**NATIONALITY AND BORDERS BILL (Bill 141)**
**HOUSE OF COMMONS SECOND READING - 19 AND 20 JULY 2021**

**IMMIGRATION LAW PRACTITIONERS' ASSOCIATION - GENERAL BRIEFING**

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on advisory and consultative groups convened by Government departments, public bodies and non-governmental organisations.

**Introduction**

1. This briefing covers what MPs need to know for the 2nd Reading of the Bill in the House of Commons. A more detailed analysis of each part of the Bill will follow for Committee Stage. The Bill covers diverse immigration-related areas:

    - British Nationality
    - Asylum
    - Immigration Offences and Enforcement
    - Modern Slavery
    - Court and Tribunal Procedure.

2. For each area, we consider (1) what the Bill seeks to achieve, (2) the problems arising, and (3) how to fix those problems.

**Executive Summary**

3. The contentious issues include the following:

- **British Nationality:** The proposal regarding child statelessness inhibits access to British citizenship and risks breaching UK international treaty commitments. It should be dropped or amended (see paras 4-13 below).

- **Asylum:** The proposal to treat classes of refugees differently depending on how they came to the UK punishes those who seek asylum. There is a lack of lawful routes to come to the UK to seek asylum when fleeing your own country, so the proposal punishes those who risk persecution and will leave them leading precarious and impoverished lives in the UK. In addition, the attempt to legislate so that late provision of evidence damages credibility cannot work sensibly and needlessly complicates the task of judges. Further, the proposed accelerated appeals process when an asylum seeker is

detained replicates the old detained fast track, which was ruled unlawful. Further, the attempt to raise the standard of proof is contrary to settled case law, the guidance of UNHCR, and the practice in other common law countries (see paras 14-30 below)

- **Immigration Offences and Enforcement:** The provisions criminalise someone arriving in the UK to claim asylum. The criminalisation of those who arrive in the UK seeking to claim asylum is (1) contrary to international treaty law by which the UK is bound; (2) contrary to the Government's stated aims; and (3) inhumane. The offending clauses should be removed from the Bill (see paras 31-45 below).

- **Modern Slavery:** The provisions wrongly focus on damaging the credibility of victims where they make late disclosure, rather than supporting them; raise the threshold for a first stage 'reasonable grounds' decision and thus shut potential victims out from support; needlessly shorten the period for recovery and reflection; and fail to provide the lawful basis on which child victims should be granted leave to remain (see paras 46-68 below).

- **Court and Tribunal Procedure:** Substantive clauses in respect of age assessments and of visa restrictions should be brought forward immediately; the placeholder clauses that exist at present deprive the House of Commons of its full power of scrutiny and debate. Only when presented can the clauses be considered. Any evidence justifying the introduction of a wasted resources regime in immigration proceedings should be published. If not adequate, the provision should be removed from the Bill. The provision for introducing a proposed good faith requirement for immigration applicants should be removed; it adds nothing (see paras 69-79 below).

**British Nationality: Part 1**

*What the Bill seeks to achieve*

4. The Bill amends the British Nationality Act 1981.

5. With one critical exception, the Bill is generally good news as regards British Nationality law. However, the exception risks putting the UK in breach of its international treaty commitments.

*The principal problem in the British nationality provisions*

6. The principal problem with the British nationality provisions comes in the proposed changes to the provision made for stateless children in Clause 9. The change will leave certain children stateless and in doing so runs contrary to the UK's obligations under the 1961 UN Convention on the Reduction of Statelessness.

7. Paragraph 3 of Schedule 2 to the British Nationality Act 1981 provides for a stateless child born in the UK or a British overseas territory to be registered as a British citizen or British overseas territories citizen (BOTC) (as the case may be). Among other things, there is a requirement that the applicant has always been stateless and that they have been in the UK or British overseas territory for 5 years. The applicant must be under 22 years of age.

8. The proposed change operates as follows: Clause 9 of the Bill adds a provision for those aged 5-17 that *the Secretary of State is satisfied* that the child applicant is *unable to acquire another nationality*. It provides that a person is able to acquire a nationality where (i) that nationality is the same as one of the parents; (ii) the person has been entitled to acquire that status since birth; and (iii) *in all the circumstances, it is reasonable to expect them (or someone acting on their behalf) to take steps to acquire that nationality*.[1]

*Problem arising*

9. The problem with the provision is that it allows the Secretary of State to keep a child born in the UK without a nationality stateless from the age of 5 onwards, when in fact, the 1961 Convention—which the British Nationality Act 1981 purports to implement—simply requires that the applicant is stateless and *not* that they cannot reasonably acquire another nationality. The *only* circumstances where conferral of British citizenship could be withheld under the 1961 Convention is where the nationality of a parent was available to the child *immediately*, without any legal or administrative hurdles, and could not be refused by the state concerned.[2] *As drafted, the Bill does not provide for such safeguards but allows impermissible latitude to the Secretary of State to refuse an application* ("…in all the circumstances, it is reasonable to expect the person (or someone acting on their behalf) to take the steps….").

10. The UK is bound by the 1961 Convention. It is obliged to apply it in good faith (as Article 26 of the 1969 Vienna Convention on the Law of Treaties requires). There is no provision in the 1961 Convention that allows for such a wide condition to be imposed. The 1961 Convention specifies that statelessness alone is sufficient. In doing so, it removes the temptation for decision-makers to form their own judgments about how easy it would be for a UK-born stateless child to acquire the nationality of one of their parents under the law of their (foreign) country, subject to the exception (as set out above), where a parent's nationality can be obtained immediately. The 1961 Convention is child protection-focused and a rule to transpose and implement it in domestic law should be drafted consistently with the requirements to have children's "best interests" in mind; see article 3 of the 1989 UN Convention on the Rights of the Child in that regard.

11. The 1961 Convention protects stateless children by obliging the state of birth to provide access to its nationality. Under the Convention, a state may require an application and a 5-year period of presence (as the UK does). Where such requirements are imposed, a child may cease being stateless as early as 5 years old. For many children, the new clause will perpetuate their statelessness as they will have no immediate entitlement to a parent's nationality but the Secretary of State's judgment will shut them out from British citizenship. The effective operation of a key provision of the 1961 Convention will be impossible for many stateless children if Clause 9 is implemented. Where the

[1] Clause 9 inserts a new paragraph 3A into Schedule 2 to the British Nationality Act 1981.
[2] See for example paragraphs 24 to 26 of the UNHCR 'Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness'.

Secretary of State refuses an application using the impermissible latitude for which the clause provides, the UK will breach its international treaty commitments accordingly.

*How to fix the problem?*

12. The clause in question should be removed or revised to be compliant with the 1961 Convention. There is no "vice" (as the Government contends[3]) where parents have chosen not to register their child's birth in their home country (so that the child thereby acquires its nationality) so as to facilitate the child registering as a British citizen under the British Nationality Act 1981, save where the right to acquire home state nationality is not taken and there is an immediate entitlement to a parent's nationality, without hurdles or obstacles, which cannot be refused on a discretionary basis. Further, any assessment of that question should be an objective question, where a court or tribunal may assess the question in turn; it should not be a subjective question for the Secretary of State alone to evaluate in all the circumstances. The 1961 Convention focuses on protecting the stateless child. Parliament ought not to legislate to enable breaches of that commitment in UK domestic law.

13. That major problem aside, the generally positive developments as regards the proposed British nationality law amendments are:

i. As regards *British overseas territories citizenship* (associated with the remaining British overseas territories such as Gibraltar and the Falkland Islands), provision is made to end historic injustices arising from earlier British nationality law. These mirror developments already made as regards British citizenship.

ii. There is a new route to registration *as a British overseas territories citizen (BOTC*) for a person born to a British mother outside the UK and Colonies prior to 1983 (Clause 1). This addresses discrimination on grounds of sex in the pre-1983 law.

iii. There is also a new route to registration *as a BOTC* for those born to unmarried British fathers, where such persons were excluded from acquiring British overseas territories citizenship (or pre-1983 equivalent) by virtue of their father's status as unmarried (Clause 2).

iv. For those registered under one of the two routes above, further provision is made for BOTCs so registered to register as British citizens by entitlement (Clause 3).

v. As regards registration *as a BOTC* while a minor, where born outside the British overseas territories to a parent BOTC by descent, provision is made to amend section 17(2) of the British Nationality Act 1981 to allow a person born to a BOTC by descent (who has resided in a British overseas territory for 3 years prior to the birth) to register at any time up until the age of 18, rather than simply in the year following birth (Clause 4).

[3] See the Explanatory Notes to the Nationality and Borders Bill, paras 137-138.

vi. As regards *British citizenship*, the Bill adjusts the provision made for registration *as a British citizen* for a person born in a foreign country to a British mother prior to 1983 or born to an unmarried father at that time (Clause 5). It does so by providing that the application will not be refused solely because the (unmeetable) requirement to register the birth at a British consulate within a year has not been met. This embeds in legislation the effect of the decision of the UK Supreme Court in *Advocate General for Scotland v Romein* [2018] UKSC 6.

vii. Further, provision is made for registration *as a British citizen* by reference to a biological British citizen father (Clause 6). It creates a route to registration where the person's mother was married to someone other than their biological British citizen father at the time of their birth. This aims to remove the breach of human rights identified in the High Court case of *K (A child) v Secretary of State for the Home Department* [2018] EWHC 1834 (Admin), which held that the definition of father in the British Nationality Act 1981 was incompatible with provisions of the European Convention on Human Rights (ECHR) by virtue of being discriminatory.

viii. In addition, provision is made for adults to register as *British citizens* or *BOTCs in special circumstances*, if, in the Secretary of State's opinion, the person would have been or would have become a British citizen and/or a BOTC had it not been for historical unfairness in the law; an act or omission of a public authority; or other exceptional circumstances relating to the person's case (Clause 7). This route avoids the residence-based requirements of naturalisation (the standard mode of acquisition) in deserving cases. As regards adults, it gives the Secretary of State much of the flexibility she has already in relation to minors.

ix. Further, there is also provision made for facilitating naturalisation *as a British citizen or as a BOTC* by dispensing with a requirement to be in a qualifying territory (such as the UK or a relevant territory) on a date at the beginning of a qualifying period (3 or 5 years) (Clause 8). This provision may benefit those shut out from acquiring British citizenship on account of the Home Office's scandalous behaviour towards the Windrush generation of Commonwealth Citizens.

**Asylum: Part 2**

*What the Bill seeks to achieve*

14. The Bill alters the rights of certain asylum seekers, and the procedures by which claims for protection are to be made and considered. Four changes in particular are notable.

15. First, Clause 10 empowers the Secretary of State to treat refugees differently if they came to the UK indirectly, delayed before claiming asylum, or entered the UK unlawfully without a good reason. For example, she could refuse them access to public funds, or bar them from obtaining settlement. The proposed clause places *no restriction* on the Secretary of State's power to treat these refugees differently.

16. Second, Clauses 16-20 empower the Secretary of State to require asylum seekers to provide evidence supporting their claim by a specified date. Decision-makers will be required to doubt an applicant's credibility if they fail to do so.

17. Third, Clause 24 creates an accelerated appeals process which the Secretary of State may impose when the asylum seeker is detained and she thinks the appeal "would likely be disposed of expeditiously". This drastically speeds up the process, giving the asylum seeker only five days to bring an appeal.

18. Fourth, Clause 29 alters the standard of proof decision-makers must apply when considering whether asylum seekers have a well-founded fear of persecution. Instead of simply asking whether there is a reasonable likelihood of persecution, decision-makers must also ask on the balance of probabilities whether an asylum seeker in fact fears persecution.

*Problems arising*

19. The introduction of differential treatment of refugees depending on how they came to the UK or made their claim cuts against the principles motivating the 1951 UN Refugee Convention. The Convention's preamble opens by citing "the principle that human beings *shall enjoy fundamental rights and freedoms without discrimination*" (emphasis added). At Article 34, the Convention obliges states parties to "as far as possible facilitate the assimilation and naturalization of refugees". The proposed Clause 10 contradicts these principles and obligations. Rather than facilitating refugees' lives in the UK, the government will single out a class of genuine refugees and put barriers in the way of their integration. In particular, the proposal that the Secretary of State may prohibit these refugees from obtaining settlement is worrying. This will make their situation perpetually precarious, denying them stability and certainty.

20. The Government has argued that the existence of "parallel illegal routes to asylum" is "deeply unfair as it advantages those with the means to pay traffickers over vulnerable people who cannot".[4] But, as noted, for most refugees, it is not possible to come to the UK lawfully. It is the most vulnerable who are least likely to be able to acquire permission to enter the UK, and most likely to be driven underground by fear of authorities once they are here. The proposed reforms only disadvantage these asylum seekers further.

21. The credibility requirements in Clauses 16-20 are worrying because they require decision-makers to adopt an artificial approach to the evidence. Permitting the Secretary of State to impose arbitrary deadlines by which evidence must be provided ignores the practical difficulties asylum seekers often face in proving their claim, having fled their homes leaving everything behind. Rather than allowing decision-makers to sensibly consider whether the late provision of evidence is a reason to doubt its credibility, weighing all the evidence on the whole, the government proposes to straight-jacket decision-makers with a series of presumptions. The caveat that decision-makers will be allowed to use their own judgment if there is a "good reason" why evidence was provided late does not mitigate

[4] New Plan for Immigration - Policy Statement, page 3.

these concerns. There are many "bad reasons" why evidence might be provided late that do not indicate dishonesty. For instance, a simple mistake by legal representatives will under this clause damage the asylum seeker's credibility, though the two are unrelated.

22. Even if the "good reason" provision is interpreted generously, these clauses will encourage rushed claims, put together as quickly as possible to comply with artificial deadlines. This will necessarily make it harder for asylum seekers to effectively prove their claims. It increases the risk that the UK will refuse to grant asylum to people who need it, and that those people will be sent back to their home countries to face persecution. This is incompatible with the UK's obligations under Article 33 of the Refugee Convention.

23. The accelerated appeals provision is worryingly reminiscent of the old "fast track" procedure, which was abandoned when the Court of Appeal held it was unlawfully and systematically unfair.[5] It is already difficult to put appeals together for asylum seekers held in detention. These appeals are often complex, and it is difficult to take instructions on an ongoing basis from people in detention. The result of these reforms will in practice be to prevent appeals, and to make it much harder to put a good case on appeal. The result will be the UK sending people away to experience persecution.

24. Lastly, the new higher standard of proof in Clause 29 ignores the reality of decision-making on asylum claims. By their nature, these claims involve people who often are not in a position to collate evidence about their circumstances. They have fled their homes, often on very short notice, in fear of violence or other persecution. They will then often have been victims of traffickers in coming to the UK. It is not realistic to expect asylum seekers to prove their cases on the same standard applied in the civil courts.

25. The stricter the standard of proof applied to asylum claims, the more claims will be refused. Given the difficulties asylum seekers face in proving their claims, Clause 29 will result in significant numbers of genuine asylum seekers being refused permission to stay in the UK. It is to be hoped that the courts will interpret these provisions sensibly, bearing in mind the difficulties faced by asylum seekers. But it is obvious the government hopes for a stricter approach. And asylum seekers should not have to rely on extended litigation to clarify the approach that will be taken to their claims.

*How to fix the problems?*

26. The government is concerned that too many asylum seekers enter the country illegally. The way to prevent this is to open up lawful routes of entry for asylum seekers.

27. Nor is any useful purpose served by treating groups of refugees differently depending on how they came to the UK or made their asylum claim. Once a person is recognised as a refugee, it is in society's interest that we help that person adjust to life in the UK. The differential treatment proposed by Clause 10 will only erect a barrier between refugees and the rest of society, encouraging the failure

[5] *The Lord Chancellor v Detention Action* [2015] EWCA Civ 840.

to integrate about which the government has repeatedly expressed concerns. Clause 10 should be abandoned.

28. As to the credibility provisions, again they serve no useful purpose. Decision-makers are already capable of assessing what factors damage credibility. They do not need statutory presumptions which require them to disregard evidence and sense.

29. Any issues with prolonged appeals processes are not resolved by creating unfair expedited processes with unfeasible deadlines. They can be solved by adequately resourcing Home Office staff and the Tribunals, so that relevant facts emerge at the earliest opportunity and accurate decisions are made in the first place and on appeal.

30. Last, any change to the standard of proof creates an unacceptable risk that the UK will in many cases abandon its obligation to protect refugees from persecution. The present approach to proof should be maintained.

**Immigration Offences and Enforcement: Part 3**

*What the Bill seeks to achieve*

31. The Bill proposes to change the immigration offence of illegal entry. At present there are offences relating to *entering* the UK as follows: (1) knowingly entering the UK in breach of a deportation order; and (2) knowingly entering the UK without leave.[6] These offences both currently have a maximum sentence of 6 months.[7]

32. The Bill proposes a new offence of knowingly *arriving* in the UK without entry clearance, where entry clearance (prior to travel) is required. The Government say this new offence is required because "the concept of 'entering the UK without leave' has caused difficulties about precisely what 'entering' means".[8] Under the current law, someone is not deemed to "enter" the UK until they disembark at a port and pass through the area designated for immigration control.[9] The Government says this new offence "will allow prosecutions of individuals who are intercepted in UK territorial seas and brought into the UK who arrive in but don't technically 'enter' the UK".[10] The new offence of knowingly arriving without entry clearance where such entry clearance is required will carry a maximum sentence length of 4 years' imprisonment (Clause 37(2) at D1(d)).

33. The Bill proposes *increasing* sentences as follows:

    (1) The maximum length of sentence for entering in breach of a deportation order will be increased

[6] Section 24(1)(a) Immigration Act 1971.
[7] Section 24(1) Immigration Act 1971.
[8] Explanatory Notes to Nationality and Borders Bill, para 384.
[9] Section 11 Immigration Act 1971.
[10] Explanatory Notes to Nationality and Borders Bill, para 388.

from 6 months to 5 years' imprisonment (Clause 37(2) at D1(d));

(2) The maximum length of sentence for knowingly entering without leave will be increased from 6 months to 4 years' imprisonment (Clause 37(2) at D1(d));

(4) The maximum length of sentence for assisting unlawful immigration will be increased from 14 years' imprisonment to life (Clause 38(1)).

34. At present the offence of helping an asylum seeker to enter the UK can only be committed if someone facilitates an asylum seeker's arrival "*for gain*".[11] The Bill proposes to remove the words "for gain" (Clause 38(2)). *This means someone acting purely altruistically to help an asylum seeker would be committing a criminal offence*.

35. The law is and remains that someone acting on behalf of an organisation which *aims to assist asylum seekers* will not be committing an offence provided the organisation does not charge for its services.[12] However, someone not acting on behalf of an organisation which aims to assist asylum seekers who facilitates an asylum seeker's arrival would be committing a criminal offence under the new provision.

*Problems arising*

36. *The Bill is criminalising someone arriving in the UK to claim asylum*. There is no visa or entry clearance application for someone to make to come to the UK to claim asylum. Someone with a well-founded fear of persecution arriving in the UK intending to claim asylum will be committing a criminal offence under the proposed section 24(C1) of the Immigration Act 1971 (Clause 37). Even if they have a visa, they will nonetheless be committing an offence. This is because their intention to claim asylum will be contrary to their intention for which the entry clearance/visa was issued.

37. The criminalisation of those who arrive in the UK seeking to claim asylum is (1) contrary to international treaty law by which the UK is bound; (2) contrary to the Government's stated aims; and (3) inhumane.

38. First, it is contrary to international law. Article 31 of the Refugee Convention provides that states shall not impose penalties on account of their illegal entry or presence on refugees where their life or freedom was threatened and they presented themselves without delay and show good cause for their illegal presence or entry. For two decades, the courts have recognised that it would be "hollow" if asylum seekers could not rely on this international law protection.[13]

[11] Section 25A(1)(a) Immigration Act 1971.
[12] Section 25A(3) Immigration Act 1971.
[13] *R v Uxbridge Magistrates' Court, ex p Admimi,* [2001] QB , pg 691B, see also pg 690F, *R v Asfaw* [2008] 1 AC 1061, para 26, para 29.

39. Further, as regards international law obligations, no consideration appears to have been given to how the new expanded criminal offence is compatible with the duty for a ship to attempt to rescue persons in danger at sea; see for example Article 98 of the UN Convention on the Law of the Sea and Chapter V, Regulation 10 of the International Convention for the Safety of Life at Sea.

40. Secondly, it is contrary to the Government's stated aim of its "long, proud tradition of providing a home for people fleeing persecution and oppression".[14] Indeed it is clear from previous statements to the House that the Government's proposal in the Bill is intended to deliberately criminalise asylum seekers in a way that was not criminal before.

41. In April 2002, during the passage of the Nationality, Immigration and Asylum Bill, the Government spokesperson in the Lords at Committee Stage made clear that it was not a criminal offence to arrive in the UK to claim asylum:

    *"a person who has arrived in this country, wants to claim asylum and, at the point where he meets with the immigration officer, claims asylum is not at that point in breach of immigration laws*."[15]

42. The Government's proposed clause seeks to deliberately reverse this position to make it a breach of immigration law and a criminal offence for someone to arrive in the UK to claim asylum.

43. Thirdly, the proposal is inhumane. There is a lack of *lawful routes to claim asylum* in the UK. Resettlement programmes are not a solution for those claiming asylum; they cover those already recognised as having a protection need. Those in need of international protection who reach UK shores should not be criminalised.

*How to fix the problem*

44. Clause 37 amending the law on illegal entry and adding the criminal offence of illegally arriving should be removed from the Bill.

45. Clause 38 amending the law on assisting unlawful immigration (so that it criminalises those who assist persons *not for gain*) should be removed from the Bill.

**Modern Slavery: Part 4**

*What the Bill seeks to achieve*

46. By way of background, the decision-making process for victims of trafficking is a 2-stage one: first there is a *reasonable grounds decision* and if positive victims are given a recovery and reflection

[14] Speech of the Secretary of State for the Home Department, Priti Patel, setting out the New Plan for Immigration, delivered 24 May 2021 https://www.gov.uk/government/speeches/home-secretary-priti-patel-speech-on-immigration.
[15] HL Deb 23 July 2002, vol 638, col 267.

period where they can access support and assistance. Then there is a (final) *conclusive grounds decision.*

47. In relation to trafficking/modern slavery, most notably, the Bill:

i. Provides for damage to a person's credibility where there is late compliance with a slavery or trafficking information notice. The latter are to be issued to asylum and human rights claimants to require them to provide relevant information relating to being a victim of slavery or human trafficking within a specified period and, if providing information outside of that period, to provide a statement setting out the reasons for doing so (Clauses 47 and 48);

ii. Alters the thresholds applied in determining whether a person should be considered a potential victim of trafficking, so that assistance and support are available to someone when there are reasonable grounds to believe the individual "*is*", rather than "*may be*", a victim of slavery or human trafficking. Provision is also made to specify in legislation the "balance of probabilities" threshold for the conclusive grounds decision (Clause 48);

iii. Reduces the recovery and reflection period available to individuals to 30 days from 45 days (Clause 49);

iv. Provides that individuals who are a threat to public order or have claimed to be a victim of trafficking in bad faith will not be given a conclusive grounds decision and they will be excluded from support and assistance (Clauses 51 and 52); and

v. Sets out when an individual who has received a positive conclusive grounds decision will be eligible for limited leave to remain (Clause 53).

*Problems arising*

48. The Government's protections to victims of trafficking arise out of the Council of Europe Convention Against Trafficking in Human Beings (the Trafficking Convention), with victim identification, support and protection being key underpinning principles.

49. Victims of trafficking and/or modern slavery should not be penalised for late-disclosure of any facts relating to their exploitation. Furthermore, as drafted the Bill unlawfully fetters the discretion of a decision-maker, stipulating that they "must take account, as damaging the person's credibility" any late disclosure and also appears to contradict or nullify the remainder of the clause which stipulates "unless there are good reasons why the information was provided late". This procedure will undermine and inhibit victims from coming forward and seeking protection. Late disclosure is well documented and to be expected.

50. The Government's own "Modern Slavery Guidance"[16] specifically addresses the need not to regard late disclosure as undermining the facts of the claim:

> "Barriers to disclosure
>
> 13.18. Victims' disclosures of historic events are often delayed. This may be due to an unwillingness to self-identify, or due to the impact of trauma, particularly post-traumatic stress disorder. […] A delay in disclosing facts should not be viewed as manipulative or taken to mean these facts are untrue. The late disclosure of these facts may be the result of an effective Recovery Period and the establishment of trust with the person to whom they disclose the information. Disclosures often come slowly and in a piecemeal way, sometimes over years."

51. As regards the tests to be applied, the decision-making process is a 2-stage one with the reasonable grounds decision being an "entry level" or "gateway" decision where the current standard applied by decision-makers is: "I suspect but I cannot prove". This test has been subjected over the years to scrutiny by the higher courts and found to be the correct and appropriate test. Changing the test so that the question is one of whether there are reasonable grounds that a person "is" rather than "may be" a victim raises the bar and thus undermines the initial protection currently provided to suspected victims and will lead to many persons being shut out from the initial recovery and reflection period and from a subsequent conclusive grounds decision and consequential leave to remain. The rationale behind the current two stage process is that frequently suspected victims need access to safe accommodation, legal advice and medical support before they can fully escape from their trafficking situation and begin to disclose the detail of what has happened to them. As the government's own Modern Slavery guidance makes plain – see above – "disclosure of […] facts may be the result of an effective Recovery Period and the establishment of trust with the person to whom they disclose the information."

52. As regards the specification of a balance of probabilities test in respect of a (second stage) conclusive grounds decision, there is no need for such statutory specification as it is well established in policy/guidance, case law and practice.

53. The proposal of a 30-day recovery and reflection period given after a positive reasonable grounds represents a reduction of 1/3rd or 15 days; currently provision is made for 45 days. 30 days is the minimum recovery and reflection period provided for by the Trafficking Convention and it is disappointing to see this reduction to the bare minimum that the Government has to provide so as to comply with its obligations. The government has introduced no data or rationale for stripping potential victims of the well-established period for recovery and it is submitted that in fact, even a 45-day period is insufficient for many victims and should not be further reduced. The reduction in

[16]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/993172/Modern_Slavery_Statutory_Guidance__EW__Non-Statutory_Guidance__SNI__v2.3.pdf

time will mean that fewer victims are recognised at the conclusive grounds stage as they will not have had adequate access to support mechanisms nor sufficient time for disclosure.

54. Individuals who are a threat to public order or have claimed to be a victim of trafficking in bad faith will be excluded from protection – they will not be given a conclusive grounds decision nor will they be able to access support and assistance. The provision is particularly problematic as there is no statutory definition of what constitutes "bad faith" and there is a real danger that anyone who fails in their bid to be recognised as a victim (perhaps due to lack of evidence or late disclosure due to trauma etc) may be deemed as having acted in bad faith.

55. However, and more importantly, the government is well aware that many victims of trafficking have been subject to criminal exploitation, *where they are forced to commit crimes*, and may have been convicted as a result (an example is the exploitation of victims for cannabis farming or even for false documents charges where a victim has been forced by their traffickers to enter the UK on a false passport). The Court of Appeal has recognised on multiple occasions the problem where victims of modern slavery are initially prosecuted for crimes which they are only belatedly recognised as having been forced into committing by their traffickers. The courts have established guidelines for out of time appeals against conviction in such cases and the Criminal Cases Review Commission has pursued many such appeals. Clause 51 includes in the definition of those who are a threat to public order anyone who is defined as a foreign criminal within the meaning given by section 32(1) of the UK Borders Act 2007. This includes any person sentenced to at least 12 months in the UK and to use the above example, would apply to many victims charged with false document offences for entering the UK on false documents forcibly provided by their traffickers. Many of these convictions are overturned only *after* the victims have been through the National Referral Mechanism (NRM) and been recognised conclusively as victims of trafficking. If they are prohibited from going through the NRM and receiving a conclusive grounds decision they are now unlikely to ever be able to vindicate their criminal conviction.

56. The 'National Referral Mechanism Statistics UK, Quarter 1 2020 – January to March second edition' show the following:

    "Overall, potential victims were most commonly referred for criminal or labour exploitation, accounting for 28% (791) and 24% (699) of all referrals respectively. An additional 11% (306) of referrals stated that potential victims had been exploited for both labour and also criminal exploitation."[17]

57. It is wrong to blame or punish victims for the crimes they were forced to commit, yet this proposal would potentially exclude them from the protections that they should be given under the Trafficking Convention.

[17]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/970638/national-referral-mechanism-statistics-uk-quarter-1-2020-january-to-march.pdf page 6 (these dates were used as less likely to have been substantially impacted by the pandemic as the later dates).

58. In addition, the proposal cuts across section 45 of the Modern Slavery Act 2015, which states that a person is not guilty of an offence if they were compelled to do the act, and the compulsion was attributable to slavery or exploitation.

59. The provisions on limited leave to remain, which impose certain criteria for the grant to leave to victims of slavery or human trafficking, are problematic in two regards.

60. Firstly, they do not address the situation of child victims of trafficking where the relevant test is what their best interests require. The standard for children is set out at Article 14 (2) of the Trafficking Convention:

    "the residence permit for child victims, when legally necessary, shall be issued in accordance with the best interests of the child and, where appropriate, renewed under the same conditions."

61. As regards to adult victims, Clause 53 attempts yet again to impermissibly narrow the circumstances in which an adult victim may qualify for leave to remain, rather than allowing for a consideration of the entirety of a victim's personal circumstances, as mandated by Article 14 of the Trafficking Convention which stipulates that leave to remain should be granted where it "is necessary owing to their [the victim's] personal situation." The Explanatory Report to the Convention explains that:

    > "184. The personal situation requirement takes in a range of situations, depending on whether it is the victim's safety, state of health, family situation or some other factor which has to be taken into account."

62. Furthermore, the Government recognises in their own guidance on Discretionary Leave for victims of Modern Slavery that:

    "When deciding whether a grant of leave is necessary under this criterion [i.e. personal circumstances] an individualised human rights and children safeguarding legislation - based approach should be adopted. The aim should be to protect and assist the victim and to safeguard their human rights…"[18]

63. There should be no statutory fettering to the current approach.

*How to fix the problem*

64. Victims of trafficking and/or modern slavery should not be penalised for late-disclosure of being a victim of any of the facts of their exploitation. In addition, specifying a mechanism that *mandates* as damaging to credibility any late-disclosure is unlawful and counter productive to the government's obligations to identify and protect victims of trafficking. It will also discourage victims from coming

[18]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/941844/dl-for-victims-of-modern-slavery-v4.0ext.pdf

forward at a later date and will thus inhibit law enforcement efforts to combat trafficking. The offending clause should be removed from the Bill.

65. As regards the initial "reasonable grounds" decisions, there should be no change to the current test as to whether there are reasonable grounds that a person "may be" a victim (as opposed to the now suggested "is" a victim). The new test would undermine the purpose of the two stage process which in turn weakens the support and protection afforded to potential victims and the possibility that they will then be found conclusively to be victims of modern slavery. Further, as regards the specification of a balance of probabilities test in respect of a (second stage) conclusive grounds decision, there is no need for such statutory specification. The clause should be removed from the Bill.

66. The current 45-day recovery and reflection period given to victims of trafficking after a positive reasonable grounds decision should be maintained. The proposed reduction to 30 days represents a weakening of the support and assistance afforded to victims of modern slavery and trafficking.

67. There is no need for a statutory provision covering individuals who represent a threat to public order or who have made a claim in bad faith. Article 13(3) of the Trafficking Convention already provides: "The Parties are not bound to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly." Furthermore, the Government's current Statutory Guidance sets out in detail at pages 147-8[19] the way in which the Government will implement Article 13(3). The Bill as drafted means that victims who have been forced into criminal exploitation will be excluded from the protection of the Trafficking Convention and of the possibility of overturning their criminal conviction at a later stage.

68. The clause on limited leave to remain needs to include separate provision for limited leave to remain for child victims of trafficking on the basis of a "best interests" assessment and to remove the limiting language which seeks to impermissibly define which personal circumstances will qualify for adult victims. The government must continue to apply the individualised human rights based approach currently contended for in the Guidance.

**Court and Tribunal Procedure: Part 5**

*What the Bill seeks to achieve*

69. The Bill proposes that the Secretary of State may make regulations about:

    (1) the processes for carrying out age assessments (Clause 58); and

    (2) the processing of applications for entry clearance from countries deemed not cooperative as regards removal of their nationals from the UK (Clause 59).

[19]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/993172/Modern_Slavery_Statutory_Guidance__EW__Non-Statutory_Guidance__SNI__v2.3.pdf

70. The regulations are to be passed by the affirmative resolution procedure. Drafts of the regulations have not yet been published, nor will they be, if—as the Explanatory Notes to the Bill make clear[20]—these clauses are 'placeholder' provisions for substantive clauses to be introduced later in the legislative process.

71. Further, the Bill also proposes a power for the First-Tier Tribunal and Upper Tribunal to be able to charge for the Tribunal's "wasted resources" caused by a "relevant participant" acting "improperly, unreasonably or negligently" (Clause 62). A relevant participant includes the Secretary of State or someone conducting proceedings on a party's behalf.

72. The Bill also proposes that the Secretary of State must "take into account" whether a person whose immigration status is at issue "has acted in good faith" (Clause 64). Acting in good faith is not defined. The Secretary of State can decide whether an applicant has acted in good faith:

    (1) in connection with the matter that is being decided;

    (2) in their dealings at any time with someone exercising immigration and nationality functions; and

    (3) in connection with any immigration litigation.

73. The impact and effect of how the Secretary of State should take into account where someone has not acted in good faith is not defined.

*Problems arising*

74. The amendments to the age assessment processes cannot be assessed as they are not currently published. It is bad practice for the Government not to publish the substantive clause: vital stages of Parliamentary scrutiny are lost when substantive changes are introduced at a late stage. If the Bill is not ready, it should not be presented to Parliament until it is ready. The rush to introduce the Bill before the Summer recess has led to the House of Commons being deprived of part of its role to scrutinise and debate these parts of the Bill at 2nd Reading.

75. The proposal to introduce a "wasted resources" regime comes on top of a regime for "wasted costs". There is no need for it. Across all areas of law, the courts and tribunals have sufficient tools through "wasted costs" provisions.

76. The proposal for a "good faith requirement" on applicants which can be "taken into account" in unspecified ways by the Secretary of State is deeply concerning. It raises the prospect of the Secretary of State effectively punishing an applicant for conduct it does not approve of. "Taking into account" could mean that the Secretary of State will withhold leave, grant a lesser form of leave, or even just disbelieve the applicant, on the basis of conduct which may on one analysis be entirely

[20] Explanatory Notes to Nationality and Borders Bill, para 596, para 621.

reasonable. An asylum seeker who is involved in protests against a particular regime whilst in the UK can have a well-founded fear of persecution regardless of what view the Secretary of State takes of the involvement in the protests.

*How to fix the problems*

77. Substantive clauses in respect of age assessments and of visa restrictions should be brought forward immediately. Only then can they be scrutinised.

78. Any evidence justifying the introduction of a wasted resources regime in immigration proceedings should be published. If not adequate, the provision should be removed from the Bill.

79. Clause 64 introducing the proposed good faith requirement should be removed.