



GLOBAL DETENTION PROJECT WEBINAR

National perspective: UK law and practice and the 'Illegal Migration Bill'

What the presentation will cover

- **The presentation will cover:**
- Current legal and policy framework for the identification and protection of victims in the UK relevant to detention:
 - (i) The application of the Council of Europe Convention on Action against Trafficking (ECAT) in UK law and policy
 - (ii) The protection of adult and child victims of trafficking in detention under UK law and policy – as it stands
- Changes to victim identification and protection in the UK under the Nationality and Borders Act 2022 (NAB) relevant in detention cases. This is dismantling of ECAT protection stage 1, or v. 1.0.
- Proposed changes in the Illegal Migration Bill (IMB). This is dismantled victim protection. Stage 2, or v.2.0.
- **Caveat! The presentation cannot cover everything in the time available.** It is a snapshot of the UK framework for victim protection in detention, the changes effected, and those yet to come (if they come).
- Hyperlinks are provided in the slides to sources including analyses of NAB and the IMB.

ECAT protection of victims in UK

- **ECAT** signed by UK March 2007, ratified December 2008. No ECAT Act of Parliament.
- **Operates via National Referral Mechanism (NRM)** for identification and support of victims commenced 1.4.2009. Operated under Home Office [Modern Slavery: Statutory Guidance for England and Wales](#) (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland, v.3.1, January 2023. Policy said to give effect to some parts of ECAT.
- **Breach of ECAT** justiciable in UK courts insofar as policy purports to implement ECAT and fails to do so: *PK (Ghana) v SSHD* [2018] EWCA Civ at §34. Failure to apply policy, including detention policies, absent good reason, may render detention unlawful: *Lumba v SSHD* [2011] UKSC 12, *Kambadzi v SSHD* [2011] UKSC 23.
- **Art 4 ECHR** given legal effect by the Human Rights Act 1998. Construed in light of ECAT Art 4 ECHR imposes positive obligations on state towards potential and confirmed victims. [VCL and AN v the UK](#), 77587/12 and 74603/12, 16.2.2021 §88, *EOG & Anor v SSHD* [2022] EWCA Civ 307 at §54.
- **Trafficking Directive 2011/36**: recital 9 and interpretation. 6.4.2013 and continuing but NAB will disapply if incompatible.

General framework for protection of adult victims in detention

- Strong presumption in favour of liberty in respect of vulnerable detainees.
- Detention will not be appropriate if a person 'at risk'.
- General common law, policy guidance, ECHR constraints on statutory power to detain
- Art 4 ECHR + ECAT constraints:
 - failure to take operational measures to protect, may include non penalisation/prosecution, and measures to protect including prompt ID and recovery and assistance: VCL §112, 150-156, 159, 161, 173, 182; [LE v Greece](#) 71545/12, 21.1.2016;
 - safeguarding against re-trafficking on release [R \(TDT\) v SSHD](#) [2018] EWCA Civ 1395 §14, 86
 - Articles 3, 5, 8, 14 ECHR.
- Detention and trafficking policy guidance constraints. E.g. Modern Slavery and AAR statutory guidance: removal of potential victims prohibited from the point of an NRM referral and pending CG decision. Release from referral or RG decision.

Heightened protection of child victims

- Heightened protection of children required by ECAT and ECHR due to their particular vulnerability : VCL §§119, 161, TDT §85,
- UK legal and policy framework + child welfare laws, generally have come to prevent children from being detained, alone or in families, again in recognition of specific vulnerabilities of children, and of separated or unaccompanied children. TDT §85.
- Child best interests and welfare principles apply: UN Convention on the Rights of the Child (UNCRC), s.55 Borders, Citizenship and Immigration Act 2009, Children Acts 1998 and 2004 (s.11 welfare duty), ECHR and ECAT. E.g. VCL §§66-107.

Dismantling of victim protection 1.0

- 2021: Guidance changed to pre-2014 position with victim ID by Home Office in detained cases and victim protection subordinate to immigration enforcement.
- NAB 2022: detention and early removal with inadmissibility decisions (Rwanda): enacted 28.4.22.
- NAB enacted despite being 'assault' on the Refugee Convention and international legal obligations: [UN Special Rapporteurs](#), [UNHCR](#), UK's former [Independent Anti-Slavery Commissioner](#), NGOs, academics, lawyers ([Doughty Street Anti-Trafficking Team](#) written evidence). Government urged to reverse the Bill.
- Part 5 NAB Modern Slavery entered into force 31.1.2023. Government said it was committed to ECAT but redefines victim definition in [The Slavery and Human Trafficking \(Definition of Victim\) Regulations 2022](#) under s.69 NAB, and curtails/ceases access to support and protection measures.
- Associated AND further far-reaching changes to Modern Slavery guidance (not in NAB) e.g.
 - Raised RG threshold in trafficking and detention policies - including [Adults at Risk: Detention of Potential or Confirmed Victims of Modern Slavery](#), v.3.0, 30.1.2023.
 - Guidance on disqualification/ cessation of protection on so-called bad faith / public order cases, including duty to complete victim ID, the prohibition of removal pending CG identification, support or leave.
- See further: [UNHCR observations](#) (2022), University of Nottingham Rights Lab, Bill [Consideration Paper](#) (2021), [NAB Policy Paper](#) (2022)

Dismantled victim protection 2.0

- Illegal Migration Bill 2023 (IMB): Prime Minister's promise to the 'British people' that anyone entering the UK illegally will be detained and swiftly removed. Government accepts it is not ECHR compatible. Will break the law, refuse access to courts or compliance with R39, and threatens [global system of refugee protection](#).
- Clauses 21-28 Modern Slavery. Provides for removal of victims with positive RG, and denies access to support and assistant measures if arrived illegally or did not come directly from country of persecution.
- No evidence for proposals or claims of 'abuse' of NRM: [Rights Lab](#) 9/10 victims identified.
- Distorted language and creation of a fake crisis. [Home Secretary](#) statement 7.3.23 claims this is not about 'scapegoating' but 'protecting' the vulnerable, and small boats part of a larger global migration crisis.
- [Former PM](#) says bill will deny support to victims and force traffickers underground
- [social workers say](#) Bill could thousands of children into the hands of criminals.
- Heavily criticised again by UNCHR, UN experts, [Council of Europe](#), [NGOs](#), [MPs](#), [academics](#) etc