

Restoring protections for modern slavery victims

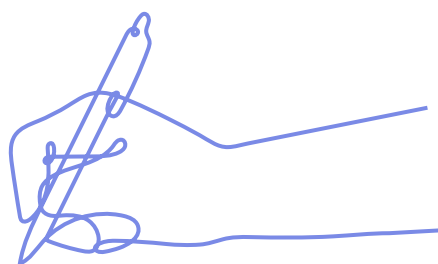
How to make the modern slavery measures in UK immigration law compatible with human rights

Author: Dr Marija Jovanovic, Bonavero Institute of Human Rights, University of Oxford¹

This is a summary of findings and recommendations from the Modern Slavery and Human Rights Policy and Evidence Centre's Policy Brief aiming to inform the Government's review of immigration law and policy by identifying specific changes which need to be made to the modern slavery measures in recent UK immigration law and related statutory guidance to make the legal and policy framework compatible with the requirements of human rights law. The full Policy Brief can be found on the Centre's website at modernslaverypec.org.

Noting the Government's unequivocal commitment to ensuring that all legislation is compatible with international law, and the overarching duty on ministers in the Ministerial Code to comply with the law, including international law, the Brief identifies the most relevant human rights obligations for the UK in the context of action against modern slavery, and explains in detail what those human rights laws require. Such obligations are contained in Article 4 of the European Convention on Human Rights 1950 (ECHR) (the prohibition of slavery and forced labour), which is incorporated into UK domestic law by the Human Rights Act 1998 (HRA), and the Council of Europe Convention on Action Against Trafficking in Human Beings 2005 (ECAT).

The Brief then considers the compatibility of the modern slavery provisions in recent UK immigration legislation and accompanying Modern Slavery Statutory Guidance with those human rights instruments and identifies specific incompatibilities which need to be addressed. It goes on to make detailed recommendations about how to make the changes required by repealing or amending specific statutory provisions and amending the Modern Slavery Statutory Guidance. Suggested textual amendments to give effect to the recommendations are included in an Annex.



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Summary of Findings

The UK's Human Rights Obligations on Modern Slavery and Human Trafficking

Immigration law is *domaine réservé* (reserved domain) of States closely linked to the principle of sovereignty of States and protected by the principle of non-intervention in their internal affairs. However, the *domaine réservé* is constrained by international obligations that countries voluntarily assume, as well as States' domestic human rights law.

Immigration policy is governed by multiple legal regimes, including International Refugee Law, general human rights instruments, such as the ECHR, as well as international treaties dealing with human trafficking and modern slavery, such as the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 2000 (the Palermo Protocol – a supplementary protocol to the UN Convention on Transnational Organised Crime) and the ECAT. Notably, the rules of International Refugee Law and modern slavery law do not overlap. This Policy Brief focuses on the latter, though Article 40 ECAT expressly acknowledges that 'Nothing in this Convention shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein'. This is important because victims of modern slavery may at the same time qualify for a refugee status, and equally, refugees may be at risk of modern slavery and therefore fall under the protective ambit of this body of law.

Article 4 ECHR and ECAT impose 3 core obligations on States:

- An obligation to put in place 'a legislative and administrative framework providing real and effective protection of the rights of victims.' This duty concerns the general legal and administrative framework including the adequacy of immigration policy.
- An obligation to take 'operational measures to protect victims, or potential victims'. 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.' 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.
- A procedural obligation to investigate potential situations of modern slavery and punish the perpetrators.

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 concerning their immigration status.

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.

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.

When it comes to victims of modern slavery with irregular migration status, there are two important restrictions imposed by Article 16 ECAT and ECHR:

- First, States must not remove *suspected* victims without a legal right to reside until: a) the identification process is completed, and b) they are provided with immediate assistance and support.
- 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.

The Compatibility of Nationality and Borders Act 2022 (NABA) with Human Rights Law

NABA contains provisions that are in direct conflict with the UK's human rights obligations towards victims of modern slavery and human trafficking.

Section 63 NABA, amended by Section 29 IMA, provides for disqualification of certain categories of victims (suspected or confirmed) from protection guaranteed by the ECAT, ECHR, and domestic legislation if a person is found to be 'a threat to public order' or has claimed the victim status 'in bad faith'. While disqualification on public order grounds is not absolutely prohibited by ECAT, it is a narrow exception to the rule established by these treaties, which requires that:

- All suspected victims of modern slavery must be identified and guaranteed immediate support and assistance; and
- The burden is on the public authorities to establish in each individual case that a suspected or identified victim is a threat to public order or has illegitimately claimed victim status (Article 4 ECHR and Articles 10 (2), 12 (1) and (2), and 13 ECAT).

Contrary to that, Section 63 NABA:

- Disqualifies from protection guaranteed by modern slavery legislation broad categories of persons listed in Section 63 (3).
- Fails to impose a requirement on public authorities to justify disqualification in each individual case. It effectively shifts the burden of proof onto the victims instead of placing a requirement on the decision-maker to establish that a person has claimed victim status improperly.
- Does not take into account the fact that some victims are compelled to commit criminal offences and may be unaware of the defence in Section 45 of the Modern Slavery Act 2015 (MSA).

Section 58 NABA concerns requests for information that may be relevant for identifying a person as a victim of modern slavery ('a slavery or trafficking information notice'). **Section 59 NABA** sets out the consequences of the late provision of the relevant status information instructing the decision-maker to consider such late notices as damaging the person's credibility, unless there are good reasons why the information was provided late. These requirements were considered by the Joint Committee of Human Rights as 'unreasonable, unfair and contrary to the UK's protective and investigative obligations in relation to preventing and combatting slavery.'

The Compatibility of Illegal Migration Act 2022 (IMA) with Human Rights Law

IMA contains provisions that are in direct conflict with the UK's human rights obligations towards victims of modern slavery and human trafficking.

Sections 22-29 IMA create a distinction between victims of modern slavery with lawful residence in the UK and those with irregular migration status, with the latter excluded from protection for all practical purposes. Such a distinction has no basis in international law. On the contrary, any discrimination between victims is expressly prohibited by Article 3 ECAT, which also includes specific protections for those with irregular immigration status (Article 13 ECAT).

These provisions require the Secretary of State to remove individuals suspected to be victims *before* their identification is completed and they are provided with immediate support and assistance. This interferes with all three core obligations in Article 4 ECHR and ECAT.

Section 29 IMA amends Section 63 (1) NABA, which now *mandates* rather than permits competent authorities to disqualify a person with a reasonable grounds decision (a potential victim) 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' – unless there are compelling countervailing circumstances. Section 29 also amends Section 63 (3) NABA, which enumerates the circumstances in which a person is considered a threat to public order. Section 63 (3) (f) NABA now disqualifies from protection anyone who is not a British citizen and has been sentenced to a period of imprisonment for any offence. It may therefore exclude from protection victims compelled to commit criminal offences by their traffickers/exploiters but who have not benefited from the statutory defence contained in Section 45 MSA. This provision contradicts the express obligations to identify and protect every victim or potential victim of modern slavery, including those with irregular immigration status and those involved in criminal offences, guaranteed under Article 4 ECHR and Articles 10 (2), 12 (1) and (2), 13 and 26 ECAT.

The Compatibility of Modern Slavery Statutory Guidance with Human Rights Law

The Modern Slavery Statutory Guidance (version 3.12 from 16 January 2025) goes beyond what Section 63 NABA expressly permits and therefore further compounds the breaches of human rights law:

- The Guidance removes the obligation to identify a victim (to make a Conclusive Grounds Decision), when making a public order disqualification decision (paragraph 14.242) contrary to the obligation of States to identify every victim of modern slavery.
- The Guidance contains an express presumption in favour of public order disqualification (paragraph 14.267), which an individual victim must refute, contrary to the obligation of States to justify any exclusion from protection in each individual case.
- The Guidance provides for public order disqualification of British nationals (paragraph 14.245) not envisaged in NABA.
- The Guidance limits the assessment of the risk of re-trafficking only to potential trafficking within/from the UK (paragraphs 14.236 and 14.276 – 14.285) – a territorial limitation not foreseen by an Article 4 ECHR requirement to protect anyone at risk of being subject to modern slavery and human trafficking.

Summary of Recommendations

Recommendation 1: The Safety of Rwanda (Asylum and Immigration) Act 2024 should be repealed in line with the Government's decision to terminate the migration and economic development partnership with Rwanda and its commitment to acting compatibly with international law.

Recommendation 2: Sections 22 – 29 of the IMA should be repealed to bring the UK's legal framework back in line with Article 4 ECHR and Articles 10 (2), 12 (1) and (2), 13, 14, 15 and 16 ECAT.

Recommendation 3: Section 63 of the NABA should be amended to bring the law and policy on public order disqualification in line with Article 4 ECHR and Articles 10 (2), 12 (1) and (2), 13, 14, 15 and 16 ECAT. See Annex for a recommendation of the changes in the wording of Section 63.

Overall, these amendments must reflect the position that disqualification on public order grounds is a narrow exception to the rule contained in international law binding on the UK that all victims or suspected victims of modern slavery must be identified and protected and that the burden is on the public authorities to establish that a suspected or identified victim is a threat to public order or has illegitimately claimed victim status in every individual case.

To achieve that, the following should be implemented:

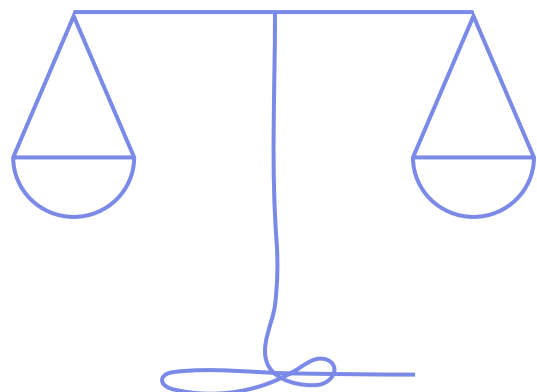
- Remove the *presumption* that public order disqualification applies when a person belongs to a category listed in Section 63 (3) of the NABA – the burden of proof should be on public authorities to *demonstrate* the need for disqualification in each individual case.
- A final decision on victim status should be made before public order disqualification could be applied, unless a decision-maker has *established* that a person has claimed victim status illegitimately.
- The relevant decision-maker should note whether the application of the non-punishment provision/modern slavery statutory defence has been considered before making a public order disqualification decision.

Recommendation 4: Sections 58 and 59 of NABA should be repealed. If brought into force, Section 59 should be amended to change "must" to "may", converting a duty on the competent authority into a power to 'take account, as damaging the person's credibility, of the late provision of the relevant status information, unless there are good reasons why the information was provided late.' See Annex for a recommendation of the changes in the wording of this provision.

Recommendation 5: The Modern Slavery Statutory Guidance should be amended to give effect to the UK's obligations under the ECAT, ECHR, and other binding rules of international law. In particular, the Guidance should be amended in the following way:

- **Remove paragraph 14.242** of the Guidance which precludes an individual who is deemed to be a threat to public order from being conclusively identified as a victim of modern slavery.
- **In the section on 'Evidence gathering and decision-making process', after paragraph 14.253, add a new paragraph** to instruct a decision-maker to note whether the application of the non-punishment provision/modern slavery statutory defence has been considered when making a public order disqualification decision.
- **Amend paragraphs 14.266 and 14. 267** to remove a presumption in favour of disqualification of those who meet the criteria from Section 62 (3) (b) and (f) of the NABA and require instead that a decision-maker justifies the decision to apply public order disqualification in each individual case.
- **Remove paragraph 14.245** that regulates public order disqualification of British nationals.
- **Amend paragraph 14.276** to require decision-makers to conduct the risk of re-trafficking assessment before applying public order disqualification regardless of whether such risk arises in the UK or the country where they may be removed/returned to.

Recommendation 6: The Home Office should collect and publish data on the risk of re-trafficking assessments undertaken as part of making a decision on public order disqualification (including the number of assessments undertaken, disaggregated by age, gender, nationality, type of exploitation) as well as the outcome of those assessments.



Proposed Amendments to the Legal and Policy Framework to make them human rights compatible

This Annex translates the recommendations made in the body of the Policy Brief into proposed amendments to the relevant provisions in statute and statutory guidance, shown by track changes to the relevant text.

Section 63 of the NABA

63 Identified potential victims etc: disqualification from protection

1. A competent authority may determine that subsection (2) is to apply to a person in relation to whom a positive reasonable grounds decision has been made if the authority ~~is satisfied~~ establishes that the person—
 - a. is a threat to public order, or
 - b. has claimed to be a victim of slavery or human trafficking in bad faith.
2. Where this subsection applies to a person the following cease to apply—
 - a. any prohibition on removing the person from, or requiring them to leave, the United Kingdom arising under section 61 or 62, and
 - b. any requirement under section 65 to grant the person limited leave to remain in the United Kingdom.
3. For the purposes of this section, the circumstances in which a person ~~is may be~~ a threat to public order include, in particular, where—
 - a. the person has been convicted of a terrorist offence;
 - b. the person has been convicted of any other offence listed in Schedule 4 to the Modern Slavery Act 2015 anywhere in the United Kingdom, or of a corresponding offence;
 - c. the person is subject to a TPIM notice (within the meaning given by section 2 of the Terrorism Prevention and Investigation Measures Act 2011);
 - d. ~~there are reasonable grounds to suspect that~~ the person is or has been involved in terrorism-related activity within the meaning given by section 4 of that Act (whether or not the terrorism-related activity is attributable to the person being, or having been, a victim of slavery or human trafficking);
[F1(da) the person is subject to a notice under Part 2 of the National Security Act 2023;

- (db) ~~there are reasonable grounds to suspect that~~ the person is or has been involved in foreign power threat activity within the meaning given by section 33 of that Act (whether or not the foreign power threat activity is attributable to the person being, or having been, a victim of slavery or human trafficking);]
- e. the person is subject to a temporary exclusion order imposed under section 2 of the Counter-Terrorism and Security Act 2015;
 - f. the person is a foreign criminal within the meaning given by section 32(1) of the UK Borders Act 2007 (automatic deportation for foreign criminals);
 - g. the Secretary of State has made an order in relation to the person under section 40(2) of the British Nationality Act 1981 (order depriving person of citizenship status where to do so is conducive to the public good);
 - h. the Refugee Convention does not apply to the person by virtue of Article 1(F) of that Convention (serious criminals etc);the person otherwise poses a risk to the national security of the United Kingdom.

Section 59 of NABA (not yet commenced)

59 Late compliance with slavery or trafficking information notice: damage to credibility

1. This section applies where—
 - a. a person aged 18 or over has been served with a slavery or trafficking information notice under section 58,
 - b. the person provided relevant status information late, and
 - c. a competent authority is making a reasonable grounds decision or a conclusive grounds decision in relation to the person.
2. In determining whether to believe a statement made by or on behalf of the person, the competent authority ~~must~~ ~~may~~ take account, as damaging the person's credibility, of the late provision of the relevant status information, unless there are good reasons why the information was provided late.
3. For the purposes of this section, relevant status information is provided "late" by the person if it is provided on or after the date specified in the slavery or trafficking information notice.
4. In this section, "relevant status information" has the same meaning as in section 58 (see subsection (3) of that section).

Modern Slavery: Statutory Guidance for England and Wales (under section 49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland (version 3.120, 316 January May 20245)

Paragraph 14.242

14.242 Where the Public Order Disqualification applies, the following cease to apply:

- any prohibition on modern slavery grounds on removing the person from the UK or requiring them to leave; and
 - any requirement on modern slavery grounds to consider the person for Temporary Permission to Stay as a Victim of Human Trafficking or Slavery (VTS) in the United Kingdom; and
 - access to a recovery period or modern slavery specific assistance and support; and
- ~~Where a Conclusive Grounds decision has not yet been made, any obligation to make a Conclusive Grounds decision.~~

Paragraph 14.245

~~14.245 Disqualification requests can be raised by Competent Authorities where:~~

- ~~• a British citizen is in detention or on licence and has been referred into the NRM; or~~
- ~~• a British citizen has presented with challenging behaviours in modern slavery support, and it has been identified by the competent authority that the individual meets the public order definition under S63(3)(b).~~

Paragraph 14.253A

In the section on 'Evidence gathering and decision-making process', after paragraph 14.253, add a new paragraph 14.253A:

A decision-maker should note whether the application of the non-punishment provision (modern slavery statutory defence) has been considered when making a public order disqualification decision.

Paragraph 14.266

14.266. The decisions must be timely. It is important that decisions on public order are made promptly for protection of the public, clarity for the individual, and those providing support. This means that decisions must be made on the information available in the decision-making window, as set out in the section 'Public Order Decision Making Framework' only. While there is no expectation for decision makers to undertake extensive investigation, they must to support their decision provide reasons for their decision that a person meets the conditions for disqualification from protection on public order grounds.

Paragraph 14.267

~~14.267. The starting point for the Public Order Disqualification decision, using the framework is that an individual who meets the public order definition is a threat to public order. When making the Public Order Disqualification decision, the decision maker must establish on the balance of probabilities whether an individual who meets the public order definition represents a threat to public order. then consider, on the evidence available, whether the individual's need for modern slavery specific protections outweighs the threat to public order posed by the individual. There is a high bar for the need for modern slavery protections or support to outweigh the threat to public order, with more weight given to the public interest in disqualification.~~

Paragraph 14.276

14.276. If decision makers decide that the Public Order Disqualification should be applied to an individual, then Competent Authorities must consider the following, using the information available at the time the disqualification is being applied. This information shall include any information already used by decision makers in making the decision to apply the Public Order Disqualification in accordance with the framework.

- ~~Is there a credible suspicion of a real and immediate risk that the individual will be re-trafficked in or from the UK?~~
- When considering this element of the assessment, decision makers should make a determination about how real and immediate a credible risk is for the case in question. The expectation is that an immediate risk would be one present at the time the assessment is being made by the Competent Authorities and could reasonably be expected to be continuing. A real risk would be one that is more than remote or fanciful.
- Factors to consider when determining whether a real and immediate risk would be present could include the recentness of the exploitation, with more recent exploitation indicating a more real and immediate risk. Other factors could include where the individual is known to still be in contact with those said to be responsible for exploiting them, or when the known address of the potential victim is the same as that from which they were said to be exploited. Conversely, if an individual's circumstances have not changed since a historic incident of trafficking and no further exploitation has taken place, this could be considered as evidence that there is not a real and immediate risk.

- In line with other decisions made in accordance with this guidance, decision makers are entitled to consider the credibility of an account before them. As such, decision makers should cross reference 'Assessing Credibility and other evidence' when deciding the Public Order Disqualification. Decision makers will consider all information that is available to them in its entirety when making a decision as to whether a real and immediate risk of trafficking or re-trafficking exists.
- **Can the decision to disqualify be issued without putting that individual at a real and immediate risk of re-trafficking in or from the UK?**
 - ~~Decision makers are not expected to make an assessment of re trafficking risk outside of the UK.~~ When making the assessment of re trafficking risk, decision makers should take into account:
 - The immediate circumstances the individual would find themselves in upon disqualification, evident in the information provided and available to decision makers. This would include, for example, whether the disqualification would result in a change of accommodation;
 - Whether the individual is known to still be in contact with their exploiters;
 - Whether the circumstances in which they were exploited no longer apply;
 - Whether, at the point of the disqualification, that person would be held in secure accommodation, for example prison or immigration detention (note ~~if the individual is held in secure accommodation, it will normally be assumed there are no immediate re-trafficking risks present and no further mitigation necessary.~~ However, where release from secure accommodation is imminent, this should also be taken into account);
 - Whether their exploiters are outside of the UK or otherwise known to be geographically distant from the individual in question;
 - Whether the exploitation was historic or recent.

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