

NATIONALITY AND BORDERS BILL – BRIEFING AND AMENDMENT FOR CLAUSE 67 DISAPPLICATION OF RETAINED EU LAW DERIVING FROM TRAFFICKING DIRECTIVE

Overview

There are significant concerns as to the potential impact of disapplication of EU law derived from the Trafficking Directive on the Modern Slavery Strategy and obligations towards victims including the identification, protection and support of victims including their ability to access wider remedies including access to, and protection within criminal justice processes.

The Trafficking Directive has been previously recognised in UK courts and tribunals prior to EU exit and therefore should continue to apply in a UK context. It is unclear why Government have included Clause 67 in the Bill and why they consider the Directive to have already been disapplied. It is not clear if the assumption of disapplication of the Directive, post January 1st, 2020, is legally correct.

To note:

- Government has not specified which sections of the Trafficking Directive it considers incompatible with the Bill.
- Government have not offered clarity as to which sections of the Trafficking Directive would cease to apply under Clause 67.

'[The EU Directive] ...It aims to get common standards as a measure of human rights protection, in order to establish robust provisions to prevent and prosecute the crime of trafficking and to protect, assist and support its victims.'

Baroness Ludford (Liberal Democrat Peer)

Introduction

The Government actively chose to opt into the Trafficking Directive in 2011, stating clearly that it wanted to remain a world leader in combating slavery and that the Directive would act as a powerful message to traffickers.

*'The UK already carries out most measures required by the directive. But opting in will ensure Britain remains a world leader in this area and enshrine in law action that happens routinely.'*¹

*'Applying to opt in to the directive would continue to send a powerful message to traffickers that the UK is not a soft touch, and that we are supportive of international efforts to tackle this crime.'*²

*'By opting into the EU Directive on human trafficking this Government has already taken steps to strengthen our response.'*³

It would be a mistake to reverse this important decision. According to the Modern Slavery Strategy (2014) opting in demonstrated:

*'our commitment to working with other countries in Europe to drive up standards across the continent in tackling trafficking.'*⁴

Notably this included demonstrating the UK's commitment to:

*'tackling human trafficking and providing support to victims.'*⁵

In addition, the Government advised:

*'The recent EU Directive on human trafficking paves the way for further engagement with EU-wide organisations and Governments to share our prosecution and investigation expertise.'*⁶

This briefing sets out concerns with Clause 67 of the Bill. Clause 67 of the Nationality and Borders Bill enables the Government to disapply retained EU law derived from the Trafficking Directive (Directive 2011/36/EU) ("Trafficking Directive") in so far as its continued existence would be incompatible with the provision made by or under the Nationality and Borders Bill.

Overarching concerns with Clause 67:

- Disapplying the Directive creates legal uncertainty especially for victims. Through Clause 67 the Government is giving itself a wide power to limit rights and remedies available to victims that are currently derived from the Trafficking Directive. Victims need to have a clear understanding of their rights to encourage them to come forward; when identified to enable engagement with authorities and other organisations involved in their cases, including in relation to the investigation and prosecution of traffickers.
- One of the overarching purposes of the Directive is to ensure the success of investigations and prosecutions of human trafficking offences. The Government states that increasing prosecutions is one of the aims of Part 5 of the Nationality and Borders Bill and disapplication of the Directive threatens their ability to do this.
- The Government has not expressly stated on the face of the Bill which specific provisions of the Directive it considers "incompatible" with the Bill and would cease to apply. However, on the face of the Bill, the incompatibilities appear to be multiple, including on fundamental issues such as the trafficking definition itself (which includes forced criminality), identification and investigation and support duties, non-punishment, and children. The Bill is directly contrary to the human rights-based and child rights approach in the Directive and the duty to implement it in accordance with fundamental rights.
- The impact of disapplication of any aspects of the Directive have not been addressed in any of the impact assessments for the Nationality and Borders Bill.
- Removal of the Directive impacts the UK's ability to retain its position and commitment to drive up standards internationally. Cross-border cooperation, especially in relation to criminal prosecutions, may be impacted.

Background information, evidence and overview of the potential impact of Clause 67:

*(Summarised content from The Rights Lab Nationality and Borders Bill Consideration Paper)*⁷

The Trafficking Directive is part of a suite of measures designed to combat the crime of trafficking. The EU has introduced several legislative measures to strengthen the protection of victims of human trafficking including EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combatting trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA (Trafficking Directive).⁸ As the Trafficking Directive states:

'Trafficking in human beings is a serious crime, often committed within the framework of organised crime, a gross violation of fundamental rights and explicitly prohibited by the Charter of Fundamental Rights of the European Union. Preventing and combating trafficking in human beings is a priority for the Union and the Member States'.⁹

The UK may no longer be a Member State of the EU, but the Government publicly remains committed to combatting trafficking, as stated in the New Immigration Plan Policy Statement.¹⁰ Thus, the express power to cease the application of rights in the Trafficking Directive if incompatible with the Bill runs counter to the Government's stated commitments.

The disapplication of any aspect of the Trafficking Directive will affect rights, entitlements, and remedies available to victims in domestic law as well as damage efforts to investigate and prosecute cases.

The EU adopted the Trafficking Directive on 5 April 2011. As noted in a report by the Anti-Trafficking Monitoring Group (ATMG), the UK's decision to opt-in to the Trafficking Directive was unanimously welcomed across the anti-trafficking sector.¹¹ On 22 March 2011, a Home Office Ministerial Statement announced that the UK would opt-in to the Directive, calling the UK a *'world leader in fighting trafficking'*. An annexe to this letter is recorded in the European Scrutiny Committee, stating:

'The Minister considers that the Directive would not add new requirements to support victims beyond those which the UK already provides, in compliance with the 2005 Council of Europe Convention, but says that the UK may have to provide the support for a longer period of time. He adds, "The Government's new prime contracting funding model for support for victims of trafficking will enable the prime contractor to assess support needs on a case-by-case basis"'.¹²

By opting into the Trafficking Directive, the UK was obliged to ensure that it was transposed in domestic law by the deadline of 6 April 2013. Since 6 April 2013 the Trafficking Directive has had 'direct effect', this means that providing the provision is clear, precise and unconditional and the deadline for implementation has passed, victims can directly enforce their rights in UK courts and has been referred to in several cases (for example: *Galdikas & Ors, R and Hounga v. Allen*).¹³ Prior to the deadline for transposition, the Government broadly took the view that existing provisions of domestic law already complied with the Directive. In 2012 the Home Office told the House of Lords that they *'complied in practice'* with Article 11 of the Trafficking Directive through the National Referral Mechanism (NRM) and victim care model.¹⁴ Therefore the Government did not at that stage deem it necessary to legislate on the NRM or victim identification or support to ensure that the Trafficking Directive was compliant with UK law.

In March 2020, Lord McColl of Dulwich (Conservative) asked Her Majesty's Government *'what plans they have to incorporate EU Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims into UK law'*. Baroness Williams of Trafford (Conservative) stated:

'The Government is committed to eradicating human trafficking and the scourge of modern slavery.

The UK currently gives effect to obligations on modern slavery under The Council of Europe Convention on Action against Trafficking in Human Beings (ECAT), Article 4 of the European Convention on Human Rights (ECHR) and the EU Anti-Trafficking Directive (2011/36), through the Modern Slavery Act 2015 and policy guidance.

At the end of the EU Exit transition period in December 2020, the UK will no longer be bound by EU law. The Modern Slavery Act 2015 and relevant policy guidance will be unaffected. The UK will remain bound by international obligations in relation to preventing and combatting human trafficking and modern slavery'.¹⁵

After eight years of the Government's general position being that the rights under the Trafficking Directive were already in domestic law, the choice to legislate now in the Nationality and Borders Bill—to reduce and restrict rights and entitlements through Part 5 of the Bill—and the presence of the express power to disapply them in the event of an incompatibility with the Bill in Clause 67 is concerning. The Government should instead ensure that rights under the Trafficking Directive continue to apply in UK law by incorporating it fully, for both the benefit of victims and prosecutions.

The Modern Slavery Act (2015) does not explicitly place a duty on the State to provide support and assistance to victims, nor set out victims' support entitlements. This means that victims are still reliant on Statutory Guidance (In England and Wales)* in relation to support entitlements and are not legally entitled to support within the UK. The Nationality and Borders Bill states identified victims are eligible for support, but not what this support is.

This is striking, because unlike asylum support that has a primary statutory base (Sections 4 and 95 support under the Immigration and Asylum Act), the support for victims is not as strongly defined or embedded in primary legislation.¹⁶

This leaves no clear legislative basis in primary legislation for the assistance and support measures that should be adopted to assist victims and required by international law. Section 49 of the Modern Slavery Act (2015) stipulates that:

'The Secretary of State must issue guidance to such public authorities and other persons as the Secretary of State considers appropriate about...arrangements for providing assistance and support to persons who there are reasonable grounds to believe may be victims of slavery or human trafficking'.¹⁷

Without a clear statutory basis for minimum standards of support, it is possible for the UK to downgrade support and assistance with administrative ease through guidance. This has been seen in practice with the removal of subsistence payments to victims (i.e. cut to the rates of financial support) during 2020, followed by their reinstatement once legal challenges were brought. It also perpetuates the piecemeal approach to victim protection which the Government said it was committed to combating in the Modern Slavery Act (2015).

The impact of Clause 67 Trafficking Directive has not been addressed in the Nationality and Borders Bill Equality Impact Assessment or the Human Rights Memorandum. The loss of any part of the Trafficking Directive could impact on prevention of slavery and exploitation, the identification of victims and protection. This in turn will impact on the ability of victims to engage with criminal prosecution as well as directly enforce their rights under the Trafficking Directive.

The Trafficking Directive also strengthens provisions including in respect of the definition of human trafficking; protection and support of victims (regardless of cooperation with the police) as well as strengthening protection and support for those who do wish to engage with criminal justice processes.¹⁸

Parliamentary Process

In the House of Commons Stuart C. McDonald (Cumbernauld, Kilsyth and Kirkintilloch East) (SNP) tabled an amendment to remove Clause 67 (Clause 56 as was) from the Nationality and Borders Bill.¹⁹

¹⁶ Scotland and Northern Ireland have set out minimum standards within their Modern Slavery and trafficking legislation.

Government's response indicated that post the transition periods (01.01.21) the UK is no longer bound by EU law and therefore the EU Directive has in effect already been disapplied. They confirmed ECAT will remain unaffected but by disapplying the Trafficking Directive (where it is deemed incompatible with provisions in the Bill) will work to bring clarity to victims about their rights and entitlements.²⁰

In the House of Lords Lord Coaker tabled a probing amendment on Clause 67 requiring the Secretary of State to review the impact of disapplying the EU Trafficking Directive before this section can come into force.²¹

Government's response stated that they do not believe any provisions in the Directive continue to have effect adding that remaining provisions compatible with the Bill would be unaffected by the Clause. No further information on the UK's legal position in relation to the Directive was offered.

Government did confirm that they are not removing any entitlements from victims nor would the implementation of Clause 67 have an impact on victim identification, protection or support.²²

Proposed amendments to Clause 67:

Suggested amendment 1

Removal of Clause 67– Disapplication of EU law deriving from the Trafficking Directive

Explanation

The Secretary of State has not expressly specified on the face of the Bill which sections of the EU Directive it considers are incompatible with the Bill nor specified the sections of the EU Directive which would cease to apply. This creates legal uncertainty. There has been no specific impact assessment and neither the Human Rights Memorandum nor the Equality Impact Assessment specifically address the impact of disapplication of EU law deriving from the Trafficking Directive. There are significant concerns as to the potential impact of disapplication of EU law derived from the Trafficking Directive on the Modern Slavery Strategy and obligations towards victims including (but not limited to) the identification, protection and support of victims including their ability to access wider remedies including access to, and protection within criminal justice processes.

Suggested amendment 2 (more probing amendment)

Clause 67 after section (2) line 16 insert new clauses:

67 (3) (a) The Secretary of State shall conduct a full review and impact assessment of section 67 (1). This shall include, but not be limited to, specifying which parts of the Trafficking Directive it considers would be incompatible with this Bill, a cost benefit analysis, the impact on the identification, protection, support and access to wider remedies of victims of all forms of slavery.

(b) The Secretary of State shall lay a report before Parliament setting out its review and impact assessment of Section 67 (1).

(c) Section 67 (1) shall not come into force until the report specified in section 67 (3) (b) has been laid before Parliament.

67 (4) (a) The Secretary of State shall, within 12 months of this Act receiving Royal Assent or the commencement of this section, whichever is sooner, conduct a review and assessment of the impact

of the application of section 67 (1). This shall include, but not be limited to, specification of which parts of the Trafficking Directive it considers would be incompatible with this Bill, a cost benefit analysis, the impact on the identification, protection, support and access to wider remedies of victims of all forms of slavery.

¹ <https://www.gov.uk/government/news/government-looks-to-join-europe-wide-action-on-trafficking>

² <https://www.gov.uk/government/speeches/eu-directive-on-human-trafficking>

³ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/97846/human-trafficking-legislation.pdf, p.3

⁴ Page 3 of the Human Trafficking Strategy 2013 sourced at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/97845/human-trafficking-strategy.pdf

⁵ Ibid paragraph 26 page 10.

⁶ Ibid paragraph 59 page 16

⁷ This section references information provided by the Rights Lab in the consideration paper on the Nationality and Borders Bill Clause 67 <https://www.nottingham.ac.uk/research/beacons-of-excellence/rights-lab/resources/reports-and-briefings/2021/october/consideration-paper-nationality-and-borders-bill.pdf>

⁸ Official Journal of the European Union (2011). Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011L0036> & https://ec.europa.eu/anti-trafficking/node/1_en.

⁹ Ibid.

¹⁰ HM Government. (2021). New Plan for Immigration – Policy Statement. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972517/CCS207_CCS0820091708-001_Sovereign_Borders_Web_Accessible.pdf, p. 31.

¹¹ ATMG. (2017). Brexit & the UK's fight against modern slavery. Available at: <https://www.antislavery.org/wp-content/uploads/2017/07/ATMG-Brexit-paper.pdf>.

¹² House of Commons. (2011). European Scrutiny Committee 24th Report, Session 2010–11 HC 428-xxii. Available at: <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/428-xxii/428xxii.pdf>, p.17.

¹³ Galdikas & Ors, R (on the application of) v Secretary of State for the Home Department & Ors (Rev 1) [2016] EWHC 942 (Admin). Available at: <https://www.bailii.org/ew/cases/EWHC/Admin/2016/942.html> & Supreme Court. (2014). Houna v. Allen. (UKSC47) Available at: <https://www.supremecourt.uk/cases/uksc-2012-0188.html>

¹⁴ Home Office. (2012). Letter from Lord Henly to Lord McColl. Available at: <http://data.parliament.uk/DepositedPapers/Files/DEP2012-0194/DEP2012-0194.pdf>

¹⁵ UK Parliament. (2020). Human Trafficking: Questions for the Home Office. Available at: <https://questions-statements.parliament.uk/written-questions/detail/2020-02-26/HL1945/>

¹⁶ NRPF. (nd). Home Office Support. Available at: <https://www.nrpfnetwork.org.uk/information-and-resources/rights-and-entitlements/support-options-for-people-with-nrpf/home-office-support/section-95-asylum-support#guide-sections> & HM Government. (1999). Immigration and Asylum Act. Available at: <https://www.legislation.gov.uk/ukpga/1999/33/section/95>

¹⁷ HM Government. (2015). Modern Slavery Act. Schedule 4 Offences to which the defence in section 45 does not apply. Available at: <https://www.legislation.gov.uk/ukpga/2015/30/section/49>

¹⁸ See in particular Articles 11-17 sourced at <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32011L0036>

¹⁹ https://publications.parliament.uk/pa/bills/cbill/58-02/0187/amend/natbord_day_rep_1207.pdf Amendment 148

²⁰ https://www.theyworkforyou.com/psc/2021-22/Nationality_and_Borders_Bill/14-0_2021-11-02b.545.3

²¹ <https://hansard.parliament.uk/Lords/2022-02-10/debates/F81A145A-6B3B-4824-894E-B0676740954E/NationalityAndBordersBill>

²² Ibid.