

SCOTTISH GOVERNMENT DEBATE: ILLEGAL MIGRATION BILL – MODERN SLAVERY

TUESDAY 25 APRIL 2023

SUMMARY

- The UK Government has introduced a new Illegal Migration Bill, which has its final stage of debate in the House of Commons on Wednesday 26 April.¹
- Individuals entering Scotland illegally will not be able to access the recovery period (which prevents deportation) (clause 21) nor get support in Scotland (clause 23) unless the person is helping police/prosecutors with their inquiries.
- The UK Government is arguing this is compatible with the European Convention against Trafficking (ECAT),² but has not been able to confirm that the modern slavery section is ECHR compliant.³ The ECAT disqualification is currently applied to specific individuals, but the Government is arguing it can apply to a group of people based on public good.
- Modern Slavery is a devolved issue within the competence of the Scottish Parliament. However, clauses 21-28 on modern slavery do not require legislative consent.⁴
- **CARE believes that this Bill will be detrimental to genuine victims of modern slavery.**

Background

1. The Illegal Migration Bill places a legal duty on the Home Secretary to remove people who have entered the UK illegally.⁵ The Bill assumes victims of modern slavery will be identified but **not be entitled to the prevention of deportation unless the victim is helping police/prosecutors with their inquiries** (clause 21) **nor to support across the UK** (clause 23 applies to Scotland). It will have effect (once passed) for anyone who has arrived in the UK illegally on or after 7 March 2023.⁶

How does this legislation interact with Scotland's Trafficking Act?

2. The UK Government publishes guidance for First Responders in Scotland to complete a referral for a person they consider to be a potential victim into the National Referral Mechanism (NRM).⁷ Decisions about **who** is a victim of modern slavery are made by the UK Government based on guidance which is non-statutory in Scotland.⁸ The UK Government determines and implements the law on whether a victim has a right to remain in the UK.
3. In 2022, 621 people were referred into the NRM from Scotland; 405 adults, 187 children and 29 whose age was unknown. Of these 50% were exploited either in the UK or UK and overseas. 50% were exploited overseas only.⁹
4. Under the devolution settlement, the **how** of the policy and legislative response to modern slavery rests with the Scottish Government. The Human Trafficking and Exploitation (Scotland) Act¹⁰ was passed in 2015 to “consolidate and strengthen the existing criminal law against human trafficking and exploitation and enhance the status of and support for its victims”.¹¹ Support for adult victims of modern slavery is provided under sections 9 and 10 but would be disapplied for victims within the scope of the Illegal Migration Bill, unless co-operating with the

¹ Bill: [Illegal Migration Bill \(parliament.uk\)](#) and Explanatory Notes: [Illegal Migration \(parliament.uk\)](#)

² Council of Europe Convention on Action against Trafficking in Human Beings, 2005

³ [ECHR Memo Illegal Migration Bill-07323 \(parliament.uk\)](#) para 45, page 9

⁴ [Illegal Migration Bill: Explanatory Notes Annex B page 43.](#)

⁵ A list of countries to which it is acceptable for people to be removed to is in the Schedule.

⁶ Clause 2(3)

⁷ [National referral mechanism guidance](#): adult (Northern Ireland and Scotland), 19 May 2022

⁸ Modern Slavery: Statutory Guidance, [Version 3.1](#), 3 March 2023

⁹ [Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK, End of Year Summary 2022](#), 2 March 2023, and Table 3

¹⁰ <https://www.legislation.gov.uk/asp/2015/12/contents>

¹¹ Modern Slavery: Statutory Guidance, [Version 3.1](#), 3 March 2023, para 1.13

police (clause 23).¹² Clause 23(8) gives the Home Secretary powers to change the provisions of the clause in response to changes made by Scottish Ministers to the support clauses in the 2015 Act.

5. Clause 25 of the Bill brings in a sunset clause that removes these provisions in 2 years, but which can be extended by a vote in Parliament (clause 25). However, the powers of the Home Secretary to make regulations under clause 23(8) are specifically excluded from the sunset provision and would remain in effect.
6. Clause 27(2)-(4) of the Bill makes direct changes to the Trafficking Act in Scotland.
7. Annex B of the Explanatory Notes says there is no need for a legislative consent process for Scotland to agree to the Secretary of State removing the power to provide support where the duty to remove in the Illegal Migration Bill applies.¹³
8. In response to a written question regarding the impact of the Bill to Scotland's devolved social justice powers, the Cabinet Secretary for Social Justice stated, “[w]e have written to the UK Government to state unequivocally that Scottish ministers do not support the Illegal Migration Bill.”¹⁴

What will be the impact on modern slavery victims in Scotland?

9. Foreign nationals who are trafficked are likely to be in the country illegally.¹⁵ The Bill would **penalise genuine victims**, who may be in the UK without their consent. They will continue to be referred into the NRM, but receive none of its safeguarding protections *unless* they are able to help police/prosecutors.
10. Before the law changes, it is possible that fewer people will enter the NRM because of fear about the future. They would not get the support they need, nor will their evidence be available for prosecutions. Individuals referred now may get support removed at some later date, eliminating the security victims need for recovery. During debate in the House of Commons, Alison Thewliss MP said, “*The Trafficking Awareness Raising Alliance in Glasgow has told me that it is increasingly difficult to reassure service users, who are victims of sex trafficking, that they will not be returned or sent to Rwanda for speaking up, and the Bill will mean that TARA cannot reassure them at all.*”¹⁶
11. Once the Bill has passed, without support and stability vulnerable individuals face returning straight back into the situations of abuse. While some victims might be willing to help the police, evidence suggests it is only after victims feel safe and stable, they engage with the police.¹⁷ On 19 April, Baroness Butler-Sloss, giving evidence to the Home Affairs Select Committee's Inquiry on Modern Slavery, stated, “*Unless the victim is properly supported and given a lot of help to understand the importance of giving evidence, they are not going to come forward... The lack of support for victims has a material effect on prosecutions.*”¹⁸ If that support is not available, it is less likely victims will be able to support prosecutions and therefore vital evidence is lost. Furthermore, it is not clear if victims will realise this option is available; and the circumstances of being able to stay in the UK are unclear as the Home Secretary will determine by regulation when remaining in the UK will be deemed “necessary”.
12. In response to a Scottish Parliamentary Question regarding concerns about the potential impact of the Bill in Scotland, the Secretary for the Constitution, External Affairs and Culture stated, “[t]he restriction on the provision of support to human trafficking victims would penalise some of society's most vulnerable people—those who have suffered unimaginable trauma, including through sexual exploitation or through being forced, through violence, to work for no pay

¹² It should be noted that changes to the law on the recovery period and temporary leave to remain were made for victims across the UK through Part 5 of the Nationality and Borders Act 2022 (NBA). Section 50A of the Modern Slavery Act 2015 specifically removes any obligation to provide support if a person has a public order disqualification from protection under the section 63 of the Nationality and Borders Act 2022. Such a provision does not currently apply in Scotland but would as a result of the Illegal Migration Bill (clause 24).

¹³ Explanatory Notes, page 43: [Illegal Migration \(parliament.uk\)](https://www.parliament.uk/legislation/2023/03/23/illegal-migration-bill)

¹⁴ <https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/meeting-of-parliament-16-03-2023?meeting=15205&iob=129696#129696>

¹⁵ Victims can be brought into the UK by lorry or other means and be exploited, and individuals arriving by small boat under current arrangements can be ‘disappear’ either before entering asylum accommodation or while in asylum accommodation and face exploitation. [National Strategic Assessment of Serious and Organised Crime 2021](#), page 24, para 61 and <https://www.theguardian.com/uk-news/2023/mar/05/young-albanian-men-viciously-exploited-after-arriving-in-uk>

¹⁶ Ibid.

¹⁷ Oral Evidence from Lara Bundock of the Snowdrop Project to the Home Affairs Select Committee: Home Affairs Committee Oral evidence: Modern Slavery, HC 1460 Tuesday 6 November 2018 Q115

¹⁸ [Home Affairs Committee: Modern Slavery 19 April 2023, Q5](#)

in absolutely appalling conditions. These shameful proposals would create additional barriers for trafficking victims and tighten the grip of perpetrators by reducing the likelihood that people will seek help.”¹⁹

Is this Bill not necessary to stop abuse of the modern slavery system?

13. No. While the Government have claimed that many of those coming across the Channel are abusing the modern slavery system,²⁰ in the most recent commentary on irregular migration they recognised only “*a small proportion*”²¹ are referred into the NRM by first responders – victims cannot refer themselves. While there is likely to be some abuse, it is also important to remember that it is the Government who decides who is or is not a victim. In 2022, 87% of adult referrals have led to a positive reasonable grounds decision (RGD) and 87% of adult RGDs have led to a positive conclusive grounds decision (CGD).²² In addition, a confirmation that someone is a victim of human trafficking does not currently lead to an automatic route to settlement in the UK.

What about the UK’s international obligations?

14. The Bill does not meet the UK’s international obligations. The UK is a signatory to the European Convention against Human Trafficking (ECAT). The Government will meet Article 10 obligations to identify victims whether they arrive legally or illegally (clause 21).²³
15. ECAT requires victims to receive a ‘recovery period’ of a minimum of 30 days to receive support and consider their cooperation in prosecutions.²⁴ This Bill will ensure that anyone deemed to have arrived illegally will not get a recovery period under the public order exemption in Article 13(3) of ECAT, unless co-operating with the police. By making support for an individual victim conditional on supporting a prosecution, the Government is breaching Article 12(6).
16. In section 63 of the Nationality and Borders Act 2022 (NBA), the public order exemption was being applied **to individual victims** who posed a threat because of serious criminality (e.g. terrorism).²⁵ The Government are now arguing public order disqualifications in clauses 21 and 28 are **justifiable for a whole group of trafficked people** because it “*considers that it is appropriate to apply the public order disqualification to illegal entrants... on the basis that it is in the interests of the protection of public order in the UK including to prevent persons from evading immigration controls in this country, to reduce or remove incentives for unsafe practices or irregular entry, and to reduce the pressure on public services caused in particular by illegal entry into the UK*”.²⁶ In the Human Rights Memorandum, the Government says that they consider a person who falls within the duty to remove under clause 2 “*is a threat to public order, arising from the exceptional circumstances relating to illegal entry into the UK, including the pressure placed on public services by the large number of illegal entrants and the loss of life caused by illegal and dangerous journeys.*”²⁷
17. The Home Secretary has not been able to confirm the Bill is compatible with Convention Rights.²⁸ CARE believes the Bill contravenes the ECHR Article 4 obligations to have “*a legislative and administrative framework to prevent and punish trafficking and to protect victims*”, without derogation from this requirement in a time of emergency.²⁹

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¹⁹ [Official Report](#), The Scottish Parliament, 22 March 2023, col 2

²⁰ For instance, House of Commons, Hansard, [31 October 2022](#), col 661

²¹ See section 5.1., Official Statistics Commentary: [Irregular migration to the UK, year ending December 2022, 23 February 2023](#)

²² [Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK, end of year summary 2022](#), 2 March 2023, Tables 16 and 19

²³ [ECAT Explanatory Report](#), 2005, para 62

²⁴ [ECAT Explanatory Report](#), 2005, para 174

²⁵ <https://www.legislation.gov.uk/ukpga/2022/36/section/63>

²⁶ Explanatory Notes: [Illegal Migration \(parliament.uk\)](#), para 135, page 26

²⁷ [ECHR Memo Illegal Migration Bill-07323 \(parliament.uk\)](#) para 45, pages 9 and 10. See also [Delegated Powers Memorandum](#), para 43, page 12

²⁸ [ECHR Memo Illegal Migration Bill-07323 \(parliament.uk\)](#) para 45, pages 9 and 10.

²⁹ [V.C.L. and A.N. v The United Kingdom](#), February 2021, para 151. See also European Court of Human Rights, Guide on Article 4 of the European Convention on Human Rights, para 56, page 16