

NATIONALITY AND BORDERS BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS MEMORANDUM

Summary of the Bill

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) and other human rights contained in relevant international obligations of the UK, in relation to the Nationality and Borders Bill (“the Bill”). It has been prepared by the Home Office (“the Department”).
2. On introduction of the Bill in the House of Commons, the Home Secretary made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in her view, the provisions of the Bill are compatible with the Convention rights.
3. On 24 March 2021, the Home Secretary published the [New Plan for Immigration](#) and opened a public consultation which ran from 24 March to 6 May 2021. The results of the consultation have informed the measures included in the Nationality and Borders Bill (“the Bill”), and the Government will publish a response in due course.
4. The Bill has three main objectives:
 - a. to increase the fairness of the UK’s system so that we can better protect and support those in need of asylum;
 - b. to deter illegal entry into the UK, thereby breaking the business model of people smuggling networks and protecting the lives of those they endanger; and
 - c. to remove more easily from the UK those with no right to be here.
5. The Bill is in five Parts.
 - a. **Part 1 – Nationality.** The provisions address anomalies and unfairness in nationality law including: new registration provisions for children of British Overseas Territories citizens who were previously not able to acquire their mother’s or unmarried father’s citizenship; a new adult registration route which will allow the Secretary of State to grant citizenship outside of the normal criteria in specific circumstances where a person failed to become British because of historical legislative unfairness, an act or omission by a public authority or due to exceptional circumstances; introducing a discretion to waive the requirement to have been in the UK at the start of the residential qualifying period for naturalisation where the special circumstances of a particular case make it appropriate to do so; and provide an entitlement to British citizenship for individuals born on or after 1 July 2006 who were unable to automatically

acquire it because their mother was married to someone other than their biological British citizen father at the time of their birth. An amendment to the statelessness provisions also inserts a new requirement in respect of applicants aged between 5 and 17 years that the Secretary of State be satisfied that the individual is unable to reasonably acquire another nationality.

- b. **Part 2 – Asylum.** The provisions will allow for the differential treatment – including the type of status that will be granted - of refugees (Group 1 and Group 2) depending on whether they have come to the UK directly from the place where their life or freedom was threatened, whether they have presented themselves without delay and, in cases where they have entered or are present in the UK unlawfully, whether they can show good cause for that unlawful entry or presence. The Secretary of State will also be able to take matters such as immigration status and compliance into account when deciding what form of accommodation support to offer to an asylum seeker. Provisions are included about the places where asylum may be claimed (not in the UK territorial sea), and about the inadmissibility of asylum claims from a national of a member State of the EU and inadmissibility of asylum claims of those who have a connection to a safe third State. This Part also contains provisions to streamline the appeals process by introducing an expanded ‘one-stop’ process to ensure that asylum and human rights claims, referrals as potential victims of modern slavery and any other protection matters are made and considered together, ahead of any appeal hearing. Improved access to legal advice is intended to help people raise such matters as early as possible, and to avoid last minute and repeat issues being raised. Provisions aim to reduce the volume of sequential claims, appeals or legal action, while ensuring access to justice and upholding the rule of law, including the introduction of a Priority Removal Notice. People who are liable for removal and can be subject to an enforced return within a reasonable timescale will, on receipt of this, be able to access legal advice for a fixed number of hours, funded by legal aid. This legal aid advice offer is non-means and non-merits tested on any aspect of their immigration status and claim(s) for remaining in the UK, including modern slavery matters. It will require recipients to bring forward any such grounds within a set time period. If a person raises a ‘late’ claim, without good reason, outside of this period and that claim is refused, any right of appeal will be direct to the Upper Tribunal rather than the First-tier Tribunal. This will ensure that any appeals following a late claim will be dealt with in the most expedient manner possible, whilst maintaining judicial oversight from the Tribunal. The introduction of a new fast-track appeal process will ensure that cases which are deemed to be unfounded or new claims which are raised late, are dealt with swiftly. A “good faith” requirement will set out principles for individuals engaging with the immigration authorities and the courts. This Bill also contains provisions that allow persons to be removed from the

United Kingdom to a safe third country whilst they have a pending asylum claim.

- c. **Part 3 – Immigration offences and enforcement.** This Bill will introduce higher sentences for offences of entering the UK illegally or in breach of a deportation order. For the facilitation offences, the requirement to prove gain in the existing offence of assisting an asylum seeker to arrive in the UK will be removed, and a new offence will be created of arriving in the UK without entry clearance where required to have such entry clearance. Immigration officers' maritime enforcement powers will be expanded including the power to direct that a vessel be taken to a place outside of the UK, subject to the agreement of the other state. There will be a new power to seize and dispose of vessels intercepted under these powers in the UK territorial sea. Immigration officers will be given the power to search unaccompanied containers which have been removed from a ship or aircraft for the purpose of satisfying themselves whether there are any people they want to examine. The Bill will also introduce a new civil penalty regime alongside the existing Clandestine Entrant Civil Penalty scheme. This will provide the Secretary of State with powers to impose a civil penalty where there has been a failure to carry out actions specified by regulations (which will include the obligation to carry out adequate checks) and to adequately secure a commercial goods vehicle, regardless of whether a clandestine entrant is found within it. The existing scheme will be amended to remove the Prevention of Clandestine Entrant: Code of Practice. Instead, the Secretary of State will specify in regulations the actions to be taken to secure the vehicle against unauthorised access. This Part also contains a placeholder provision in relation to requiring migrant workers in the UK territorial sea to obtain authorisation to so work; provision about notice requirements for removals from the UK; and provision about immigration bail.
- d. **Part 4 – Modern slavery.** The measures in Part 4 seek to ensure that victims are identified as quickly as possible, while enabling decision makers to distinguish more effectively between genuine and non-genuine accounts of modern slavery. Provisions clarify the thresholds applied in determining whether a person should be considered a victim of modern slavery or trafficking. Provisions clarify the thresholds applied in determining whether a person should be considered a victim of modern slavery or trafficking. Provisions also enable those potential victims who are a threat to public order or who have improperly claimed to be a victim of modern slavery or trafficking to be disqualified from the recovery period protection. In relation to those conclusively identified as a victim of modern slavery or trafficking, provisions set out the circumstances in which the Secretary of State must grant limited leave to a confirmed victim and the circumstances in which the Secretary of State is not required to grant leave, or may revoke

leave if it has already been granted, if the Secretary of State considers the person is a threat to public order or has improperly claimed to be a victim of modern slavery or trafficking.

- e. **Part 5 – Miscellaneous and general.** This Part contains placeholder provisions about: (i) age assessment of individuals where there are doubts as to their claimed age; (ii) visa penalties on any country that does not cooperate on the removal of its nationals who do not have a right to be in the UK; and (iii) electronic travel authorisations, which will fully digitise our future borders system so that, in the same way as countries like the United States, Canada, Australia and New Zealand, before a person travels to the UK for a visit, they will need to apply for permission where aspects of any criminality must be provided through self-declaration. These placeholder provisions will be supplemented by Government amendments ahead of Committee stage in the House of Commons. This Part also contains provision about payment of a charge in respect of wasted or unnecessary tribunal costs incurred due to a party's unreasonable actions.
6. Other than as regards the placeholder clauses, the Department considers that clauses of or Schedules to the Bill which are not mentioned in this memorandum do not give rise to any human rights issues. The Convention rights raised by provisions in the Bill are prohibition on torture, inhuman or degrading treatment or punishment (Article 3); prohibition of slavery and forced labour (Article 4); liberty and security of person (Article 5); fair trial (Article 6); no punishment without law (Article 7); private and family life (Article 8); freedom of expression (Article 10); discrimination (Article 14); and Article 1 Protocol 1 (peaceful enjoyment of property).
 7. The Bill includes placeholder clauses on the following matters, in respect of which the intention is to replace the placeholder clause by way of amendment at Committee stage. The Department is satisfied that the regulation making powers in the placeholder clauses can all be exercised compatibly with the Convention rights, and intends to provide an assessment of the amendments' compatibility with Convention rights when they are tabled. The placeholder clauses are as follows:
 - a. clause 42 (authorisation to work in the territorial sea),
 - b. clause 44 (prisoners liable to removal from the United Kingdom),
 - c. clause 58 (age assessments),
 - d. clause 59 (processing of visa applications from nationals of certain countries),
 - e. clause 60 (electronic travel authorisations),
 - f. clause 61 (Special Immigration Appeals Commission).

European Convention on Human Rights

Article 3 ECHR

8. Article 3 is an absolute prohibition on torture or to inhuman or degrading treatment or punishment.

Clause 10 (differential treatment of refugees)

9. Clause 10 (differential treatment of refugees) will engage Article 3 as regards the power to impose conditions about no recourse to public funds.
10. This clause defines two groups of refugees (Group 1 refugees, who satisfy certain conditions aligned with those set out in Article 31(1) of the Refugee Convention¹; and Group 2 refugees, who do not) and creates a power to treat refugees from each group (and their family members) differently. Subsection (5) lists examples of differential treatment as regards the refugee themselves. The four examples listed in subsection (5) are: the length of any period of limited leave to enter or remain; the requirements that must be met in order to be granted indefinite leave to remain; whether to attach a “no recourse to public funds” condition to a grant of limited leave to enter or remain; whether to grant leave to enter or remain to members of the refugee’s family. Subsection (6) lists examples of differential treatment as regards family members of the refugee (but does not apply to family members who are refugees themselves). However, all refugees recognised as genuine refugees by the UK will be entitled to work and benefit from education and healthcare provision on the same terms.
11. The power to impose a “no recourse to public funds” condition potentially engages Article 3 ECHR because of the risk of destitution (*R (Limbuella) v Secretary of State for the Home Department* [2005] UKHL 66). However, clause 10 does not itself require treatment which breaches Article 3 ECHR. The power to impose a restriction on recourse to public funds (found in section 3(1)(c(ii)) of the Immigration Act 1971) will not be exercised where to do so would lead to destitution that would otherwise breach Article 3 ECHR. The Department is therefore satisfied that clause 10 is compatible with Article 3.
12. The justification for the differentiation policy (which is consistent with Article 31 of the Refugee Convention) is as follows:
 - a. the UK has a legitimate interest in discouraging ‘forum shopping’ and encouraging asylum seekers to claim asylum in the first

¹ Article 31(1) provides: The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

safe country they arrive in. As a result, there is justification for treating less favourably asylum seekers who have not come directly from a country where their life or freedom was threatened;

- b. the UK also has a legitimate interest in encouraging asylum seekers to present themselves to the authorities and make claims at the first available opportunity. As a result, there is justification for treating less favourably asylum seekers who have not presented themselves without delay to the Secretary of State;
- c. the UK also has a legitimate interest in promoting lawful methods of entry. As a result, there is justification for treating less favourably asylum seekers who have no good excuse for not using lawful means for entering the UK.

13. As regards Article 14 ECHR (non discrimination in enjoyment of Convention rights) taken with Article 3, differential treatment between the two Groups of refugees may arguably be considered differential treatment between analogous groups requiring justification under Article 14. The Department considers that differential treatment based on one or more of the criteria set out in Article 31 of the Refugee Convention (which reflects an international consensus) is compatible with Article 14 if it does not disadvantage Group 2 disproportionately, in light of the legitimate aims summarised above. The Department considers that differential treatment which will not in fact breach Article 3 is not a disproportionate impact on Group 2, and is a proportionate way of achieving the legitimate aims set out above. Maintaining the ability to differentiate including in this respect, is considered a proportionate way to achieve those aims whilst ensuring sufficient flexibility to mitigate the impact where necessary in individual cases.

Clause 26 and Schedule 3 (removal of asylum seeker to safe third country)

14. While the ECHR is not an international instrument concerned expressly with the protection of refugees, Article 3 has been interpreted by the ECtHR (in the *Soering v UK* line of caselaw) as providing an effective means of protection against all forms of return to places where there are substantial grounds for believing that there is a real risk that an individual would be subjected to torture, or to inhuman or degrading treatment or punishment. This contrasts with the Refugee Convention where an individual is only protected from refoulement if the reasons for their persecution are on the basis of their race, religion, nationality, membership of a particular social group or political opinion (Article 33(1) of the Refugee Convention). This protection from refoulement is removed for any refugee who is a danger to the security of the country; or, as a result of them committing a particularly serious crime, they constitute a danger to the community of that country (Article 33(2) of the Refugee Convention). Refugee status (and therefore protection from refoulement) may also be

denied on the basis of the exclusion criteria in Article 1F of the Refugee Convention. As these same exclusions from protection do not exist under Article 3 of the ECHR, removal may be prohibited under Article 3 where the Refugee Convention would otherwise allow it, and is often relied on by individuals seeking to prevent their removal from the UK.

15. Clause 26 and Schedule 3 (removal of asylum seeker to safe third country) amend section 77 of the Nationality, Immigration and Asylum Act 2002 to allow individuals who have a pending asylum claim to be removed to a safe third country whilst their claim is processed, without having to certify each individual case under Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. A country will be deemed safe if it is a place (a) where a person's life and liberty are not threatened by reason of the person's race, religion, nationality, membership of a particular social group or political opinion; (b) from which a person will not be removed elsewhere other than in accordance with the Refugee Convention; (c) to which a person can be removed without their Convention rights under Article 3 being contravened, and from which a person will not be sent to another State in contravention of the person's Convention rights, and (d) of which the person is not a national or citizen. For States listed at Part 2 or 3 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004, (a), (b) and (c) are presumed satisfied, although a claimant can rebut the presumption in relation to (c). For States listed at Part 4 of the 2004 Act, (a) and (b) are presumed satisfied. Clause 26 and Schedule 3 also create a rebuttable presumption that, there is no risk that an individual's rights under Article 3 ECHR, would be breached on return to certain specified countries. The countries are those listed in paragraph 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 as amended by the Bill, which are the EEA states and Switzerland, with a power for the Secretary of State to add countries to, and to remove them from, this list. This presumption would be rebuttable by the claimant, the burden being on the claimant to show that their specific Article 3 rights would be breached if they were required to return. The Department considers these provisions are compatible with Article 3 ECHR, in the light of the Grand Chamber judgment in *Ilias v Hungary* (2020) 71 EHRR 6.

Clauses 16 (provision of evidence in support of protection or human rights claim), 17 (asylum or human rights claim: damage to claimants' credibility), 18 (priority removal notices), 19 (priority removal notices: supplementary), 20 (late compliance with priority removal notice: damage to credibility), 21 (priority removal notices: expedited appeals) and 23 (late provision of evidence in asylum or human rights claim: weight)

16. Clauses 16 to 21 and 23 engage Article 3 of the ECHR as per paragraph 14 above. The effects of the provisions are that:
- a. Where a person makes an asylum or human rights claim and raises evidence late without good reason in support of that claim:

- i. a decision-maker must have regard to whether minimal weight should be given to that evidence (clause 23); and
 - ii. such conduct shall be taken account by a decision-maker as damaging to the person's credibility (clause 17).
- b. Where a person is served with a priority removal notice ("PRN") and:
 - i. makes an asylum or human rights claim and/or raises supporting grounds, reasons or evidence outside of the PRN time limit without good reason:
 - 1. a decision-maker must have regard as to whether minimal weight should be given to any evidence raised late (clause 23); and,
 - 2. such conduct shall be taken account by a decision-maker as damaging to the person's credibility (clause 20); and/or,
 - ii. as part of a protection or human rights claim provides a statement in support of their being a victim of slavery or human trafficking outside of the PRN time limit without good reason, this conduct shall be taken account by a decision-maker as damaging to their credibility (clause 20).
- c. Where a person has not acted in "good faith", this should be taken account of as damaging their credibility when they make an asylum or human rights claim (clause 17).

16. The Department considers that the clauses are compatible with Article 3. There are various safeguards within the clauses that mitigate against a decision which could lead to removal that would be in breach of rights arising under Article 3:

- a. claimants will have the opportunity to provide reasons as to why their credibility should not be damaged and, where there are good reasons, credibility will not be damaged;
- b. the impact on credibility in respect of asylum and human rights claims that are not made by people in receipt of a PRN (clause 17) will be created by adding the relevant conduct to the existing section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, which allows decision-makers to judge the extent to which credibility should be damaged, and is not itself determinative of a claim; and,
- c. the evidence-weighting clause (23) is a discretionary power that by itself will also not be determinative of a claim.

17. Further, section 6 of the Human Rights Act will prevent removal from the UK if to do so would breach Article 3 ECHR. The Department is therefore satisfied that the clauses are compatible with Article 3 ECHR.

Article 4 ECHR (prohibition of slavery and forced labour)

18. Article 4 of the ECHR prohibits slavery or servitude and forced or compulsory labour. ECtHR case law has determined that it also imposes positive obligations on the state, which must take active steps to protect persons within its jurisdiction from being subject to acts prohibited under Article 4: *J v Austria* (Application No. 58216/12, 17 January 2017), at [106.]. The following are the broad categories of positive obligation:
- a. a general duty, which requires the state to adopt legislative and administrative measures aimed at punishing traffickers, preventing trafficking and protecting victims (*Chowdhury v Greece* (Application No. 21884/15, 30 March 2017));
 - b. an investigative or procedural duty, to investigate situations of potential trafficking (*R (TDT) v SSHD* [2018] 1 WLR 4922, at [17]), which is triggered where there is a “credible suspicion” that an individual has been trafficked;
 - c. a protective duty, to take operational measures to protect victims or potential victims of trafficking: *Rantsev v Cyprus and Russia* (2010) 51 EHRR 1, at [286]. That duty requires the state to take the necessary measures even before any trafficking offence is formally established, and to take appropriate measures to remove an individual from a situation of risk. Again, the duty is triggered in circumstances where state authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an individual has been or was at a real or immediate risk of being trafficked: *Rantsev*, at [286]. In that sense, there is an identification aspect to the protective duty, although in *R (TDT) Vietnam v SSHD* [2018] 1 WLR 4922, at [41], the Court of Appeal doubted whether this extended to persons who were historical victims of trafficking only (i.e. but were not at risk of re-trafficking in future). However, the Court of Appeal pointed out that this was unlikely to arise often in practice.
19. As regards clause 53 (leave to remain for purpose of Trafficking Convention), there is no express right under Article 4 to a residence permit as there is under Article 14 of the Council of Europe Convention on Action against Trafficking in Human Beings (“ECAT”). Article 14 of ECAT is discussed at paragraph 77 below.
20. The Department is satisfied that clause 48 (amendments to the Modern Slavery Act 2015) is compatible with Article 4 ECHR for the same reasons it is consistent with ECAT, discussed at paragraph 70 below.

21. Causes 18 to 20 and clauses 46 (provision of information relating to being a victim of slavery or human trafficking) and 47 (late compliance with slavery or trafficking information notice: damage to credibility) engage Article 4 since they impact how decisions will be made in respect of whether someone is a victim of modern slavery. The Department is satisfied that appropriate safeguards are in place to ensure compliance with Article 4. There are no mechanistic or blunt provisions that automatically prevent someone from being identified as a victim, even if they raise modern slavery matters out of time. The door has been left deliberately ajar to ensure that genuine victims will still be identified as such.

Article 5 ECHR (right to liberty and security)

22. Article 5 limits the circumstances in which a person can be deprived of their liberty. In all cases, detention must be in accordance with a procedure prescribed by law.

23. Clause 41 and Schedule 5 contain maritime enforcement powers, building on those in Part 4 of the Immigration Act 1971. The purpose for which the powers may be excised is for preventing, detecting, investigating the following offences: entering (or attempting) to enter the UK in breach of a deportation order (section 24(A1) of the 1971 Act as renumbered by this Bill); entering (or attempting) to enter the UK without leave (section 24(B1) of the 1971 Act as renumbered by this Bill); arriving (or attempting) to arrive in the UK without entry clearance if entry clearance is required (section 24(C1) of the 1971 Act inserted by this Bill); facilitation (or an attempt at facilitation) of a breach of immigration laws (section 25 of the 1971 Act, as amended by this Bill); assisting (or attempting to assist) an asylum seeker to arrive or enter (or attempt to arrive or enter) the UK (section 25A of the 1971 Act, as amended by this Bill); or facilitation (or an attempt at facilitation) of a breach of a deportation order (section 25B of the 1971 Act to the extent that section continues to apply by virtue of regulation 5(7) of the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations 2020 (S.I. 2020/1309)). The powers include the power to stop, board, divert and detain the vessel, including requiring it to be taken to a place outside of the UK and detained there. These powers are comparable to those in section 88 of the Policing and Crime Act 2017. The existing powers under Part 4 of the Immigration Act 1971 allow a vessel, once intercepted, only to be taken to the UK. To the extent that these powers involve the detention of a person on board the vessel engaging Article 5 ECHR, Article 5(4) requires that everyone who is deprived of their liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and their release ordered if the detention is not lawful; and Article 5(5) includes a right to compensation if detention was contrary to Article 5. If persons on a vessel are taken to the UK, their right to challenge their detention (if any) can be secured in the UK as they will have access to the courts. If a person is considered detained on a vessel

and taken to a place outside of the UK and then brings proceedings to challenge their detention (if any) on board the vessel, the Department will seek to put in place mechanisms as necessary to ensure that challenge can take place effectively.

Article 6 ECHR (right to a fair trial)

Article 6(1)

24. Article 6(1) provides that in the determination of a person's civil rights and obligations, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
25. Immigration and asylum matters do not involve the determination of civil rights and obligations within the meaning of Article 6(1) (see eg *Maaouia v France*).
26. Clause 39 and Schedule 4 (penalty for failure to secure goods vehicle) engage Article 6(1) ECHR (right to fair trial) as they create a new civil penalty for those operating goods vehicles. (Article 1 of Protocol 1 is considered separately below.)
27. Part 2 of the Immigration and Asylum Act 1999 ("the 1999 Act") created a civil penalty regime for those responsible for allowing clandestine entrants into the UK. Whilst this provision has been in place in various forms for over 20 years, a high proportion of drivers and hauliers still fail to properly secure their vehicles, thereby allowing clandestine entrants to use their vehicles for illegal entry.
28. Clause 39 and Schedule 4 engage Article 6(1) ECHR (right to fair trial) as they create a new civil penalty for those operating goods vehicles. (Article 1 of Protocol 1 is considered separately below.) They allow the Secretary of State to impose a civil penalty on a person responsible for a goods vehicle if the vehicle is not adequately secured against unauthorised access, and the person has not taken the actions required of them by regulations made by the Secretary of State (and the Secretary of State is required to consult before making such regulations). The Secretary of State must specify in regulations what is meant by a goods vehicle being adequately secure against unauthorised access and the actions to be taken by a responsible person to secure that goods vehicle against unauthorised access. The actions to be taken will include a requirement to report any attempts of unauthorised access, to put in place measures to ensure that adequate checks have been carried out before or during the journey and to keep documentation to establish the actions have been taken when asked at the border. The maximum penalty is to be set in regulations made by the Secretary of State, who must also issue a code of practice specifying matters to be considered in determining the amount of penalty payable. Where a penalty is imposed on the driver of a goods vehicle, who is contracted to drive the vehicle on behalf of the

vehicle's owner or hirer (whether under an employment contract or otherwise), the driver and the owner/hirer (as appropriate) are jointly and severally liable for the penalty imposed on the driver (whether or not a penalty is also imposed on the owner/hirer). A person is not to be liable to the imposition of a penalty under this provision for breach of any requirement if that person was acting under duress in breaching that requirement, or if that person did not know, and had no reasonable grounds for suspecting, that a clandestine entrant was, or might be, concealed and has taken the actions specified in regulations to ensure that the goods vehicle is secure against unauthorised access.

29. Clause 39 and Schedule 4 omit section 33 of the 1999 Act to remove the requirement for a Prevention of Clandestine Entrant: Code of Practice, which will be replaced with regulation making powers. The Secretary of State must specify in regulations the actions to be taken by each person responsible for a transporter in relation to the securing of the goods vehicle against unauthorised access.
30. The Department was previously the subject of a legal challenge before the Court of Appeal as to the compatibility of the regime with Article 6 and Article 1, Protocol 1 ECHR: *International Transport Roth GmbH & others v Secretary of State for the Home Department* [2002] EWCA Civ 158. The existing provisions in the 1999 Act address the Court's criticisms in the *Roth* judgment that the regime was "criminal" in nature and confirm that the scheme is to be regarded as "civil" for the purposes of Article 6(1) of ECHR.
31. The new regime provided for in the Bill will modify and apply the existing sections 35 and 35A of the 1999 Act, affording an individual a statutory right to object and a right of appeal to the civil court (against both the imposition of the penalty and the level of the penalty). At each stage of the penalty process, the person responsible for the goods vehicle will be able to present documentation to the Secretary of State to confirm they have taken the actions required of them under the regulations. The statutory appeal will operate as a re-hearing of the Secretary of State's decision. The Department is satisfied that there is no interference with Article 6(1), as an individual is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Article 6(2)

32. Article 6(2) provides that everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
33. As regards the burden of proof, in the leading case, *R v Sheldrake* [2004] UKHL 43 the House of Lords considered a number of European Court of Human Rights decisions and extracted the following principles: "The overriding concern is that a trial should be fair, and the presumption of innocence is a fundamental right directed to that end. The Convention does not outlaw presumptions of fact or law but requires that these should

be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of mens rea. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption. Security concerns do not absolve member states from their duty to observe basic standards of fairness. The justifiability of any infringement of the presumption of innocence cannot be resolved by any rule of thumb, but on examination of all the facts and circumstances of the particular provision as applied in the particular case.”

34. In *R v Makuwa* [2006] EWCA Crim 175, the Court of Appeal considered section 31(1) of the Immigration and Asylum Act 1999. It accepted that that section imposed a legal burden on the Defendant but decided it was justified to do so – notwithstanding the severe penalty (10 years), it did not impose on the Defendant the burden of disproving an essential ingredient of the offence, there was a legitimate public interest in what was sought to be achieved (immigration control) and the matters that had to be proved were largely in the Defendant’s knowledge.

35. The existing illegal entry offence at section 24(1)(a) of the Immigration Act 1971 (if contrary to the Immigration Act 1971 a person who is not a British citizen knowingly enters the UK without leave or in breach of a deportation order) is subject to an associated provision at section 24(4) which provides:

“(4) In proceedings for an offence against subsection (1)(a) above of entering the United Kingdom without leave,-

(a) any stamp purporting to have been imprinted on a passport or other travel document by an immigration officer on a particular date for the purpose of giving leave shall be presumed to have been duly so imprinted, unless the contrary is proved;

(b) proof that a person had leave to enter the United Kingdom shall lie on the defence if, but only if, he is shown to have entered within six months before the date when the proceedings were commenced.”

36. The effect of subsection (4)(a) is that any stamp purporting to have been imprinted by an immigration officer is to be presumed to have been so imprinted unless the contrary is proved. This provision places a burden on a person, who could be the defendant or the prosecution, to prove something. It appears that it may work both to the benefit and detriment of a defendant. The effect of subsection (4)(b) is to require a defendant to prove that they had leave to enter the UK if they are shown to have entered the UK in the six months before proceedings commenced.

37. Clause 37 of the Bill effects two changes in respect of section 24(4). First, to extend it to the new arrival without required entry clearance offence (see new section 24(C1) inserted by clause 37(2) of this Bill) by adding a new section 24(5)(a) and (b) (clause 37(3)(d)). Secondly, to remove the time limit as regards both the existing section 24(4)(b) (clause 37(3)(c)(ii)) and the new s.24(5)(b) so that the burden will be shifted to the Defendant for the entirety of the period of time that proceedings can be brought.

- a. The Department has considered the compatibility of the current provision and the proposed amendments with Article 6(2). There is no case-law of which the Department is aware which considers whether the existing section 24(4) creates a reverse burden and, if it does, whether it is justifiable.
- b. To the extent there is a reverse burden, the Department considers it, and the provisions in the Bill, compatible with Article 6(2). For example, it is the case that leave to enter is not necessarily given in writing. There are a number of scenarios in which an individual might lawfully enter and not be given any physical proof that was the case, e.g. use of e-gates and oral leave to enter. The overarching justification of any reverse burden is to assist with upholding the integrity of the system of immigration control and to deter irregular migration to the UK. As regards the severity of the sentence, the current offences are summary only and attract a maximum of six months imprisonment and / or a fine). Although the Bill will increase the sentence to a maximum, on indictment, of 4 years (5 years in the case of entry in breach of a deportation order) and/or a fine, this is not considered to take the sentencing into severe territory. Further, as noted above, there may be no records produced or kept at present by the Department in certain cases, and so it would be in the knowledge of the defendant how and when they entered the UK and to provide details about the date of arrival or entry and whether they had leave or entry clearance when they arrived or entered. This would also be the case for clandestine entry to the UK.

Article 7 ECHR (no punishment without law)

38. Article 7(1) provides that no one is to be found guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed, and that a heavier penalty must not be imposed than the one that was applicable at the time the criminal offence was committed.

39. Subsection (4) of clause 44 (Article 31(1): immunity from penalties) has the effect of narrowing the scope of the statutory defence created by section 31(1) of the Immigration Act 1999. At present, a refugee may have a defence to prosecution for certain document related offences where they are caught attempting to leave the UK to seek asylum in another country (where the UK is a transit country). Subsection 4 ensures the statutory

defence is not available in the case of attempts to leave. To ensure compliance with Article 7 ECHR, appropriate transitional provisions will be included in commencement regulations (so that unamended statutory defence continues to apply in respect of conduct which occurred before the entry into force of the clause). The Department is satisfied that clause 34 is compatible with Article 7.

Article 8 ECHR (right to respect for private and family life)

40. Article 8 protects the right to respect for a person's private and family life, their home and their correspondence. It is a qualified right and may be interfered with where the interference is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Clause 6 (British citizenship: remedying discrimination relating to paternity)

41. Clause 6 (British citizenship: remedying discrimination relating to paternity) addresses the declaration of incompatibility made in the case of *R(K) v SSHD [2018] EWHC 1834 (Admin)*, that the definition of "father" for the purposes of the nationality of a child (as defined by section 50(9A) of the British Nationality Act 1981 ("the 1981 Act") was incompatible in certain circumstances with Article 14 of the European Convention on Human Rights when read in conjunction with Article 8.

42. Section 50(9A) of the 1981 Act defines who is a "father" for the purposes of determining the nationality of the child. "Father" is either: the husband (or male civil partner) of the child's mother at the time of the child's birth, or the person treated as the father in IVF cases. If neither of those situations apply, the father is someone who can provide proof of paternity. The above definition of "father" came in to force on 1 July 2006. Before then, "father" was only defined as the husband of the child's mother. Therefore, where the child's biological parents were unmarried, the child could not acquire British Citizenship from their father.

43. Remedial registration routes were subsequently inserted into the 1981 Act to provide an entitlement to register as a British citizens to those individuals born prior to 1 July 2006 (sections 4E – 4J of the 1981 Act). However, these remedial registration routes are not currently available to those born on or after 1 July 2006. This prevents children born on or after that date from having an entitlement to British citizenship where their mother was married to someone other than their biological father at the time of their birth.

44. The declaration of incompatibility was made in the following terms:

"It is declared, pursuant to section 4(2) of the Human Rights Act 1998, that in relation to a child:

(a) who is born to a woman who is at the time of the child's birth married to a man other than the child's biological father; but

(b) to whom none of the provisions of the Human Fertilisation and Embryology Act 1990 and the Human Fertilisation and Embryology Act 2008 listed in section 50(9A)(b) and (ba) of the British Nationality Act 1981 is relevant;

section 50(9A) of the British Nationality Act 1981 is incompatible with Article 14 of the European Convention on Human Rights read with Article 8.”

45. Clause 6 remedies the disparity between those born before 1 July 2006 and those born on or after this date. This will mean that all children who are born to a non-British mother married to someone other than their British citizen biological father at the time of their birth will have an entitlement to British citizenship.
46. In addition, section 4D of the 1981 Act provides a registration route for children who were born outside of the UK and qualifying British Overseas Territories to members of the British armed forces, serving outside the UK and qualifying territories. Currently, a child does not qualify under this provision where their mother was married to someone other than their biological father at the time of the child's birth. This will also be remedied by clause 6.
47. The Department is satisfied that clause 6 fully remedies the incompatibility with Article 8 identified by the Court in *R(K)*.

Clause 53 (leave to remain for victims of slavery or human trafficking)

48. In relation to clause 53, under the current non statutory discretionary leave policy relating to confirmed victims of modern slavery temporary leave may be granted where the confirmed victim fulfils one of the following criteria: (a) leave is necessary owing to personal circumstances; (b) leave is necessary to pursue compensation; (c) they are helping police with their enquiries. The Bill will provide clarity on eligibility for a residence permit under Article 14 of ECAT by setting out, in primary legislation, the circumstances in which it is necessary for the Secretary of State to grant a confirmed victim limited leave to remain. The clause reflects the obligations set out in Article 14 (1) ECAT and also, in light of Article 15 (3) ECAT, provides that leave must be granted where the Secretary of State considers it necessary for the purpose of enabling the person to seek compensation in respect of the relevant exploitation.
49. The Department considers that clause 53 is drafted in such a way so as to ensure the decision can be made compatibly with Article 8 (and Article 1 of Protocol 1), where those rights are engaged on the facts of the specific

case, and is satisfied that clause 53 is compatible with those rights.

Clause 10 (differential treatment of refugees)

50. Clause 10 engages Article 8 ECHR as regards the granting leave to family members of refugees (so-called family reunion), and restrictions on recourse to public funds. The clause itself will not require the power to be exercised in a way incompatible with the Convention rights as the clause creates a neutral, discretionary power. The implementation of the proposals will consider carefully the justification for interference with any rights under Article 8 (for example in relation to family reunion) and also Article 14 taken with Article 8 as regards differential treatment between refugees in either Group. The differential treatment power pursues the legitimate aims set out at paragraph 12 above. And individual circumstances will be taken into account.

Clause 11 (accommodation for asylum seekers etc)

51. Clause 11 will permit the SSHD to take into account various factors in determining the type of accommodation to be provided, including accommodation centres. The factors are: the stage that the individual's claim has reached, including whether or not the claim is being considered for a declaration of inadmissibility, and the individual's previous compliance with any conditions, to include those relating to asylum support or immigration bail. This may engage Article 8, and Article 14 taken with Article 8, due to the proposed differential treatment between asylum seekers on the basis set out in the clause. The policy pursues the legitimate aim of improving efficiencies and case working and providing a more cost-effective system of support. This is because the intention is that those who are accommodated in the centres will have their claim dealt with quickly and, in order to maximise the use of the centres, we intend to house people there who: are more likely to be have their claim treated as inadmissible and be returned to a third country; are more likely to have their case quickly refused as clearly unfounded and thus be returned to their country of origin; or have already had their claim and appeal refused but need support until they return to their country of origin. The processes involved in preparing individuals for return (usually involving matters such as arranging documentation interviews, medical checks and booking flights) are more easily and efficiently managed where caseworkers are on site. This procedure will allow us to separate out these cases from others which involve a live asylum claim that has to be substantively assessed and which can be followed by a lengthy appeals process in cases where the individual is unsuccessful. The intention is that these other claims will be considered by a separate set of caseworkers and are more likely to be suited to dispersal accommodation across the UK. The accommodation centres will meet the required minimum standards for support and are likely to lead to cost efficiency due to the shorter period of time we will need to house people requiring support. Further, there is an intention to have an individualised assessment to ensure that the accommodation is adequate, which will guard against any breach of Article 8 in an individual

case.

52. To the extent that those people who are being considered for a declaration of inadmissibility or have had their asylum claim deemed inadmissible (the inadmissible group) are comparable to those people who are having their substantive asylum claim considered (the admissible group), and to the extent there is any difference in treatment for the purposes of Article 14 (as regards both, the Department would wish to reserve its position to argue that they are not comparable and there is no difference in treatment), it is justified due to the reduced accommodation costs and the improved efficiencies in case working. Providing support on-site at accommodation centres will enable caseworkers and voluntary sector staff to conduct face-to-face interviews and gather information more effectively, particularly in regard to matters such as travel document interviews, which are usually necessary to enable an individual's removal from the UK if their asylum claim is found to be inadmissible or otherwise refused. These efficiencies are intended to lead to faster resolution of asylum claims, more removals and reduced support costs.

Clauses 22 (civil legal aid: services for recipients of priority removal notices), 54 (civil legal aid: services in relation to the national referral mechanism) and 55 (civil legal services under section 10 of LASPO: add-on services in relation to national referral mechanism)

53. Clauses 22, 54 and 55 engage Article 8. The former clause provides for up to but no more than 7 hours of legal aid to be provided for recipients of a priority removal notice (PRN), without reference to the recipient's means or the merits of their case. The latter clause provides for additional legal aid for advice on referral into the National Referral Mechanism for those in receipt of in scope legal aid advice on a protection related matter. These add to rather than amend existing entitlement to legal aid. Relevant here in particular, legal aid is made available to an applicant under section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 where there is a determination that failure to provide funding would be a breach of their ECHR or retained enforceable EU rights, or that it would be appropriate to make funding available having regard to the risk of breach. In an individual case there must also be a determination that the applicant is financially eligible for legal aid (the means test) and an application of the criteria as to the merits of the applicant's case (the merits test).

54. In *R (Gudanaviciene & Others) v Director of Legal Aid Casework & Lord Chancellor*, the Court of Appeal confirmed that the procedural obligations of the Article 8 right can give rise to an obligation for the state to provide legal aid. The court confirmed that in practice it is unlikely that there is any real difference between the test for Article 6 compliance and the test for Article 8 compliance in this context. Whether legal aid is required "will depend on the particular facts and circumstances of each case (a) the importance of the issues at stake; (b) the complexity of the procedural, legal and evidential issues; and (c) the ability of the individual to represent himself without legal assistance, having regard to his age and mental

capacity.”(paragraph 72 of *Gudanaviciene*). The provision of legal aid in the circumstances set out above, in addition to what is already provided for in the Act, helps to ensure that there is legal aid provided for those who need it most, i.e. in these circumstances for those who are in receipt of a PRN or for those who may be a victim of modern slavery. The Department is satisfied that the legal aid scheme is compatible with Article 8 in relation to legal aid provision.

Clauses 16 (provision of evidence in support of protection or human rights claim), 17 (asylum or human rights claim: damage to claimants’ credibility), 18 (priority removal notices), 19 (priority removal notices: supplementary), 20 (late compliance with priority removal notice: damage to credibility), 21 (priority removal notices: expedited appeals) and 23 (late provision of evidence in asylum or human rights claim: weight)

55. Clauses 16 to 21 and 23 (please see paragraph 16 above for further detail) engage Article 8 as well as Article 3. The Department considers that the clauses are also compatible with Article 8. There are various safeguards within the clauses that mitigate against a decision that could lead to a person’s removal from the United Kingdom and a breach of their rights arising under Article 8:

- a. nothing in these clauses prevents a person’s grounds, reasons or evidence in support of an Article 8 claim being considered by the Department or the Courts;
- b. claimants will have the opportunity to provide reasons as to why their credibility should not be damaged and, where there are good reasons, credibility will not be damaged;
- c. the impact on credibility in respect of asylum and human rights claims that are not made by people in receipt of a PRN (clause 17) will be created by adding the relevant conduct to the existing section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, which allows decision-makers to judge the extent to which credibility should be damaged, and is not itself determinative of a claim; and
- d. the evidence-weighting clause (23) is a discretionary power that by itself will also not be determinative of a claim.

Article 14 (prohibition of discrimination)

56. Article 14 enshrines the right not to be discriminated against in “the enjoyment of the rights and freedoms set out in the Convention”. Other than in relation to clause 63, discussed below, where relevant, Article 14 has been considered alongside the Convention right in whose ambit the possible difference in treatment falls.

57. Clause 63 (Tribunal Procedure Rules to be made in respect of costs orders etc) requires the Tribunal Procedure Rules (“the Rules”) to make

provision which requires the first-tier and upper Immigration and Asylum Tribunals to consider making a wasted costs order if satisfied that certain conduct has taken place. The Rules must also prescribe the requisite conduct which, in the absence of evidence to the contrary, is to be treated as either: (1) “improper, unreasonable or negligent” for the purposes of sections 25A(1) and 29 of the Tribunals, Courts and Enforcement Act 2007” or (2) “an unreasonable act” for the purposes of section 29 of that Act. Subsection 3 of clause 63 makes clear that the Rules cannot compel the IAC to impose a costs order; the requirement would be to consider doing so.

58. Clause 63 makes provision only in respect of the Immigration and Asylum Chamber (“IAC”). Section 29 of the Tribunals, Courts and Enforcement Act 2007 makes provision for costs to be awarded at the discretion of the first tier tribunal, subject to the Rules. Rules 9(2) to (9) provide that the IAC can make orders in respect of wasted costs or unreasonable costs. Under rule 9(3), the IAC may make an order under rule 9 on an application or on its own initiative. However, to the extent that the effect of clause 63 is that there is a difference in treatment between analogous groups (users of the IAC and those of other Chambers), which falls within the ambit of Article 8 ECHR (an individual’s procedural rights under Article 8 to have their claim determined fairly), the Department considers that any difference in treatment is in pursuit of a legitimate aim and is objectively justifiable. There are examples in recent caselaw where the courts have expressed concern about the conduct of a minority of representatives in the immigration and asylum context, for example, see *FB Afghanistan* SSHD [2020] EWCA Civ 1338, *Madan* [2007] EWCA Civ 770, and *Hamid* [2012] EWHC 3070 (Admin). Further, the Tribunal Procedure Committee, on whom the obligation to make the rules required by clause 63 is imposed, would have an obligation to ensure that the ensuing Rules are drafted fairly and compatibly with the Convention rights. Section 22(4) of the Tribunals, Courts and Enforcement Act 2007, which will apply to rules made under clause 63 as it applies to all Tribunal Procedure Rules, provides that the power to make rules must be exercised with a view to securing “that ... justice is done” and “that the tribunal system is accessible and fair”.

Article 1 of Protocol 1 (protection of property)

59. Article 1 of Protocol 1 protects against control of use, or deprivation of, a person’s possessions. It provides that no one is to be deprived of their possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. However, it is clear that that does not in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

60. To the extent that clause 10 (differential treatment of refugees) provides for differential treatment which arguably falls within the scope of Article 1

of Protocol 1, as regards the restrictions on access to welfare benefits for certain refugees that might otherwise be eligible, the consideration here is the same as in relation to Article 8 and this clause (see paragraph 50).

61. Clause 39 and Schedule 4 (penalty for failure to secure good vehicle) engage Article 1 of Protocol 1 to such extent the levying of civil penalties impacts on an individual's peaceful enjoyment of a person's possessions. The provisions will also allow, as the current civil penalty regime does (section 32 of the Immigration and Asylum Act 1999) for the detention of vehicles until all penalties to which the notice relates, and any expenses reasonably incurred by the Secretary of State in connection with the detention, have been paid. Whilst the detention of a person's vehicle may interfere with their right to possess property, any interference is justified and proportionate for the following reasons. The new regime will permit the detention of vehicles where a penalty notice has been issued, pending a decision to issue a penalty and where there has been default in the payment of the penalty. To such extent that Article 1 Protocol 1 has been interfered with, it is considered that the detention of an individual's possessions (goods vehicle) is in the public interest and is a proportionate means to achieve a legitimate aim (i.e. the recovery of unpaid penalties, which will act as a deterrent effect to encourage good vehicle security). When enforcing the policy, immigration officers are likely to agree to the release of goods freight contained therein, where the owner, consignor or any other person who has an interest in any freight detained. Further, a vehicle is released upon payment of the unpaid fine and any reasonable expenses incurred in connection with the detention. The detention provisions at sections 36 and 36A of the 1999 Act contain a number of safeguards that ensure that vehicles are detained for no longer than is necessary in the circumstances to secure payment. Section 36 was amended and section 36A was inserted following the *Roth* judgment (see paragraph 30 above) to address criticisms by the Court of Appeal that vehicles could be held indefinitely and did not afford sufficient protections to vehicle owners and operators. The Department is satisfied that the Bill provisions are compatible with Article 1 of Protocol 1.
62. Paragraph 7 of Schedule 5 creates a new power to seize and dispose of vessels in UK waters which are reasonably suspected of being involved in a relevant offence. Relevant offences are: entry in breach of a deportation order (section 24(A1) of the Immigration Act 1971 as amended by this Bill), illegal entry (section 24(B1) of the Immigration Act 1971 as amended by this Bill), arrival without required entry clearance (section 24(C1) of that Act, a new offence created by this Bill); facilitation (section 25 of that Act, as amended by this Bill), assisting an asylum seeker to arrive in or enter the UK (section 25A of that Act, as amended by this Bill), facilitation of a breach of a deportation order (section 25B of the 1971 Act to the extent that section continues to apply) and attempts to commit any of those offences. The Department considers the power to seize and dispose does amount to an interference with Article 1 of Protocol 1: the former controls the use of property and the latter amounts to permanent deprivation of property. However, the Department considers that there is justification

meaning the powers in the Bill do not involve a breach of Article 1 of Protocol 1, particularly when set against the significant cost to the taxpayer of storing an increasing number of vessels. The Department seeks to ascertain the owners of vessels. Three vessels have been returned since 2018. The safeguards for a vessel owner are as follows. First, the Department may not dispose of the boat until 31 days has elapsed. Secondly, if the boat is flagged, the Department must notify the flag state (this will also assist in seeking to ascertain the owner). Thirdly, the Department will be required to take steps to ascertain the owner and, unless to do so would prejudice criminal investigations or proceedings, to notify the owner. The Department is satisfied that the provision in the Bill is compatible with Article 1 of Protocol 1 in that it strikes a fair balance between the wider public interest and the interest of a vessel owner.

The Refugee Convention

63. The Department wishes to address briefly some aspects of the Refugee Convention which contain rights similar to the Convention rights.
64. Article 33(1) provides that, subject to Article 33(2), no Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. The Department considers that the provisions in the Bill are compatible with Article 33(1), as regards removal of a person from the UK, for the same reasons as it is considered they are compatible with Article 3 ECHR.
65. Article 3 requires contracting parties to apply the Refugee Convention “without discrimination as to race, religion or country of origin.” Although clause 10 (differential treatment of refugees) provides a power to treat the two Groups refugees differently, the basis for doing so is the conditions in Article 31 of the Refugee Convention, and those conditions do not relate to nationality, religion or country of origin. The Department considers there is a reasonable argument that Article 3 is confined only to direct discrimination. Even if, contrary to that view, Article 3 encompasses indirect discrimination, it would not add to the rights under Article 14 of the ECHR, discussed in this context above. Further, the Department considers there is also a respectable argument that the prohibition on discrimination under Article 3 does not apply in relation to benefits and entitlements which go beyond the minimum standards set out in the Refugee Convention (see Article 5 of the Convention). The Department is therefore satisfied that clause 10 is compatible with Article 3 of the Refugee Convention.
66. Articles 23 and 24 of the Refugee Convention require the UK to afford refugees “lawfully staying” in its territory the same treatment as is afforded to nationals, as regards entitlements to public relief (welfare benefits) and

social security. Clause 10 (differential treatment of refugees) permits differentiation when it comes to the use of no recourse to public funds conditions, and the Department will ensure that the powers in clause 10 are implemented in a way which is compatible with Articles 23 and 24.

Council of Europe Convention on Action against Trafficking in Human Beings (“ECAT”)

67. Whilst the rights under Article 4 ECHR and rights under ECAT are not necessarily co-extensive, the Department wishes to address the compatibility of the Bill with ECAT.
68. Article 10(2) of ECAT provides that where a state has “reasonable grounds to believe” that an individual has been a victim of trafficking, the individual shall not be removed from its territory “until the identification process as victim of an offence provided for in Article 18 ... has been completed”. Article 18 requires States to adopt legislative and other measures to establish as criminal offences intentional instances of human trafficking. The State is also required to ensure that the person receives the assistance provided for in Article 12.
69. “Reasonable grounds to believe” is not defined in ECAT, but the Explanatory Report to ECAT states at paragraph 132: “[ECAT] does not require absolute certainty – by definition impossible before the identification process has been completed – for not removing the person concerned from the Party’s territory. Under [ECAT], if there are “reasonable” grounds for believing someone to be a victim, then that is sufficient reason not to remove them until the identification process establishes conclusively whether or not they are the victims of trafficking.”
70. Clause 48 (amendments to Modern Slavery Act 2015) changes the position from the current reasonable grounds to believe that a person may be a victim to reasonable grounds to believe that a person is a victim. This is consistent with the wording of Article 10(2) of ECAT.
71. The conclusive grounds threshold is not mentioned in ECAT. Article 10(2) of ECAT refers to the point at which the “identification process as victim of an offence provided for in Article 18 of this Convention has been completed”. The Explanatory Notes to ECAT state : “132. The Convention does not require absolute certainty – by definition impossible before the identification process has been completed – for not removing the person concerned from the Party’s territory. Under the Convention, if there are “reasonable” grounds for believing someone to be a victim, then that is sufficient reason not to remove them until completion of the identification process establishes conclusively whether or not they are victims of trafficking.” The existing statutory guidance on the conclusive grounds decision adopts as a standard of proof the balance of probabilities, and in Court of Appeal in *MN v SSHD* [2020] EWCA Civ 1746, Underhill LJ held

that "the adoption of the civil standard of proof is unobjectionable, indeed in practice inescapable". The Department therefore considers that clause 48, which includes the balance of probabilities standard, is consistent with ECAT.

72. For the reasons as described in paragraph 21 in relation to Article 4 ECHR, the Department considers that Articles 10 to 13 are engaged in relation to clauses 18 to 20 and clauses 46 and 47. However, the Department considers that appropriate safeguards are in place so that the provisions are compatible with ECAT.
73. Article 12 of ECAT requires states to provide various forms of support to "assist victims in their physical, psychological and social recovery". Article 13 of ECAT provides for a minimum Recovery and Reflection period, during which an individual may not be removed from the jurisdiction. Article 13 includes that the Parties are not bound to observe this period if grounds of public order prevent it or if it is found that victims status is being claimed improperly.
74. Clause 49 (potential victims of slavery or human trafficking: recovery period) sets out on the face of the Bill a recovery and reflection period during which support is provided to an individual and they are protected from removal from the UK, subject to certain exemptions and qualifications. The exemptions are set out in clause 51 and reflect Article 13(3) of ECAT. Where an exemption applies, there will be (a) no requirement to make a conclusive grounds decision and (b) no requirement to provide support and assistance. The Department considers it is compatible with EACT to adopt a position that, once the public order or other exemption is properly invoked, the obligations to give a conclusive grounds decision and/or residence permit, and to provide support, falls away on the basis that the invocation of the public order exemption (or any other exemption) must have been expected to result in removal. The other exemption on the face of the Bill will be where victims status is improperly claimed. The Department considers this is compatible with the wording of Article 13.
75. Clause 50 addresses the position when a competent authority has previously made a positive reasonable grounds decision (first RG decision) in relation to a person, and then a further positive reasonable grounds decision (further RG decision) is made in relation to the person and, as respects the further RG decision, the reasonable grounds for believing the person is a victim of slavery or trafficking arise from things done wholly before the first RG decision was made. The clause disapplies the requirement to provide a recovery period or make a conclusive grounds decision unless the competent authority considers it appropriate in the circumstances of the case. The intention is that it will be "appropriate" to do so in circumstances in which ECAT requires it.

76. The Department considers this is compatible with Articles 10, 12 and 13 of ECAT because:
- a. the person will already have had one recovery and reflection period and so in relation to that person regarding whom there are reasonable grounds to believe, the opening sentence of Article 13 has been satisfied (the Department does not interpret Article 13 as requiring that an individual should in all cases have a new recovery and reflection period in relation to each new alleged incident of modern slavery);
 - b. where a new recovery need does arise, recovery and reflection will be provided so that Article 12 is satisfied;
 - c. where a person has had a positive conclusive grounds decision that they are a victim and Article 10(2) has already been applied, Article 10(2) is no longer relevant;
 - d. where the person's previous conclusive grounds decision was negative, the Secretary of State will be required to make a new conclusive grounds decision on the new referral, and the person will be protected from removal in the meantime, ensuring compliance with Article 10(2);
 - e. if the Secretary of State is making a conclusive grounds decision following a police request, the person will have any new needs assisted with and will be protected from removal pending that decision.
77. Article 14(1) requires the state to provide a renewable residence permit to victims in one or other of the two following situations or in both: (a) the competent authority considers that their stay is necessary owing to their personal situation; (b) the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings. In relation to clause 53 (leave to remain for victims of slavery or human trafficking), under the current non statutory discretionary leave policy relating to victims of modern slavery, temporary leave may be granted where the confirmed victim fulfils one of the following criteria: (a) leave is necessary owing to personal circumstances; (b) leave is necessary to pursue compensation; (c) victims who are helping police with their enquiries. The Bill will provide clarity on eligibility for a residence permit under Article 14(1) by setting out the relevant criteria in primary legislation, in particular reflecting that that the Department considers that the scope of the 14(1)(a) ECAT obligation, in light of the obligation in Article 12(1) ECAT, is where leave is necessary to assist the person in their recovery from any harm arising from the relevant exploitation to their physical and mental health and their social well-being. The above interprets the wording in Article 14 (1)(a) in light of one of the core aims of ECAT and exemplified in Article 12(1) to "assist victims in their physical, psychological and social recovery". Whilst the Court of Appeal in *PK Ghana v SSHD* [2018] EWCA Civ 98 recognised that personal circumstances is a "wide concept" Hickenbottom LJ also

found that “Article 14(1)(a) of the Convention requires the identification of the individual’s relevant personal circumstances, and then an assessment by the competent authority of whether, as a result of those circumstances in pursuance of the objectives of the Convention, it is necessary for the person to remain in the United Kingdom” and that there is “no additional obligation outside of Article 14, to allow a victim to reside to enable his or her full recovery”. The department considers that the range of purposes set out in the legislative provision reflects the approach of Hickinbottom LJ, as linked to the objectives of ECAT.

78. It is also relevant that there are existing protection and immigration rules which can provide if necessary for personal circumstances wider than ongoing recovery needs and the Department is satisfied that the clause is compatible with Article 14 of ECAT. In addition, the clause provides for a grant of leave where necessary to enable the individual to claim compensation in respect of the relevant exploitation, in light of the obligation in Article 15(3) ECAT.

Status of Stateless Persons Convention 1954 and the 1961 Convention on the Reduction of Statelessness (“the Stateless Conventions”)

79. This is relevant to clause 9 (citizenship: stateless minors).

80. The domestic provisions for reducing statelessness within the nationality framework are set out at section 36 and Schedule 2 of the British Nationality Act 1981. Paragraph 3 of Schedule 2 provides for a stateless child born in the UK to be registered as a British citizen. In summary this provision requires for the individual to: be born in the UK; be under the age of 22; have always been stateless; have been present in the UK 5 years prior to the date of application and to not have exceeded the permitted number of days absent from the UK

81. Clause 9 amends the age requirements at paragraph 3 of Schedule 2 to apply to individuals between the ages of 18 and 22. It also inserts a new provision in Schedule 2 which applies to applicants aged between 5 and 17 years which mirrors paragraph 3, with an additional requirement that the Secretary of State be satisfied that the child cannot reasonably acquire another nationality. A person is able to acquire another nationality where: it is the same as one of their parents; the person has been entitled to acquire that nationality since birth; and in all the circumstances, it is reasonable to expect the person (or someone acting on their behalf) to take the steps necessary to acquire that nationality. The Department is satisfied that this is compatible with the Stateless Conventions.

UN Convention on the Rights of the Child (“UNCRC”)

82. The UNCRC requires the best interest of the child to be a primary consideration in all actions concerning children, including actions undertaken by administrative authorities and legislative bodies. This requirement is implemented in domestic law by section 55 of the Borders, Citizenship and Immigration Act 2009, which requires the Secretary of State to ensure that any functions relating to immigration, asylum or nationality are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK.
83. The Department has carefully considered the best interests of the child throughout the formation of all the policy given effect to in this Bill.
84. In relation to clause 9 (citizenship: stateless minors), Article 7 of the UNCRC provides that a child has “the right to acquire a nationality” and Article 7(2) provides that States Parties shall ensure the implementation of these rights “in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless”. The Department considers that, for the same reasons as discussed above in relation to this clause and the Statelessness Conventions, that this is also compatible with Article 7 of the UNCRC.

Home Office
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