OPINION OF SENIOR COUNSEL

for

JUSTRIGHT SCOTLAND, SCOTTISH REFUGEE COUNCIL and CHILDREN AND YOUNG PEOPLE'S COMMISSIONER SCOTLAND

in the matter of

the ILLEGAL MIGRATION BILL

June, 2023

JustRight Scotland
Ref: Andy Sirel/Jen Ang

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Introduction

1. I am asked various questions as set out in the letter to me from JustRight Scotland dated 8 May 2023. The questions relate to the Illegal Migration Bill which was introduced to the House of Commons on 26 April 2023. The focus of the questions which I am asked about is Clause 23 (disapplying powers and duties under the Human Trafficking and Exploitation (Scotland) Act 2015), and Clauses 15-20 (which relate to the care of unaccompanied migrant children). I have addressed these provisions and the questions relating to them separately, though there is some overlap. All references to the Illegal Migration Bill are to the version which was brought from the Commons on 27 April 2023.

PART I: Clause 23 – provisions relating to support: Scotland

2. I refer to the full terms of Clause 23.

Question 1 – legislative consent

3. I am asked whether I consider that the Legislative Consent Motion ('LCM') process is engaged. I consider that it is. Clause 23(2) provides that in the circumstances set out in sub-clause (1), certain duties and powers of the Scottish Ministers under the Human Trafficking and Exploitation (Scotland) Act 2015 'do not apply'. In certain very limited circumstances – as set out in sub-clause (3) - Clause 23(2) does not apply. This is a

circuitous way of saying that in those very limited circumstances, the duties and powers of SMs under the 2015 Act do apply.

4. Schedule 5 of the Scotland Act 1998 ('SA 1998') sets out matters that are reserved to the Westminster Parliament. None of the reservations relate to the provisions in the 2015 Act referred to above. By matter of convention, the Westminster Parliament will not normally legislate with regard to devolved matters; by virtue of the Scotland Act 2016, that convention, the Sewel Convention, was put on a statutory footing by amendment to the Scotland Act 1998. The new section 28(8) does not, however, add to the force of the convention. It remains non-justiciable (R (Miller) v SoS for Exiting the EU [2018] AC 61).
5. The provisions of Clause 23 obviously relate to devolved matters; it would be hard to think of a clearer example. I have no doubt that section 28(8) of the SA 1998 applies, and that had the convention been followed, the Scottish Parliament should have been asked to consider passing a legislative consent motion. I understand that such a motion may still be put before the Scottish Parliament.
6. On the Sewel Convention and legislation passed without consent of the devolved administration, see the recent paper published by the Scottish Government: Devolution since the Brexit referendum, in particular at pages 9-10 https://www.gov.scot/publications/devolution-since-the-brexit-referendum/

Question 2: Potential public law/constitutional challenges to the disapplication of devolved powers and duties under an ASP

7. As already noted, the fact that a Westminster Bill relates to devolved matters and has not been the subject of a legislative consent motion, does not matter from a legal perspective (see R (Miller) above). It does not affect the validity of that legislation. Indeed, Parliament retains the right to legislate on devolved matters by virtue of s.28(7) of the Scotland Act 1998.
8. Given the terms of s.28(7) and how s.28(8) has been interpreted by the Supreme Court, I cannot conceive of any way in which - if the Bill is enacted by Parliament - it could be challenged in the courts simply on the basis that it is disapplying certain provisions of an ASP.
9. In Himsworth & O'Neill: Scotland's Constitution, it is suggested that it 'remains open to the Scottish Parliament to amend or repel measures enacted by Westminster

pursuant to an LCM so far as they fall within the Parliament's competence.' (para 6.23) The same must surely apply to measures enacted **without** an LCM. That said, the ultimate power lies in the hands of Westminster, in its ability to alter the competencies of the Scottish Parliament.

10. There are other circumstances in which the UK government has passed legislation without the consent of the Scottish Parliament, when it has been acknowledged that the convention applies, e.g. the EU (Withdrawal) Act 2018, and the United Kingdom Internal Markets Act 2020.

Question 3: Victims of trafficking and positive obligations under ECHR and ECAT

11. I am asked whether the non-provision of support and assistance to victims of trafficking who meet Clause 2, is a violation of the positive obligations set out in Article 4 of the European Convention on Human Rights ('ECHR') and Article 12 of the European Convention on Action against Trafficking in Human Beings ('ECAT').
12. Article 12, ECAT requires parties to adopt legislative or other measure to assist victims of human trafficking, and stipulates what that assistance must include as a minimum. The 2015 Act was enacted in part to meet the obligations (of the UK) contained in the Treaty and other international instruments. The Explanatory Report to ECAT points out that Art. 12 'applies to all victims, whether victims of national or transnational trafficking.' (para 146) 'The persons who must receive assistance measures are all those who have been identified after completion of the Article 10 identification process.' (para 147) During the identification process, if the authorities have 'reasonable grounds to believe' a person is a victim, the person is only entitled to the measures in Art. 12 (1) and (2).
13. The Explanatory Report makes clear that assistance is not conditional on agreeing to cooperate with the investigation of potential crime (Art. 12(6) and para. 168). Article 13 provides that during the 'recovery and reflection period' (of at least 30 days) the person in respect of whom there are reasonable grounds to believe he/she is a victim, is entitled to the measures in Art. 12(1) and (2).
14. In the UK Government's memorandum, it relies on Art. 13(3) as a justification for not observing the recovery and reflection period (see ECHR Memorandum on IM Bill dated 7 March 2023, para 45). In particular, it argues that it is not bound to observe

the period on 'grounds of public order'. The Memorandum states:-

> "Clauses 21 to 24 reflect the position under Article 13(3) of ECAT and are premised on the fact that a person in respect of whom the Secretary of State is required under clause 2(1) to make arrangements for removal, is a threat to public order, arising from the exceptional circumstances relating to illegal entry into the UK, including the pressure placed on public services by the large number of illegal entrants and the loss of life caused by illegal and dangerous journeys." (para 45)

15. In essence, the UK government characterises every person who is or may be a victim of human trafficking (who is subject to the Clause 2 removal duty) as being a threat to public order. That blanket approach simply cannot be correct. Further, the justification – the pressure placed on public services – is based on **all** persons entering the country 'illegally', not just those who have been trafficked. Having regard to the purpose of the treaty, in particular the protection of victims of human trafficking and the relatively short period of reflection and recovery, in my opinion the non-provision of support and assistance is in breach of the obligations contained in ECAT.
16. In relation to Article 4, ECHR, the European Court of Human Rights has interpreted it as containing certain positive obligations on States. These include (1) the putting in place of legislative and administrative measures to prevent and punish trafficking and to protect victims (VCL v UK (2021) 73 EHRR 9, para 151), and (2) the taking of operational measures including assisting victims in their physical, psychological and social recovery (VCL v UK at para 153). The obligation to take operational measures must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities (CN v UK (2013) 56 EHRR 24, para 68; Rantsev v Cyprus (2010) 51 EHRR 1, para 287).
17. The UK Government's ECHR Memorandum states that there are 'safeguards to protect rights under Article 4' (para 46). The first of these relates broadly to a disapplication of the provisions if the person is cooperating with an investigation by a public authority. However, ECAT Article 12(6) makes clear that assistance to a victim cannot be made conditional on a willingness to act as a witness. The Explanatory Report to ECAT states in terms:-

> "The drafters wish to make it clear that under Article 12, paragraph 6, of the Convention, assistance is not conditional upon a victim's agreement to cooperate with competent authorities in investigations and criminal proceedings." (para 168)

18. The European Court of Human Rights has made clear that in interpreting Article 4 it

has regard to international instruments such as ECAT. The precise scope of operational measures under Article 4 has not been elucidated by the Court in relation to support and assistance of victims of human trafficking. However, where, as here, there is a blanket ban on providing any support or assistance, in conflict with the provisions of ECAT, I consider it highly likely that a breach of Article 4 would be established. Blanket bans are generally seen as anathema to Convention rights.

Question 4: unlawful discrimination

19. The question here relates to the distinction which would be made between victims of human trafficking who meet Clause 2 of the Bill, and UK-national victims, in terms of access to assistance and support. Clause 23 is directed at sections 9 and 10 of the 2015 Act; those sections relate to support for adult victims of trafficking and exploitation. The Policy Memorandum on the Human Trafficking and Exploitation (Scotland) Bill stated that the necessary support for children who may be victims of trafficking was already provided for in legislation (Children (Scotland) Act 1995, Children's Hearings (Scotland) Act 2011, and the Children and Young People (Scotland) Act 2014).
20. Article 14, ECHR prohibits discrimination in the enjoyment of the rights under the Convention on any ground. Article 14 is not a standalone ground of complaint; the facts must come within the 'ambit' of one or more of the other articles of the Convention. Here, the facts come within the ambit of Article 4. It should be noted that the European Court of Human Rights does not often examine Article 14 if it has found a violation of one of the other Articles.
21. The basis of discrimination is on grounds of national origin. The burden then falls on the UK government to prove that the discrimination is objectively justified. That involves four issues:-
    (i) is the objective of the measure sufficiently important to justify the limitation of a protected right;
    (ii) is the measure rationally connected to that objective;
    (iii) could a less intrusive measure have been used without unacceptably compromising the achievement of the objective; and
    (iv) when balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, does the former outweigh

the latter.

(See in the context of human trafficking R(K) v SSHD [2018] EWHC (Admin); [2019] 4 WLR 92 at paras. 34-39)

22. The government's ECHR Memorandum does not grapple with this issue in the context of assistance and support, although Article 14 is mentioned at other points of the Memorandum. I am unconvinced that the basis for discrimination could be objectively justified, particularly in light of the obligations under ECAT to all victims of human trafficking.

23. Article 3, ECAT also prohibits discrimination in the implementation of the Convention. The Explanatory Report states that the 'meaning of discrimination in Article 3 is identical to that given to it under Article 14' of the ECHR. (para 63). The Report goes on to say that –

> "Article 3 of the Convention might be contravened, even if there were no contravention of other provisions of the Convention, if the measures provided for in those articles were implemented differently in respect of particular categories of person (for example, depending on sex, age or nationality) and the difference in treatment could not be reasonably justified." (para 69)

24. Very similar issues therefore arise under Article 3, ECAT and Article 14, ECHR. As already indicated, I find it hard to conceive of what justification there could be for the difference in treatment proposed in this part of the Bill.

25. Agents have also referenced the Equality Act 2010. It is not obvious to me which of the protected characteristics would be relevant. 'Disability' may be relevant, but I would defer providing an opinion on whether any remedy under the 2010 Act would be available, until a concrete situation is in play.

Question 5: acts of SMs and compatibility with Convention rights

26. This question asks about the interplay between the SA 1998, and the requirement on SMs to act compatibly with ECHR rights. Under s.57(2) of the SA 1998, SMs have no power to act in a way which is incompatible with any of the Convention rights. However, under s.6(2) of the Human Rights Act 1998 ('HRA 1998'), the requirement to act compatibly with a Convention right does not apply to an act if –

> "(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
> (b) in the case of one or more provisions of, or made under, primary legislation

which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

27. SMs and the Scottish Parliament are public authorities for the purposes of s.6 (see Reed and Murdoch: Human Rights Law in Scotland (para 1.79); and Sommerville v Scottish Ministers (No. 2) 2008 SC (HL) 45, para 107). In proceedings brought under HRA 1998, it may therefore be a defence for SMs to assert that they could not have acted differently due to the provisions of primary legislation, i.e. the IM Bill. Whether that is so may depend on precisely what the nature of the complaint against SMs is.
28. That does not, however, address what the position would be if the complaint was brought under the SA 1998. In Sommerville (above) it was said that a complaint could be made under the HRA 1998 or the SA 1998 or both, and that it was not necessary to choose one basis rather than the other (see Lord Rodger, para 108). It may be possible to proceed against SMs under the SA 1998 if there are acts (or failures to act) which are incompatible with Convention rights, i.e. in this situation Article 4. This is untested territory, and quite how the courts would resolve it is therefore uncertain.

Question 6: Positive obligations on SMs

29. In view of the answer to question 5 above, it is arguable that SMs remain under a positive obligation to provide support to victims of trafficking. I note that prior to the 2015 Act, the Scottish Government provided grant funding to organisations to support victims, i.e. before there was any statutory duty on, or basis for, them to do so. (See Policy Memorandum on the Human Trafficking and Exploitation Bill, paras 8 and 57-58)
30. I see no reason why the provision of funding could not be made on a non-statutory basis, as it was done before the 2015 Act. In practice, that may be problematic, since the clear intention of the Secretary of State is to prevent such support.

Question 7: Other means of support

31. I have nothing to add beyond what is said above in relation to question 6.

Question 8: Obligations of Police Scotland and COPFS to investigate potential trafficking

32. As already noted, Article 4 contains a positive obligation on States to investigate where there may be breaches of the rights under that article. Public authorities remain subject to the duty under the HRA 1998 to act compatibly with Convention rights. Clause 23 does not, in my view, affect the obligations on public authorities to identify any victim of human trafficking and exploitation.

Question 8 *bis*: Obligations to report victims to Home Office

33. This question, which was added in to my letter of instruction, asks whether in light of Clause 23, there are legal duties on Scottish public authorities (Police Scotland and COPFS) to report persons – who appear to have arrived irregularly etc. but whom they regard as having human trafficking indicators – to the Home Office.
34. In England and Wales, the Modern Slavery Act 2015 contains a duty on certain public authorities (PAs) to notify the Secretary of State if there are reasons to believe that a person may be a victim of slavery or human trafficking (s.52). There is no equivalent provision in the (Scottish) 2015 Act. Section 38 of that Act requires a 'specified public authority' to notify Police Scotland of persons who are or appear to be victims of any offences under sections 1 and 4. However, no regulations have been made under s.38 stating which PAs the obligation applies to (although the Scottish government did consult on this some time ago).
35. Under section 52 (of the Modern Slavery Act 2015), the notification to the Secretary of State may not include information that identifies or enables the person to be identified, unless they consent to the inclusion of that information (s.52(3); see also Modern Slavery Act 2015 (Duty to Notify) Regulations 2015 (SI 2015/1743), as amended). This only applies to those aged 18 or over; consent is not required for someone under the age of 18. The purpose of the notification provisions is to gather information on the extent of human trafficking, not for the purpose of identifying those who may be subject to removal.
36. Referring back to the terms of the questions I have been asked, Clause 23 does not, in my view, affect whether or not the Scottish public authorities referred to are under any duty to report persons in the circumstances described. The question of what powers and duties public authorities have to share information about immigration

status with the Home Office is a thorny issue. There are certainly circumstances in which the Police has the power to share such information. The National Police Chiefs Council (for England and Wales) has provided guidance on 'Information sharing with the Home Office where a victim or witness of crime is a suspected immigration offender'. The guidance notes that the role of police includes enforcement of immigration law and assisting the Home Office in enforcement of immigration law. It refers to the power under s.20 of the Immigration and Asylum Act 1999 (as amended) to supply information to the Home Office for use for immigration purposes (para 4.1). In addition, it refers to common law powers to share information with other public bodies where it is in the public interest to do so in pursuit of the police's functions and the functions of the body with whom the information is being shared (para 4.2)

37. I am not aware of any similar document produced by Police Scotland. There is, I understand, an information sharing agreement between Police Scotland and the Home Office, signed in 2016, but I am unable to locate that from an internet search. (It is referred to in the Scottish Parliament Justice Sub-Committee on Policing inquiry into Police Scotland's role in immigration enforcement processes - https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/110370.aspx) I have only been able to locate the Information sharing Standard Operating Procedure (2019 – available at https://www.google.com/search?client=firefox-b-d&q=police+scotland+information+sharing+SOP)
38. The Information Commissioner has issued a statutory code of practice on Data Sharing. (Available at: https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/data-sharing/data-sharing-a-code-of-practice/about-this-code/) The Code contains guidance on the processing of date for law enforcement purposes (under Part 3 of the Data Protection Act 2018).
39. This Opinion is not the place for a full account of the intricacies of the processing of personal data. Suffice to say that there will be circumstances in which there is **power** to supply information to the Home Office about persons who appear to have arrived irregularly and whom the police regard as having human trafficking indicators.
40. As for **duties** to inform the Home Office in such circumstances, I have not carried out an exhaustive search of immigration legislation and the duties arising thereunder. As already noted, section 20 of the Immigration and Asylum Act 1999 contains a **power** to supply information to the Secretary of State. Section 20A of that Act contains a

duty to supply nationality documents to the Secretary of State in certain circumstances. A local authority has a **duty** to inform the Secretary of State if (amongst other things) a person in its area is in the UK in breach of immigration laws (within the meaning of the British Nationality Act 1981, s.50A) and is not an asylum seeker: Schedule 3, para 14 of the Nationality, Immigration and Asylum Act 2002.

41. In any given situation, where the police or COPFS propose sharing information (about a person who has arrived in breach of the Bill and who appears to have human trafficking indicators) it should be established whether that is being done as a matter of legal duty (and if so, what that legal duty is) or through the exercise of a power.
42. I have not, as yet, been able to identify where such a legal duty exists, although as I have said I have not carried out an exhaustive inquiry into immigration legislation.

Question 9: Competence of a Scottish National Referral Mechanism ('NRM')

43. I am asked whether in light of s.9(8) of the 2015 Act, Scottish Ministers have the locus and the power to create a separate NRM mechanism and be a 'competent authority' for the purposes of Article 10 ECAT?
44. Section 9(8) of the 2015 Act contains a regulation making power enabling SMs to modify subsections (6) and (7) to make provision about the circumstances in which there are reasonable and conclusive grounds to believe a person is a trafficking victim. The regulation making power may also provide for the procedure to be followed by any person making a determination as to victim status, the criteria they must apply and the persons who may make a determination or take any step in the procedure.
45. Clause 27 of the IM Bill proposes adding in a further subsection (10) to section 9, which is that section 9 'is subject to section 23 of the Illegal Migration Act 2023'. Clause 23 does not in terms modify section 9(8), but it does enable the Secretary of State to amend any regulations made by Scottish Ministers under section 9(8).
46. It may therefore be possible for SMs to provide by Regulations for a separate 'competent authority'. The UK government would, however, be able to amend those Regulations by virtue of clause 23(9). I do not consider that if a separate 'competent authority' were created for Scotland, that it would affect the provisions of Clause 23 about the provision of support – on which see above.

Question 10: Potential respondents in JR proceedings

47. The question asked is about what challenge might be made if an adult victim of trafficking was blocked from receiving support and assistance because of the terms of Clause 2, and in particular against whom might any challenge be taken.
48. As explained above, I am of the opinion that a decision not to provide support and assistance to an adult victim of human trafficking is a breach of Article 4, ECHR. I would anticipate proceedings being taken against both the Secretary of State for the Home Department, and Scottish Ministers. It is a little difficult to advise on prospects of success in the abstract. However, I consider that there are certainly reasonable prospects against the SSHD. The position of SMs is a little trickier, but I would also consider the prospects to be reasonable – it is likely to be important that both are convened in any proceedings.

PART II: Clauses 15-20 - Provisions relating to care of unaccompanied migrant children

Question 1: is the legislative consent process applicable?

49. Clause 15 enables the Secretary of State to provide, or arrange for the provision of, accommodation for unaccompanied children in England, along with 'other types of support' to the child. Clause 16 permits the Secretary of State to transfer a child from 'accommodation for unaccompanied migrant children' to accommodation provided by a local authority in England under s.20 of the Children Act 1989, and vice versa. The date of a transfer being made must be at least 5 working days after the decision of the Secretary of State. Clause 17 imposes a duty on a local authority in England to provide her with information about 'the accommodation and support provided to children by the local authority' and such other information as may be specified in regulations made by the Secretary of State. Clause 18 provides for the enforcement of local authorities' duties under sections 16 and 17.
50. In relation to Scotland (and Wales and Northern Ireland), clause 19 empowers the Secretary of State to make regulations extending clauses 15 to 18 to those

jurisdictions. The regulations may 'amend repeal or revoke any enactment (including an enactment contained in this Act)'. It is also provided that 'enactment' includes 'an enactment contained in, or in an instrument made under, an Act of the Scottish parliament'.

51. This wide-ranging power granted to the Secretary of State permits her, by regulations, to amend, repeal or revoke legislation, both primary and secondary, of the Scottish Parliament. Clause 19 clearly relates to devolved powers. If the power is exercised by the Secretary of State, it would affect devolved powers such as the protection and care of children. In my opinion, the Scottish Parliament should have been asked to consider passing a legislative consent motion in relation to Clause 19, as would be anticipated and expected under s.28(8) of the SA 1998. I refer also to my comments above in answer to Question 1 and Clause 23.

Question 2: potential public law/constitutional law challenges

52. As with my answer to Question 2 and Clause 23, I cannot see any basis for challenging Clause 19 on public law or constitutional grounds, simply because the UK government has not sought permission from the devolved authorities.

Question 3: responsibilities of Scottish local authorities in light of Clause 16

53. I am asked whether in light of Clause 16, Scottish local authorities are still required to conduct their usual best interests/welfare/risk assessments ahead of a child exiting their care to the Home Secretary.
54. Until regulations are made by the Secretary of State under clause 19, it is not possible to give definitive advice. However, I will proceed on the assumption that the regulations will mirror (so far as possible) what is in clauses 15 to 18. That would mean that the Secretary of State could decide that an unaccompanied child who is being provided with accommodation by a local authority in Scotland should cease providing that accommodation, and transfer the child to accommodation for unaccompanied migrant children, i.e., accommodation provided by, or arranged by, the Secretary of State.
55. In the Explanatory Notes to the Bill, it is stated that:

"The Secretary of State is currently not in the position of corporate parent to any unaccompanied child. There is nothing in the Bill which changes this position. The Home Office has always taken the view that these children should be in local authority care. The Home Office does not have, and therefore cannot discharge, duties under Part 3 of the Children Act 1989. It is for the local authority where an unaccompanied child is physically located to consider its duties under the Children Act 1989.' (para 101)

56. The Joint Briefing on the Illegal Migration Bill for the House of Lords (prepared by a coalition of organisations) notes that there is no explanation as to how children will access their entitlements from local authorities when accommodated by the Home Office (see pp. 34-35). I would agree that it is not at all obvious from the Bill how the welfare of children accommodated by the Home Office is to be secured.
57. So far as Scotland is concerned, I understand that unaccompanied asylum-seeking children, including child victims of human trafficking, are currently looked after and accommodated by local authorities – in practice their social work departments - under s.25 of the Children (Scotland) Act 1995 ('the 1995 Act'). Home Office staff are directed to make referrals to children's services (in the devolved administrations) when they have identified children as being in need or at risk, recognising that there are differences in legislation and local arrangements in those administrations. (See Statutory Guidance to the UK Border Agency: Every Child matters – change for children (2009) at paras 2.26 – 2.28).
58. S.25(1) of the 1995 Act imposes a duty on a local authority to provide accommodation for any child within their area who appears to need accommodation because (among other reasons) the child is lost or abandoned. By virtue of s.17(6) of that Act, a child for whom the local authority is providing accommodation under s.25 is 'looked after'. Where a child is 'looked after', the local authority has a number of duties, of great importance being the duty to 'safeguard and promote his welfare (which shall, in the exercise of their duty to him be their paramount concern)' (s.17(1)(a)).
59. Thus, in the case of an unaccompanied migrant child, accommodated by a local authority under s.25, the local authority would require to consider whether any alteration of the child's accommodation would 'safeguard and promote' the child's welfare. Under s.23A (inserted by the Children and Young People Act (Scotland) 2014) in exercising a function under or by virtue of (amongst others) s.17, the local authority 'must have regard to the general principle that functions should be exercised

in relation to children and young people in a way which is designed to safeguard, support and promote their wellbeing' (s.23A(2). In assessing the wellbeing of a child or young person, the local authority must do so by reference to the matters listed in s.96(2) of the 2014 Act. S.96(2) lists the matters known as SHANARRI (Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible, and Included).

60. I also note the terms of Part 9 of the 2014 Act, and the duties imposed on 'corporate parents'. The responsibilities of corporate parents, set out in s.58, apply to every child who is looked after by a local authority (s.57). Unsurprisingly, those responsibilities include the duty to assess the needs of children and young people for services and support it provides, and to promote their interests (s.58(1)).

61. I do not consider that a Scottish local authority would be relieved of its obligations to consider the best interests and welfare of a child whom they were looking after, simply because regulations under Clause 19 permit the Secretary of State to direct the authority to transfer the child to unaccompanied migrant children accommodation. The practicality of how a local authority would implement those duties, is a different issue.

62. In order to answer that, consideration must be given to the duties on the Secretary of State when making a decision about a transfer. Section 55 of the Borders, Citizenship and Immigration Act 2009, under the heading 'Duty regarding the welfare of children' provides:-

> "(1) The Secretary of State must make arrangements for ensuring that-
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
> (2) The functions referred to in subsection (1) are-
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality; …"

63. A decision by the Secretary of State to transfer a child under Clause 16 would be considered to be a function of the Secretary of State in relation to immigration or asylum. That appears to be recognised by the Secretary of State in the ECHR Memorandum accompanying the Bill (see para 38). The ECHR Memorandum then boldly states that where an unaccompanied child's Article 8 rights are interfered with, 'this will be justified under Article 8(2) as being both a necessary and proportionate

means of achieving one of the legitimate aims outlined above.' (para 39) It is difficult to understand how that statement can be made in the abstract, since clearly the proportionality of any decision has to be assessed under reference to the particular facts and circumstances of the individual child.

64. S.55 has been described as having its genesis in Article 3(1) of the United Nations Convention on the Rights of the Child ('UNCRC'). (see MK (Section 55 - Tribunal Options) Sierra Leone [2015] UKUT 223, para 7) Article 3(1) states:-

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

Although the provisions of s.55 and Article 3(1) are in different terms, there is probably no difference between them in substance. It should be noted that s.55 protects all children who are in the UK.

65. The requirement to make decisions which are in the best interests of a child has been considered in the asylum context at the highest level in a number of cases. Firstly, in ZH (Tanzania) v SSHD [2011] 2 AC 166 the Supreme Court considered a claim for asylum by the mother of two children. She argued that her removal from the UK would be a disproportionate interference with her rights under Article 8, ECHR. The court held:-

- that international law placed a binding obligation upon public bodies, including the immigration authorities and the Secretary of State, to discharge their functions having regard to the need to safeguard and promote the welfare of children;
- that the obligation applied not only to how children were looked after in the United Kingdom but also to decisions made about asylum, deportation and removal from the United Kingdom; and
- that in all decisions directly or indirectly affecting a child's upbringing national authorities were required to treat the best interests of the child as a primary consideration, by identifying what those best interests required and then assessing whether the strength of any other consideration, or the cumulative effect of other considerations, outweighed the child's best interests.

(See the opinions of Baroness Hale, paras 21-26; Lord Hope, para 44; and Lord Kerr, para 46)

66. In a Scottish appeal, Zoumbas v SSHD 2014 SC (UKSC) 75, Lord Hodge delivering the judgment of the court endorsed the following principles (at para 10):-

> "(1) The best interests of a child are an integral part of the proportionality assessment under Art 8 ECHR;

(2) In making that assessment, the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration;
(3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant;
(4) While different judges might approach the question of the best interests of a child in different ways, it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play;
(5) It is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations;
(6) To that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an Art 8 assessment; and
(7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

(See also the court's additional comments at para 13.) The decision in Zoumbas was cited with approval in a recent Supreme Court case, namely, HA (Iraq) v SSHD [2022] 1 WLR 3784, para 27.

67. It can be seen from the above that, in my opinion, Scottish local authorities remain subject to the duties in the 1995 Act (and other legislation) to act in the best interests of a child in their care. The Secretary of State, however, also requires to have regard to the best interests of the child as her primary consideration. I consider below, in relation to question 7, how any conflict in the views of a local authority and the Secretary of State may be resolved in litigation.

Question 4: interaction of Clauses 15-18 with children's hearing system

68. The question posed is how Clauses 15-18 interact with the current ability to seek compulsory/protective orders, bearing in mind many of the children affected by the Bill's provisions are survivors of torture and exploitation, including ongoing exploitation. In particular, is a Compulsory Supervision Order, or an order made by a Children's Hearing, defeated by Clause 16?
69. The Children's Hearings (Scotland) Act 2011 ('the 2011 Act') contains detailed provisions about children who are in need of measures of care. The provisions range

from seeking a child protection order (under s.37) to the making of compulsory supervision orders (under Part 9). Orders made under the 2011 Act may include a requirement that a child reside at a specified place, and a secure accommodation authorisation.

70. Any regulations made by the Secretary of State under Clause 19 ought to take account of the provisions of the 2011 Act. Otherwise, there would be a recipe for chaos. What would happen to a child who was the subject of a compulsory supervision order, but in respect of whom the Secretary of State then made a transfer decision? Could the various powers in the 2011 Act be exercised in respect of a child who was in Home Office accommodation?
71. If the regulations made under Clause 19 do not address the functioning of the children's hearings system under the 2011Act, it would, in theory at least, remain possible for the panel of a children's hearing to make a decision that the child ought to remain in local authority accommodation, notwithstanding the Secretary of State's decision. The panel would not, of course, be able to overrule the Secretary of State's decision, but it is possible for a conflict to arise between the panel's decision and that of the Secretary of State. In practice, the only way to challenge the Secretary of State's decision would be by way of judicial review (see below).
72. Likewise, in theory there would be no reason why, for example, a compulsory supervision order ('CSO') could not be made in respect of a child who was in Home Office accommodation. In practice, some of the measures that might be attached to a CSO may not be practicable (see s.83(2) of the 2011 Act).

Question 5: Scottish child protection processes and Home Office care

73. I am asked whether there are ways in which the Scottish Ministers or Scottish local authorities can continue to discharge their duties to affected children or mitigate the impact of Clauses 15-18? E.g. if a child is in Home Office care in a Scottish local authority area, and there is evidence of abuse or exploitation, do the child protection processes still apply – i.e. Inter-Agency Referral Discussion, Joint-Investigative Interview process etc.
74. In answering question 3, I was considering the situation of a child who was a 'looked' after' child under the 1995 Act. This question asks about a child who has been removed from local authority accommodation and placed in Home Office

accommodation. As already noted, s.17 of the 1995 Act places duties on local authorities in respect of a child who is 'looked after' by them. S.17(6) defines what is meant by that. It includes a child 'for whom they **are** providing accommodation under section 25…' (emphasis added)

75. If the local authority is no longer providing accommodation, because the child has been moved to Home Office accommodation, he/she would no longer be a 'looked after' child (unless one of the other parts of subsection (6) applied). It is possible that the child may be subject to a compulsory supervision order under the children's hearing system; I have considered above how that system interacts with the IM Bill.
76. If the child is no longer a 'looked after' child, the duties under s.17 cannot arise. That does not mean that the local authority has no obligations as regards the child. S.60 of the 2011 Act imposes a duty on local authorities to 'make all necessary inquiries into the child's circumstances' if the local authority considers the child is in need of protection, guidance, treatment or control, and a CSO may be necessary. The local authority must then give any information it has to the Principal Reporter, in order that he can carry out his functions under the 2011 Act. The inquiries made by the local authority may presumably include obtaining information via child protection processes such as an Inter-Agency Referral Discussion, or Joint-Investigative Interview. On child protection processes in Scotland, reference should be made to the Scottish Government's National Guidance for child protection in Scotland (2021). https://www.gov.scot/publications/national-guidance-child-protection-scotland-2021/documents/
77. I note the recent decision in Article 39 v SSHD [2023] EWHC 1398 (Fam) where the petitioner sought to trigger the English court's inherent jurisdiction to make wardship orders in relation to a number of unaccompanied asylum-seeking children who had gone missing from Home Office run accommodation. The court found that there was no need to exercise its inherent jurisdiction because there was already a comprehensive statutory scheme for the protection of children in a local authority area (Children Act 1989). If the children were located and met the statutory criteria, they would be the responsibility of the local authority where they were found.
78. Interesting though this decision is, I do not consider that it affects my conclusions on the position under Scots law.

Question 6: potential ECHR challenges

79. I have referred above to the principle of the welfare of the child and acting in the best interests of the child. That principle requires to be applied in compliance with rights arising under the ECHR. Article 8 is the most obvious article, protecting as it does the right to respect for one's home. The concept of 'home' in Article 8 has an autonomous meaning; whether or not a particular place is a person's home depends on the facts of the case and whether there are sufficient and continuous links with it (see Prokopovich v Russia (2006) 43 EHRR 10 at para. 36).
80. A person's mental health which is integral to identity and the ability to function socially is also recognised as forming part of the right to respect for private life under Article 8 (see R (Razgar) v SSHD [2004] 2 AC 368). A decision to transfer a child into Home Office accommodation might well adversely affect the mental health of a vulnerable child.
81. Article 3 prohibits in absolute terms torture or inhuman or degrading treatment of punishment. It is possible that the conditions in Home Office accommodation in which a child is placed, may amount to inhuman or degrading treatment. It is self-evident that this could only be judged on the basis of specific accommodation. Without such detail, it is not possible to say more than that Article 3 may be relevant.
82. I am also asked about whether Article 4 may be a basis for challenging a decision of the Secretary of State to order transfer to Home Office accommodation. I presume that Article 4 has been referenced because of the risk of accommodated children falling into (or back into) the hands of traffickers. Again, all I can say is that is possible that Article 4 may be relevant, depending on the accommodation the child is being moved to and the circumstances of the particular child.
83. Finally, I am asked about whether there may be unlawful discrimination under Article 14, ECHR or the Equality Act 2010. I refer to my views expressed in relation to Article 14 and the 2010 Act in answer to Question 4 and Clause 23.
84. The ECHR Memorandum acknowledges that Article 14 rights (when taken together with Article 8) may be engaged in respect of decisions taken under clauses 15 to 20. It accepts that unaccompanied children who are subject to removal under the Bill may be in a different position than children who are looked after by a local authority and not subject to removal. Being a child refugee is recognised as an 'other status' under

Article 14 (see R (DM) v SSHD [2023] EWHC 740 (Admin)).

85. The Memorandum continues by saying:-

> "However, the duties owed by a local authority to a child who is physically present within their area will remain the same even if the child is accommodated by the Home Office. Furthermore, any difference in treatment would not be as a result of nationality. The Government considers that any difference in treatment would be minimal in any event and that it would be objectively justifiable in pursuit of a legitimate aim." (para 40)

86. It is difficult to understand how it can be said that any difference in treatment would be 'minimal', when it is not at all clear how local authorities would exercise their responsibilities in relation to such children. There is no indication of what legitimate aim would be met by transferring a child into Home Office accommodation. It may be problematic for the Secretary of State to justify the difference in treatment, but much will depend on how the system operates and the individual circumstances.
87. As for the Equality Act, as with my answer to question 4 and Clause 23 above, I am unclear what protected characteristic would be in play.

Question 7: potential remedies of unaccompanied migrant children

88. The question posed is: If JRS were to represent an unaccompanied child who was forcibly removed from local authority care to the care of the Home Secretary, against their wishes and the professional opinion of the local authority, against whom could litigation arguing unlawfulness be taken, and what are the prospects of success? E.g., against the Secretary of State for the Home Department; against the local authority; against both?
89. I would envisage that litigation would be by way of judicial review of the decision of the Secretary of State. The grounds on which judicial review may be taken are well known. The particular ground relied upon would depend on the basis for the Secretary of State's decision in a particular case. It is likely that issues under the HRA 1998 would also form part of any petition. I would expect the court to carry out an intense scrutiny of any justification by the Secretary of State for the decision to transfer the child into Home Office accommodation.
90. The local authority is likely to be an interested party, although whether it would be convened as an additional respondent would depend on the particular circumstances.
91. Coercive orders against Ministers of the Crown, including interim orders, have been

available in judicial review in Scotland since the decision in Davidson v Scottish Ministers 2006 SC (HL) 41.

92. It is not possible in the abstract to advise on prospects of success in any proceedings.

The opinion of

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June 2023