

Legal Analysis of Section 63 of the Nationality and Borders Act 2022 and modern slavery statutory guidance

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Executive Summary

Since 2022, the UK has adopted several legal and policy instruments¹ intended to restrict access to protections available to victims of modern slavery and human trafficking (MSHT) under domestic² and international law.³ This analysis focuses on one such measure, introduced by Section 63 Nationality and Borders Act 2022 (NABA) and given effect through the Modern Slavery Statutory Guidance,⁴ which disqualifies from protection potential or confirmed victims⁵ of MSHT on public order grounds – the so-called ‘public order disqualification’(POD). The analysis considers whether Section 63 and relevant provisions of the Modern Slavery Statutory Guidance are compatible with the UK’s obligations under Article 4 of the European Convention of Human Rights (ECHR) and the Council of Europe Convention on Action Against Trafficking in Human Beings (ECAT).⁶

It is found that Section 63 (3) NABA and relevant provisions in the Statutory Guidance, which set out the application POD, exceed the scope of permissible restrictions to protective obligations contained in Article 13 (3) ECAT. As a result, these provisions, on their face, breach the obligation to identify and protect every victim of MSHT without discrimination and without exception (Articles 4 and 14 ECHR and Articles 3 and 10 ECAT) by creating a legal presumption that every potential victim who falls within their scope is a threat to public order and requiring that the authorities balance this presumed threat to public order with their protection needs, with more weight given to the public interest in disqualification. This goes against both the letter and spirit of international law.

¹ Nationality and Borders Act 2022; Illegal Migration Act 2023; Treaty between the governments of the UK and Rwanda for the provision of an asylum partnership to strengthen shared commitments on the protection of refugees and migrants 2023; Safety of Rwanda (Asylum and Immigration) Bill 2024.

² Modern Slavery Act 2015; Human Trafficking and Exploitation (Scotland) Act 2015; Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.

³ European Convention of Human Rights 1950 (ECHR); the Council of Europe Convention on Action Against Trafficking in Human Beings 2005 (ECAT).

⁴ 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 (versions 3.1-3.8).

⁵ Potential victim is an individual with a positive Reasonable Grounds decision – a decision made when the relevant competent authority finds that there are reasonable grounds to believe that the person is a victim of MSHT. Confirmed victim is an whom the relevant competent authority determined ‘on the balance of probabilities’ to be a victim of MSHT. See Modern Slavery Statutory Guidance, section 7.

⁶ The analysis uses the term ‘victim’ because it features in legal instruments that regulate the subject of modern slavery and human trafficking.

These provisions furthermore create a strong risk of violating Article 26 ECAT, which requires States not to punish victims of modern slavery and human trafficking who had been compelled to commit criminal offences. As noted by the European Court of Human Rights in *V.C.L. and A.N. v the United Kingdom*, correct victim identification is a prerequisite for the application of the non-punishment principle guaranteed by Article 26 ECAT, which will be significantly impeded by the public order disqualification provisions.

In addition, the application of these provisions in practice is likely to lead to the breaches of a duty to investigate and prosecute the perpetrators of MSHT (Article 4 ECHR and 27 ECAT).

The analysis is divided in seven parts.

Part 1 briefly explains international legal obligations of States under Article 4 ECHR and ECAT, which are binding on the UK.

Part 2 follows with the analysis of permissible restrictions of certain protective obligations contained in Article 13 ECAT.

Part 3 then discusses Section 63 NABA and its compatibility with these international obligations.

Part 4 subsequently considers relevant provisions in the Modern Slavery Statutory Guidance, which seek to give effect to Section 63 NABA. This part also reflects on the applicability of POD to British Nationals.

Part 5 discusses legal challenges to POD before the UK courts and resulting changes in the Modern Slavery Statutory Guidance from January 2024.

Part 6 considers the relationship between the POD and removal of potential or confirmed victims of MSHT from the UK, under the recent Treaty with Rwanda and the Safety of Rwanda Bill. This part also addresses the question of the location of exploitation in the POD risk of re-trafficking assessment and how the risk of re-trafficking outside the UK features in such an assessment. Lastly,

Part 7 reflects on the changes in the Modern Slavery Statutory Guidance pertaining to the threshold and required evidence for identifying victims of MSHT and their compatibility with international obligations.

1. International legal obligations under ECAT and ECHR

International law requires that every victim of MSHT is identified and supported without discrimination and without exception (Articles 4 and 14 ECHR and Articles 3 and 10 (2) ECAT).⁷ Potential victims with irregular migration status and victims compelled to commit criminal offences are not excluded from such protection, and are entitled to further protection.

Namely, Article 10 (2) ECAT expressly guarantees that potential victims of MSHT 'shall not be removed from its territory until the identification process as victim (...) has been completed' and 'shall be entitled to assistance guaranteed by Article 12 (1) and (2)'.⁸ In addition, by virtue of Article 13 ECAT, potential or confirmed victims of MSHT are entitled to a recovery and reflection period of a minimum 30 days, which has a dual aim – to allow victims to recover and escape the influence of traffickers⁹ and to allow victims to come to a decision on cooperating with the law-enforcement authorities in any prosecution of the traffickers.¹⁰ While this protective obligation 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.'¹¹

When it comes to victims of MSHT involved in criminal offences, the non-punishment principle, enshrined in Article 26 ECAT and a number of other international instruments,¹² as well as in British law,¹³ requires States to provide for the *possibility* of

⁷ See M 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); 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); Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings (16 May 2005) para 62 (ECAT Explanatory Report).

⁸ GRETA, '4th General Report on GRETA's Activities', GRETA(2015)1(March 2015) 40.

⁹ ECAT Explanatory Report, paras 172-173.

¹⁰ *Ibid*, para 174.

¹¹ ECAT Explanatory Report, paras 172-174.

¹² 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.

¹³ 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.

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'.¹⁴ While this provision does not provide immunity from prosecution, punishment, or even imprisonment of survivors of MSHT, being convicted of a criminal offence does not disqualify them from simultaneously holding a victim status and accessing the protection guaranteed to *any* survivor, including those in prisons.¹⁵

Could States abandon or restrict these obligations on public order grounds? The answer is a qualified *no*. As explained below and in part 3 of the analysis, while the obligations to identify every victim of MSHT and prosecute the perpetrators could not be restricted on public order grounds, Article 13 ECAT allows for a narrow exception from an obligation to provide a reflection and recovery period, which is intended 'to guarantee that victims' status will not be illegitimately used.'¹⁶

According to the European Court of Human Rights (ECtHR) in the seminal *Rantsev v Cyprus and Russia* judgment:

Unlike most of the substantive clauses of the Convention, art.4 makes no provision for exceptions and no derogation from it is permissible under art.15(2) even in the event of a public emergency threatening the life of the nation..¹⁷

This means that even in situations of extreme crisis ('in time of war or other public emergency threatening the life of the nation' (Article 15(1) ECHR)) States are not permitted to limit, modify, or suspend their obligations arising out of such 'absolute' rights in pursuit of any competing public interests.

Obligations arising out of Article 4 ECHR, which the ECtHR interprets in the light of the relevant provisions of ECAT¹⁸ and are given effect in domestic law by the Human Rights Act 1998 (HRA) are the following:

¹⁴ Article 26 ECAT.

¹⁵ 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 survivor' (Modern Slavery and Human Rights Policy and Evidence Centre, November 2023).

¹⁶ ECAT Explanatory Report para 173.

¹⁷ *Rantsev v Cyprus and Russia*, para 283.

¹⁸ *Rantsev v Cyprus and Russia*, para 285; *Chowdury and Others v Greece*, para 110; *J and Others v Austria*, para 106;

- A general obligation to put in place ‘a legislative and administrative framework providing real and effective protection of the rights of victims.’¹⁹
- A specific obligation to take ‘operational measures to protect victims, or potential victims’.²⁰ Such protection measures specifically include ‘facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery.’²¹
- A specific procedural obligation to investigate potential situations of modern slavery and punish the perpetrators.²²

The protective and procedural obligations are triggered by a ‘credible suspicion’ (reasonable grounds to believe) that a person is a victim of modern slavery.²³ 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.’²⁴ 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’.²⁵

Significantly, even though these obligations could not be waived or restricted by a reference to public interest, they are not unlimited – the appropriate measures required from national authorities must not be interpreted to impose ‘an impossible or disproportionate burden’ on them.²⁶ This, however, is a high threshold, and States are duty-bound to identify even those victims who are not exploited in their territory.²⁷

Unlike obligations to identify every victim of MSHT enshrined in Article 4 ECHR and 10 (2) ECAT, Article 13 ECAT, which provides for a recovery and reflection period, does

¹⁹ *Chowdury and Others v Greece*, para 87; *Rantsev v Cyprus and Russia*, paras 285, 290-293; *J and Others v Austria*, para 106.

²⁰ *VCL and AN v United Kingdom*, paras 152 – 153; *J and Others v Austria*, paras 109-111.

²¹ *Ibid*, para 153. See also *Chowdury and Others v Greece*, para 110.

²² *Rantsev v Cyprus and Russia*, para 288; *CN v the United Kingdom*; *SM v Croatia* [GC], para 307. European Court of Human Rights, ‘Guide on Article 4 of the European Convention on Human Rights: Prohibition of slavery and forced labour’ (updated on 31 August 2022) para 69.

²³ 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.

²⁴ 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.

²⁵ *J and Others v Austria*, paras 110 and 111.

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

²⁷ *J and Others v Austria*, paras 110 - 111.

allow for a narrow exception on public order grounds. However, as shown in Part 3 below, States have a burden of proving that such an exception is justified in each individual case. Contrary to that, part 3 of this analysis shows that Section 63 (3) NABA contains a sweeping provision which makes a broad category of victims susceptible to disqualification from all protections under domestic legislation while the Modern Slavery Statutory Guidance requires that the authorities balance this *presumed* threat to public order with their protection needs, with more weight given to the public interest in disqualification.

2. Article 13 ECAT and the exclusion from the recovery and reflection period on public order grounds

It is not incompatible with ECAT to exclude some individuals from certain protections guaranteed by this treaty on public order grounds. Article 13(3) ECAT, which provides for the recovery and reflection period, stipulates that '[t]he Parties are not bound to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly.' The Explanatory Report to ECAT explains that '[t]his provision aims to guarantee that *victims' status will not be illegitimately used*.'²⁸ This clearly restricts the scope of this limitation to what is primarily a protective duty designed specifically to protect victims with irregular migration status.²⁹

In line with that, in its written submission to the inquiry by the Joint Committee on Human Rights conducted in relation to its legislative scrutiny of the Illegal Migration Bill (now Illegal Migration Act 2023), the Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA) emphasised that 'the grounds of public order should always be interpreted on a case-by-case basis' reminding that they 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.'³⁰ Accordingly, any exceptions from a protective obligation must be narrowly interpreted³¹ and must be amply justified by a State. This requires conducting necessary investigations as part of the identification process and making a decision based on evidence that a victim status *is* used illegitimately. As an exception to a protective obligation, it is a duty of States to justify the need for such exclusion in each particular case, and it is not for victims or potential victims to provide evidence to justify the need for protection.

²⁸ ECAT Explanatory Report, para 173 (emphasis added).

²⁹ In their submission to the JCHR, the Group of Experts on Action against Trafficking in Human Beings (GRETA) noted that 'the recovery and reflection period is mainly intended to apply for people in an irregular situation.' Joint Committee on Human Rights, Legislative Scrutiny: Illegal Migration Bill, 'Written Evidence by the GRETA (IMB0024) to the JCHR enquiry' para 15.

³⁰ *Ibid*, paras 15 and 16. See also 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.

³¹ 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; A Solomou, 'Exceptions to a Rule Must Be Narrowly Construed' in J 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.

Accordingly, while neither the exclusion from the recovery and reflection period nor the punishment of potential or identified victims of modern slavery are *per se* incompatible with international law, the following analysis in Part 3 shows that section 63 NABA goes considerably further than what Articles 13 (3) and 26 ECAT permit. It effectively instructs public authorities to disregard the obligations to identify a person as a victim and the obligation to investigate the offence of human trafficking itself, which are *not qualified* in either Article 4 of ECHR or ECAT.³²

3. Disqualification of potential or confirmed victims of modern slavery on ‘public order’ and ‘bad faith’ grounds (Section 63 NABA, amended by Section 29 IMA)

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 people with lived experience of modern slavery. The relevant provisions of the NABA are contained in part 5 entitled ‘Modern Slavery’.³³ Among the various issues arising from these provisions, of particular importance is the disqualification of certain categories of victims (potential or confirmed) from protection guaranteed by the ECAT, ECHR, and domestic legislation³⁴ if a person is found to be ‘a threat to public order’ or has claimed the victim status ‘in bad faith’ (Section 63 NABA).

NABA is part of a broader package of legislation and policy designed to tackle ‘illegal’ migration,³⁵ which also includes the Illegal Migration Act 2023 (IMA), and most recently, the Treaty with Rwanda and the Safety of Rwanda Bill, which are meant to enable the implementation of the IMA by facilitating removals of migrants from the UK to Rwanda.³⁶

³² M 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).

³³ The majority of modern slavery provisions in NABA have entered into force on 30 January 2023.

³⁴ 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.

³⁵ 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>.

³⁶ Home Office ‘World first partnership to tackle global migration crisis’ (14 April 2022), <https://www.gov.uk/government/news/world-first-partnership-to-tackle-global-migration-crisis>. This policy has been challenged before both the European Court of Human Rights and domestic courts. On 14 June 2022,

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’.³⁷ Section 29 of the Illegal Migration Act 2023 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.³⁸ 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 for a vast category of individuals convicted of *any* criminal offence punishable by imprisonment, even if have been compelled to commit them. It would be then on a victim or potential victim to provide evidence to refute such a presumption to avoid disqualification.

According to NABA Section 63 (2), 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.³⁹ The Explanatory Notes to the NABA specify that ‘[t]his is intended to enable the removal of those who pose a threat to the UK’.⁴⁰ Yet, neither the NABA nor Explanatory Notes clarify the notion of such ‘threat’.

the European Court of Human Rights decided to grant an urgent interim measure, under Rule 39 of the Rules of Court, in the case of *N.S.K. v. the United Kingdom* (application no. 28774/22, formerly *K.N. v the United Kingdom*), an asylum-seeker from Iraq who was facing imminent removal to Rwanda, following the recent establishment of an asylum partnership arrangement between the UK Government and the Government of the Republic of Rwanda. The High Court of Justice of England and Wales has found the overall policy to be lawful in *The King (On The Application Of AAA and Others) v The Secretary of the Home Department* [2022] EWHC 3230 (Admin). This decision has been appealed and, on 29 June 2023, the Court of Appeal judges have ruled that it is unlawful to send asylum seekers to Rwanda. See *R (on the application of AAA and Ors) v The Secretary of State for the Home Department* [2023] EWCA Civ 745. Following a decision of the UK Supreme Court that the policy was unlawful, the UK Government has signed a Treaty with Rwanda and proposed legislation that establishes that Rwanda was a safe country and seeks to prevent domestic courts from challenging this statement of fact. With the change of the Government in July 2024, this policy and accompanying legal instruments have been scrapped.

³⁷ Sections 63 (1) and 64 (5) NABA.

³⁸ 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’.

³⁹ Section 63 (2) NABA.

⁴⁰ Explanatory Notes: Nationality and Borders Act, ch 36, para 624.

Whereas NABA does not provide criteria on what might count as ‘bad faith’,⁴¹ 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)-(e)**).⁴² However, it should be noted that the Council of Europe expert body tasked with monitoring State compliance with ECAT (GRETA) had pointed out in its latest report on the UK’s that:

[T]he fight against terrorism must be conducted in compliance with international obligations, in particular the European Convention on Human Rights and the Council of Europe Anti-Trafficking Convention. In this context, GRETA stresses the importance of proactively investigating any allegation of trafficking in human beings, including in cases of potential victims of trafficking recruited on national territory to join a terrorist organisation abroad, ensuring that victims of trafficking are identified as such and receive the support and assistance provided for by the Convention, and applying the non-punishment principle.⁴³

This interpretation rules out automatic disqualification from protection of even individuals suspected of involvement in terrorist activities.

Moreover, as pointed out by the Joint Committee on Human Rights in its report on the then Nationality and Borders Bill, such an exclusion from protection would include situations where a potential victim has not yet been convicted of an offence.⁴⁴ Namely, **Section 63(3)(d)** requires only ‘reasonable grounds to suspect that the person is or has been involved in terrorism-related activity’, and applies ‘whether or not the terrorism-related activity is attributable to the person being, or having been, a victim of slavery or human trafficking’. In other words, a person who has never been convicted, and who has been coerced to commit terrorism-related activity in a context amounting to human trafficking, might still lose protection under this provision.⁴⁵ Not only would such an

⁴¹ 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.

⁴² Section 63(3)(a),(c)-(e)NABA.

⁴³ GRETA, ‘Evaluation Report: United Kingdom, Third Evaluation Round’ GRETA(2021)12 (20 October 2021), para 49.

⁴⁴ Joint Committee on Human Rights ‘Legislative Scrutiny: Nationality and Borders Bill (Part 5) - Modern Slavery’ (15 December 2021) para 65.

⁴⁵ *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’

exclusion contradict express international legal obligations to identify and support every victim of human trafficking explained above, it might also defeat its own purpose, in allowing traffickers who force people to participate in dangerous acts to continue to do so, without encouraging the victims to complain and to cooperate with the investigation and prosecution of the perpetrators.

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. 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.⁴⁶ 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.⁴⁷

Schedule 4 of the MSA contains a list of more than 100 offences of various degrees of seriousness where the statutory defence cannot be used. GRETA expressed its concern that Section 45 of the MSA 'gave a rather narrow interpretation of the non-punishment principle', and urged the UK authorities to 'ensure that the non-punishment provision was capable of being applied to all offences that victims of [human trafficking] were compelled to commit'.⁴⁸ 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

(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/>.

⁴⁶ 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>>.

⁴⁷ *Ibid.*

⁴⁸ GRETA, 'Evaluation Report: United Kingdom, Third Evaluation Round' GRETA(2021)12 (20 October 2021) 169.

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 s.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.⁴⁹

Furthermore, **Section 63(3)(f)** 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 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 MSHT 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. Accordingly, the new Section 63 (3) (f) as amended by Section 29 IMA will disqualify from protection anyone who:

- (i) is not a British citizen,
- (ii) has been convicted in the United Kingdom of an offence, and
- (iii) has been sentenced to a period of imprisonment for the offence;

(fa) the person is liable to deportation from the United Kingdom under section 3(5) or (6) of the Immigration Act 1971 (deportation for the public good etc or as a result of recommendation following conviction);

(fb) the person is liable to deportation from the United Kingdom under any provision of, or made under, any other enactment that provides for such deportation.

⁴⁹ Joint Committee on Human Rights ‘Legislative Scrutiny: Nationality and Borders Bill (Part 5) - Modern Slavery’ (15 December 2021) para 64.

This contradicts the claim by the UK Government that Section 63 NABA applies to ‘individuals who have been convicted of the most serious offences’,⁵⁰ and applies the exclusion to anyone sentenced to a term of immediate imprisonment, regardless of the seriousness of such an offence or the length of the 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 MSA, as well as those victims convicted for immigration-related offences.⁵¹ As pointed out in the Policy Paper produced by the University of Nottingham’s Rights Lab:

Traffickers commonly target and exploit those with criminal convictions. There is a danger that exploitation of those with criminal convictions could increase, as traffickers may know that if their victim has been in prison for 12 months or more, they may not be afforded protection from the state.⁵²

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.⁵³

It is therefore clear that the exclusion of such a broad and loosely defined group of victims of MSHT from protection contradicts several express obligations of States under Article 4 ECHR and ECAT as explained by domestic⁵⁴ and international bodies.⁵⁵

⁵⁰ Communication from the United Kingdom concerning the case of *V.C.L. and A.N. v the United Kingdom* (Application No. 77587/12), 14 March 2023.

⁵¹ 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>.

⁵² University of Nottingham Rights Lab, ‘Modern Slavery: Commitments by the UK Government, An overview of the commitments made by the Government in relation to Part 5 (Modern Slavery) of the Nationality and Borders Act 2022’ 16.

⁵³ Joint Committee on Human Rights ‘Legislative Scrutiny: Nationality and Borders Bill (Part 5) - Modern Slavery’ (15 December 2021), para 65.

⁵⁴ *Ibid*, paras 62 – 75 ; Letter from the Independent Anti-Slavery Commissioner to the Home Secretary (7 September 2021).

⁵⁵ 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’)

In particular, in their comments on the then Nationality and Borders Bill, the UN Special Rapporteurs noted their concern that Section 63 (previously 62) ‘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.⁵⁶ 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 obligation to ensure **non-punishment of victims** of trafficking or contemporary forms of slavery for *any unlawful acts* that that are a direct consequence of trafficking’, enshrined in Article 26 ECAT.⁵⁷ 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.⁵⁸ 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.⁵⁹

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=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>.

⁵⁶ UN Special Rapporteurs’ submission’, 8.

⁵⁷ *Ibid*, 11 (emphasis added).

⁵⁸ Joint Committee on Human Rights ‘Legislative Scrutiny: Nationality and Borders Bill (Part 5) - Modern Slavery’ (15 December 2021), paras 51-53.

⁵⁹ *Ibid*.

Therefore, identification of victims and their protection are instrumental for discharging not just the States' positive obligation to protect victims of MSHT 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.⁶⁰ The Statutory Guidance considers 'ready cooperation with authorities' as one of the indicators that a threat to public order as 'low'.⁶¹ However, even when a person 'co-operates with the authorities, has made admissions in good time, complying with reporting requirements; and there is tangible evidence from the prosecuting authorities that the person meaningfully assisting an investigation' the Guidance suggests that that 'this indicator alone is not sufficient to categorise [a threat to public order] as low'.

What is more, criminal convictions and imprisonment of victims may result in further exploitation and re-victimisation, which States are required to prevent.⁶² 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'.⁶³

4. Operationalisation of Section 63 NABA in the Modern Slavery Statutory Guidance

The Modern Slavery Statutory Guidance,⁶⁴ sets out the process to be followed by domestic authorities when determining whether an individual should be disqualified from protection, although it must be noted that this Guidance only governs POD requests based on Section 63 (3) (b) and (f). It explains that requests 'relating to national security

⁶⁰ 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.

⁶¹ 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 (v3.8, 22 February 2024) para. 14.275.

⁶² 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).

⁶³ Joint Committee on Human Rights 'Legislative Scrutiny: Nationality and Borders Bill (Part 5) - Modern Slavery' (15 December 2021), para 20.

⁶⁴ 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 (v3.8, 22 February 2024).

(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.⁶⁵

The latest version of the Modern Slavery Statutory Guidance available at the time of writing from 22 February 2024 contains provisions on POD 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, itself shown to be incompatible with international legal obligations binding on the UK, the Guidance goes beyond what Section 63 NABA expressly permits.

In particular, 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

⁶⁵ *Ibid* para 14.237.

- Where a Conclusive Grounds decision has not yet been made, any obligation to make a Conclusive Grounds decision

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 MSHT. 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 (Conclusive Grounds Decision or CGD). Not only does this contravene obligations arising out of Article 4 ECHR and 10 (2) ECAT, discussed in Part 1 of this analysis, but it also has no legal basis in NABA.⁶⁶

Furthermore, while the Guidance rightly instructs decision-makers to apply the public order and bad faith disqualifications ‘on a case-by-case basis’,⁶⁷ the starting point in this assessment is a *presumption* that a person fulfilling conditions from Section 62 (3) (b) and (f) NABA is a threat to public order, which ought to be disproved 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 demonstrating that their modern slavery specific recovery needs outweigh the presumed risk to public order. The Guidance however expressly notes that ‘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’ and creates ‘no expectation for decision makers to undertake

⁶⁶ 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 report on legislative scrutiny, the JCHR noted in 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)27 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.

⁶⁷ Modern Slavery Statutory Guidance (v3.8, 22 February 2024) paras 14.251, 14.265, 14.270 and 14.301.

extensive investigation to support their decision.⁶⁸ This effectively removes the burden of justifying the need for POD from the authorities. This is contrary to a clear obligation of States under Article 4 ECHR and 10 (2) ECAT to identify every victim of MSHT on their own initiative, as well as Article 13 ECAT to justify denying a potential victim the recovery and reflection period.

Finally, the Modern Slavery Statutory Guidance also contains provisions on the process of disqualifying British nationals from protections available under domestic law. Accordingly, the Guidance states in para 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 legal basis for excluding from protection British nationals. The IMA applies to 'persons who enter or arrive in the United Kingdom in breach of immigration control',⁶⁹ while Section 63 (2) NABA, as noted above, envisages only the following consequences for a person deemed to be a threat to public order or 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.⁷⁰

However, even if such disqualification only applied to non-British nationals, this would arguably violate Article 3 ECAT and Article 14 ECHR, which guarantee non-discrimination in the enjoyment of human rights. Article 3 ECAT requires 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

⁶⁸ *Ibid*, paras. 14.266-14.267.

⁶⁹ Section 1 (1). See also Section 2 (2) IMA.

⁷⁰ 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.

without discrimination on any ground including national origin.’ Distinguishing between British and non-British victims/survivors of modern slavery would create a two-tiered system of protection in breach of international law.

5. Legal Challenges to POD

The operation of the modern slavery provisions in NABA has been subject to legal challenges,⁷¹ which resulted in a withdrawal of some aspects of the POD policy claimed to be in breach of Article 4 ECHR.

On 26 July 2023, the High Court granted interim relief and ordered that the Secretary of State for the Home Department must not exercise her public order disqualification powers to remove support from potential victims of modern slavery pending trial unless she first conducted and took into account of an assessment of the risks of re-trafficking.⁷² The High Court stipulated that all potential trafficking victims must be assessed for such a risk before any order disqualifying them from support is made. As a result all POD decisions were paused. On 18 January 2024, the parties have settled the claim and the Home Office has issued a new version of the Statutory Guidance, which now requires that the decision-maker conducts a re-trafficking risk assessment before they are allowed to disqualify a victim or potential victim from protection. If there is an immediate and real risk of re-trafficking the potential victim will not be disqualified.

However, this does not address the question of the legality of the policy on public order disqualification *overall*, beyond the issue of the potential risk of re-trafficking.

Namely, in addition to the need to consider whether and how POD may result in ‘a real and immediate risk of being re-trafficked’, which must be accounted for in making a decision, the preceding discussion has shown that any disqualification from protection is an exception from an express protective obligation, and as such, ought to be very narrowly construed. In other words, even if an individual is assessed as not at risk of

⁷¹ Matrix Chambers, ‘Secretary of State for the Home Department Withdraws Public Order Disqualification Policy’ (22 January 2024) [Secretary of State for the Home Department withdraws Public Order Disqualification policy - Matrix Chambers \(matrixlaw.co.uk\)](https://www.matrixlaw.co.uk/news/secretary-of-state-for-the-home-department-withdraws-public-order-disqualification-policy/).

⁷² 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%2Dtrafficking.>

being re-trafficked, any exclusion from protection must be amply justified by the Government on case-by-case basis. As noted before, international law places the burden of *demonstrating* that a person *is* a threat to public order (or has claimed the status in bad faith) in each individual case squarely on the Government. The Modern Slavery Statutory Guidance however reverses this process by *assuming* that a person who meets the conditions of Section 63 (b) and (f) (by being convicted of a certain offence or specific penalty) automatically represents a threat to public order and instructing the decision maker to then consider:

[O]n 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.⁷³

Therefore, the recent changes in the Statutory Guidance do not bring this policy into compliance international law binding on the UK. As shown in Parts 1 and 2 above, such international legal obligations do not permit any restrictions from a duty to identify every victim of MSHT and allow just for a narrow exception from an obligation to provide a recovery and reflection period on public order grounds. While an individual assessment of every case, as envisaged by the Modern Slavery Statutory Guidance, is necessary to comply with permitted exceptions, international law offers no basis for either limiting such an assessment to just the risk of re-trafficking or for making a presumption in favour of disqualification and then requiring victims to disprove it.

6. Removal of potential or confirmed victims from the UK and the location of exploitation in the POD risk of re-trafficking assessment

Individuals subject to POD on the basis of Section 63 NABA who are foreign nationals and have arrived to the UK 'illegally' are at risk of being removed to a third country under

⁷³ Modern Slavery Statutory Guidance (v3.8, 22 February 2024) para 14.267.

the IMA⁷⁴ and the Treaty with Rwanda from December 2023.⁷⁵ This means that in addition to (and likely due to) a discontinuation of 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.

Despite that, the Modern Slavery Statutory Guidance only directs decision-makers to consider ‘real and immediate risk of re-trafficking (...) in the UK or from the UK’ and expressly notes that ‘the Decision makers are not expected to make an assessment of re-trafficking risk outside of the UK.’

The basis for this exclusion is not clear especially because the Guidance explains that ‘Foreign National Offenders who have already received a stage 2 deportation decision or a signed deportation order will be automatically presumed to be a high risk to public order’ and therefore subject to POD.⁷⁶ In such circumstances, any potential risk of re-trafficking would be outside the UK.

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 international legal obligations elaborated in Part 1. In particular, such obligations towards victims of MSHT include not just their rescue and support, but also a duty to prevent an individual from falling a 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.’⁷⁷

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*

⁷⁴ 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).

⁷⁵ See 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).

⁷⁶ Modern Slavery Statutory Guidance (v3.8, 22 February 2024) paras 14.270 and 14.275.

⁷⁷ *Rantsev v Cyprus and Russia*, para 286 (emphasis added).

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*.⁷⁸

It is clear from this test, which has been repeated in all subsequent caselaw on human trafficking,⁷⁹ that the protective ambit of Article 4 covers not just those who already are victims of trafficking but also those who are ‘at real and immediate risk of being, trafficked or exploited’.

Accordingly, when a person subject to removal is a potential or confirmed victim of MSHT, the positive Article 4 ECHR duty to take operational measures to protect them applies, requiring an assessment of whether there are substantial grounds to believe that their removal will expose them to a real risk of trafficking or re-trafficking. This is a factual question that decision-makers must assess in each individual case.

As with other obligations arising from Article 4 ECHR, such assessment should be conducted on the authorities’ own initiative, as soon as ‘the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion’ that a person might be at risk.⁸⁰ GRETA has therefore expressly stated 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.⁸¹

This is consistent with the decision on the requirements of Article 4 ECHR set out by the English Court of Appeal in *R (TDT) v Secretary of State for the Home Department*. There Underhill LJ held that:

⁷⁸ *Ibid* (emphasis added).

⁷⁹ See, for example, *CN v the United Kingdom*, para 67; *VCL and AN v United Kingdom*, para 152.

⁸⁰ European Court of Human Rights, ‘Guide on Article 4 of the European Convention on Human Rights: Prohibition of slavery and forced labour’ (updated on 31 August 2022) para. 60.

⁸¹ GRETA, ‘[Guidance note on the entitlement of victims of trafficking and persons at risk of being trafficked to international protection](#)’ (2020) para 32.

[H]aving [been trafficked in the past] is the paradigm case of someone who is likely to be at real and immediate risk and so require protection (...) In order to decide whether a past victim is indeed no longer at real and immediate risk of being (re-) trafficked the authorities will in any event have to conduct a careful assessment of the kind for which they contended.⁸²

As explained elsewhere,⁸³ a State is allowed to return a victim to their country of nationality or permanent residence (Article 16 ECAT). However, such return is subject to specific conditions, which require that only conclusively identified victims could be returned and that a State makes 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.⁸⁴ GRETA explained 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.⁸⁵

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.’⁸⁶ 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.

⁸² *R (TDT) v Secretary of State for the Home Department* [2018] 1 WLR 4922, paras 40 and 41.

⁸³ 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).

⁸⁴ 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.

⁸⁵ GRETA, ‘[Guidance note on the entitlement of victims of trafficking and persons at risk of being trafficked to international protection](#)’ (2020) para 44.

⁸⁶ *Ibid.*

While the ECAT is silent on the removal to third countries, it expressly prohibits such removals before victim identification process is completed.⁸⁷ This nonetheless is a precisely a consequence of POD, which bars decision makers from making a Conclusive Grounds Decision – the final decision on one’s victim status in the UK’s National Referral Mechanism. Furthermore, in light of the object and purpose of ECAT as an instrument designed to protect victims of MSHT, the same type of assessment of the impact of removal to the third country would be warranted, not least because removing them to an unknown country would likely increase the risk of re-trafficking.⁸⁸ Also, many traffickers use the threat of deportation to control their victims.

7. Thresholds and required evidence for identifying victims of MSHT

Decisions concerning POD have direct implications on victim identification and prosecution of the perpetrators, which are two key obligations of States under international law. As already noted in Part 1 above, neither Article 4 ECHR nor Articles 10 (2) and 27 ECAT permit limitations to these obligations on public order grounds. This means that even if Article 13 (3) ECAT may allow a limited exception from a recovery and reflection period in a particular case, a State is required to conclude victim identification process and continues to be bound by a duty to prosecute the perpetrators.

As shown in Parts 3 and 4 of this analysis, the application of POD clearly interferes with both these obligations.

Notwithstanding that finding, it is worth reflecting on how the Modern Slavery Statutory Guidance deals with victim identification process *in general* and whether it provides correct instruction to decision makers in line with international law.

The obligation to identify and protect all victims of MSHT does not require a report by a victim – it is triggered when 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.’⁸⁹ Both Article 10 (2)

⁸⁷ Article 10 (2) ECAT.

⁸⁸ It has been noted that ‘forced removals and deportation are evidenced in literature to be factors related to re-trafficking.’ See University of Nottingham Rights Lab and Independent Anti-Slavery Commissioner, ‘Re-trafficking: The current state of play’ (November 2021) 14.

⁸⁹ *Rantsev v Cyprus and Russia*, para 286.

ECAT and Article 4 ECHR deliberately set a low threshold for triggering states' protective obligations towards victims of modern slavery, in line with express belief that the identification process is often lengthy and complex, while potential victims have immediate protection needs.

The instruction provided by the Modern Slavery Statutory Guidance to decision makers when it comes to the standard to be applied to victim identification decisions is overall in line with international obligations.⁹⁰ It requires that a decision maker establishes whether 'there are reasonable grounds to believe, based on all available general and specific evidence but falling short of conclusive proof, that a person is a victim' of either human trafficking or slavery, servitude or forced or compulsory labour.⁹¹ The positive Reasonable Grounds decision will be followed by a substantive Conclusive Grounds decision on whether someone is formally recognised as a victim, with a higher threshold:

The test to use for the Conclusive Grounds decision is whether, 'on the balance of probabilities', there are sufficient grounds to decide that the individual being considered is a victim of human trafficking or slavery, servitude, and forced or compulsory labour. This threshold is higher than the reasonable grounds test, but lower than the criminal standard of proof.⁹²

However, the earlier version of the Guidance created confusion for decision-makers by conflating the *standard of proof* (reasonable grounds to believe) with the *type of evidence* that give rise to such reasonable grounds to believe that a person is a victim. Namely, following a statement by the former PM Sunak from December 2022 that the UK Government intended to 'significantly raise the threshold someone has to meet to be considered a modern slave',⁹³ a new version of Modern Slavery Statutory Guidance was published on 30 January 2023. The Guidance instructed a decision maker to consider whether 'there are reasonable grounds to believe, *based on objective factors but falling short of conclusive proof*, that a person is a victim' of MSHT.⁹⁴ The Guidance explained that:

⁹⁰ Modern Slavery Statutory Guidance (v3.8, 22 February 2024) Section 7.

⁹¹ *Ibid*, para 7.4. See also paras 14.50 – 14.57.

⁹² *Ibid*, para 7.10.

⁹³ Oral statement to Parliament, PM statement on illegal migration: 13 December 2022 [PM statement on illegal migration: 13 December 2022 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/speeches/pm-statement-on-illegal-migration-13-december-2022).

⁹⁴ Statutory Guidance (v.3, 30 January 2023) para 7.4 (emphasis added).

An 'objective' factor is a piece of information or evidence that is based in fact. Ordinarily, a victim's own account, by itself, would not be sufficient absent objective factors to have real suspicion.⁹⁵

This change in the Modern Slavery Statutory Guidance and accompanying statements by the officials,⁹⁶ clearly conflated the *standard of proof* (reasonable grounds to believe) with the *type of evidence* that give rise to such reasonable grounds to believe that a person is a victim.

To understand this difference, it is worth considering other instances where the 'reasonable grounds for suspicion' standard is used, such as the application of 'stop and search' powers of the police under section 1 of the Police and Criminal Evidence Act 1984 (PACE), section 23 of the Misuse of Drugs Act 1971 (MDA) or the Psychoactive Substances Act 2016.⁹⁷ Accordingly, the Psychoactive Substances Act 2016 authorises police officers to stop and search persons and vehicles where there are reasonable grounds to suspect that the person has committed, or is likely to commit, an offence under the Act or that the vehicle contains evidence of an offence. This is said to be 'an objective test, in that it expects that a reasonable person given the same information would also suspect that the individual is carrying the item.'⁹⁸ This means that an officer must genuinely suspect that they will find the item searched for and it must be objectively reasonable for them to suspect this, given the information available to them.⁹⁹ The term 'objective' here clearly refers to the cognitive aspect of the assessment and not the type or quality of evidence.

When it comes to the latter, ECAT does not specify the type of evidence required to meet the 'reasonable grounds' threshold. GRETA suggests that such decisions should be made on the basis of the presence of the well-established operational indicators established by international organisations:

⁹⁵ *Ibid.*, para 14.52.

⁹⁶ [PM statement on illegal migration: 13 December 2022 - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/statements/pm-statement-on-illegal-migration-13-december-2022). See also a statement by the then Immigration Minister who noted that 'the updated guidance will mean decision makers now base their assessments on objective factors to determine whether there are reasonable grounds to believe a person is a victim.'<https://questions-statements.parliament.uk/written-statements/detail/2022-12-13/hcws441>

⁹⁷ College of Policing, Stop and Search: Reasonable Grounds for Suspicion (updated 16 January 2023) <https://www.college.police.uk/app/stop-and-search/fair#reasonable-grounds-for-suspicion>.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

Any person *showing signs* that he/she has been subjected to (...) trafficking in human beings (...) should be considered as a victim of trafficking. This does not imply that victims must provide proof that they have been injured or financially damaged, but it may involve giving some measure of independent evidence supporting their claim. It might sometimes be difficult for victims to justify one of the elements, e.g. the purpose of exploitation, prior to a criminal investigation, which is why it is important to apply *operational indicators of trafficking in human beings* (as designed by several international organisations, such as ILO, IOM, UNODC and ICMPD).¹⁰⁰

The list of such indicators is long and includes physical, psychological, and also situational or environmental indicators.¹⁰¹ For instance, the indicators include situations where victims 'feel that they cannot leave', 'show fear or anxiety', '[are] subjected to violence or threats of violence against themselves or against their family members and loved ones', their 'passports or identity documents, contracts, payslips, bank information, health records' are withheld or they 'lack (...) information about rights as workers in the UK as well as support and advice services.'¹⁰²

Significantly, both the earlier and the version of the Modern Slavery Statutory Guidance from January 2023 reflected this approach and referred expressly to the UNDOC's list of indicators and to the work of the International Labour Organization (ILO) to instruct a decision-maker considering whether a person is potential victim of modern slavery.¹⁰³

The January 2023 Statutory Guidance therefore elaborated in more detail what might amount to 'objective factors', and 'the most useful objective factors (information or evidence)¹⁰⁴ but did not, and in fact, *could not* change the *standard of proof* required for reaching a positive Reasonable Grounds decision without being in direct breach of

¹⁰⁰ GRETA, '2nd General Report on GRETA's Activities', GRETA(2012)13 (4 October 2012) para 45 (emphasis added).

¹⁰¹ International Labour Organization, ILO indicators of Forced Labour (1 October 2012) https://www.ilo.org/global/topics/forced-labour/publications/WCMS_203832/lang-en/index.htm.

¹⁰² United Nations Office on Drugs and Crime (UNODC), Human Trafficking Indicators https://www.unodc.org/documents/human-trafficking/HT_indicators_E_LOWRES.pdf.

¹⁰³ Modern Slavery Statutory Guidance (v.3, 30 January 2023) paras 3.19, 3.5.

¹⁰⁴ *Ibid*, paras 14.54, 14.55, and 14.58 – 14.61.

Article 10 ECAT.¹⁰⁵ What is more, it did not even substantially change the earlier requirement of grounding a reasonable grounds decision on 'reliable, credible, precise and up-to-date intelligence, information or evidence'.¹⁰⁶ Therefore, even the earlier version of the Statutory Guidance was clear that:

Reasonable suspicion would not normally be met on the basis of an unsubstantiated claim alone, without reliable, credible, precise and up-to-date reference to some or all of the below:

- reference to the indicators of modern slavery in the referral
- intelligence or information from law enforcement agencies, including objective country of origin
- evidence information from First Responders, support organisations, social services and persons involved in assisting the victim
- evidence of some specific behaviour by the person concerned.¹⁰⁷

While the Guidance could not have raised the standard of proof for a reasonable grounds decision without being in direct breach of Article 10 ECAT, more evidence is needed to establish whether and how the statements from the officials and changes in the wording of the Guidance may have affected the perceptions of caseworkers.

Namely, the January 2023 Statutory Guidance instructed decision-makers to focus on the credibility of potential victim's account and/or reasons for delay in disclosure thereby creating a significant nudge towards negative findings. The January 2023 Guidance thus introduced further questions and information required from the First Responder Organisations, such as: 'Is there any evidence raised by the First Responder regarding the credibility of the account?'¹⁰⁸ This implied that First Responders might be specifically required to comment on credibility. Furthermore, the Guidance introduced a new section on 'timing of claim' which asked:

¹⁰⁵ See *SM v Secretary of State for the Home Department* [2024] EWHC 1683 (Admin) where the High Court of England and Wales discussed the standard of proof for making a reasonable grounds decision, which is fully in line with ECAT.

¹⁰⁶ Modern Slavery Statutory Guidance (v 2.13, December 2022) para 14.56.

¹⁰⁷ *Ibid*, paras 14.55 and 14.52.

¹⁰⁸ Statutory Guidance (v.3, 30 January 2023) para 14.60

Was the information raised at the first opportunity, or when asked or at a later stage? Was any delay in disclosure explained or justified? 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.¹⁰⁹

Accordingly, even though the legal threshold for making a positive Reasonable Grounds decision has not changed, public statements to that effect as well as the fact that the NRM referral form was updated to include more requirements for First Responder Organisations tasked with referring victims to the NRM, may well have influenced decision makers. This conclusion stems from the fact that following the adoption of the January 2023 Guidance there has been a notable drop in the positive Reasonable Grounds decisions in 2023 (from 88% to 55%), and for Conclusive Grounds decisions (89% to 66%).¹¹⁰

Significantly, as a result of a legal challenge,¹¹¹ the January 2023 Guidance was amended in July 2023, and the new version removed references to ‘objective factors’ in relation to the Reasonable Grounds decision. Despite that and a specific instruction to decision makers ‘to consider all forms of evidence in reaching their conclusion – this is not restricted to objective evidence to prove or disprove an account’,¹¹² the rate of negative RGDs has remained low. It is not clear whether this has been due to perceived changes in the Guidance or other reasons.

Conclusion and recommendations for legal and policy interventions

¹⁰⁹ *Ibid.*

¹¹⁰ L Williams and V Tecca, ‘Four things we’ve learned from the 2023 NRM stats’ (13 March 2024) <https://modernslaverypec.org/latest/four-things-weve-learned-from-the-2023-nrm-stats>.

¹¹¹ Duncan Lewis, ‘SSHD withdraws new evidential test for “Reasonable Grounds” decisions in Modern Slavery Statutory Guidance’ (28 June 2023) [https://www.duncanlewis.co.uk/news/SSHD_withdraws_new_evidential_test_for_%E2%80%98Reasonable_Grounds%E2%80%99_decisions_in_Modern_Slavery_Statutory_Guidance_\(28_June_2023\).html#:~:text=Further%20to%20a%20judicial%20review%20challenge%20for%20two,order%20to%20receive%20a%20positive%20reasonable%20grounds%20decision](https://www.duncanlewis.co.uk/news/SSHD_withdraws_new_evidential_test_for_%E2%80%98Reasonable_Grounds%E2%80%99_decisions_in_Modern_Slavery_Statutory_Guidance_(28_June_2023).html#:~:text=Further%20to%20a%20judicial%20review%20challenge%20for%20two,order%20to%20receive%20a%20positive%20reasonable%20grounds%20decision).

¹¹² Modern Slavery Statutory Guidance (v3.8, 22 February 2024) para 14.64.

Legal and policy interventions in the UK designed to tackle ‘illegal’ migration have had a profound impact on the operationalisation of the Modern Slavery Act 2015, with further effects expected to occur once all provisions in the relevant legislation start being implemented. The MSA has so far provided a solid basis for the UK to discharge its international legal obligation to identify and protect every victim or potential victim of MSHT. In its latest evaluation report from 2021 (which preceded the legal developments discussed here), GRETA has found that ‘[t]hrough its strong measures to identify victims, the UK is setting an important model for Europe’.¹¹³

However, recent developments, including the introduction of POD in Section 63 NABA and its extension beyond the statutory language in the Modern Slavery Statutory Guidance, have undermined these efforts leaving the MSA virtually impotent in cases of victims without a regular immigration status or who are involved in criminal offences. This effectively established a hierarchy of victimhood expressly prohibited by the ECAT and ECHR.

To reverse this negative trend and make protections afforded by the MSA practical and effective for all victims of MSHT, the following should be implemented:

- When it comes to POD – the burden should be on public authorities to demonstrate the need for disqualification in each individual case.¹¹⁴
- A final decision on victim status should be made before POD could be applied, unless it is established that a person has claimed victim status in bad faith/illegitimately.
- The relevant decision-maker should review whether the application of the non-punishment principle has been duly considered before making a public order disqualification.
- For confirmed victims, public authorities should always conduct a risk of re-trafficking assessment (including for victims to be removed/returned to another country).
- The Government should clarify the legal basis on which POD applies to British nationals.

¹¹³ GRETA(2021)12 (20 October 2021) para 18.

¹¹⁴ GRETA has announced its intention to publish guidance on the interpretation of Article 13 (3) ECAT. See [GRETA holds its 49th plenary meeting - Action against Trafficking in Human Beings \(coe.int\)](#).

MODERN SLAVERY & HUMAN RIGHTS

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