

## **DRAFT MODERN SLAVERY BILL**

### **EUROPEAN CONVENTION ON HUMAN RIGHTS**

#### **MEMORANDUM BY THE HOME OFFICE**

#### **INTRODUCTION**

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the draft Modern Slavery Bill. The memorandum has been prepared by the Home Office. It is considered the Bill is compatible with the Convention rights, subject to resolution of the issues described in paragraph 9 below.

#### **Summary**

2. The Bill is in 4 parts:
  - Part 1 makes provision for offences on slavery and human trafficking;
  - Part 2 makes provision for slavery and trafficking prevention orders;
  - Part 3 makes provision for an Anti-slavery Commissioner;
  - Part 4 makes provision for a duty to notify and miscellaneous matters.
3. The draft Bill extends to England and Wales only pending further discussion with the devolved administrations. The Department considers that clauses of and schedules to this Bill which are not mentioned in this memorandum do not engage rights protected under the European Convention on Human Rights (“ECHR”).
4. The Department considers that in affording enhanced protection for the victims, and potential victims, of slavery and human trafficking and therefore of their rights under Article 4, this draft Bill is an ECHR-enhancing measure.

## **Part 1: Offences**

5. Part 1 of the Bill provides for three offences in respect of slavery and trafficking. Clause 1 contains an offence of slavery, servitude and forced or compulsory labour. This offence is the same as the offence in section 71 of the Coroners and Justice Act 2009 save for an increase in the maximum penalty to life imprisonment. It is being re-enacted to be placed in the same piece of legislation as the trafficking offence in clause 2.
6. The offence in section 71 was enacted to address the criticisms of the United Kingdom in the European Court of Human Rights decision in *CN v UK* 13 November 2012, 4239/08<sup>1</sup>. The Court in this case emphasised that domestic servitude is distinct from trafficking and exploitation and involves a complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance. A thorough investigation into complaints of such conduct therefore requires an understanding of the many subtle ways an individual can fall under the control of another. The Court considered that due to the absence of a specific offence of domestic servitude, the domestic authorities were unable to give due weight to these factors. Keeping the offence separate in the Bill is the easiest way to achieve the specificity required by case law and therefore to meet the requirements of Article 4.
7. Clause 2 of the Bill contains a new trafficking offence covering both sexual and non sexual exploitation. It combines the offences currently found in sections 59A of the Sexual Offences Act 2003 and the offence in section 4 of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004, without making any substantive changes save for an increase in the maximum penalty to life imprisonment. The combined offence contains in particular detailed provisions on what form of physical movement of the victim is required and the meaning of exploitation. It is therefore suggested that the offence is sufficiently certain for the purposes of Article 7 ECHR. No other particular ECHR issues arise.

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<sup>1</sup> See also *Asuquo v UK* which was settled and *Kawago v UK* which was struck out on the basis of our unilateral declaration.

8. The third offence is found in clause 4. This is an offence of committing another offence with the intention of committing the trafficking offence or with the intention of committing an inchoate offence concerning the trafficking offence. This is modelled on the existing offence in section 62 of the Sexual Offences Act 2003. The clause 3 offence does not criminalise any new conduct being contingent on the commission of an existing offence. What it does is permit the imposition of a higher sentence if the necessary intention is made out and any sentencing court will itself be bound by the ECHR. Accordingly, no ECHR issues arise.
  
9. Clause 5 covers the penalties for the offences in clauses 1 and 2 giving each a potential life sentence, as well as the offence in clause 4. Clause 6 covers two sentencing provisions relating to the offences in clauses 1 and 2. The offences are included in Schedule 15 to the Criminal Justice Act 2003 which means offenders will qualify for the 'dangerousness' sentence provisions in that Act, including a life sentence under s.225(2). In addition the offences are included in Schedule 15B to the 2003 Act, which means offenders will qualify for the '2-strikes' automatic life sentence provided for in s.224A of that Act. As a consequence of these clauses those found guilty of the clause 1 and 2 offences might potentially receive a life sentence with a "whole life order". The Department is aware of the ECtHR Grand Chamber judgement in *Vinter and others v United Kingdom* (66069/05) that concerns the Article 3 compatibility of whole life orders under the 2003 Act in the absence of a mechanism for review. The Government is currently considering how to respond to that judgement
  
10. Clauses 7 to 8 concern the forfeiture and detention of vehicles, ships and aircraft. These provisions are based on section 60A and 60B of the Sexual Offences Act 2003 extended to the new combined trafficking offence in clause 2. The Sexual Offences Act provisions were themselves based on provisions in sections 25C and 25D of the Immigration Act 1971 and all provide for more bespoke provision for forfeiture in trafficking than that in section 143 of the Powers of the Criminal Courts (Sentencing) Act 2000. Clause 7 gives a discretionary power to the Court on conviction of the trafficking offence to order the forfeiture of vehicles, ships and aircraft used in conjunction with the offence. The clause determines from whom the forfeiture occurs and in clause 7(8) provides for an opportunity to make representations. Clause 8 allows the detention pre trial of vehicles, ships and aircraft that might be forfeited on

conviction. Again in clause 8(3) there is a mechanism through which release of the vehicle, ship or aircraft may be sought. These provisions may engage both the ECHR rights in Article 1 of Protocol 1 (“A1P1”) and Article 6. So far as A1P1 is concerned the Department considers that any interference is justifiable in the public interest in preserving evidence, preventing the commission of further crimes and in the case of forfeiture, punishment. So far as Article 6 is concerned the Bill provides for a process by which the owner may make representations before the Court and leaves the ultimate decision on forfeiture or detention to the Court. This provides an ECHR compliant mechanism for determining these matters.

## **Part 2: Slavery and Trafficking Prevention Orders**

11. Part 2 of the Bill makes provision for the slavery and trafficking prevention order (clauses 11 to 21) and slavery and trafficking risk order (clauses 22 to 28).

### *Slavery and trafficking prevention order (“STPO”)*

12. An STPO can be made in relation to a person who has been convicted of a slavery or human trafficking offence<sup>2</sup> if the prohibitions in it are considered to be necessary to protect a person or persons in the United Kingdom from harm caused by that person committing an offence in Part 1 of this Bill. An STPO may be made by the court following a person’s conviction<sup>3</sup>, or at a later time on the application of the police or National Crime Agency (“NCA”) as a freestanding matter<sup>4</sup>. An STPO prohibits the person from doing anything described in it and may have effect for a fixed period of least 5 years; it may include prohibitions in relation to foreign travel<sup>5</sup>.

### *Slavery and trafficking risk order (“STRO”)*

13. An STRO can be made by the court on the application of the police or NCA in relation to a person who it considers has acted in a way which makes it necessary to protect or person or persons from harm caused by the person concerned committing an offence in Part 1 of this Bill<sup>6</sup>.

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<sup>2</sup> This is defined in the Schedule.

<sup>3</sup> See clause 11.

<sup>4</sup> See clauses 12 and 13.

<sup>5</sup> See clauses 14 and 15.

<sup>6</sup> See clause 21.

Unlike an STPO, a conviction is not a condition for obtaining this order. An STRO prohibits the person from doing anything described in it and may have effect for a fixed period of least 2 years; it may include prohibitions in relation to foreign travel<sup>7</sup>.

14. In relation to both orders:

- the court may make an interim order<sup>8</sup>;
- the person concerned (and others) may apply to vary, renew or discharge an order if circumstances change<sup>9</sup>;
- the person concerned may appeal the making, variation or extension of an order<sup>10</sup>; and
- breach of an order is an offence<sup>11</sup>.

15. Although the proceedings by which these orders are obtained are civil proceedings, the Department accepts that the burden of proof will be akin to the criminal standard<sup>12</sup>.

16. These provisions clearly engage Article 8(1). The effect of a person being made the subject of one of the proposed orders will constitute an interference with that person's Article 8(1) rights, and the issue by virtue of Article 8(2) therefore is whether such an interference is in accordance with the law, and is necessary in a democratic society in the interests of public safety, the prevention of crime, the protection of health or for the protection of the rights and freedoms of others<sup>13</sup>.

17. In assessing whether a particular interference with Article 8(1) rights is proportionate, the Department has taken into account the jurisprudence of the European Court of Human Rights on the duties of states in other, similar contexts. In relation to the prevention of sexual offending, the court in *Stubbings –v- United Kingdom*<sup>14</sup> noted that Article 8 may impose positive duties on states to protect children and others from sexual offending. The Department considers that there are similar, parallel duties in respect of

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<sup>7</sup> See clause 22 and 23.

<sup>8</sup> See clauses 17 and 25.

<sup>9</sup> See clauses 16 and 24.

<sup>10</sup> See clauses 18 and 26.

<sup>11</sup> See clauses 19 and 27.

<sup>12</sup> See *R –v- Crown Court at Manchester ex parte McCann & Others* [2002] UKHL 39 and *Commissioner of the Police of the Metropolis –v- Ebanks* [2012] EWHC 2368).

<sup>13</sup> These include, for example, observing the rights of potential victims under Articles 4 and 8 of the Convention.

<sup>14</sup> (1996) 23 EHRR 213.

the protections which should be afforded to persons who may be victims of slavery or trafficking.

18. The provisions also confer on the police and NCA the power to apply for an order and confer on the courts the power to make an order. As a public authority, each will have a duty under section 6 of the Human Rights Act 1998 to ensure that their own actions are compatible with the Convention.
19. The requirement that the court must be satisfied that the order is necessary to protect a person from harm caused by the person in respect of whom the order is sought, in tandem with the participation of the person concerned in the court process (including a prescribed right of appeal and power to subsequently apply to the court to vary or discharge the order), ensures that that person's Convention rights are safeguarded.
20. In relation to each order, the interference with Article 8(1) which may be justified under Article 8(2) is the imposition of prohibitions by virtue of the order. The interference will be in accordance with the law; there is clear provision in primary legislation governing the basis on which the court may make an order. The independent oversight by the court and the fact that statutory language means that the court may only make an order where it is satisfied that this is necessary to (amongst other things) prevent the commission of a criminal offence ensures that the requirements in Article 8(2) are met.
21. The Department considers, therefore, that the provisions in Part 2 are compatible with the Convention.

### **Part 3: Anti-slavery Commissioner**

22. Part 3 of the Bill (clauses 30 to 34) creates a new Anti-slavery Commissioner. ECHR issues only potentially arise in clause 33 in respect of the duty to cooperate with the Commissioner in that it might include disclosure of personal information that engages Article 8. However, the Department considers that any such disclosure should be justified in that the role of the Commissioner is to improve the investigation and prosecution of trafficking offences, Further, the Bill provides that public authorities need not disclose information that breaches the Data Protection Act. Further, each

public authority is itself bound by the Human Rights Act such disclosures should in any event only be made if compatible with Convention Rights.

#### **Part 4: Duty to notify**

23. Clause 35 provides that public authorities specified by the Secretary of State are required to make certain disclosures to the NCA in respect of persons they suspect of being victims of trafficking. What information must be disclosed will be specified by the Secretary of State by Order and will allow names and addresses and other identifying information to be withheld if the victim does not consent. To the extent that specified bodies are required to disclose personal information then Article 8 may be engaged. The purpose of the disclosure is to assist the NCA in its work in preventing trafficking; a legitimate purpose for the prevention and detection of crime in ECHR terms. The intention is that identifying information about the person trafficked will not be required to be disclosed without consent and in any event the NCA will itself hold and use such information in accordance with the ECHR and the Data Protection Act 1998. There is also a safeguard in subsection (3) of the clause which sets out that Provision information should not be reported which contravenes the Data Protection Act 1998. Accordingly, the Department is satisfied that these provisions are compatible with the ECHR.

**Home Office**

**December 2013**