures with local authorities for children.

## **7. Clause 60 – Identified potential victims of slavery or human trafficking: Recovery period**

- 7.1. We note the concerns in relation to Clause 60 of the Bill, which sets the minimum Recovery Period at 30 days, which aligns domestic law in the UK with our obligations under ECAT. I would however like to assure you that our policy remains, as per our current practice, that we will apply a Recovery Period of a minimum of 45 days – a more generous Recovery Period than our international obligations require – or until the Conclusive Grounds decision is taken, whichever is longer.
- 7.2. Furthermore, support for confirmed victims does not end following the initial recovery period. A Recovery Needs Assessment will be

conducted as soon as possible for all confirmed victims receiving Modern Slavery Victim Care Contract (MSVCC) support. This puts in place a tailored transition plan, specific to the confirmed victim's ongoing recovery needs. This needs-based approach will ensure that we provide tailored support to assist victims to recover and rebuild their lives.

- 7.3. MSVCC support is also provided in a way that takes into account individual needs, including disabilities. The prime contractor will ensure that victims are matched to the best contracted support service available, based on any acute needs they may have, and any support providers' particular specialisms, where relevant and possible. For example, the MSVCC provides different types of accommodation capable of meeting a range of needs and support requirements, including accommodation suitable for those victims with disabilities.

## **8. Clause 62 – Identified potential victims etc: disqualification from protection**

- 8.1. Through Clause 62, the UK Government wants to ensure protection from removal and support are not afforded to serious criminals and those who pose a national security threat. We note the concerns raised that Clause 62 would be in breach of our international obligations to identify, assist and protect all victims. However, we are defining “grounds of public order” for the purposes of Article 13 of ECAT and the ability under that Article to remove protection from removal on those grounds. We are including in that definition: (a) people who have received an order depriving them of citizenship status where to do so is conducive to the public good; and (b) where the Refugee Convention does not apply to the person by virtue of Article 1(F) of that Convention (serious criminals etc.).
- 8.2. Clause 62 seeks to further define “public order” to make it operationally possible to withhold the Recovery Period in certain circumstances, in line with ECAT. Nonetheless, we will carefully consider each individual case to ensure that people who genuinely need protection and support receive it. Any decision to withhold a Recovery Period from an individual will be balanced with our priority to safeguard vulnerable victims.
- 8.3. Clause 62 will be operationalised in a way which is fully compliant with relevant obligations under ECAT, the Palermo Protocol and the Refugee Convention, including with regard to non-refoulement and complementary protection and each individual case will be carefully considered in line with our international obligations.

## **9. Conclusive Grounds decision where the claim is made in “bad faith”**

- 9.1. In December 2021, during the Report Stage of the Bill, the Government clarified the legislative position that, in specific circumstances, we can withhold the rights that flow from a Conclusive Grounds (CG) decision. Decisions to withhold Recovery Periods and, correspondingly, whether to proceed to a CG decision will be made on a case-by-case basis.

Clause 62 is not a blanket disqualification. The individual circumstances of each case will be carefully considered and further detail on CG decision-making, where disqualifications apply, will be set out in guidance. This is in line with ECAT, which allows for the Recovery Period to be withheld under grounds of public order and improper claims and, therefore, we consider that the requirement to make a CG decision can fall away in this situation.

**10. Disqualification on public order grounds – impact on victims who have travelled through conflict zones or whose exploiters have links to terrorist organisations**

- 10.1. The Joint Communication asks about the possibility of victims being denied support due to having travelled to particular conflict zones or due to the status of the trafficker that they are associated with. As previously mentioned, this is not a blanket disqualification. Rather Clause 62 in the Bill makes the public order grounds disqualification – which is set out in ECAT – operationally possible to apply.
- 10.2. To reiterate, the UK Government will carefully consider each individual case to ensure that people who genuinely need protection and support receive it. This includes consideration as to whether their crime was committed as part of their exploitation. The discretion provided in the clause to consider on a case-by-case basis enables these wider considerations to be factored in as part of the decision-making. Further detail will be set out in published guidance and in the training provided to decision-makers. We consider this clause fully complies with all the international obligations to which you refer.

**11. Disqualification on public order grounds – victims who have committed offences as a direct consequence of trafficking**

- 11.1. The Joint Communication raises specific concerns regarding the impact of Clause 62 on victims who commit offences as part of their exploitation. I would like to emphasize that we are aware of the pressures victims can face to commit crimes during the period of exploitation and we are therefore developing underpinning guidance that balances both risk and vulnerabilities, giving consideration to both age and crimes committed as part of exploitation.
- 11.2. The disqualification laid out in this clause is also separate to the defence at Section 45 of the Modern Slavery Act 2015. Section 45 provides a statutory defence for adult and child victims who have been forced to commit crimes as a result of their exploitation in certain circumstances. A person may not avail themselves of the Section 45 defence if they are being prosecuted for one of the serious offences listed in Schedule 4 of the 2015 Act. By virtue of Clause 62 of the Nationality and Borders Bill, decision-makers may decide to withhold the Recovery Period if a person has been convicted of one of the offences listed in Schedule 4 of the 2015 Act. Therefore, Clause 62 is a distinct process, separate to the use of Section 45 as a defence. Any decision on withholding the Recovery Period on grounds



of public order will still be considered on a discretionary basis, taking the individual's vulnerabilities and circumstances into account.

## **12. Criminal offences**

- 12.1. The UK Government is not preventing migrants from seeking asylum. However, we believe that those seeking asylum should do so in the first safe country and we want to encourage those seeking protection to use legal and safe routes. We maintain that people in need of protection should avoid making dangerous journeys and claim asylum in the first safe country they reach – that is the fastest route to safety. The first safe country principle is widely recognised internationally and is a fundamental feature of the Common European Asylum System.
- 12.2. The new offence for people arriving in the UK without a required entry clearance applies to everyone who requires entry clearance for entry on arrival to the UK. This means it would also apply to refugees who require entry clearance for entry on arrival. However, it is our position that we are not ultimately seeking to prosecute those who are recognised as refugees who come to the UK to seek asylum. It will remain the focus of Immigration Enforcement to remove some individuals from the UK as soon as is reasonably possible, without prosecutions. This could include those who arrive without prior permission (entry clearance or electronic travel authorisation) and who are not granted refugee status. However, there may be a need for prosecution when there are aggravating circumstances, such as when an individual has put others in danger by their actions or they arrived in the UK without permission on previous occasions. In such cases, prosecutors may decide that it is in the public interest to prosecute. When a prosecution is being considered, prosecutors will always apply 'a public interest test' which takes into account factors such as whether a person has sought asylum, and they may wait to see whether refugee status is granted before deciding whether a prosecution should be pursued.

## **13. Particular Social Group**

- 13.1. Clause 32 aims to clarify an area where there has been a degree of contradiction and confusion for a number of years. We are not changing our policy or position on the 'test' for establishing if someone is part of a 'Particular Social Group'. We are clarifying the original intention of the definition in the Refugee or Person in Need of International Protection (Qualification) Regulations 2006, which transposed, at the time, the applicable EU law into domestic law. The drafting of those definitions provides that both elements of the definition must be satisfied in order for a person to be considered to be a member of a Particular Social Group. We note that there are conflicting domestic judgments on this issue and the courts have in some cases interpreted the 'and' as an 'or' for the purpose of the 2006 Regulations, resulting in the need for clarification.

- 13.2. The intention is to provide clarity and consistency for all those working in, and engaging with, the asylum system. Defining how key elements of the Convention should be interpreted and applied is vital in creating a robust system which can generate consistency and certainty.
- 13.3. Victims of trafficking may still be considered a member of a Particular Social Group for the purposes of considering an asylum claim if they meet the conditions outlined in Clause 32(3) and (4). The clarified definition does not preclude that. All decisions are made on a case-by-case basis in accordance with our obligations under the Refugee Convention. This interpretation is consistent with the decision of the Upper Tribunal in the case of HVT (Vietnam) cited in the Joint Communication.
- 13.4. We note that there is no authoritative or universally agreed definition of “particular social group” among State parties to the Convention, and in particular, whether the test set out in Article 1(A) (2) of the Refugee Convention should be applied cumulatively or not. The UN High Commissioner for Refugees (UNHCR) has issued guidance supporting the view that the cumulative approach is a misapplication of the Refugee Convention; however, that guidance is neither legally binding nor determinative as a matter of international law. Article 1(A) (2) of the Refugee Convention does not elaborate on what is meant by ‘membership of a particular social group’, and there is no supra-national body with the authority to give a determinative ruling. As such, the question is whether interpreting Article 1(A) (2) in good faith in accordance with the ordinary meaning to be given to its terms in their context and in light of the object and purpose of the convention, the UK can properly form the view that the definition in Clause 32 correctly captures what is meant in the Refugee Convention by “a particular social group”.
- 13.5. Following consideration of the broad wording in the Refugee Convention, the travaux préparatoires, the approach of a number of other jurisdictions and Article 31 of the Vienna Convention on the Law of Treaties, we remain of the view that the current definition in Clause 32 is a good faith, compatible interpretation of the Refugee Convention. Furthermore, this interpretation supports its core purpose; to provide protection to those who need it, based on a fear of being persecuted for the reasons set out in the Refugee Convention.

**8 April 2022**