



# Every Child Protected Against Trafficking

## About ECPAT UK

*ECPAT UK is a leading UK-based children's rights organisation campaigning and advocating for the rights of children to be protected from threats of trafficking, exploitation and transnational child sexual abuse. We have a long history of campaigning against child trafficking and exploitation in the UK, having produced the first research into trafficking of children in the UK in 2001.*

*An integrated programme of practice, research, training, youth participation and advocacy informs our campaigning efforts. ECPAT UK has been instrumental in raising awareness of the plight of children trafficked into and within the UK for all forms of exploitation and advocating for changes in policy and legislation to improve the UK's response to this abuse. Our direct work with young victims of trafficking, provides insight into their experiences and the processes and systems that they encounter. ECPAT UK is part of the ECPAT International network of 118 organisations across 102 countries working to end child exploitation.*

**For further details, contact Laura Durán Senior Policy Officer at [l.duran@ecpat.org.uk](mailto:l.duran@ecpat.org.uk)**

Trafficked children are often treated as offenders rather than victims in the UK justice system, resulting in their victimisation by the State as well as by their traffickers. The process leading to prosecution can be a deeply traumatising experience for trafficked children with significant long-term impacts, punishing them for being victims of abuse. Children who are treated as suspects are incredibly difficult to then engage as witnesses due to the inevitable erosion of trust, thereby reducing the potential impact of the Modern Slavery Act to secure prosecutions<sup>1</sup>. Our understanding of the impact of this in practice is challenging due to the lack of publicly available data on non-punishment and the use of the statutory defenses which are not collected by neither the Ministry of Justice ('MoJ') nor the Crown Prosecution Service<sup>2</sup>.

## Specific information on models of implementation

In the United Kingdom, all devolved administrations have set out the implementation of the non-punishment principle. In England and Wales, the Crown Prosecution Service sets out in guidance the approach of the crown towards 'suspects in criminal cases who might be victims of modern slavery and trafficking'<sup>3</sup> which includes the additional requirements for suspects who may be children. The legal framework underpinning prosecutor's guidance is set out in Section 45 of the Modern Slavery Act 2015 which introduces a defense for victims, including children, who commit criminal offences. The statutory defense only provides a defense after prosecution - it does not protect victims from being prosecuted in the first instance and is thus not compliant with the international definition of non-prosecution that states victims of trafficking should not be prosecuted or punished for criminal activities they have been compelled to commit as a direct consequence of being trafficked<sup>4</sup>. The

---

<sup>1</sup> UNICEF UK. (2017). *Victim not criminal: trafficked children and the non-punishment principle in the UK*. Available at: [https://downloads.unicef.org.uk/wp-content/uploads/2017/05/Unicef-UK-Briefing\\_Victim-Not-Criminal\\_2017.pdf](https://downloads.unicef.org.uk/wp-content/uploads/2017/05/Unicef-UK-Briefing_Victim-Not-Criminal_2017.pdf)

<sup>2</sup> Home Office. (2019). *Independent Review of the Modern Slavery Act 2015: Final report*. Available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/803406/Independent\\_review\\_of\\_the\\_Modern\\_Slavery\\_Act\\_-\\_final\\_report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803406/Independent_review_of_the_Modern_Slavery_Act_-_final_report.pdf)

Anti-Trafficking Monitoring Group (ATMG). (2018). *Before Harm is Done: Examining the UK's response to the prevention of trafficking*. Available at: <http://www.antislavery.org/wp-content/uploads/2018/09/Before-the-Harm-is-Done-report.pdf>

<sup>3</sup> Crown Prosecution Service. (2020). *Human Trafficking, Smuggling and Slavery CPS Guidance*. Available at: <https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery>

<sup>4</sup> Directive 2011/36/EU on combating and preventing trafficking in human beings and protecting its victims.



## Every Child Protected Against Trafficking

statutory defense can therefore only act as a very limited safety net, rather than preventing criminalisation from occurring in the first place.

In addition, the statutory defense is not appropriate for children and not compliant with international legislation on child trafficking. The defense is based on the notion that a person is 'compelled' to commit the act and a 'reasonable person' would have no realistic alternative in the situation. A child who has been trafficked and enslaved would never 'reasonably' be able to consent to commit a crime and therefore cannot consent to be exploited, as explained in international law. The 2015 independent review of the Modern Slavery Act raised concerns about the statutory defense's inconsistency with Article 8 of the EU Trafficking Directive<sup>5</sup>. The logic as set out by the court on the reasonable persons test is to safeguard against "unscrupulous" use of the defense which lies within the application of the objective tests set out in Section 45(1)(d) (for persons over 18) and Section 45(4)(c) (for persons under 18)<sup>6</sup>. A UNICEF report found that there are "serious shortcomings in the implementation of the non-punishment principle in the UK."<sup>7</sup>

Section 45 also excluded offences by which a victim of trafficking may avail themselves of the defense. These are listed under Schedule 4<sup>8</sup> and include a large range of offences. Where an offence is not covered by the defense, the CPS should still consider whether it is in the public interest to prosecute or not, considering the Director of Public Prosecutions guidance on modern slavery cases. In serious cases (such as rape or where someone had been killed), it is essential that prosecutors can look at all the circumstances of the case and consider both the victim of the offence and position of the modern slavery victim when determining whether it is in the interests of justice, that a prosecution should proceed."<sup>9</sup>

The inspection of policing responses to modern slavery and human trafficking also highlighted that inconsistent and ineffective identification of victims is failing to prevent the criminalisation of victims of trafficking<sup>10</sup>. It found low awareness of the section 45 defense for victims of modern slavery who commit an offence, limited use of preventative powers and low numbers of notifications to the Home Office about potential victims. There is guidance for crown prosecutors in place to prevent children from reaching the point of criminalisation for crimes committed as a result of their exploitation<sup>11</sup>, but cases of children being convicted continue, showing that the current guidance is not sufficient to ensure that children are protected<sup>12</sup>. The court of appeal has emphasised the duty of both prosecutors and defense lawyers to make proper enquiries in criminal prosecutions involving

---

<sup>5</sup> Haughey, C. (2016). *The Modern Slavery Act Review*. Home Office. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/542047/2016\\_07\\_31\\_Haughey\\_Review\\_of\\_Modern\\_Slavery\\_Act\\_-\\_final\\_1.0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/542047/2016_07_31_Haughey_Review_of_Modern_Slavery_Act_-_final_1.0.pdf)

<sup>6</sup> R v Kreka and R v Gega [2018]

<sup>7</sup> UNICEF UK. (2017). *Victim not criminal: trafficked children and the non-punishment principle in the UK*. Available at: [https://downloads.unicef.org.uk/wp-content/uploads/2017/05/Unicef-UK-Briefing\\_Victim-Not-Criminal\\_2017.pdf](https://downloads.unicef.org.uk/wp-content/uploads/2017/05/Unicef-UK-Briefing_Victim-Not-Criminal_2017.pdf)

<sup>8</sup> *Modern Slavery Act 2015*. Section 45 (Schedule 4).

<sup>9</sup> Modern Slavery Bill, Factsheet: Defence for victims (Clause 45) Home Office, November 2014

<sup>10</sup> Her Majesty's Inspectorate of Constabulary & Fire and Rescue Services. (2017). *Stolen freedom: the policing response to modern slavery and human trafficking*. Available at: <https://www.justiceinspectors.gov.uk/hmicfrs/publications/stolen-freedom-the-policing-response-to-modern-slavery-and-human-trafficking/>

<sup>11</sup> Crown Prosecution Service guidance states that "If the defendant is a child victim of trafficking/slavery, the extent to which the crime alleged against the child was consequent on and integral to his / her being a victim of trafficking / slavery must be considered. In some cases, the criminal offence is a manifestation of the exploitation." Crown Prosecution Service (2018), *Human trafficking, smuggling and slavery*. Available at: [http://www.cps.gov.uk/legal/h\\_to\\_k/human\\_trafficking\\_and\\_smuggling/](http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/)

<sup>12</sup> See for example:

[http://www.lancashiretelegraph.co.uk/news/15787347.JAILED\\_Vietnamese\\_men\\_found\\_guarding\\_cannabis\\_farm\\_with\\_900\\_plants/](http://www.lancashiretelegraph.co.uk/news/15787347.JAILED_Vietnamese_men_found_guarding_cannabis_farm_with_900_plants/)



## Every Child Protected Against Trafficking

individuals who may be victims of trafficking<sup>13</sup>. The CPS guidance states duties for prosecutors if they have reason to believe that the person is a victim of trafficking or slavery, including that they must make proper inquiries. Unfortunately, these are soft under the guidance and extend only to a prosecutor's duty to 'advise' law enforcement to investigate the trafficking and/or to make a referral to the NRM<sup>14</sup>.

The guidance further conflates the definition for child victims under the Convention which excludes the 'means' section as it relates to children. The guidance states that in the context of drug offences 'the victims are often children, aged 14 to 17 years' yet it goes on to state 'Prosecutors should also be alive to the fact that, if a person, by joining an illegal organisation or a similar group of people with criminal objectives and coercive methods, voluntarily exposes and submits himself to illegal compulsion, he cannot rely on the duress to which he has voluntarily exposed himself as an excuse either in respect of the crimes he commits against his will or in respect of his continued but unwilling association with those capable of exercising upon him the duress which he calls in aid: R v Fitzpatrick [1977] N.I.L.R. 20.'<sup>15</sup> This interpretation contradicts the positive obligations imposed on states as defined in Ranstev to establish an adequate legal framework that contains the spectrum of safeguards to ensure the practical and effective protection of the rights of victims.<sup>16</sup>

There is emerging focus on the roles of juries in human trafficking offence cases. Arising from a judgement handed down in February 2020, the case of R v DS [2020] EWCA Crim 285 which concerns an appeal regarding a 17-year old's conviction for drug possession offences with intent to supply. The judge at first instance stayed the prosecution as an abuse of process in light of the Single Competent Authority's (SCA) 'conclusive grounds' determination that the defendant, a child, was a victim of human trafficking. On appeal, the Crown successfully argued that the introduction of the 'modern slavery defence' (s.45 of the Modern Slavery Act 2015) meant that the issue of exploitation was not a matter for the judge, but the jury. The Court of Appeal explains in R v DS that the Crown must continue to take a conclusive grounds decision by the SCA into account in deciding:

- a) *'Whether a defendant is a Victim of Trafficking; and*
- b) *Whether the offending has a very close nexus with the exploitation' (paragraph 41).*

But it reiterates that the prosecutor does not need to abide by the conclusive grounds decision and can seek to challenge the finding before a jury, inviting them to come to a different decision to the Single Competent Authority. None of this is new, but following R v DS, it is to be expected that a prosecutor might proceed to trial, erring on the side of caution.

Where the CPS and the Single Competent Authority reach different decisions, it is now the jury that acts as an arbitrator between these two arms of the state. Importantly, the jury as the answer to the question 'who in the criminal justice system consistently and accurately identifies the victim of modern slavery?', is perhaps unsurprising, but courtrooms are not neutral environments. The

---

<sup>13</sup> The Court of Appeal in R v O [2008] EWCA Crim 2835 case of a 17-year-old child who was sentenced by the Crown Court to a period of imprisonment without reference to the relevant protocols by either the prosecution or defence, and without reasonable enquiries having been made as to the defendant's trafficking history. The Court of Appeal further emphasised this duty in L, HVN, THN and T v R [2013] EWCA Crim 991.

<sup>14</sup> Crown Prosecution Service. (2018). *CPS Guidance Human Trafficking, Smuggling and Modern Slavery*. Available at: <https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery>

<sup>15</sup> Crown Prosecution Service. (2018). *CPS Guidance Human Trafficking, Smuggling and Modern Slavery*. Available at: <https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery>

<sup>16</sup> Ranstev v Cyprus and Russia (2010) 51 EHRR 1 [288]



## Every Child Protected Against Trafficking

evidence placed before a jury and the rules by which the jury must approach their decision-making are determined by legal principles and the success of the argument advanced by the prosecution and defence.

Transferring responsibility to the jury, the Court in *R v DS* does not resolve the tensions and complexities inherent in one arm of the state seeking to undermine the decision of the other and the implications of the same in practice. For instance, the Court of Appeal seems to accept that the admissibility, or otherwise, of a positive conclusive grounds decision itself is likely to be a matter of contention, without seeking to resolve the issue: ‘whether the decision of the Authority is admissible at all before the jury is an issue which has been briefly canvassed before us, but we do not think it is right for us to express any view’ (paragraph 43). This leaves big question marks over the role of the jury in modern slavery defence cases and it remains unclear who will describe the significance of the decision to the jury or the weight that will be attached to it. The practical consequences of the decision in *R v DS* are yet to be seen but we believe greater understanding of the provision is needed across the UK.

In Northern Ireland, the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 sets out a statutory defence under Section 22. There is not publicly available data detailing how in many cases the statutory defence has been raised in the case of children. Children are offered a greater degree of protection than in England and Wales as the “reasonable person test” is absent in the Northern Ireland legislation. The test is largely framed around how the criminal justice system interprets and understands “choice”, an inappropriate consideration in the context of human trafficking for children’s cases which preclude the ‘means’ portion of the definition in both domestic and international frameworks.

Similar to the issues highlighted in England and Wales, ECPAT UK is concerned the statutory defence is not enough to protect children and guarantee the principle of non-punishment as set out in international law, as they only apply once the criminal proceeding has commenced, and it does not offer additional protection during the arrest, detention, criminal charge, or within any further sanctioning administrative or immigration proceeding against the child. We recommended that the scope of the non-punishment measures be extended to other stages of the criminal and administrative proceedings in children’s cases.

In Scotland, there is no statutory defence in place. Instead, Section 8 of the Human Trafficking and Exploitation (Scotland) Act 2015 places a duty on the Lord Advocate to issue and publish Instructions about the prosecution of a person who is, or appears to be, the victim of an offence of human trafficking. The Act stipulates that the Instructions must include factors to be taken into account or steps to be taken by the prosecutor when deciding whether to prosecute a child who does an act which constitutes an offence, and the act appears to be done as a consequence of the child being a victim of trafficking. The Crown Office and Procurator Fiscal Service (COPFS – Scotland) have produced revised guidance on non-prosecution in the Lord Advocate’s Instructions in Scotland.<sup>17</sup>

### **Examples of deprivation of citizenship as punishment against trafficked persons.**

---

<sup>17</sup> Crown Office and Procurator Fiscal Service. (2016). Lord Advocate’s Instructions for Prosecutors when considering Prosecution of Victims of Human Trafficking and Exploitation. Available at: [https://www.copfs.gov.uk/images/Documents/Victims\\_and\\_Witnesses/HumanTrafficking/Lord%20Advocates%20Instructions%20for%20Prosecutors%20when%20considering%20Prosecution%20of%20Victims%20of%20Human%20Trafficking%20and%20Exploitation.pdf](https://www.copfs.gov.uk/images/Documents/Victims_and_Witnesses/HumanTrafficking/Lord%20Advocates%20Instructions%20for%20Prosecutors%20when%20considering%20Prosecution%20of%20Victims%20of%20Human%20Trafficking%20and%20Exploitation.pdf)



## Every Child Protected Against Trafficking

ECPAT UK is concerned that the legislative framework or the Modern Slavery Statutory Guidance does not set out how children exploited by armed groups fit within the criteria for consideration by decision makers under the National Referral Mechanism or protect them from punishment. Children have received negative NRM determinations as form of exploitation was not considered by SCA decision makers to constitute trafficking within the parameters of the NRM. The use of children in armed conflict as a worst form of child labour is set out in ILO Convention No.182, alongside the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict prohibits all recruitment – voluntary or compulsory – of children under 18 by armed groups is currently not transcribed to consideration by decision makers in the UK. Some cases have been highly reported in the press such as those of British children captured after the collapse of Islamic State in Syria, with reports of them being held in deplorable conditions and deprived of their UK citizenship.<sup>18</sup>

Given the Security Council held its first-ever meeting on human trafficking in the context of armed conflict in December 2015. During the debate the Council deplored all acts of trafficking perpetrated by ISIL, Boko Haram, the Lord's Resistance Army (LRA) and other armed or terrorist groups. Ms. Nadia Murad Basee Taha shared with the Council her own experiences of slavery perpetrated by ISIL. The Council called upon Member States to reinforce their political commitment and improve the implementation of applicable legal obligations to criminalize, prevent and otherwise combat human trafficking, while enhancing efforts to detect and disrupt it.<sup>19</sup> ECPAT UK has raised these concerns with the Home Office but there is currently no commitment to review the statutory definition of modern slavery particularly as it pertains to children recruited and exploited by armed groups.

### **The limits or challenges on the application of the non-punishment principle, in law or in practice**

ECPAT UK is concerned that currently, the number of children identified in Northern Ireland and Scotland remains low<sup>20</sup> which may limit a child's access to in practice to the non-punishment provision. The Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland by the Committee of the Rights of the Child stated at paragraph 47 (b) *'In Northern Ireland, children face violence, including shootings, carried out by non-State actors involved in paramilitary-style attacks, as well as recruitment by such non-State actors.'* The Committee recommended the United Kingdom *'take immediate and effective measures to protect children from violence by non-State actors involved in paramilitary-style attacks as well as from recruitment by such actors into violent activities, including through measures relating to transitional and criminal justice.'*

As set out by the Independent Anti-Slavery Commissioner,<sup>21</sup> during her visits to Scotland and Northern Ireland, she spoke with officials to understand why fewer victims are being referred there than in England and Wales. She was told that child criminal exploitation (CCE) is not yet a significant issue in these regions and this is likely to be a contributing factor. The on-going issues regarding the exploitation of children are not being identified in Northern Ireland, a concern also highlighted by the Northern Ireland Commissioner for Children and Young People (NICCY) in her submission to the draft Modern Slavery Strategy 2018/19<sup>22</sup>. The current guidance Co-operating to Safeguard Children and Young People in Northern Ireland acknowledges the additional vulnerabilities faced by children

<sup>18</sup> [https://www.rightsandsecurity.org/assets/downloads/Europes-guantanamo-THE\\_REPORT.pdf](https://www.rightsandsecurity.org/assets/downloads/Europes-guantanamo-THE_REPORT.pdf)

<sup>19</sup> <https://undocs.org/S/PRST/2015/25>

<sup>20</sup> Home Office. (2020). *National Referral Mechanism statistics end of year review 2019*.

<sup>21</sup> Independent Anti-Slavery Commissioner. (2020) *Annual Report 2019-2020*. Available at:

[https://www.antislaverycommissioner.co.uk/media/1461/ccs207\\_ccs0520602790-001\\_iasc\\_annual-report-2019-2020\\_e-laying.pdf](https://www.antislaverycommissioner.co.uk/media/1461/ccs207_ccs0520602790-001_iasc_annual-report-2019-2020_e-laying.pdf)

<sup>22</sup> NICCY. (2018). *Draft Modern Slavery Strategy 2018-2019*.





## Every Child Protected Against Trafficking

and young people 'living in a post-conflict society which is still experiencing legacy issues associated with paramilitarism'<sup>23</sup>. It recognises that, within some communities, 'there can be an acceptance of the use of violence as a response to perceived anti-social behaviour, crime committed by individuals or as a method of control over children and young people'. The guidance highlights 'children may also be abused or exploited by adults who hold power within their communities, where fear is used to coerce the child or young person into compliance'.

Additionally, the 2015 Fresh Start agreement sets out the Northern Ireland Executive's commitment to tackling paramilitary activity and associated criminality. A recent briefing provided an overview of child sexual exploitation of boys and its link to paramilitarism.<sup>24</sup> The study cites other forms of exploitation as well such as one case where a young male victim assumed his role in life as 'drug running' for a paramilitary group, being sexually exploited as well. These examples support the views that child criminal exploitation is also an issue in the context of Northern Ireland which is currently not being identified as such. The Anti-Slavery Commissioner highlighted in her report that there are interventions that had been developed to address the grooming of children by paramilitaries<sup>25</sup>, but these are absent from the strategy. Similarly, the development of practice does not provide for commitments to develop Contextual Safeguarding strategies<sup>26</sup> which recognise a need for alternative approaches to child protection given that a significant amount of risk relating to the exploitation of children also comes from environments outside the home. ECPAT UK recommends there is a commitment to consistent identification and safeguarding of children, focused on a child-centred and collaborative approach for all agencies responding to paramilitarism and child trafficking.

### **Discriminatory provisions in the law or policy on the non-punishment principle or discrimination in practice in implementation.**

Police intervention and arrest are being used in various areas in the UK as a disruption measure to keep children safe when there is improper intervention in their care in other areas.<sup>27</sup> Measures outlined to increase communication with police must not result in an increased police presence in children's lives. The most common profile identified in the United Kingdom of child trafficking was that of child criminal exploitation with a total of 1,250 referrals in Q1 and 2 of 2020 alone of which 79.2% are British national children.<sup>28</sup> This form of exploitation can be found in all regions of the country, predominantly in England and Wales with link between large urban centres and drug supply in smaller villages and rural areas. The targeting of schools and pupil referral units is prevalent as recruitment grounds for UK based children exploited for criminality with recent from Just for Kids Law stating that children who are outside of mainstream education are more vulnerable to becoming victims of child criminal exploitation.<sup>29</sup>

---

<sup>23</sup> Co-operating to Safeguard Children and Young People in Northern Ireland

<sup>24</sup> Dr Jacqui Montgomery-Devlin. (2020). *The influence of paramilitarism in Northern Ireland on the recognition of child sexual exploitation in young males*. Available at: <https://www.safeguardingni.org/sites/default/files/sites/default/files/imce/Briefing%20paper%20No.2.pdf>

<sup>25</sup> *Ibid.*

<sup>26</sup> Carlene Firmin. (2017). *Contextual Safeguarding: An overview of the operational, strategic and conceptual framework*. Available at: <https://www.csnetwork.org.uk/assets/documents/Contextual-SafeguardingBriefing.pdf>.

<sup>27</sup> Howard League. (2020). *Victims not criminals*. Available at: <https://howardleague.org/wp-content/uploads/2020/03/Victims-not-criminals.pdf>.

<sup>28</sup> Home Office. (2020). *National Referral Mechanism statistics*. Available at: <https://www.gov.uk/government/collections/national-referral-mechanism-statistics>

<sup>29</sup> Just for Kids Law. (2020). *Excluded, exploited, forgotten: Childhood criminal exploitation and school exclusions*. Available at: [https://justforkidslaw.org/sites/default/files/fields/download/JfKL%20school%20exclusion%20and%20CCE\\_2.pdf](https://justforkidslaw.org/sites/default/files/fields/download/JfKL%20school%20exclusion%20and%20CCE_2.pdf)



## Every Child Protected Against Trafficking

Children exploited for criminality who have an irregular immigration status may face discrimination in the application of the non-punishment principle in immigration proceedings. Following the interpretation given to Article 14 ECAT by the Court of Appeal in PK(Ghana), where the stay of the victim is necessary to achieve the aims of the Trafficking convention (which include the protection and assistance), the survivor has the right to discretionary leave to remain. A non-exhaustive explanation of when a stay might be 'necessary' is found in the discretionary leave policy and includes considerations of safety, health, family and private life. This mirrors the criteria outlined in the Explanatory Report to ECAT. Article 14 permits of no exception on grounds of criminality or public order.

The Court of Appeal in PK(Ghana) v SSHD [2018] EWCA Civ 98 considering the Home Office's previous policy on DL concluded that Article 14(1)4 merely requires consideration of whether it is necessary for the victim to remain in a country because of his or her personal circumstances considered in the light of, and with a view to achieving, those objectives as expressed in Article 1 and the preamble to ECAT (PK(Ghana) at [50]). 'Personal circumstances' is a 'wide concept and wide enough to include the consequences of having been trafficked. The purposes of ECAT set out at Article 1(b) include 'to protect the human rights of the victims of trafficking...' The explanatory report at §184 expressly states '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'.

The Home Office's most recent version of the policy<sup>30</sup>, drafted to reflect the wider aims and objectives of ECAT identified and explained in PK(Ghana), adopts this approach identifying the necessity to ensure the protection and assistance of the victim and to safeguard their human rights: "When deciding whether a grant of leave is necessary under this criterion 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." Despite this, the Discretionary Leave policy contains an apparent presumption precluding those deemed Foreign National Offenders (FNO) who are trafficking victims from being granted discretionary leave. Such a policy conflicts with the broader non-punishment principle enshrined in Article 26 ECAT and Article 8 of Directive 2011/36/EU. The policy states that in foreign national offender cases:

*"Criminals or extremists should not normally benefit from leave on a discretionary basis because it is a Home Office priority to remove them from the UK. DL can only be granted with the authority of the grade 5 who must give authority for deportation not to be pursued. It may be justifiable to grant DL for 6 months initially to enable regular reviews. Where DL is granted for 6 months or less, if the individual travels outside the UK their limited leave will lapse, and they cannot return unless they make a successful application for leave under the Immigration Rules."*

Whilst the Home Office clearly recognises in the Statutory Guidance that victims may be exploited in 'forced criminality' it is silent as to what to do where a Conclusive Grounds decision has been made in respect of a victim and neither indicate that such a victim should be treated any differently from a victim without convictions. As children exploited for criminality who still have offences which have not been appealed transition into adulthood, they become liable for

---

<sup>30</sup> Home Office. (2020). Discretionary Leave for Victims of Modern Slavery. V 4.0. Available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/941844/dl-for-victims-of-modern-slavery-v4.0ext.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/941844/dl-for-victims-of-modern-slavery-v4.0ext.pdf)



## Every Child Protected Against Trafficking

deportation as foreign national offenders and are presumptively precluded from accessing discretionary leave.