

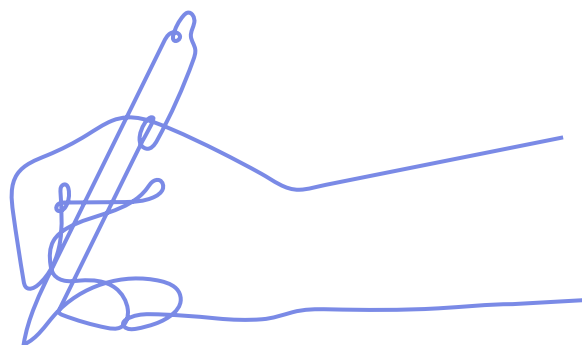
# Restoring protections for modern slavery victims

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

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### Summary

This Policy Brief aims 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. 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 and explains in detail what those human rights laws require. It then considers the compatibility of the modern slavery provisions in recent UK immigration legislation and accompanying Guidance in the light of those requirements 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 Guidance. Suggested textual amendments to give effect to the recommendations are included in an Annex.



## 1. Introduction

In its recent Report, *The Modern Slavery Act 2015: becoming world-leading again*<sup>1</sup> the House of Lords Modern Slavery Act 2015 Committee stated that modern slavery policy must align with the UK's commitments under international law, noting that the compliance of the previous government's immigration legislation with international law, including agreements on modern slavery and human trafficking to which the UK is a signatory, has been contested. The Committee recommended that the new government should review its policy and procedures to ensure that primary legislation and statutory guidance are positively compliant with its international obligations.<sup>2</sup>

In its Response to the Committee's Report, the Government states unequivocally that it is "committed to ensuring that all legislation is compliant with its international obligations including the Palermo Protocol and the European Convention on Action against Trafficking in Human Beings".<sup>3</sup> The Home Secretary has also reiterated the new Government's commitment to acting compatibly with international law when it comes to reforming immigration law and policy.<sup>4</sup> The new Government has also shown the importance it attaches to acting compatibly with international law by reinstating in the Ministerial Code an express reference to the duty on ministers to comply with international law and treaty obligations.<sup>5</sup>

This Policy Brief focuses on the changes needed to bring modern slavery<sup>6</sup> measures in the UK's recent immigration legislation, and the related policy framework,<sup>7</sup> in line with the requirements of human rights law, both in UK law (most notably obligations contained in the European Convention on Human Rights (ECHR), made part of UK law by the Human Rights Act) and international law (specifically, the Council of Europe Convention on Action Against Trafficking in Human Beings (ECAT)).<sup>8</sup> It aims to inform the legislative review of immigration legislation being conducted by the UK Government.<sup>9</sup>

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1. [The Modern Slavery Act 2015: becoming world-leading again](#), HL Paper 8 (16 October 2024) at para. 73.

2. Para. 74.

3. Government Response to House of Lords Modern Slavery Act 2015 Committee, Report of Session 2024-25, *The Modern Slavery Act 2015: Becoming World-Leading Again*, CP 1216 (December 2024), p. 10.

4. HC Deb 22 July 2024, vol 752, col 390 [Border Security and Asylum - Hansard - UK Parliament](#).

5. [Ministerial Code](#) (updated 6 November 2024), para. 1.6.

6. The term 'modern slavery', which does not have an internationally agreed definition, is a concept used in the UK context as an umbrella term to denote a range of practices defined in different international legal instruments, including slavery, servitude, forced labour and human trafficking.

7. The Nationality and Borders Act 2022 (NABA); The Illegal Migration Act 2024 (IMA); the Safety of Rwanda (Asylum and Immigration) Act 2024; 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 3.10, 31 May 2024); and Guidance on Temporary permission to stay: considerations for victims of human trafficking or slavery (version 3.1, 27 August 2024).

8. This Policy Brief draws on several pieces of legal analysis conducted by the author and published by the Modern Slavery and Human Rights Policy and Evidence Centre. See Marija Jovanovic, 'Legal Analysis of Section 63 of the Nationality and Borders Act 2022 and Modern Slavery Statutory Guidance' (Modern Slavery and Human Rights Policy and Evidence Centre, 2 August 2022); Marija Jovanovic, 'Legal Analysis of the Rwanda Treaty and the Rwanda Safety Bill and the UK's legal obligations towards victims of modern slavery and human trafficking' (Modern Slavery and Human Rights Policy and Evidence Centre, 28 January 2024); Marija Jovanovic, 'Legal Analysis of the Human Rights Compatibility of the Modern Slavery Sections in the Illegal Migration Act (Sections 22-29)' (Modern Slavery and Human Rights Policy and Evidence Centre, 11 September 2023).

9. UK Parliament, Written Questions, Answers and Statements, Question for Home Office, UIN HL263 (tabled on 23 July 2024, answered on 5 August 2024) [Written questions and answers - Written questions, answers and statements - UK Parliament](#); UK Parliament, Written Questions, Answers and Statements, Question for Home Office, UIN HL887 (tabled on 9 September 2024, answered on 17 September 2024) [Written questions and answers - Written questions, answers and statements - UK Parliament](#).

Immigration law is a domain where states enjoy a wide degree of autonomy.<sup>10</sup> However, this autonomy is constrained by the international human rights commitments which States have voluntarily assumed.<sup>11</sup> Such limitations usually concern the admission, treatment and the possibility of removing those without permission to enter or remain in the territory of another State.<sup>12</sup>

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'.<sup>13</sup> It imposes positive obligations to prevent, prosecute and punish the perpetrators of modern slavery and protect its victims.<sup>14</sup> These obligations have been crystallised in the jurisprudence of the ECtHR, which draws heavily on ECAT when interpreting their scope.

In the period between 2021 and early 2024, the UK, under the previous government, adopted a range of legal and policy measures aimed at addressing what it called 'the challenge of illegal migration',<sup>15</sup> 'the broken asylum system' and what it alleged to be the 'rising abuse of the National Referral Mechanism (NRM)'<sup>16</sup> – the UK's mechanism for identifying and supporting survivors of modern slavery.

Accordingly, the UK passed the Nationality and Borders Act 2022 (NABA), the Illegal Migration Act 2023 (IMA) and signed the Treaty with Rwanda accompanied by the Safety of Rwanda (Asylum and Immigration) Act 2024. The Rwanda Treaty and the Safety of Rwanda (Asylum and Immigration) Act were meant to operationalise the IMA by facilitating the removal from the UK to Rwanda of those without the right to enter or remain. The Act came into force in April 2024, on the ratification of the Rwanda Treaty. The new Government has ended the migration and economic development partnership with Rwanda, and made clear that the

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10. See e.g. Vincent Chetail, *International Migration Law* (OUP 2019) noting that 'any discussion about migration inexorably starts by acknowledging the centrality of territorial sovereignty and the correlative right of states to control and regulate the movement of persons across their borders.'

11. For example, Article 79 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW) expressly refers to the right of each State Party to establish the criteria governing admission of migrant workers and members of their families. However, it notes that concerning other matters related to their legal situation and treatment, States Parties are subject to the limitations set forth in the Convention. Accordingly, once migrant workers are found within the State territory, whether regular or irregular, they are entitled to a range of rights. The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), which monitors the implementation of the ICRMW by the States, noted in their General Comment No 5 (2021) that 'entry and irregular stay of a person in a State should never constitute a criminal offence' and that 'the mere fact of entering or remaining in an irregular situation in a State is not sufficient reason to mandate the immigration detention of migrant workers and members of their families, since that exceeds the legitimate purpose or interest of States to control and regulate migration.'

12. See the European Court of Human Rights, 'Guide on the case-law of the European Convention on Human Rights: Immigration' (August 2023).

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

14. Evidence suggests the terms 'survivor of modern slavery' and 'people with lived experience of modern slavery' are generally preferable when talking about the people most directly affected by this form of exploitation. This Policy Brief uses the terms 'potential victim' and 'victim' in places, given they are used in the Modern Slavery Act 2015, the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) and many other official documents and statistics. See W Asquith, A Kiconco, A Balch 'Promising practices in the engagement of people with lived experience to address modern slavery and human trafficking' (2022).

15. This Policy Brief refers throughout to "irregular migration" rather than "illegal migration".

16. HM Government, 'New Plan for Immigration' (2021). See also, the Secretary of State for the Home Department, Policy paper 'New Plan for Immigration: legal migration and border control' (updated 25 November 2022) <https://www.gov.uk/government/publications/new-plan-for-immigration-legal-migration-and-border-control-strategy/new-plan-for-immigration-legal-migration-and-border-control-accessible>

Rwanda scheme will not be implemented, but has not yet set out its detailed plans in respect of the Safety of Rwanda (Asylum and Immigration) Act 2024.<sup>17</sup> None of the relevant modern slavery provisions in the IMA have been brought into force.

These pieces of legislation have attracted considerable scrutiny from both domestic and international actors and many provisions of these Acts were considered to be incompatible with the UK's international obligations.<sup>18</sup> In particular, modern slavery provisions in the NABA, the IMA, and the Safety of Rwanda Act represent significant changes to how modern slavery victims are identified and supported in the UK. It must be pointed out however that to date not all provisions pertaining to modern slavery in NABA and none of the modern slavery provisions in IMA have entered into force.

This Policy Brief first sets out the scope and legal effect of the obligations arising from Article 4 ECHR and ECAT with a particular focus on those relevant for victims with irregular migration status. It then examines the provisions of NABA and IMA as well as those parts of the Modern Slavery Statutory Guidance<sup>19</sup> which seek to give effect to these statutory provisions. This analysis is followed by a set of recommendations, which are primarily concerned with measures that need to be taken immediately to bring this legislation into line with the UK's legal obligations under ECHR and ECAT.

In addition to the provisions identified by this Brief that require such an immediate Government intervention, there are also provisions in domestic law and policy which are contributing to the high risks of exploitation and violations of Article 4 ECHR and ECAT, and as such require review and improvement. These include the instruments that form the wider legal and policy framework on immigration, such as the Extradition Act 2003 or the Immigration Act 2016.

For example, Section 34 of the Immigration Act 2016 contains the offence of illegal working, which on its face may not be incompatible with international law. Still, its application in practice can affect the compliance with the obligations contained in the ECHR and ECAT, most notably, the obligation to identify and protect victims of modern slavery for the purpose of labour exploitation (Article 4

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17. HC Deb 22 July 2024, vol 752, col 386; UK Parliament, Written Questions, Answers and Statements, Question for Home Office, UIN HL263 (tabled on 23 July 2024, answered on 5 August 2024) [Written questions and answers - Written questions, answers and statements - UK Parliament](#); UK Parliament, Written Questions, Answers and Statements, Question for Home Office, UIN HL887 (tabled on 9 September 2024, answered on 17 September 2024) [Written questions and answers - Written questions, answers and statements - UK Parliament](#).

18. Joint Committee on Human Rights 'Legislative Scrutiny: Nationality and Borders Bill (Part 5) - Modern Slavery' (15 December 2021); Joint Committee on Human Rights 'Legislative Scrutiny: Illegal Migration Bill' (11 June 2023); Joint Committee on Human Rights, Safety of Rwanda (Asylum and Immigration) Bill: Second Report of Session 2023-24 (7 February 2024); 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); UNHCR Observations on the Nationality and Borders Bill (October 2021); UNHCR Updated Observations on the Nationality and Borders Bill (January 2022); Anti-Slavery International 'The Nationality and Borders Bill will harm victims of modern slavery' (10 February 2022); Joint Committee on Human Rights, Legislative Scrutiny: Illegal Migration Bill, 'Written Evidence by the GRETA (IMB0024)'; Joint Committee on Human Rights, Legislative Scrutiny: Illegal Migration Bill, 'Written Evidence by Anti-Slavery International (MSA0076)'; Joint Committee on Human Rights, Legislative Scrutiny: Illegal Migration Bill, 'Written Evidence by the International Organization for Migration MSA0087'; Marija Jovanovic, 'The Rwanda Treaty and Bill and the UK's Legal Obligations towards Victims of Modern Slavery and Human Trafficking' (Modern Slavery and Human Rights Policy and Evidence Centre, January 2024).

19. 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 3.12, 16 January 2025). This Brief does not consider the Guidance on Temporary Permission to Stay: Guidance on Temporary permission to stay: considerations for victims of human trafficking or slavery (version 3.1, 27 August 2024). That Guidance will be considered in a future updated version of this Brief.

ECHR and Articles 10, 12, and 13 ECAT) as well as the non-punishment obligation (Article 26 ECAT). Similarly, the rules governing short term visas in the agriculture and care sectors are found to significantly exacerbate the vulnerability of migrant workers to exploitation and are therefore in need of urgent review and replacement with a better system.<sup>20</sup>

However, these are outside the scope of this Policy Brief, but may be subject to a more detailed analysis in a further Policy Brief in future.

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

### 2.1 The Relevant Treaties

The UK is party to a range of international treaties relevant for preventing and prosecuting modern slavery and for protecting its victims. These include both specialised treaties, 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 Council of Europe Convention on Action Against Trafficking in Human Beings (ECAT), and general human rights instruments, such as the European Convention on Human Rights 1950 (ECHR). Notably, the ECHR is incorporated into UK domestic law by the Human Rights Act 1998 (HRA).

### 2.2 The Core Obligations

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.'<sup>21</sup> This duty does not refer solely to criminal legislation but extends to the general legal and administrative framework including the adequacy of immigration policy.<sup>22</sup>
- An obligation to take 'operational measures to protect victims, or potential victims'.<sup>23</sup> 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.'<sup>24</sup> The protective obligation also

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20. I Thiemann, 'UK agriculture and care visas: worker exploitation and obstacles to redress' (Modern Slavery and Human Rights Policy & Evidence Centre, 2024).

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

22. *Rantsev v Cyprus and Russia* paras 290-293.

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

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

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.<sup>25</sup>

- A procedural obligation to investigate potential situations of modern slavery and punish the perpetrators.<sup>26</sup>

There are two key features of States' obligations under Article 4 ECHR which are important to note. First, the prohibition of slavery and forced labour in Article 4 ECHR is one of the four unqualified and non-derogable rights in the Convention.<sup>27</sup> This means that States are not permitted to limit, modify, or suspend their obligations arising out of such 'absolute' rights in pursuit of any competing public interests (they are unqualified), even in situations of extreme crisis ('in time of war or other public emergency threatening the life of the nation' (Article 15(1) ECHR)) (they are non-derogable). As the ECtHR has made clear:

'[T]ogether with Articles 2 and 3, Article 4 enshrines one of the basic values of the democratic societies making up the Council of Europe ... Unlike most of the substantive clauses of the Convention, Article 4 makes no provision for exceptions and no derogation from it is permissible under Article 15 (2) even in the event of a public emergency threatening the life of the nation'.<sup>28</sup>

Second, when interpreting the positive obligations imposed by Article 4 ECHR, the ECtHR draws heavily on the provisions of ECAT.<sup>29</sup> 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),<sup>30</sup> 13 (recovery and reflection period),<sup>31</sup> 15 (compensation and legal redress),<sup>32</sup> and 26 (non-punishment).<sup>33</sup>

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

26. *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 3 August 2022) para 69.

27. These are: the right to life (Article 2 ECHR); the prohibition of torture and inhuman or degrading treatment (Article 3 ECHR), the prohibition of slavery and servitude (Article 4 ECHR), and the prohibition on retrospective criminal law (Article 7 ECHR).

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

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

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

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

32. *Ibid.*, para. 126.

33. *VCL and AN v United Kingdom*.

## 2.3 Who is protected by positive obligations under Article 4 ECHR and ECAT?

The obligation to identify and protect victims and potential victims of human trafficking, contained in Article 4 ECHR and Articles 10 and 12 ECAT, is not conditional upon a person's immigration status, willingness or ability to cooperate with criminal investigations or prosecutions against the perpetrators, the place of exploitation, or their involvement in criminal offences.

The Explanatory Report to ECAT, which can be used as guide to its interpretation,<sup>34</sup> expressly states that 'the Convention applies both to victims who legally entered or are legally present in the territory of the receiving Party and those who entered or are present illegally.'<sup>35</sup> Accordingly, the obligation to identify every victim of MSHT must be observed regardless of whether the individual is lawfully present in the UK.

The Explanatory Report to ECAT further notes that 'assistance is not conditional upon a victim's agreement to cooperate with competent authorities in investigations and criminal proceedings'.<sup>36</sup> This is also echoed in the UK's Modern Slavery Statutory Guidance, which clarifies that:

If a person is a victim of modern slavery, then they are a victim of a crime. It is not necessary for a victim to cooperate with a criminal case in order to obtain a Reasonable Grounds decision (...) It is not necessary to prove that an offence has taken place, or for there to be an ongoing criminal investigation to find that an individual is a victim of human trafficking and/or slavery, servitude, and forced or compulsory labour.<sup>37</sup>

States are also duty-bound to identify even those victims who are not exploited in their territory – all State Parties to the ECHR are under a positive obligation to identify and support any suspected victim – not just those exploited in the country in which they are discovered.<sup>38</sup> This is significant given that the NRM data reveals that between April and June 2024 40% (1,743) of potential victims referred to the NRM claimed that they were exploited exclusively overseas.<sup>39</sup>

34. Since 1965, each newly adopted treaty has an explanatory report which details the main stages in its preparation and comments article by article on the *raison d'être* and the meaning of the provisions of the treaty. The reason for this is the fact that the *travaux préparatoires* of Council of Europe conventions and agreements are not made public. Instead, it was deemed appropriate to publish a report which, without revealing the attitudes of the various experts of governmental delegations during the proceedings, would be of a nature to facilitate the application of their provisions. However, the same committee that prepares the text of a draft convention also issues an explanatory report. The official publication of the explanatory report usually contains the proviso 'this report does not constitute an instrument providing an authoritative interpretation of the text of the convention although it may facilitate the understanding of the convention's provisions'. See Jörg Polakiewicz, *Treaty Making in the Council of Europe* (Council of Europe Publishing 1999).

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

36. ECAT Explanatory Report para 168.

37. Modern Slavery Statutory Guidance paras 14.79 and 14.80.

38. *J and Others v Austria*, paras 110 - 111.

39. UK Government, Official Statistics, Modern slavery: NRM and DtN statistics, April to June 2024.

Finally, 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,<sup>40</sup> as well as in British law,<sup>41</sup> 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’.<sup>42</sup> While this provision does not guarantee immunity from prosecution, punishment, or even imprisonment of survivors 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* survivor, including to those in prisons.<sup>43</sup> This point is particularly important given the prevalence of people subject to ‘criminal exploitation’ in the UK,<sup>44</sup> who could potentially be disqualified from protection on the basis of the NABA discussed below. According to the NRM data for the period between April to June 2024, children were most often referred for criminal exploitation (49% of all referred potential victims) and it was the second most reported type of exploitation for adult males (33% of all referred potential victims).<sup>45</sup>

## 2.4 How are positive obligations under Article 4 ECHR and ECAT triggered and what do they entail?

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.<sup>46</sup> 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.’<sup>47</sup> However, if an individual does raise a claim of being a victim of modern slavery, the ECtHR requires that such claims ‘as a whole were taken seriously’.<sup>48</sup>

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.<sup>49</sup> Similarly, while the procedural

40. Article 31 of 1951 Convention Relating to the Status of Refugees prohibits the imposition of penalties on refugees on account of their illegal entry or presence in a country. See also Office of the High Commissioner for Human Rights, Recommended Principles and Guidelines for Human Rights and Human Trafficking (2002) (‘OHCHR Principles’), Principle 7, Guidelines 2.5, 4.5, and 5.5.

41. 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.

42. Article 26 ECAT.

43. M. Jovanovic, P. Burland, V. Topp, F. 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’ (Modern Slavery and Human Rights Policy and Evidence Centre, November 2023).

44. Christine Cooper, Olivia Hesketh, Nicola Ellis, Adam Fair, ‘A Typology of Modern Slavery Offences in the UK: Research Report 93’ (Home Office, October 2017).

45. UK Government, Official Statistics, Modern slavery: NRM and DtN statistics, April to June 2024.

46. 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. See also *VCL and AN v the United Kingdom*, para 152; *Rantsev v Cyprus and Russia*, paras 286 and 288; *CN v the United Kingdom*; *SM v Croatia* [GC], para 307.

47. 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.

48. *J and Others v Austria*, paras 110 and 111.

49. *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.



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.<sup>50</sup> This means that the authorities are required to take adequate steps and deploy resources with a view to securing the conviction and punishment of the perpetrators. The focus is on the process, and not necessarily the final outcome.<sup>51</sup>

## 2.5 Identifying and protecting suspected and confirmed victims of modern slavery with irregular migration status: obligations pertaining to the right to stay and return/removal of identified victims

In the context of enforcing domestic immigration legislation and policy, it is significant to note two important restrictions imposed by Article 16 ECAT. 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 (Article 12 (1) and (2) ECAT). Second, any return of *identified* victims of modern slavery to their country of nationality or permanent residence requires an individualised assessment of the impact of such return on ‘the rights, safety and dignity of that person’. 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.

### a. Removing suspected victims of modern slavery

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.’<sup>52</sup> 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’.<sup>53</sup> For that reason, Article 10 (2) of ECAT expressly prohibits *removing suspected* victims, that is individuals with a positive reasonable grounds

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50. 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).

51. 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.’).

52. 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.

53. *Ibid.*

decision, from the State Party until the identification process is complete:

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.

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*.<sup>54</sup>

Furthermore, Article 10 (2) of 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) of ECAT.<sup>55</sup>

The Group of Experts on Action Against Trafficking in Human Beings ("GRETA") – the Council of Europe's Expert Body tasked with monitoring States' compliance with ECAT<sup>56</sup> – 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.<sup>57</sup>

For that purpose, 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 traffickers<sup>58</sup> and to allow victims to come to a decision on cooperating with the law-enforcement authorities in any prosecution of the traffickers.<sup>59</sup> While it applies to any victim of MSHT, 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.'<sup>60</sup>

54. ECAT Explanatory Report, para 133 (emphasis added).

55. Notably, according to Article 12 (3) ECAT, those victims of MSHT who are lawfully resident within a territory of a Member State and 'who do not have adequate resources and need such help' are entitled to 'medical or other assistance' In addition, Article 12 (4) ECAT provides that victims of MSHT with lawful residence are entitled to 'access to the labour market, to vocational training and education.'

56. Group of Experts Against on Action Against Trafficking in Human Beings.

57. GRETA, '4th General Report on GRETA's Activities', GRETA(2015)1(March 2015) 40 (emphasis added).

58. ECAT Explanatory Report, paras 172-173.

59. *Ibid.*, para 174.

60. *Ibid.*, para 172.

However, unlike the obligation to identify every victim of MSHT 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<sup>61</sup> and any restrictions or denial of protection must be amply justified by a State in each individual case. 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 individual situation'.<sup>62</sup>

This was confirmed by GRETA 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.'<sup>63</sup>

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.<sup>64</sup>

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.'<sup>65</sup>

61. 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.

62. Group of Experts on Action against Trafficking (GRETA), '4th General Report on GRETA's Activities covering the period from 1 August 2013 to 31 September 2014', GRETA(2015)1(Council of Europe, March 2015) 47. In January 2023, GRETA announced intention to publish guidance on Article 13 ECAT. [GRETA holds its 49th plenary meeting - Action against Trafficking in Human Beings \(coe.int\)](https://www.coe.int/en/web/greeta/49th-assembly).

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

64. Joint Committee on Human Rights, Legislative Scrutiny: Illegal Migration Bill, 'Written Evidence by the GRETA (IMB0024) to the JCHR enquiry' para 15.

65. ECAT Explanatory Report, para 173.

## b. Removing confirmed/identified victims of modern slavery

States have much more freedom when it comes to returning victims who are *identified* (that is, have received a positive Conclusive Grounds decision in the UK) and afforded immediate protection and assistance during the reflection and recovery period. ECAT does not expressly cover the possibility of removing an identified victim to a third country. It does provide, in Article 16, for the repatriation and return of identified victims to a State 'of which a victim is a national or in which that person had the right of permanent residence at the time of entry into the territory of the receiving Party'. Importantly, however, such return is subject to two express conditions, which are in turn predicated upon a State's compliance with a range of obligations that arise from both ECHR and ECAT, as well as other international instruments binding on the UK, such as the 1951 UN Convention Relating to the Status of Refugees.

First, before returning a person to their country of nationality or permanent residence, States must observe a clear and unequivocal obligation to identify every victim of modern slavery regardless of their immigration status. As discussed above, no exceptions or limitations of this obligation are permitted under Article 4 ECHR and Article 10 (2) ECAT.

Second, before returning an identified victim of MSHT to their country of nationality or permanent residence, Article 16 ECAT requires State Parties to make an individualised assessment of the impact of such return on 'the rights, safety and dignity of that person'. The Explanatory Report to ECAT elaborates that 'such rights include, in particular, 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',<sup>66</sup> referring in that regard to the ECHR jurisprudence available at the time.

Significantly, GRETA expressly noted that the phrase 'due regard for the rights, safety and dignity' of victims also implies protection from re-trafficking, and not just from the risk of being subjected to torture or to inhuman or degrading treatment or punishment.<sup>67</sup> It clarified that:

A full and competent risk assessment must be carried out before anyone is returned. Risk assessments should include an assessment of at least the risk of re-victimisation and re-trafficking, and options for reintegration and societal participation, including access to the labour market and education.<sup>68</sup>

66. Para 202.

67. GRETA, 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by UK' (First evaluation round, 12 September 2012) GRETA(2012) 6, para 312; GRETA, 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by France' (First evaluation round, 28 January 2013) GRETA(2012)16, para 198; GRETA, 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Italy' (First evaluation round, 4 July 2014) GRETA(2014)18, para 175.

68. GRETA, 'Guidance note on the entitlement of victims of trafficking and persons at risk of being trafficked to international protection' (2020) para 44.

The Explanatory Report to ECAT further notes that '[t]he return of a victim shall also take into account the status of any legal proceedings related to the fact that the person is a victim, in order not to affect the rights that the victim could exercise in the course of the proceedings as well as the proceedings themselves.'<sup>69</sup> This suggests that a decision maker must consider a person's removal in light of any ongoing criminal proceedings against the traffickers, which represent a separate obligation under both Article 4 ECHR and Article 27 ECAT.

Although ECAT does not specifically address the possibility of removing an identified victim to a third country, the object and purpose of ECAT as an instrument designed to protect victims of modern slavery would call for the same type of assessment of the impact of such removal on their rights. The nature and scope of such an assessment is guided by the rules established in the jurisprudence of the ECtHR on expulsion, deportation, and extradition.<sup>70</sup> It must be noted however that while Article 16 ECAT governs the repatriation of victims of modern slavery, the ECHR applies to *any* person at risk of being removed to a country where they may face serious human rights violations, most notably the right to life and prohibition of torture contained in Articles 2 and 3 respectively.<sup>71</sup>

### c. Granting residence permits to confirmed/identified victims of modern slavery

Neither the ECHR nor ECAT provide an automatic entitlement to a residence permit to those without lawful residence in States Parties to these Conventions. Article 14 (1) ECAT instructs states to issue renewable residence permits to victims of modern slavery with an irregular migration status 'in one or other of the two following situations or in both': first, when the competent authority considers that their stay is necessary 'owing to their personal situation'; and second, when the competent authority considers that their stay is necessary 'for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.' While Article 14 ECAT does not specify any length of residence permit it does provide that the permit has to be renewable.

The discretion left to States when deciding to whom to grant residence permits is constrained by an obligation enshrined in Article 12 (6) ECAT, which stipulates that 'Each Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness'.

GRETA was therefore 'concerned by indications that the provision of assistance to victims of trafficking hinges on their co-operation with law enforcement authorities, even though the link does not exist formally.'<sup>72</sup> It noted that:

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69. *Ibid.*

70. ECAT Explanatory Report paras 202-203. See also the European Court of Human Rights, [Guide on the case-law - Immigration \(coe.int\)](#).

71. The European Court of Human Rights, [Guide on the case-law - Immigration \(coe.int\)](#).

72. GRETA, 'Assistance to Victims of Human Trafficking: Thematic Chapter of the 8th General Report on GRETA's Activities' (Council of Europe, October 2019) 5-6.

[D]ifficulties arise when a country chooses to make the residence permit conditional on the victim's co-operation, which in practice undermines the unconditional nature of assistance to victims. There are situations in which victims might be afraid to co-operate in the investigation because of threats from the traffickers. Granting a residence permit on account of the personal situation of the victim takes in a range of situations, such as the victim's safety, state of health and family situation, and tallies with the human rights-based approach to combating trafficking in human beings. GRETA has therefore invited State Parties to consider granting temporary residence permits to victims of human trafficking on the basis of their personal situation, in addition to the residence permit on the basis of the victim's co-operation in the investigation or criminal proceedings.<sup>73</sup>

It must finally be noted that the use of a word 'victim' in Article 14 ECAT presupposes that a person has been first identified as a victim (equivalent to a UK's Conclusive Grounds decision) and afforded a recovery and reflection period in order to decide whether or not to cooperate with law enforcement authorities.

### 3. The Compatibility of NABA 2022 with Human Rights Law

On 28 April 2022, the UK adopted the Nationality and Borders Act (NABA) amending the 2015 Modern Slavery Act (MSA) and bringing forward changes to the identification and support of victims of modern slavery. The relevant provisions of the NABA are contained in part 5 entitled 'Modern Slavery'.<sup>74</sup> Among the various issues arising from these provisions, of particular concern are:

- a. Section 63 which provides for disqualification of certain categories of victims (potential or confirmed) from protection guaranteed by the ECAT, ECHR, and domestic legislation<sup>75</sup> if a person is found to be 'a threat to public order' or has claimed the victim status 'in bad faith'.
- b. Sections 58 and 59 dealing respectively with 'a slavery or trafficking information notice' and 'compliance with slavery or trafficking information notice: damage to credibility'.<sup>76</sup>

73. GRETA, '9th General Report on GRETA's Activities' (March 2020) para 161.

74. The majority of modern slavery provisions in NABA have entered into force on 30 January 2023.

75. The Modern Slavery Act 2015; the Human Trafficking and Exploitation (Scotland) Act 2015; the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.

76. Joint Committee on Human Rights 'Legislative Scrutiny: Nationality and Borders Bill (Part 5) - Modern Slavery' (15 December 2021).

### 3.1 Public Order Disqualification Provisions (Section 63 of the NABA)

**Section 63 (1) of the NABA** originally stipulated that a person with a 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'.<sup>77</sup> According to **Section 63 (2) of the NABA**, the consequences for individuals deemed to be 'a threat to public order' or have claimed victim status in 'bad faith' are: a disqualification from the recovery and reflection period, necessary assistance and support, and the entitlement to a temporary residence permit – protections that are guaranteed to all victims or potential victims of modern slavery by international law (Article 4 ECHR, Articles 10, 12, 13, and 14 ECAT).

**Section 29 of the IMA** subsequently amended Section 63 (1) NABA to *mandate* rather than permit competent authorities to disqualify such victims from protection unless there are compelling countervailing circumstances.<sup>78</sup> These changes, which are not yet in force, with a commencement date yet to be appointed, will create a legal presumption in favour of disqualification from *any protection* of a vast category of individuals. The onus would then be on a victim or potential victim to provide evidence to refute such a presumption to avoid disqualification. As explained in the previous section, such disqualification of modern slavery victims 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 (*ex officio*): 'the authorities must act of their own motion once the matter has come to their attention.'<sup>79</sup>

Whereas NABA does not provide criteria on what might count as 'bad faith',<sup>80</sup> it offers a non-exhaustive list of circumstances in which a person represents 'a threat to public order'. Many of these examples concern 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)**).<sup>81</sup> In other words, a person who has never been convicted, and who has been coerced to commit terrorism-related activity in a context

77. Sections 63 (1) and 64 (5) NABA.

78. The Illegal Migration Act, enacted on 20 July 2023, expanded the scope of NABA provisions and denied protection to any potential or confirmed victim of modern slavery who arrives in the UK 'illegally'. These individuals are deemed to be a threat to public order by virtue of their irregular entry in the UK, even when such an entry was part of their trafficking. Accordingly they are to be denied any protection and assistance except in very limited circumstances. Namely, Section 22 (3) - (6) of the IMA 2023 allows for a narrow exception from automatic disqualification from protection for persons cooperating with law enforcement authorities and only when there are 'compelling circumstances' which require the person to be present in the United Kingdom for that purpose. In other words, the IMA 2023 stipulates that the Secretary of State 'must assume for the purposes of subsection (3)(b) that it is not necessary for the person to be present in the United Kingdom to provide the cooperation in question' – a presumption that could be set aside by the presence of 'compelling circumstances'.

79. 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.

80. Modern Slavery Statutory Guidance (v3.8, 22 February 2024) in para 14.296 explains that '[a]n individual may be considered to have claimed to be a victim of modern 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.

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

amounting to human trafficking, might still lose protection under this provision.<sup>82</sup> Such an exclusion contradicts express human rights and international legal obligations to identify and support every victim of human trafficking contained in Article 4 ECHR and Article 10 (2) ECAT.<sup>83</sup>

Furthermore, **Section 63(3)(b)** NABA excludes from protection those individuals who are convicted of offences listed in Schedule 4 to the Modern Slavery Act (MSA). Section 45 of the MSA provides for a statutory defence (legislative protection from prosecution) in England and Wales for victims of modern slavery and human trafficking, which 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. Known as the non-punishment principle, this guarantee is provided in Article 26 ECAT and a range of international instruments.<sup>84</sup> As already pointed out above, while this provision does not provide blanket immunity from prosecution, punishment, or even imprisonment of victims of MSHT, neither does it expressly permit automatic exclusion of certain offences from its reach.<sup>85</sup> 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 in all post MSA cases, 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.

It is worth emphasizing that whereas the involvement in offences listed in Schedule 4 of the MSA excludes victims from the statutory defence under Section 45 *only*, Section 63(3)(b) of the NABA now disqualifies such victims entirely from *any* protection and assistance guaranteed in ECAT and under domestic law. In fact, it denies such victims the very status of victim. By imposing such further restrictions and indeed a disqualification from victim status, the UK is in breach of its obligations to identify and protect every victim of MSHT, contained in Article 4 ECHR and Article 10 (2) ECAT.<sup>86</sup>

Furthermore, **Section 63(3)(f) of the NABA** disqualifies 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)'. **Section 29 of the IMA** amends this provision by disqualifying from protection anyone who

82. *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 <https://www.osce.org/files/f/documents/2/7/491983.pdf>. For a discussion of the nexus between trafficking and terrorism see also Jayne Huckerby, 'When Terrorists Traffic Their Recruits', *Just Security* (15 March 2021) <https://www.justsecurity.org/75343/when-terrorists-traffic-their-recruits/>; Jayne Huckerby, 'When Human Trafficking and Terrorism Connect: Dangers and Dilemmas', *Just Security* (22 February 2019) <https://www.justsecurity.org/62658/humantrafficking-terrorism-connect-dangers-dilemmas/>.

83. GRETA, 'Evaluation Report: United Kingdom, Third Evaluation Round' GRETA(2021)12 (20 October 2021), para 49.

84. See M Jovanovic and M Niezna, 'Non-Punishment of Victims/Survivors of Human Trafficking in Practice: A Case Study of the United Kingdom' (Council of Europe 2023) < <https://rm.coe.int/non-punishment-of-victims-survivors-of-human-trafficking-in-practice-a/1680ac86f4> >.

85. GRETA, 'Evaluation Report: United Kingdom, Third Evaluation Round' GRETA(2021)12 (20 October 2021) 169.

86. Joint Committee on Human Rights 'Legislative Scrutiny: Nationality and Borders Bill (Part 5) - Modern Slavery' (15 December 2021) para 64.



has been sentenced to a period of imprisonment for any offence or is 'liable to deportation from the United Kingdom under any provision of, or made under, any other enactment that provides for such deportation'. This significantly broadens the list of circumstances in which a victim of modern slavery would be treated as a threat to public order to include cases where the person has been sentenced to imprisonment regardless of the seriousness of their offence or the length of imprisonment. It would therefore exclude from protection victims compelled to commit criminal offences by their traffickers/exploiters who are prosecuted and convicted due to their lack of knowledge of the availability of the defence from Section 45 of the MSA, as well as those victims convicted for immigration-related offences.<sup>87</sup> As already explained, 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 of the ECAT.

Finally, **Section 63(3)(i)** NABA excludes from protection any 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 such risks.<sup>88</sup>

It is therefore clear that the exclusion of such 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, contradicts several express obligations of States under Article 4 ECHR and ECAT as also pointed out by domestic<sup>89</sup> and international bodies.<sup>90</sup>

In particular, in their comments on the then Nationality and Borders Bill, the UN Special Rapporteurs 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.<sup>91</sup> The UN Special Rapporteurs reminded that there were no exceptions to the obligation to identify victims, which implies that even victims who have committed criminal offences should be identified as such. Moreover, the UN Special Rapporteurs also expressed concern that Clause 63(3) 'would be in violation of the State's

87. 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>.

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

89. *Ibid.*, paras 62 – 75; Letter from the Independent Anti-Slavery Commissioner to the Home Secretary (7 September 2021).

90. Among those expressing criticism were the UN Special Rapporteur on Trafficking in Persons, the UN Special Rapporteur on the Human Rights of Migrants, the UN Special Rapporteur on Contemporary Forms of Slavery, and the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism. See 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 ('UN Special Rapporteurs' submission') <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=26788>. See also UNHCR Observations on the Nationality and Borders Bill, October 2021 <https://www.unhcr.org/publications/legal/615ff04d4/unhcr-legal-observations-nationality-and-borders-bill-oct-2021.html>; UNHCR Updated Observations on the Nationality and Borders Bill, as amended, January 2022 <https://www.refworld.org/pdfid/61e529af4.pdf>; Anti-Slavery International 'The Nationality and Borders Bill will harm victims of modern slavery', <https://www.antislavery.org/nationality-and-borders-bill-will-harm-victims-of-modern-slavery/#:~:text=The%20Bill%20would%20therefore%20block,allow%20traffickers%20to%20evade%20justice>.

91. UN Special Rapporteurs' submission', 8.

obligation to ensure non-punishment of victims of trafficking or contemporary forms of slavery for *any unlawful acts* that are a direct consequence of trafficking', enshrined in **Article 26 ECAT**.<sup>92</sup> It has been further pointed out by the Joint Committee on Human Rights that excluding certain victims from protection due to their criminal activities could violate States' duty to investigate modern slavery offences and prosecute the perpetrators, which applies to all instances of trafficking or slavery, regardless of whether the victim had been convicted of an offence.<sup>93</sup> The Joint Committee noted that:

Excluding certain victims from protection increases the likelihood that their cases will not be adequately investigated or prosecuted and, therefore, that action will not be taken against organised gangs exploiting these victims of slavery or human trafficking. Such an approach therefore runs counter to the UK's obligations under [the CoE Anti-Trafficking Convention] and Article 4 ECHR, as well as leaving gaps in enforcing action against traffickers. We are concerned that such an approach will leave a loophole for those responsible for exploiting people in slavery and human trafficking to evade investigation and prosecution, by targeting those with a criminal past.<sup>94</sup>

Therefore, identification of victims and their protection are instrumental for discharging not just the States' positive obligation to protect victims of modern slavery but also their obligation to prosecute and punish the perpetrators. Exclusion of victims who have committed offences, or who are suspected of criminal offences, from protection would limit their involvement in any investigations, prosecutions, and criminal proceedings.<sup>95</sup>

What is more, criminal convictions and imprisonment of victims may result in further exploitation and re-victimisation, which States are required to prevent.<sup>96</sup> The Joint Committee noted that 'there is a significant body of evidence that organised gangs deliberately target vulnerable people, and specifically target those recently released from prison, as potential victims of slavery or trafficking'.<sup>97</sup>

Accordingly, The UK Government should amend Section 63 of the NABA (and the relevant provisions in the Modern Slavery Statutory Guidance as noted below) to

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92. *Ibid.*, 11 (emphasis added).

93. Joint Committee on Human Rights 'Legislative Scrutiny: Nationality and Borders Bill (Part 5) - Modern Slavery' (15 December 2021), paras 51-53.

94. *Ibid.*

95. In its submission to the Court in *V.C.L. and A.N. v United Kingdom*, para 143, GRETA noted that: 'Criminalisation of victims (...) discouraged them from coming forward and cooperating with the investigation into those responsible for their trafficking.' See also JCHR NABA Report, paras 19, 50-53; UN Special Rapporteurs' submission, 8; *MS (Pakistan) v Secretary of State for the Home Department* [2020] UKSC 9, para 36, Anti-Slavery International, *Trafficking for Forced Criminal Activities and Begging in Europe: Exploratory Study and Good Practice Examples* (Anti-Slavery International London 2014) 34.

96. M Jovanovic, 'The Rwanda Treaty and Bill and the UK's legal obligations towards victims of modern slavery and human trafficking' (Modern Slavery and Human Rights Policy and Evidence Centre, 28 January 2024).

97. Joint Committee on Human Rights 'Legislative Scrutiny: Nationality and Borders Bill (Part 5) - Modern Slavery' (15 December 2021), para 51.

bring its 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.

Such 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.

### 3.2 Slavery or Trafficking Information Notice (Sections 58 and 59 of the NABA)

Section 58 of the NABA stipulates that the Secretary of State may serve a 'slavery or trafficking information notice', which requires the recipient to provide the Secretary of State (and any other competent authority specified in the notice), before the specified date, with any 'relevant status information' the recipient has. 'Relevant status information' is information that may be relevant for the purpose of making a reasonable grounds decision or a conclusive grounds decision in relation to the recipient. The recipient must also provide a statement setting out their reasons for not providing the relevant status information before the specified date.

Section 59 of the NABA then sets out the consequences of providing such late notice, which applies only in cases of adult victims of modern slavery:

In determining whether to believe a statement made by or on behalf of the person, the competent authority must 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.

The JCHR report on the Nationality and Borders Bill from 2021 identified these provisions, which are not yet in force, with a commencement date yet to be appointed, as one of the 'three themes that seem to raise more significant concerns' (the other two being POD and definition of victim). The JCHR report noted that:

Clause [59] would set a deadline for potential victims to disclose the full details of their exploitation, or face a new statutory obligation that late provision of evidence must damage their credibility. In these circumstances, this seems to be unreasonable, unfair and contrary to the UK's protective and investigative obligations in relation to preventing and combatting slavery. We recommend that this provision is amended so that late evidence 'may' rather than 'must' damage the credibility of a victim's case."<sup>98</sup>

It is worth pointing out that the provisions of the Modern Slavery Statutory Guidance on barriers to disclosure and difficulty recalling facts, on assessing credibility, as well as on working with vulnerable victims deal with this issue adequately.<sup>99</sup> In particular, para 14.61 of the Guidance directly speaks to the JCHR's recommendation 'that this provision is amended so that late evidence "may" rather than "must" damage the credibility of a victim's case':

If the individual has had multiple opportunities to raise information in relation to an instance of modern slavery and fails to do so until action is brought against them, such as an Immigration Enforcement removal direction, then this should be weighed in the balance with all other evidence and *may* damage their credibility.<sup>100</sup>

Accordingly, Sections 58 and 59 of NABA should not be brought into force, or if they were, Section 59 should be amended to change instruction to the competent authority from 'must' to '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.'

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98. Joint Committee on Human Rights 'Legislative Scrutiny: Nationality and Borders Bill (Part 5) - Modern Slavery' (15 December 2021).

99. 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 3.12, 16 January 2024) paras 13.14 - 13.24, Annex E and Annex D respectively

100. Ibid para 14.61 (emphasis added).

## 4. The Compatibility of IMA 2022 with Human Rights Law

On 20 July 2023, the Illegal Migration Act 2023 (IMA) received Royal Assent with the purpose to 'create a scheme whereby anyone arriving illegally in the United Kingdom will be promptly removed to their home country or to a safe third country to have any asylum or human rights claim processed.'<sup>101</sup> The IMA builds on the NABA, and the measures set out in the New Plan for Immigration<sup>102</sup> as part of the previous Government's wider strategy to tackle "illegal migration".

**Sections 22-29 of the IMA** contain provisions that significantly affect how modern slavery victims are identified and supported in the UK. Sections 26-28 contain procedural provisions, which are ancillary to those contained in Sections 22-25, and do not on their own raise the issue of incompatibility with the UK's international human rights obligations.

Under **Section 2 (1) of the IMA**, the Secretary of State must make arrangements for the removal of a person from the United Kingdom if the person meets specific conditions. Such conditions relate to a person's entry into the UK without legitimate leave to enter or remain and the fact that they did not arrive in the United Kingdom directly from a country in which they face persecution on the grounds of their race, religion, nationality, membership of a particular social group or political opinion.

According to **Section 22 of the IMA**, an individual who meets the conditions in Section 2 (1) who has a 'positive reasonable grounds decision' – a decision made when a competent authority finds that there are reasonable grounds to believe that the person is a victim of modern slavery – will be automatically removed (subject to a very narrowly defined exception) before the victim identification process has been completed (e.g. before the competent authority has reached a 'conclusive grounds decision' which is a final decision on one's victim status in the UK). Such removal would violate the express obligation to identify every victim of modern slavery before their return to the country of origin could be considered (Article 4 ECHR, Articles 10 (2) and 16 ECAT) explained above.

Subject to the same conditions, **Sections 23-25 of the IMA** in addition exclude individuals with a 'positive reasonable grounds decision' from any assistance and support measures granted by the modern slavery legislation throughout the UK, including the devolved jurisdictions,<sup>103</sup> in violation of the obligation to provide such assistance and support in Article 4 ECHR and Articles 10 (2), 12 (1) and (2) and 13 ECAT.

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101. The Explanatory Notes relate to the Illegal Migration Act 2023.

102. HM Government, 'New Plan for Immigration' (2021).

103. The Modern Slavery Act 2015; The Human Trafficking and Exploitation (Scotland) Act 2015; The Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.

These exclusions apply even if a person entered or stayed in the UK illegally *against* their will, because they were trafficked, unless they are immediately prepared to co-operate with law enforcement authorities, their presence for that purpose is deemed necessary, and ‘the public interest in the person providing that co-operation is outweighed by any significant risk of serious harm to members of the public which is posed by the person’.<sup>104</sup>

As already mentioned in the previous section, **Section 29 of the IMA** amends Section 63 (1) NABA, which originally stipulated that a person with a reasonable grounds decision (a 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’. Section 29 of the IMA now *mandates* rather than permits competent authorities to disqualify such victims from the recovery period and relevant support 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. In particular, Section 63 (3) (f) of the NABA now disqualifies from protection anyone who is not a British citizen and has been sentenced to a period of imprisonment for *any* offence or is ‘liable to deportation from the United Kingdom under any provision of, or made under, any other enactment that provides for such deportation’. 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 of the 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), and 13 ECAT. As explained above, only Article 13 (3) ECAT allows for a narrow exception from the mandatory recovery and reflection period of minimum 30 days on ‘public order’ grounds, but such an exception must be amply justified by a State in each individual case.

In addition to being directly in breach of the two core obligations under Article 4 ECHR discussed above – an obligation to put in place ‘a legislative and administrative framework providing real and effective protection of the rights of victims’<sup>105</sup> and an obligation to take ‘operational measures to protect victims, or potential victims’<sup>106</sup> – excluding from protection any potential victim of modern slavery who has arrived in the UK irregularly would also likely lead in practice to breaches of the separate obligation to investigate and prosecute the perpetrators of this offence. This is because without the victim’s co-operation it would be difficult to gather relevant evidence to prove the offence of modern slavery.<sup>107</sup>

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104. Sections 22 (3) – (5), 24 (3) – (5), and 25 (3) – (5) of the IMA discussed further below.

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

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

107. Oral evidence provided by Assistant Chief Constable Jim Pearce to the House of Lords Modern Slavery Act 2015 Committee (2024). ‘Uncorrected oral evidence: The Modern Slavery Act 2015, Monday 26 February 2024’.

Sections 22 (3) – (5), 24 (3) – (5), and 25 (3) – (5) of the IMA permit a very narrow exemption from the automatic disqualification from protection and removal of potential victims of modern slavery who arrive in the UK in breach of immigration rules. Such an exemption applies to potential victims of modern slavery who co-operate with law enforcement authorities in a criminal investigation against the perpetrators, but only on the condition that the Secretary of State considers that it is necessary for the person to be present in the United Kingdom to provide that co-operation, and that the public interest in the person providing that co-operation is not outweighed by any significant risk of serious harm to members of the public which is posed by the person. Moreover, Sections 22 (5), 24 (5) and 25 (5) of the IMA create a legal presumption that it is not necessary for the person to be present in the United Kingdom to provide the co-operation in question – a presumption that can only be set aside by the presence of ‘compelling circumstances’ to the contrary. Significantly, potential victims would need to make a decision on such co-operation without benefiting from the 30-day recovery and reflection period guaranteed by Article 13 of ECAT and Section 61 of the NABA, which is intended to allow potential victims some time to recover and come to a decision on co-operating with the law-enforcement authorities in the investigation and possible prosecution of the traffickers. This directly contradicts Article 12 (6) ECAT. The Explanatory Report to ECAT expressly notes that:

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 co-operate with competent authorities in investigations and criminal proceedings.<sup>108</sup>

It is clear that Sections 22–29 of 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 stipulates that ‘the implementation of the provisions of this Convention by Parties, in particular the enjoyment of measures to protect and promote the rights of victims, shall be secured without discrimination on any ground including national origin’. These provisions are therefore incompatible with all three core obligations in Article 4 ECHR and ECAT.

Accordingly, 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.

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<sup>108</sup> ECAT Explanatory Report para 168.

## 5. The Compatibility of Modern Slavery Statutory Guidance with Human Rights Law

The Modern Slavery Statutory Guidance<sup>109</sup> is published under section 49(1) of the Modern Slavery Act 2015 and contains the instructions for public authorities and other relevant bodies in charge of victim identification and support.

It contains detailed guidance on the process to be followed by domestic authorities when determining whether an individual should be disqualified from protection. It must be noted that this Guidance only governs public order disqualification requests based on Section 63 (3) (b) and (f). It explains that requests 'relating to national security (which may fall under subsections 63(3) (a), (c), (d), (e), (g), (h), or (i) of the Nationality & Borders Act 2022)' would be subject to separate guidance.<sup>110</sup>

The latest version of the Modern Slavery Statutory Guidance available at the time of writing from 16 January 2025 contains provisions on public order disqualification in paragraphs 14.235 – 14.292 and provisions concerning 'bad faith' disqualification in paragraphs 14.293 – 14.333.

While intended to give effect to Section 63 NABA, which is itself incompatible with human rights law, including international legal obligations binding on the UK, for the reasons explained above, the Guidance goes beyond what Section 63 NABA expressly permits and therefore further compounds the breaches of human rights law. Four aspects warrant particular attention:

- Exclusion of the obligation to identify a victim when making a public order disqualification decision (paragraph 14.242 of the Guidance)
- A presumption in favour of public order disqualification (paragraph 14.267 of the Guidance)
- Public order disqualification of British nationals (paragraph 14.245 of the Guidance)
- The assessment of the risk of re-trafficking as part of the decision-making process when applying public order disqualification (paragraphs 14.236 and 14.276 – 14.285 of the Guidance)

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109. Modern Slavery: statutory guidance for England and Wales (under s49 of the Modern Slavery Act 2015)

and non-statutory guidance for Scotland and Northern Ireland (version 3.12, 16 January 2025).

110. *Ibid* para 14.237.



## 5.1 Exclusion of the obligation to identify a victim when applying public order disqualification

According to section 63 (2) NABA, if a person is deemed to be a threat to public order or has claimed to be a victim in bad faith:

[T]he 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.

Furthermore, by virtue of Section 64 (5) NABA, which amends Section 50 of the Modern Slavery Act 2015, such individuals would be disqualified from any assistance and support.

However, according to **paragraph 14.242 of the Guidance**:

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 14.242 of the Guidance therefore adds a significant further consequence of deeming a person a threat to public order – it precludes such an individual from being identified as a victim of modern slavery. It expressly states that any ongoing process of identification would be terminated and a person would not be entitled to have a final decision on their status as a victim of modern slavery (a Conclusive Grounds Decision). Not only does this contravene obligations arising out of Article 4 ECHR and 10 (2) ECAT, as explained above, but it also has no legal basis in NABA itself.<sup>111</sup> It is worth pointing out that one of the earlier versions of the Nationality and Borders Bill did contain a clause which

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<sup>111</sup> It should be noted that one of the earlier versions of the Nationality and Borders Bill did contain a clause which stated that no Conclusive Grounds decision would be made, but this clause was eventually dropped from the Bill. In its legislative scrutiny report on the Bill, the JCHR noted that: 'We had concerns that there was a significant risk that clause 62, as introduced, was incompatible with the UK's procedural duty to investigate under Article 4 ECHR and ECAT. This is because clause 62(2)(a) provided that the obligation to make a conclusive grounds decision ceased to apply where the public order or bad faith exceptions apply. We are pleased to see that amendments made at Report stage in the Commons have removed that particular concern.' JCHR, Legislative Scrutiny: Nationality and Borders Bill (Part 5)—Modern Slavery, Eleventh Report of Session 2021–22 (15 December 2021) para 49.

stated that no Conclusive Grounds decision would be made, but this clause was eventually dropped from the Bill. In its legislative scrutiny report on the Bill, the JCHR noted that:

We had concerns that there was a significant risk that clause 62, as introduced, was incompatible with the UK's procedural duty to investigate under Article 4 ECHR and ECAT. This is because clause 62(2)(a) provided that the obligation to make a conclusive grounds decision ceased to apply where the public order or bad faith exceptions apply. We are pleased to see that amendments made at Report stage in the Commons have removed that particular concern.<sup>112</sup>

## 5.2 A presumption in favour of public order disqualification

While the Guidance rightly instructs decision-makers to apply the public order and bad faith disqualifications 'on a case-by-case basis',<sup>113</sup> the starting point in this assessment is a *presumption* that a person fulfilling conditions from Section 62 (3) (b) and (f) of the NABA is a threat to public order, which has to be disproved by that individual to avoid disqualification. Therefore, **paragraph 14.267 of the Statutory Guidance** expressly stipulates that:

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. The decision maker must 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.

This presumption could be set aside by the individual demonstrating that their modern slavery specific recovery needs outweigh the presumed risk to public order. **Paragraph 14.267 of the Guidance**, however, expressly states that '[t] here 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' and **paragraph 14.266** expressly states that '[t]here is no expectation for decision makers to undertake extensive investigation to support their decision.' The effect of these provisions in the Statutory Guidance is to remove the burden of justifying the need for POD from the authorities. This is contrary to the clear obligation of States under Article 4 ECHR and 10 (2) ECAT to identify every

112. JCHR, Legislative Scrutiny: Nationality and Borders Bill (Part 5)—Modern Slavery, Eleventh Report of Session 2021–22 (15 December 2021) para 49.

113. Modern Slavery Statutory Guidance (version 3.10) paras 14.251, 14.265, 14.270 and 14.301.

victim of MSHT on their own initiative, as well as the obligation under Article 13 ECAT to justify denying a potential victim the recovery and reflection period.

### 5.3 Public order disqualification of British nationals

The Modern Slavery Statutory Guidance also contains provisions on the process of disqualifying British nationals from protections available under domestic law. The Guidance states in **paragraph 14.245** that:

Disqualification requests can be raised by Competent Authorities where:

- a British citizen is in detention or on licence and is being 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).

However, neither NABA nor IMA provide a legal basis for excluding British nationals from assistance and support. The IMA applies to 'persons who enter or arrive in the United Kingdom in breach of immigration control'.<sup>114</sup> Section 64 (5) of the NABA prescribes that a duty to provide necessary assistance and support during the recovery period ceases to apply in relation to a person in respect of whom a determination is made under section 63 (2) of the NABA (disqualification from protection). Section 63 (2) NABA, as noted above, envisages only the following consequences for a person deemed to be a threat to public order or who has claimed to be a victim in bad faith: they are no longer protected from removal and they are not entitled to limited leave to remain in the UK. It is self-evident that a prohibition on removing a person from the UK or providing them a limited leave to remain would only apply with respect to someone who is *not* a British national or does not have legal residence in the UK.<sup>115</sup>

### 5.4 The assessment of the risk of re-trafficking as part of the decision-making process when applying public order disqualification

Following a decision of the High Court that that all potential trafficking victims must be assessed for the risk of re-trafficking before any order disqualifying them from support is made,<sup>116</sup> the Statutory Guidance was amended to require a separate risk of re-trafficking assessment once it is determined that a public order disqualification can apply to the individual (paragraphs 14.236 and 14.276

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114. Section 1(1) of the IMA. See also Section 2(2) IMA.

115. According to dataset 'National Referral Mechanism and Duty to Notify Statistics, 2014-2023' published on UK Data Service (<https://beta.ukdataservice.ac.uk/datacatalogue/studies/study?id=8910>) no UK national has been disqualified so far.

116. Matrix Chambers, 'High Court orders no public order disqualifications of slavery victims may take place without a risk assessment pending trial' (27 July 2023) <https://www.matrixlaw.co.uk/news/high-courts-orders-no-public-order-disqualifications-of-slavery-victims-may-take-place-without-a-risk-assessment-pending-trial/#:~:text=The%20High%20Court%20has%20ordered,the%20risks%20of%20re%20trafficking>.

- 14.285). If there is 'a real and immediate risk that cannot be mitigated' the potential victim will not be disqualified (paragraph 14.277).

While this represents a welcome move, it does not address the question of the human rights compatibility of the policy on public order disqualification overall, discussed earlier in this Brief.

Furthermore, paragraph 14.276 of the Modern Slavery Statutory Guidance only directs decision-makers to consider 'real and immediate risk that the individual will be re-trafficked in the UK or from the UK' and expressly notes that '[d]ecision makers are not expected to make an assessment of re-trafficking risk outside of the UK.' This ignores the fact that individuals subject to public order disqualification who are foreign nationals and have arrived in the UK 'illegally' are at risk of being removed to a third country under the IMA or returned to their home country.<sup>117</sup> This means that in addition to (and likely due to) a discontinuation of the victim identification process and disqualification from accessing available assistance and support in the UK, such individuals may be at risk of re-trafficking and further harm – either in their country of nationality/legal residence or in a third country.

This exclusion from the assessment of the risk of re-trafficking in the country of return or removal contradicts both the letter and spirit of the UK's human rights law obligations, including its international legal obligations set out above. In particular, such obligations include not just victim rescue and support, but also a duty to prevent an individual from falling victim in the first place and their protection from re-trafficking. Namely, in the landmark *Rantsev* case, the ECtHR ruled that Article 4 ECHR 'may, in certain circumstances, require a state to take operational measures to protect victims, or *potential* victims, of trafficking.'<sup>118</sup> The test outlined by the Court reads as follows:

In order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be demonstrated that the state authorities were aware, or ought to have been aware, of circumstances giving rise to a *credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited* within the meaning of art.3(a) of the Palermo Protocol and art.4(a) of the Anti-Trafficking Convention. In the case of an answer in the affirmative, there will be a violation of art.4 of the Convention where the authorities fail to take *appropriate measures within the scope of their powers to remove the individual from that situation or risk*.<sup>119</sup>

117. As discussed above Sections 22-25 of the Illegal Migration Act stipulate that despite a positive reasonable grounds decision, the Secretary of State is required to remove such a person from the United Kingdom and deny them access to support and assistance measures if the conditions in Section 2 are satisfied (a person is in the UK without legitimate leave to enter or remain and they did not arrive to the United Kingdom directly from a country in which they face persecution).

118. *Rantsev v Cyprus and Russia*, para 286 (emphasis added).

119. *Ibid* (emphasis added).

It is clear from this test, which has been repeated in all subsequent case-law of the Court on human trafficking,<sup>120</sup> that the protective ambit of Article 4 of the ECHR covers not just those who are already victims of trafficking but also those who are 'at real and immediate risk of being trafficked or exploited'. It does not place any restriction as to the territory where such risk of trafficking or re-trafficking may occur.

GRETA has similarly noted that:

The risk of being re-trafficked would in itself trigger a State's obligation to protect against the possibility of being subjected to slavery, servitude or forced labour. The removal of a person to a territory where they are at risk of being trafficked or re-trafficked would expose the person to a risk of being subjected to a violation of Article 4 of the European Convention on Human Rights.<sup>121</sup>

As explained above, Article 16 ECAT permits States to return an identified victim to their country of nationality or permanent residence. However, such return is subject to specific conditions, which include an individualised assessment of the impact of such return on 'the rights, safety and dignity of that person'. This assessment includes protection from re-trafficking.<sup>122</sup>

Accordingly, the provisions of the Modern Slavery Statutory 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', add a new paragraph after paragraph 14.253 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 gives reasons justifying the decision to apply public order disqualification in each individual case.

120. See, for example, *CN v the United Kingdom*, para 67; *VCL and AN v United Kingdom*, para 152.

121. GRETA, 'Guidance note on the entitlement of victims of trafficking and persons at risk of being trafficked to international protection' (2020) para 32.

122. GRETA, 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by UK' (First evaluation round, 12 September 2012) GRETA(2012) 6, para 312; GRETA, 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by France' (First evaluation round, 28 January 2013) GRETA(2013)16, para 198; GRETA, 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Italy' (First evaluation round, 4 July 2014) GRETA(2014)18, para 175.

- 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.

## 6. 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

3. 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.
4. 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.
5. 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 t~~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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