

WRITTEN EVIDENCE SUBMITTED BY MODEN SLAVERY AND HUMAN RIGHTS POLICY EVIDENCE CENTRE

(BSAI0024)

Summary

The submission suggests that the Bill's retention of section 29 of the Illegal Migration Act 2023 (IMA), and of section 63 of the Nationality and Borders Act 2022 (NABA), which section 29 IMA amends, is incompatible with the UK's obligations under the European Convention on Action Against Trafficking in Human Beings (ECAT) and Article 4 the European Convention on Human Rights (ECHR). It suggests that the Committee seek further explanations from the Government as to why, in its view, the retention of section 29 IMA and section 63 NABA is compatible with those obligations in specific respects. The UK's relevant human rights obligations are summarised in the Appendix to the submission.

- (1) The Committee may wish to ask the Government for further explanation as to why section 63 NABA (alone and as amended by section 29 IMA) is compatible with the positive obligations contained in Article 4 ECHR and Articles 10 (2), 12 (1) and (2), 13, 14, and 26 ECAT.

Section 63 (3) NABA introduces the "Public Order Disqualification" ("POD"), which excludes a broad and loosely defined group of victims of modern slavery from any protection and assistance including the recognition of their status as a victim of crime. Together with the Modern Slavery Statutory Guidance, which outlines the decision-making process when applying the public order disqualification, section 63 NABA creates a presumption in favour of such disqualification, which victims would need to refute. This is contrary to several express obligations which the UK has voluntarily assumed in Article 4 ECHR and Articles 10 (2) and 13 ECAT.

Section 63(3)(b) NABA furthermore excludes from protection those individuals who are convicted of offences listed in Schedule 4 to the Modern Slavery Act (MSA). However, Article 26 ECAT (the non-punishment principle) does not permit automatic exclusion of certain offences from its reach. In addition, permitted exclusions from the non-punishment principle do not authorise restrictions of other protective obligations towards victims of human trafficking.

- (2) The Committee may wish to ask the Government for further explanation of the rationale for the Border Security, Asylum and Immigration Bill retaining the presumption that the public order disqualification applies when a person belongs to a category listed in section 63 (3) NABA and further expanding the range of situations in which such disqualification ought to apply.

Section 29 IMA amends Section 63 (1) NABA to *mandate* rather than permit competent authorities to disqualify from any protection a broad range of victims listed

in section 63 (3) NABA, unless there are compelling countervailing circumstances. Section 29 IMA also amends section 63 (f) NABA to exclude from protection anyone who has been sentenced to a term of imprisonment of any length. These amendments are incompatible with Article 4 ECHR and Articles 10 (2) and 13 ECAT, which impose express obligations on public authorities to identify and support every victim of human trafficking on their own initiative, including those with irregular immigration status and those involved in criminal offences, and to justify any restrictions or denial of protection in each individual case. They also create a strong likelihood of infringements of Article 26 ECAT, which guarantees protection against prosecution and punishment.

(3) The Committee may wish to ask the Government for further explanation of the rationale for the Border Security, Asylum and Immigration Bill not requiring a final decision on victim status before the public order disqualification is applied.

Section 63 NABA and paragraph 14.242 of the Modern Slavery Statutory Guidance absolve a decision-maker from the obligation to make a final decision on a person's victim status when making a public order disqualification decision. Furthermore, when making a public order disqualification decision, more weight is being given to the public interest in disqualification than to the need for protections (paragraph 14.267 of the Modern Slavery Statutory Guidance) and there is "no expectation for decision makers to undertake extensive investigation to support their decision" (paragraph 14.266 of the Modern Slavery Statutory Guidance). This is incompatible with Article 4 ECHR and Articles 10 (2) and 13 ECAT, which impose express obligations on public authorities to identify and support every victim of human trafficking on their own initiative, including those with irregular immigration status and those involved in criminal offences, and to *justify* any restrictions or denial of protection in each individual case.¹

¹ Specific amendments to Section 63 of the NABA to make it human rights compatible are proposed in 'Modern Slavery and Human Rights PEC (Marija Jovanovic), Restoring protections for modern slavery victims: How to make the modern slavery measures in UK immigration law compatible with human rights, January 2025

<https://files.modernslaverypec.org/production/assets/downloads/Restoring-Protection-Briefing-Summary.pdf?dm=1738849584>.

Response to JCHR question 4b): “4. The Bill will repeal the majority of the Illegal Migration Act 2023 (IMA), but will retain various provisions. b) Is the retention of section 29 IMA, which broadens the public order disqualification in relation to victims of trafficking and modern slavery, compatible with the UK’s obligations under ECAT and Article 4 of the ECHR?”

1. **Section 63 (1) NABA as enacted stipulated that a person with a positive Reasonable Grounds Decision (potential victim) *may* be disqualified from protection if the competent authority is satisfied that the person is a “threat to public order” or has claimed victim status in “bad faith”.** Given that the exclusion from protection on public order grounds is “intended to apply in very exceptional circumstances” and requires “an individual examination and respect for the principle of proportionality”, this provision appears on its face to be in line with international law.²
2. **However, the Modern Slavery Statutory Guidance, which sets out the decision-making framework for such decisions, creates a *presumption* that a person meeting conditions from section 63 (3) NABA is a threat to public order** (paragraph 14.267). The effect of these provisions in the Statutory Guidance is to remove the burden of justifying the need for disqualification from the authorities, shifting it instead on to a victim or potential victim. This is contrary to the clear obligation of States under Article 4 ECHR and 10 (2) ECAT to identify every victim of human trafficking on their own initiative, as well as the obligation under Article 13 ECAT to justify denying a potential victim the recovery and reflection period on public order grounds. (See paragraph 8 below and Appendix paragraphs 2, 3, 5, 6, 8, 9)
3. **According to sections 63 (2) and 64 (5) NABA, the consequences for individuals deemed to be “a threat to public order” or having claimed victim status in “bad faith” are: a disqualification from the recovery and reflection period, a disqualification from any necessary assistance and support, and a disqualification from the entitlement to a temporary residence permit –** protections available to all victims or potential victims of modern slavery by international law (Article 4 ECHR, Articles 10, 12, 13 and 14 ECAT). The Modern Slavery Statutory Guidance goes further by expressly removing an obligation of a competent authority to make a Conclusive Grounds decision on one’s victim status (paragraph 14.242). Articles 4 ECHR and Article 10 (2) ECAT, which contain a duty to identify and protect every victim of human trafficking, do not permit any limitations on public order grounds. Article 13 (3) ECAT permits States not to observe the recovery and reflection period “if grounds of public order prevent it or if it is found that victim status is being claimed improperly”. However, because of the protective nature of the obligation contained in Article 13, any exception must be narrowly interpreted. This means that any restrictions or denial of protection must be amply *justified* by a State in each individual case (See Appendix paragraphs 8, 9).
4. **Section 63 (3) NABA contains a non-exhaustive list of circumstances in which a person represents “a threat to public order”.**³ Many of these examples concern

² Group of Experts on Action Against Trafficking in Human Beings (GRETA), Guidance Note on the recovery and reflection period (Article 13 of the Council of Europe Convention on Action against Trafficking in Human Beings) THB-GRETA(2024)14 (Council of Europe, September 2024) para 34.

³ Whereas NABA does not provide criteria on what might count as “bad faith”, Modern Slavery Statutory Guidance (v3.12, 16 January 2025) in para 14.296 explains that “[a]n individual may be considered to have claimed to be a victim of modern

involvement in terrorism-related activities (Section 63 (3) (a), (c), (d) and (e)), including situations where a potential victim has not yet been convicted of an offence (Section 63 (3) (d)).⁴ In other words, a person who has never been convicted of a criminal offence and who has been coerced to commit terrorism-related activity in a context amounting to human trafficking, might still lose protection under this provision.⁵ A blanket exclusion of such individuals from any protection contradicts express human rights and international legal obligations to identify and support every victim of human trafficking contained in Article 4 ECHR and Articles 10 (2), 12, and 13 ECAT (see Appendix paragraphs 2, 3, 5, 6, 8, 9, 10).

5. **Section 63(3)(b) NABA also excludes from any protection those individuals who are convicted of offences listed in Schedule 4 to the Modern Slavery Act (MSA) and denies them the very status of victim. Article 26 ECAT (the non-punishment principle) nonetheless does not permit automatic exclusion of certain offences from its reach. What is more, even when the exclusion from the non-punishment principle is justified, this does not authorise restrictions of other protective obligations towards victims of human trafficking, nor does it preclude victims from being identified as such** (See Appendix paragraph 10). Section 45 of the MSA, which gives effect to Article 26 ECAT, provides for a statutory defence (legislative protection from prosecution) in England and Wales for victims of modern slavery and human trafficking. It applies to adults who were compelled to carry out criminal offences as a result of their exploitation, and to children who committed the offence as a direct consequence of being victims of trafficking or slavery. The defence is not available for all criminal offences and Schedule 4 to the MSA contains a broad range of criminal offences that do not have a Section 45 defence available (including modern slavery offences). However, the Court of Appeal Criminal Division, in *R v AAD* [2022] 1 WLR 4042 and *R v AFU* [2023] EWCA Crim 23, confirmed that a criminal court's jurisdiction to declare a prosecution an abuse of process in order to comply with the non-punishment principle remains available in principle, whether or not they are Schedule 4 offence cases. There is no evidence of how many times such a declaration has been made in practice. Notwithstanding that, there is no reason why any offence would be excluded *a priori* if a person has been compelled to commit it, nor is there any basis in ECAT for involvement in criminal offences automatically justifying the denial of victim status. As the Group of Experts on Action Against Trafficking in Human Beings ("GRETA")⁶ advises:

“In general, a conviction for or probable cause that the person has committed a serious criminal offence might trigger the public order clause under Article 13, albeit without infringement of the non-punishment principle guaranteed in Article 26. If a victim of human trafficking was compelled to be involved in unlawful activities, the public order clause should not be applied. The fact that victims may have difficulties disclosing their situation, including any unlawful activities they may have been compelled to commit, should be taken into account. It is for these reasons that the public order clause should be applied with the greatest caution. The protection of public order needs to be

slavery in bad faith where they, or someone acting on their behalf, have knowingly made a dishonest statement in relation to being a victim of modern slavery.” See further paras 14.296 – 14.333.

⁴ Joint Committee on Human Rights ‘Legislative Scrutiny: Nationality and Borders Bill (Part 5) - Modern Slavery’ (15 December 2021) para 65.

⁵ *Ibid* para 66. For examples of the types of trafficking and exploitation taking place in the context of armed conflict or terrorist activities see OSCE, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, ‘Trafficking In Human Beings And Terrorism Where and how they intersect’ (2021) 46-49.

⁶ The Council of Europe’s Expert Body tasked with monitoring States’ compliance with ECAT.

balanced against the need and positive obligation to provide support to victims of trafficking.⁷

6. **Section 63 (3) (i) NABA finally excludes from protection “the person [who] otherwise poses a risk to the national security of the United Kingdom”.** This leaves unfettered discretion to the competent authority, which might not have appropriate expertise and experience to evaluate what constitutes a risk to national security.
7. **Overall, the exclusions from protections contained in section 63 NABA contradict express human rights and international legal obligations to identify and support every victim of human trafficking contained in Articles 10 (2), 12, 13, and 26 ECAT and Article 4 ECHR.** The UN Special Rapporteurs similarly noted their concern that section 63 “would be in breach of the State’s international legal obligations to identify and protect all victims of trafficking or contemporary forms of slavery, without discrimination and without exception”, enshrined in Article 4 ECHR and Articles 10 and 12 of ECAT.⁸ Moreover, the UN Special Rapporteurs also expressed concern that section 63(3) “would be in violation of the State’s obligation to ensure non-punishment of victims of trafficking or contemporary forms of slavery for any unlawful acts that that are a direct consequence of trafficking”,⁹ enshrined in Article 26 ECAT.
8. **Section 29 IMA amends section 63 (1) NABA to *mandate* rather than permit Competent Authorities to disqualify such victims from protection, unless there are compelling countervailing circumstances.** This amendment creates a *legal presumption* in favour of disqualification from any protection of a wide category of individuals, placing the onus on a victim to provide evidence to refute such a presumption to avoid disqualification. This is contrary to human rights obligations enshrined in domestic and international law, which require that public authorities identify and protect victims of modern slavery on their own initiative “once the matter has come to their attention”¹⁰ and that any exception from protective obligations must be justified by a State. **This provision is therefore incompatible with protective obligations under Articles 10 (2) and 12 ECAT and Article 4 ECHR. Automatic disqualification from protection is also contrary to Article 13 ECAT, which guarantees a recovery and reflection period to any victim or potential victim (see Appendix paragraphs 2, 3, 5, 6, 8, 9).** As GRETA advises:

“The grounds of public order are intended to apply in very exceptional circumstances and cannot be used by States Parties to circumvent their obligation to provide access to the recovery and reflection period. Therefore, the public order exception in Article 13 should be applied restrictively with due regard to the circumstances of the individual case. The State has the burden of proof and the decision to apply the public order

⁷ Group of Experts on Action Against Trafficking in Human Beings (GRETA), Guidance Note on the recovery and reflection period (Article 13 of the Council of Europe Convention on Action against Trafficking in Human Beings) THB-GRETA(2024)14 (Council of Europe, September 2024) para 35.

⁸ Communication from the Mandates of the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (GBR 11/2021), 5 November 2021 <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=26788>.

⁹ *Ibid.*

¹⁰ European Court of Human Rights, ‘Guide on Article 4 of the European Convention on Human Rights: Prohibition of slavery and forced labour’ (updated on 31 August 2022) paras 60 and 69. *CN v the United Kingdom*, para 69; *Chowdury and Others v Greece*, para 116; *J and Others v Austria* para 107; *Zoletic and Others v Azerbaijan*, para 185.

exception must be substantiated with evidence.

Of relevance in this context is the case law of the European Court of Human Rights in relation to the public order exception in Article 1 of Protocol No. 7 of the European Convention on Human Rights (ECHR) related to the expulsion of lawfully resident aliens. The Court has stressed that the fact of “merely indicating that the applicant was dangerous for public order and security, without relying on the slightest argument in support of that assertion, cannot be justified by the provisions of paragraph 2 of Article 1 of Protocol No. 7.”¹¹

9. **Section 29 IMA also amends section 63(3)(f) NABA, which originally disqualified from protection “the person [who] is a foreign criminal within the meaning given by section 32(1) of the UK Borders Act 2007 (automatic deportation for foreign criminals)”.** The amendment results in a disqualification from protection of anyone who has been sentenced to a period of imprisonment regardless of the seriousness of their offence or the length of imprisonment as well as anyone “liable to deportation from the United Kingdom under any provision of, or made under, any other enactment that provides for such deportation”. It would therefore exclude from protection victims compelled to commit criminal offences by their traffickers who are prosecuted and convicted due to their lack of knowledge of the availability of the defence in section 45 MSA, as well as those victims convicted for immigration related offences.¹² **This amendment creates a strong likelihood of infringements of Article 26 ECAT, which contains protection from prosecution and punishment of those victims compelled to commit criminal offences as part of their exploitation (see Appendix paragraph 10).**
10. **Section 29 IMA therefore significantly broadens the list of circumstances in which a victim of modern slavery would be treated as a threat to public order and therefore compounds the incompatibility of section 63 NABA with the express obligations to identify and protect every victim or potential victim of modern slavery guaranteed under Article 4 ECHR and ECAT.** International law does not exclude from protection victims with irregular immigration status or victims compelled to commit criminal offences – on the contrary, it provides additional protections to these categories of victims in Articles 13 and 26 ECAT. (see Appendix paragraphs 10, 11, 12, 13).

¹¹ Group of Experts on Action Against Trafficking in Human Beings (GRETA), Guidance Note on the recovery and reflection period (Article 13 of the Council of Europe Convention on Action against Trafficking in Human Beings) THB-GRETA(2024)14 (Council of Europe, September 2024) para 33.

¹² Letter from the Independent Anti-Slavery Commissioner to the Home Secretary (7 September 2021) <https://www.antislaverycommissioner.co.uk/media/1668/iasc-letter-to-the-rt-hon-priti-patel-mp-home-secretary-march-2021.pdf>.

Appendix

Summary of the UK's Human Rights Obligations on Modern Slavery and Human Trafficking

The information contained in this appendix is set out in a previous Modern Slavery PEC policy brief authored by Dr Marija Jovanovic.¹³

1. **The prohibition of slavery, servitude, forced labour, and human trafficking is contained in all general human rights instruments, including most notably Article 4 of the ECHR.** The ECHR has been incorporated in UK law through the Human Rights Act 1998 (HRA) and therefore represents part of the domestic legal framework. Together with Article 2 ECHR (the right to life) and Article 3 ECHR (the prohibition of torture), Article 4 is recognised by the European Court of Human Rights ("ECtHR") as enshrining "one of the basic values of the democratic societies making up the Council of Europe".¹⁴ It imposes positive obligations to prevent, prosecute and punish the perpetrators of modern slavery and protect its victims. These obligations have been crystallised in the jurisprudence of the ECtHR, which draws heavily on ECAT when interpreting their scope.
2. **Three core obligations are imposed on States by this body of law**, as spelled out in the jurisprudence of the European Court of Human Rights (ECtHR) on Article 4 (prohibition of slavery and forced labour):
 - An obligation to put in place "a legislative and administrative framework providing real and effective protection of the rights of victims."¹⁵ This duty does not refer solely to criminal legislation but extends to the general legal and administrative framework including the adequacy of immigration policy.¹⁶
 - An obligation to take "operational measures to protect victims, or potential victims".¹⁷ Protection measures required by Article 4 ECHR include "facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery."¹⁸ The protective obligation also covers protection from prosecution and punishment in cases where victims, or potential victims, have been compelled to commit criminal offences as part of their exploitation.¹⁹
 - A procedural obligation to investigate potential situations of modern slavery and punish the perpetrators.²⁰

¹³ Modern Slavery and Human Rights PEC (Marija Jovanovic), 'Restoring modern slavery protections in UK immigration law', 27 January 2025, <https://www.modernslaverypec.org/resources/restoring-modern-slavery-protections-in-uk-immigration-law>.

¹⁴ *Rantsev v Cyprus and Russia*, para 283.

¹⁵ *Chowdury and Others v Greece*, para 87; *Rantsev v Cyprus and Russia*, para 285; *J and Others v Austria*, para 106.

¹⁶ *Rantsev v Cyprus and Russia*, paras 290-293.

¹⁷ *VCL and AN v United Kingdom*, paras 152 – 153; *J and Others v Austria*, paras 109-111.

¹⁸ *Ibid*, para 153. See also *Chowdury and Others v Greece*, para 110.

¹⁹ *V.C.L. and A.N. v United Kingdom*, para 159.

²⁰ *Rantsev v Cyprus and Russia*, para 288; *CN v the United Kingdom*; *SM v Croatia [GC]*, para 307; *T.V. v Spain*, paras 95-119. See also, European Court of Human Rights, 'Guide on Article 4 of the European Convention on Human Rights: Prohibition of slavery and forced labour' (updated on 31 August 2022) para 69.

3. **Rights enshrined in Article 4 ECHR are considered “absolute”**, which means that they cannot be simply balanced out by a reference to public interest. The rights of individuals must be the starting position in any decision of public authorities concerning their status.
4. **When interpreting the positive obligations imposed by Article 4 ECHR, the ECtHR draws heavily on the provisions of ECAT.**²¹ This is in line with the Court’s general approach that the ECHR cannot be interpreted in a vacuum and should as far as possible be interpreted in harmony with other rules of international law of which it forms part. In interpreting obligations under Article 4 ECHR, the Court has therefore relied on ECAT Articles 10 (identification of the victims),²² 13 (recovery and reflection period),²³ 15 (compensation and legal redress),²⁴ and 26 (non-punishment).²⁵
5. **The obligation to identify and protect victims and potential victims of human trafficking is not conditional upon a person’s:**
 - Immigration status;
 - Willingness or ability to cooperate with criminal investigations or prosecutions against the perpetrators;
 - Country of exploitation;
 - Involvement in criminal offences.
6. **The positive obligations of States towards a specific victim of modern slavery are triggered by a “credible suspicion” (reasonable grounds to believe) that a person is a victim of modern slavery.** These obligations do not depend on a victim’s report – the authorities must act of their own motion once the matter has come to their attention. While the protective duty could not be waived or restricted by States by a reference to public interest, it is not unlimited – the appropriate measures required from national authorities must not be interpreted to impose “an impossible or disproportionate burden” on them.²⁶ Similarly, while the procedural obligation requires an effective investigation, which “must also be capable of leading to the identification and punishment of individuals responsible” and requires that “the authorities must take whatever reasonable steps they can to collect evidence and elucidate the circumstances of the case”, this is an obligation not of result but of means.²⁷ This means that the authorities are required to take adequate steps and deploy resources

²¹ *Rantsev v Cyprus and Russia*, para 285; *Chowdury and Others v Greece*, para 110; *J and Others v Austria*, para. 106.

²² *Chowdury and Others v Greece*, para 110.

²³ *Chowdury and Others v Greece*, para. 121.

²⁴ *Ibid*, para. 126.

²⁵ *VCL and AN v United Kingdom*.

²⁶ *Zoletic and Others v Azerbaijan*, para 188; *J and Others v Austria*, para 107; *CN v the United Kingdom*, para 68; *Rantsev v Cyprus and Russia*, para 287; *Osman v the United Kingdom*, para 116.

²⁷ The European Court of Human Rights, Guide on Article 4 of the European Convention on Human Rights: Prohibition of slavery and forced labour (31 August 2023).

with a view to securing the conviction and punishment of the perpetrators. The focus is on the process, and not necessarily the final outcome.²⁸

7. **ECAT recognises that identifying a trafficking victim is a process which takes time** and “may require an exchange of information with other countries or Parties or with victim-support organisations, and this may well lengthen the identification process.”²⁹ For that reason, Article 10 (2) ECAT requires that all suspected victims should have the benefit, during the identification process, of the assistance measures provided for in Article 12 (1) and (2) ECAT. Moreover, by virtue of Article 13 ECAT, victims of modern slavery are entitled to a recovery and reflection period of a minimum of 30 days. This protective obligation has a dual aim – to allow victims to recover and escape the influence of traffickers³⁰ and to allow victims to come to a decision on cooperating with the law-enforcement authorities in any prosecution of the traffickers.³¹ While it applies to any victim of human trafficking, it is particularly designed to protect those “who are illegally present in a Party’s territory or who are legally resident with a short-term residence permit.”³²

8. **Unlike the obligation to identify every victim of human trafficking contained in Articles 4 ECHR and 10 ECAT, the Article 13 ECAT obligation to provide for a reflection and recovery period provides for a narrow exception on “public order” grounds.** In particular, Article 13 (3) ECAT permits States not to observe the recovery and reflection period “if grounds of public order prevent it or if it is found that victim status is being claimed improperly.” Still, because of the protective nature of the obligation contained in Article 13, any exception must be narrowly interpreted.³³ In a recent Guidance Note, GRETA stated that “The grounds of public order are intended to apply in very exceptional circumstances and cannot be used by States Parties to circumvent their obligation to provide access to the recovery and reflection period. Therefore, the public order exception in Article 13 should be applied restrictively with due regard to the circumstances of the individual case. The State has the burden of proof and the decision to apply the public order exception must be substantiated with evidence”.³⁴ GRETA has therefore urged the authorities to ensure that no termination of the recovery and reflection period is carried out without due regard to the person’s

²⁸ See Constantin P Economides, ‘Content of the Obligation: Obligations of Means and Obligations of Result’ in James Crawford (ed) et al, *The Law of International Responsibility* (OUP 2010) (“Obligations of means impose on a State the obligation to do the best they can in furtherance of a specific goal, but without the guarantee that this goal will be reached. By contrast, obligations of result require a State to guarantee the achievement of the prescribed result.”).

²⁹ Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings (16 May 2005) para 62 (ECAT Explanatory Report) para 131.

³⁰ ECAT Explanatory Report, paras 172-173.

³¹ *Ibid*, para 174.

³² *Ibid*, para 172.

³³ A rule of treaty interpretation based on the Latin maxim that an exception to a general rule should be narrowly construed to avoid undermining the general rule (“exceptio est strictissimae applicationis”). See for instance *Sabeh El Leil v France*, [GC] (29 June 2011) para 66; Alexia Solomou, ‘Exceptions to a Rule Must Be Narrowly Construed’ in Joseph Klingler et. al (eds) *Between the Lines of the Vienna Convention? Canons and Other Principles of Interpretation in Public International Law* (Kluwer Law International 2019) 359-385.

³⁴ Group of Experts on Action Against Trafficking in Human Beings (GRETA), Guidance Note on the recovery and reflection period (Article 13 of the Council of Europe Convention on Action against Trafficking in Human Beings) THB-GRETA(2024)14 (Council of Europe, September 2024) para 33.

individual situation in its written evidence to the Joint Committee on Human Rights in its scrutiny of the IMA during its passage through Parliament, which noted that:

“[T]he grounds of public order should always be interpreted on a case-by-case basis ... [and] are intended to apply in very exceptional circumstances and cannot be used by States Parties to circumvent their obligation to provide access to the recovery and reflection period.”³⁵

GRETA’s evidence further added that:

“Considering a person arriving irregularly on the territory of a State Party as per se a threat to the public order would be contrary to the purpose of Article 13 of the Convention and would deprive the recovery and reflection period of meaning, application and effectiveness. In practical terms, this would amount to a reservation to the Convention, which is not allowed under Article 45.”³⁶

9. Accordingly, the Article 13 (3) exception from a duty to provide for a recovery and reflection period on public order grounds has a very limited purpose: “[it] aims to guarantee that victims’ status will not be illegitimately used.”³⁷

10. When it comes to victims of modern slavery involved in criminal offences, the non-punishment principle, enshrined in Article 26 ECAT and a number of other international instruments, as well as in British law,³⁸ requires States to provide for the *possibility* of not prosecuting or punishing victims of human trafficking for their involvement in unlawful activities “to the extent that they have been compelled to do so.”³⁹ While this provision does not guarantee immunity from prosecution, punishment, or even imprisonment of the victims of modern slavery, being convicted of a criminal offence does not disqualify them from simultaneously holding victim status and accessing the protection guaranteed to any victim, including to those in prisons.⁴⁰ This point is particularly important given the prevalence of people subject to “criminal exploitation” in the UK, who could potentially be disqualified from protection on the basis of the NABA.

11. When it comes to victims of modern slavery with irregular migration status, Article 10 (2) ECAT expressly prohibits removing suspected victims, that is individuals with a positive Reasonable Grounds Decision, from the State Party until the identification process is complete. ECAT recognises that identifying a trafficking victim is a process which takes time and “may require an exchange of information with other countries or Parties or with victim-support

³⁵ Joint Committee on Human Rights, Legislative Scrutiny: Illegal Migration Bill, ‘Written Evidence by the GRETA (IMB0024) to the JCHR enquiry’ paras 15 and 16.

³⁶ *Ibid*, para 15

³⁷ ECAT Explanatory Report, para 173.

³⁸ Section 45 of the Modern Slavery Act 2015; Section 8 of the Human Trafficking and Exploitation (Scotland) Act 2015; Section 22 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.

³⁹ Article 26 ECAT.

⁴⁰ Modern Slavery and Human Rights PEC (Marija Jovanovic, Patrick Burland, Vanessa Topp, Francisca Fluhr), ‘Tackling the blind spot of the UK anti-slavery regime: The role and responsibility of prisons in securing the rights of modern slavery survivors’ (November 2023).

organisations, and this may well lengthen the identification process.” However, many victims may be illegally present in the country and therefore at risk of being removed before such identification process is completed, which risks making their rights under this treaty “purely theoretical and illusory”. For that reason, Article 10 (2) stipulates that:

“Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been a victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities.”

12. Significantly, the Explanatory Report to ECAT makes clear that “[t]he words ‘removed from its territory’ refer both to removal to the country of origin and removal to a third country. Furthermore, Article 10 (2) of ECAT requires that all suspected victim’s should have the benefit, during the identification process, of the assistance measures provided for in Article 12 (1) and (2) of ECAT. GRETA has similarly noted that:

“Identifying a trafficking victim is a process which takes time; therefore the Convention provides that when the competent authorities have reasonable grounds to believe that a person has been a victim of trafficking, *he/she must not be removed from the country until the identification process is completed* and must receive the assistance required by the Convention.”

13. There are furthermore two important restrictions imposed by Article 16 ECAT and ECHR that set limitations to States’ removal of victims of human trafficking:

- First, States must not remove suspected victims without a legal right to reside until: a) the identification process is completed (Articles 10 (2) and 13 ECAT), and b) they are provided with immediate assistance and support (Article 12 (1) and (2) ECAT).
- Second, any return of identified victims of modern slavery to their country of nationality or permanent residence requires a prior individualised assessment of the impact of such return on ‘the rights, safety and dignity of that person’, which includes the right not to be subjected to inhuman or degrading treatment, the right to the protection of private and family life and the protection of his/her identity, or the risk of re-trafficking. Article 14 (1) ECAT instructs states to issue renewable residence permits to victims of human trafficking either in exchange for cooperation with the law-enforcement authorities or on account of the victim’s needs. However, States enjoy a wide discretion when deciding to whom to grant residence permits, which may undermine a comprehensive set of protection measures guaranteed in other ECAT provisions.

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