

Legal Analysis of the Human Rights Compatibility of the Modern Slavery Sections in the Illegal Migration Act (Sections 22-29)

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This legal analysis of the modern slavery measures in the Illegal Migration Act has been conducted by Dr Marija Jovanovic from the University of Essex. She is the author of *State Responsibility for 'Modern Slavery' in Human Rights Law* (Oxford University Press, 2023).

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Executive Summary

This Note contains an analysis of the human rights compatibility of the modern slavery clauses in the Illegal Migration Act. Sections 22-29 of the Act are incompatible with the UK's obligations under Article 4 of the European Convention on Human Rights (ECHR), which are also part of UK law through the Human Rights Act 1998 (HRA). Article 4 ECHR obligations draw expressly on the Council of Europe Convention on Action Against Trafficking in Human Beings (ECAT), which came into force in respect of the United Kingdom on 1 April 2009. Therefore, Sections 22-29 of the Act contravene both the UK's domestic human rights law and its international obligations under both the ECHR and ECAT.

Under Article 4 ECHR, states have three core obligations. First, an obligation to put in place a legislative and administrative framework providing real and effective protection of the rights of victims.¹ This duty extends to the general legal and administrative framework, including the adequacy of immigration policy. In addition to this general obligation, states have two specific obligations which are owed to any potential victim of 'modern slavery' (a term used in the Modern Slavery Act 2015 to encompass human trafficking, slavery, servitude and forced labour): a duty to take operational measures to protect victims, or potential victims and a procedural obligation to investigate potential situations of modern slavery and punish the perpetrators. The last two 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.

The obligation to protect victims, or potential victims, of modern slavery established under Article 4 ECHR includes 'facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery.'¹ Article 4 ECHR draws expressly on Article 10 ECAT which stipulates that such victims 'shall not be removed from its territory until the identification process as victim (...) has been completed by the competent authorities'. While the obligation to protect victims, or potential victims, is not unlimited – the appropriate measures required from national authorities must be within the scope of their powers and must not be interpreted to impose 'an impossible or disproportionate burden' on them²– it must be acknowledged that the right not to be held in slavery or servitude in Article 4 ECHR is one of the 'absolute' rights in the Convention, which does not allow for any limitations or balancing against the broader public interest and cannot be derogated from even in times of emergency.

Sections 22-29 of the Act are incompatible with all three core obligations in Article 4 ECHR mentioned above. They automatically exclude from protection any potential victim of modern slavery who has arrived in the UK irregularly. Under Section 22, an individual with 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 (i.e. before the competent authority has reached a 'conclusive grounds decision' which is a final

¹ *Chowdury and Others v Greece*, para 110.

² *Zoletic and Others v Azerbaijan*, para 188.

decision on one's victim status in the UK). This would violate an express obligation to identify every victim of modern slavery, before their return to the country of origin could be considered. Removal of potential victims would also likely lead to a breach of an obligation to investigate and prosecute the perpetrators of this offence because without the victim's cooperation it would be difficult to gather relevant evidence to prove the offence of modern slavery.

The Act permits a very narrow exemption from the automatic disqualification from the victim identification process and access to assistance and support for people cooperating with law enforcement authorities. Still, potential victims would need to make a decision on such cooperation without benefiting from a 30-day recovery and reflection period guaranteed by Article 13 ECAT, which is intended to allow potential victims some time to recover and come to a decision on cooperating with the law-enforcement authorities in a prosecution of the traffickers. The Government has committed to allowing a 30-day reflection and recovery period to potential victims whose exploitation took place in the UK via forthcoming statutory guidance.³ While this concession mitigates some of the incompatibility issues, it is at odds with obligations arising out of ECAT and ECHR, as outlined below.

³ Jenrick, R. (2023) ['Illegal Migration Bill'](#) HoC Deb. Vol. 76 col. 207.

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Legal Analysis of the Human Rights Compatibility of Sections 22-29 (Modern Slavery)

This analysis primarily focuses on Sections 22-25 and 29 of the Act, which give rise to serious implications for the human rights of victims of modern slavery under both the UK's Human Rights Act and international law currently binding on 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.

Section 22 of the Illegal Migration Act contains provisions relating to removal of an individual with a 'positive reasonable grounds decision' – a decision made by a competent authority that there are reasonable grounds to believe that the person is a victim of slavery or human trafficking – when such a person meets the conditions in Section 2. 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. When these conditions are met, a potential victim will be removed from the UK before the victim identification process has been completed (before a 'conclusive grounds decision' by a competent authority).

Subject to the same conditions contained in Section 2, Sections 23-25 in addition exclude individuals with a 'positive reasonable grounds decision' from assistance and support measures granted by the modern slavery legislation throughout the UK, including the devolved jurisdictions.⁴

These exclusions apply even if a person entered or stayed in the UK illegally against their will, because they were trafficked and exploited, unless they are immediately prepared to cooperate with law enforcement authorities, their presence for that purpose is deemed necessary, and 'the public interest in the person providing that cooperation is outweighed by any significant risk of serious harm to members of the public which is posed by the person' (Sections 22 (3), 24 (3), and 25(3) discussed further in section 1).

Section 29 amends Section 63 (1) NABA, which 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'.⁵ Section 29 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) 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

⁴ 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.

⁵ NABA, s 63(1).

deportation'. It may therefore exclude from protection victims compelled to commit criminal offences by their traffickers/exploiters but haven't benefited from Section 45 Modern Slavery Act (MSA), which provides a defence for such victims in line with the non-punishment principle enshrined in the Council of Europe Convention on Action Against Trafficking in Human Beings (ECAT).⁶

These provisions disregard the UK's international obligations under the European Convention on Human Rights (ECHR) and the ECAT. Notably, the obligations contained in the ECHR are embedded in domestic British law through the Human Rights Act 1998 (HRA). Therefore, Sections 22-29 of the Act, in their current form, would contravene both domestic and international human rights law currently binding on the UK.

⁶ See [Letter from the Independent Anti-Slavery Commissioner to the Home Secretary](#) (7 September 2021).

1. The Relevant Provisions in ECHR and ECAT and the Relationship Between the Two Instruments

The relevant ECHR provisions

Several provisions of the ECHR are directly engaged by Sections **22-29** of the Illegal Migration Act, although **Article 4** ECHR (the prohibition of slavery, servitude, forced labour and human trafficking) is the most relevant of these and will therefore be covered in greater detail. In addition to Article 4, **Article 1** (the obligation to secure the ECHR rights to everyone within a state's jurisdiction), **Article 3** (the prohibition of torture and inhuman or degrading treatment or punishment), **Article 8** (the right to respect for private and family life), **Article 13** (the right to an effective remedy), **Article 14** (the right to non-discrimination in the enjoyment of Convention rights including on grounds of national origin) and **Article 34** (the right to petition the European Court of Human Rights claiming to be the victim of a violation) are all engaged by the Bill's proposed automatic removal of potential victims of modern slavery without lawful residence in the UK.

When it comes to Article 4 ECHR, which is given effect in domestic law by the Human Rights Act 1998 (HRA), the following positive obligations have crystallised in the Court's case law to date:

- An **obligation to put in place 'a legislative and administrative framework providing real and effective protection of the rights of victims'**.⁷ This duty extends to the general legal and administrative framework including the adequacy of immigration policy.⁸
- An **obligation to take 'operational measures to protect victims, or potential victims'**.⁹ 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'.¹⁰ Importantly, even when an individual is not a victim of exploitation in a specific ECHR Member State, all State Parties are under a positive obligation to identify and support any potential victim – not just those exploited in the country in which they are discovered.¹¹
- A **procedural obligation to investigate potential situations of modern slavery and punish the perpetrators**.¹²

The last two obligations are triggered by a 'credible suspicion' (reasonable grounds to believe) that a person is a victim of modern slavery.¹³ 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'.¹⁴ However, if an individual does raise a claim of being a victim of

⁷ *Chowdury and Others v Greece*, para 87; *Rantsev v Cyprus and Russia*, para 285; *J and Others v Austria*, para 106.

⁸ *Rantsev v Cyprus and Russia* paras 290-293.

⁹ *VCL and AN v United Kingdom*, paras 152 – 153; *J and Others v Austria*, paras 109-111.

¹⁰ *Ibid*, para 153. See also *Chowdury and Others v Greece*, para 110.

¹¹ *J and Others v Austria*, paras 110 - 111.

¹² *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.

¹³ 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.

¹⁴ 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*

modern slavery, the ECtHR requires that such claims ‘as a whole were taken seriously’.¹⁵

The prohibition of slavery and forced labour in Article 4 ECHR is one of the four unqualified and non-derogable rights in the Convention.¹⁶ 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. The language used by the Government in the explanatory material accompanying the Bill to justify the modern slavery provisions of the Illegal Migration Bill refers to ‘radical’ measures and ‘exceptional circumstances relating to the illegal entry into the UK’.¹⁷ Such language is similar to the language used in the ECHR jurisprudence on Article 15, which allows for some flexibility for States dealing with crises by derogating from certain Convention obligations. However, no such derogation is allowed from Article 4 obligations. As the European Court has made clear:

‘together 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’.¹⁸

The relevant ECAT provisions

The key ECAT provisions engaged by Sections 22-29 of the Illegal Migration Act are:

Article 3 (Non-discrimination principle), which 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 without discrimination on any ground including national origin.

Article 10 (Identification of victims), which contains the following requirement in Article 10(2):

Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim (...) has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2.¹⁹

Article 12 (Assistance to victims), which includes access to specialist support such as accommodation, legal representation, and access to healthcare.

Article 13 (Recovery and reflection period) which requires states to provide in their domestic law a “recovery and reflection period” of at least 30 days which applies to any potential or confirmed victim including and especially those with irregular migration

Kingdom, para 69; *Chowdury and Others v Greece*, para 116; *J and Others v Austria* para 107; *Zoletic and Others v Azerbaijan*, para 185.

¹⁵ *J and Others v Austria*, paras 110 and 111.

¹⁶ 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).

¹⁷ HM Government (2023) ‘Illegal Migration Bill: European Convention on Human Rights Memorandum’ paras 45, 47; HM Government (2023) ‘Illegal Migration Bill Explanatory Notes’ para 135.

¹⁸ *Rantsev v Cyprus and Russia*, para 283.

¹⁹ Council of Europe Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series 197 (16 May 2005) (emphasis added).

status. During this period, states must authorise the persons concerned to stay in their territory as well as access to the measures contained in Article 12 (1) and (2).²⁰

Article 14 (Residence permit), which requires 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.

Article 16 (Repatriation and return of victims), which requires that repatriation/return programmes are conducted with due regard for the rights, safety and dignity of victims of trafficking, is preferably voluntary and complies with the obligation of non-refoulement.²¹

Article 27 (Ex parte and ex officio applications), which requires that states ensure that investigations into or prosecution of offences established in accordance with this Convention shall not be dependent upon the report or accusation made by a victim, at least when the offence was committed in whole or in part on its territory.

Article 40 (Relationship with other international instruments), which confirms in Article 40(1) that ECAT shall not affect the rights and obligations derived from other international instruments which contain provisions on matters governed by it and which ensure greater protection and assistance for victims of trafficking (i.e. the 1951 Refugee Convention) and in Article 40(4) that nothing in ECAT shall affect the rights, obligations and responsibilities of States and individuals under international law, including international human rights law.

The relevance of ECAT to the ECHR

When explaining and elaborating the obligations imposed by Article 4 ECHR, the European Court of Human Rights draws heavily on the provisions of ECAT. The Court has explained that the extent of the positive obligations arising under Article 4 have to take account of ECAT, which requires not only the punishment of traffickers but prevention and protection of victims.²² 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 Article 4, the Court has therefore relied on Articles 10,²³ 13,²⁴ 15,²⁵ and 26 of ECAT,²⁶ which will be explained further below. A useful example of this cross pollination between the two Council of Europe mechanisms is the significant 2021 judgement against the UK in *V.C.L. and A.N.*, the first case in which the Court considered the prosecution of victims of modern slavery. The Court's judgment referred to the 'non-punishment principle' enshrined in Article 26 ECAT noting that the prosecution of victims, or potential victims, of trafficking could be at odds with the State's obligation to take operational measures to protect them where they are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual has been trafficked.²⁷ This shows the vital role of ECAT in the interpretation of Article 4 ECHR by the Strasbourg Court.

²⁰ Articles 12 (3) and (4) contain a more extensive set of measures that apply to those individuals who have been formally identified as victims of human trafficking by competent authorities and are lawfully resident within its territory. They include medical or other assistance for victims without adequate resources, and access to the labour market, to vocational training and education.

²¹ GRETA, 2nd report on Norway, GRETA (2017)18, para 148.

²² *Rantsev v Cyprus and Russia*, para 285; *Chowdury and Others v Greece*, para 110; *J and Others v Austria*, para. 106.

²³ *Chowdury and Others v Greece*, para 110.

²⁴ *Chowdury and Others v Greece*, para. 121.

²⁵ *Ibid*, para. 126.

²⁶ *VCL and AN v United Kingdom*.

²⁷ *V.C.L. and A.N. v United Kingdom*, para. 159.

2. Obligation to identify and protect victims of modern slavery

An obligation to identify a victim of modern slavery is contained in Article 4 ECHR and Article 10 ECAT.

According to Article 4 ECHR, the obligation to identify a victim falls under a broader duty 'to take operational measures to protect victims, or potential victims, of trafficking.'²⁸ 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.'²⁹

The duty is triggered from the moment when the State authorities become '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 subjected to treatment in breach of Article 4 of the Convention.'³⁰ The same 'credible suspicion' triggers a procedural obligation to investigate potential situations of trafficking and exploitation.³¹ 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.'³² 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'.³³

In addition to Article 4 ECHR, the obligation of states to identify and protect victims of trafficking is expressly established in Article 10 (2) of the Council of Europe Anti-Trafficking Convention (ECAT), which came into force in respect of the United Kingdom on 1 April 2009. It contains the following requirement:

Each Party shall ensure that, if the competent authorities have *reasonable grounds to believe* that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim (...) has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2.³⁴

Arguably, 'reasonable grounds to believe' standard contained in Article 10 (2) ECAT corresponds to 'credible suspicion' that triggers State's positive obligations under Article 4 ECHR.

²⁸ *VCL and AN v United Kingdom*, paras 152 – 153.

²⁹ *Ibid*, para 153. See also *Chowdury and Others v Greece*, para 110.

³⁰ 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 (emphasis added). See also *VCL and AN v the United Kingdom*, para 152; *Rantsev v Cyprus and Russia*, para 286.

³¹ *Rantsev v Cyprus and Russia*, para 288; *CN v the United Kingdom*; *SM v Croatia* [GC], para 307.

³² *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.

³³ *J and Others v Austria*, paras 110 and 111.

³⁴ Council of Europe Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series 197 (16 May 2005) (emphasis added).

Like the Strasbourg Court, the Council of Europe expert body tasked with monitoring compliance with ECAT (GRETA)³⁵ has made it clear that ‘identification of victims is one of the key obligations of the Convention’³⁶ and that states must not remove potential victims until the identification process is completed:

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.³⁷

GRETA has furthermore emphasized the importance of proactively investigating any allegation of trafficking in human beings because ‘many trafficked people do not always identify themselves as “victims” and are not aware of the legal meaning behind the term. Therefore, the onus of identification lies on the authorities.’³⁸ This position is reinforced in the UK’s Statutory Guidance which notes that ‘[v]ictims may not be aware that they have been exploited or may be unwilling to self-identify for another reason.’³⁹

In the UK, an obligation to identify a victim is discharged through the National Referral Mechanism (NRM) – the mechanism for identification and support of survivors of human trafficking and modern slavery.⁴⁰ The process is governed by the Statutory Guidance.⁴¹

The identification process is comprised of two stages – a reasonable grounds decision and conclusive grounds decision. These decisions are made either by the Single Competent Authority (SCA) or the Immigration Enforcement Competent Authority (IECA).⁴² The decision-making process taken by the SCA and IECA is the same.

A positive reasonable grounds decision is made when there are reasonable grounds to believe that an individual is a victim of slavery or human trafficking ‘based on all available general and specific evidence but falling short of conclusive proof, that a person is a victim of human trafficking.’⁴³ Such evidence includes ‘victim’s account and any other relevant information that supports or undermines it, including but not limited to: eyewitness testimony, medical or expert reports, travel records, police investigations, general evidence such as Country Reports, or supporting evidence of the person’s

³⁵ Group of Experts Against on Action Against Trafficking in Human Beings.

³⁶ 4th GRETA Report, 6.

³⁷ *Ibid*, 40 (emphasis added).

³⁸ GRETA, ‘4th General Report on GRETA’s Activities’, GRETA (2015)1(March 2015) 40. See also GRETA, ‘Evaluation Report United Kingdom’ GRETA (2021)12 (20 October 2021), para 49 (4th GRETA Report).

³⁹ 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 3.4, 24 July 2023) Section 6.2. See also Section ‘Victims who are reluctant to self-identify’.

⁴⁰ The National Referral Mechanism was established in 2009 but the adoption of the MSA 2015 [has put it on a statutory footing](#).

⁴¹ 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 3.4, 24 July 2023).

⁴² 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 3.4, 24 July 2023) paras 4.13 – 4.18.

⁴³ 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 3.4, 24 July 2023) para 7.4. See also paras 14.50 – 14.79.

exploitation the First Responder provides, such as observed modern slavery indicators.⁴⁴

A reasonable grounds decision, which should be made 'where possible, within five working days since the referral to the NRM, is not the final decision about the victim's status. Accordingly, it is made on the basis of a low standard of proof – reasonable grounds to believe (credible suspicion).⁴⁵ Positive reasonable grounds decision requires competent authorities to conduct further enquiries to establish 'on the balance of probabilities' whether there is sufficient information to decide if the individual is a victim of modern slavery and make a conclusive grounds decision, which is a final decision on a person's status.⁴⁶ While this threshold is higher than the reasonable grounds test, it is lower than the criminal standard of proof.

Following a positive reasonable grounds decision, an adult victim is entitled to Government-funded support through the Modern Slavery Victim Care Contract, which includes accommodation, material assistance, financial support, translation and interpretation services, information and advice, as well as to access to legal aid for immigration advice, medical care and counselling, and assistance to return to their home country if not a UK national.⁴⁷ Such support continues following a positive conclusive grounds decision and can be withdrawn only after conducting Recovery Needs Assessment (RNA) but no sooner than 45 calendar days following a positive conclusive grounds decision.⁴⁸

Notwithstanding these guarantees, 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). Similar exclusion from protection against removal and access to support on public order grounds is stipulated in Section 63 of the NABA, as amended by Section 29 of the IMA, discussed further in section 2 of this report.

Sections 22 (3), 24 (3) and 25 (3) IMA carve out a limited exception from an automatic disqualification from protection and removal of potential victims of modern slavery who arrive in the UK in breach of immigration rules. Such an exception applies to potential victims of modern slavery who cooperate with law enforcement authorities in 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 cooperation, and that the public interest in the person providing that cooperation is not outweighed by any significant risk of serious harm to members of the

⁴⁴ Modern Slavery Statutory Guidance para 14.53.

⁴⁵ This standard of proof, which serves to trigger states' protective obligations is low because it is the beginning rather than the end of the victim identification process, which ECAT states is 'often tricky, and necessitates detailed enquiries' while (presumed) victims have immediate protection needs. See Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings (16 May 2005) paras 127 and 131 (ECAT Explanatory Report).

⁴⁶ Modern Slavery Statutory Guidance paras. 14.129 – 14.131.

⁴⁷ Modern Slavery Statutory Guidance section 8 and Annexe F.

⁴⁸ Ibid para. 827.

public which is posed by the person. What is more, Sections 22 (5), 24 (5) and 25 (5) create a legal presumption 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’ to the contrary.

This directly contradicts both international law and domestic guidance on victim identification and protection. 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 cooperate with competent authorities in investigations and criminal proceedings.⁴⁹

Similarly, the 24 July 2023 version of the Modern Slavery Statutory Guidance 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.⁵⁰

In essence, the modern slavery provisions in the IMA allow the authorities to circumvent the UK’s international obligation to identify every victim of human trafficking prescribed by Article 4 ECHR and Article 10 ECAT.⁵¹

As already noted in section 1, an obligation to identify and protect victims of human trafficking contained in Article 4 ECHR and Article 10 (2) ECAT is not qualified. Article 4 ECHR is one of the ‘absolute’ rights, which cannot be derogated from and does not contain any limitations.⁵² Absolute rights protect against serious violations of individual autonomy such as the right to life, freedom from torture, and the prohibition of slavery; they are said to enshrine one of the ‘basic values of the democratic societies making up the Council of Europe’.⁵³ Accordingly, in contrast with obligations arising out of rights contained in Articles 8 – 12 ECHR known as ‘qualified’ rights,⁵⁴ state obligations that stem from ‘absolute’ rights carry a considerable weight. While such obligations are not unlimited – the appropriate measures required from national authorities must be within the scope of their powers and must not be interpreted to impose ‘an impossible or

⁴⁹ ECAT Explanatory Report para 168.

⁵⁰ Modern Slavery Statutory Guidance paras 14.78 and 14.79.

⁵¹ *Chowdury and Others v Greece*, para 110; *J and Others v Austria*, para 109; *VCL and AN v United Kingdom*, para 160.

⁵² The term ‘absolute rights’ refers to rights contained in Articles 2, 3, 4(1) and 7 of the ECHR. See Jacobs, Ovey and White, *The European Convention on Human Rights* (7th edition, OUP 2017) 219. See also Mavronicola, ‘What is an “Absolute Right”? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights’ (2012) *Human Rights Law Review* 723-758. Webber, ‘Proportionality and Absolute Rights’, in V Jackson and M Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (CUP 2016).

⁵³ *Siliadin v France*, paras 82 and 112; *CN v The United Kingdom*, para 65.

⁵⁴ Right to respect for private and family life (Article 8 ECHR), Freedom of thought, conscience and religion (Article 9 ECHR) and Freedom of assembly and association (Article 11 ECHR), Right to marry (Article 14 ECHR).

disproportionate burden' on them⁵⁵– they cannot be simply balanced out by a vague reference to public order.

In sum, the obligation to identify and protect potential victims of human trafficking, which includes a duty not to remove them from their territory until this process is completed, discussed further in the following section, is established under both ECAT and Article 4 ECHR and represent an obligation that states ought to discharge *ex officio* without any input or assistance from a victim.

⁵⁵ *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.

3. The recovery and reflection period of a minimum 30 days

The Explanatory Report to ECAT acknowledges that identifying a trafficking victim is a process which takes time and is 'often tricky and necessitates detailed enquiries'.⁵⁶ Because of that, ECAT stipulates that:

Even though the identification process is not completed, as soon as competent authorities consider that there are reasonable grounds to believe that the person is a victim, they will not remove the person from the territory of the receiving State (...) Paragraph 2 [of Article 10] seeks to avoid their being immediately removed from the country before they can be identified as victims. Chapter III of the Convention secures various rights to people who are victims of trafficking in human beings. Those rights would be purely theoretical and illusory if such people were removed from the country before identification as victims was possible.⁵⁷

It is therefore clear that any removal of the victims unlawfully present in a State Party could only be done after a person has been identified as a victim. In the UK context, this requires a conclusive grounds decision.⁵⁸

By allowing a removal of a person with a positive reasonable grounds decision, provided for by Section 22 of the Illegal Migration Act, such an individual is denied not only a final decision on their status as a victim of human trafficking, but also a 'reflection and recovery period' guaranteed by Article 13 ECAT, which entitles them to a range of support and assistance measures stipulated in Articles 10 (2) and 12 (1) and (2) ECAT.

Namely, Article 13 (1) ECAT provides for a recovery and reflection period 'of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim.' The purpose of the recovery and reflection period is two-fold. First, it allows victims to recover and escape the influence of traffickers. The Explanatory Report notes that '[v]ictims recovery implies, for example, healing of the wounds and recovery from the physical assault which they have suffered. That also implies that they have recovered a minimum of psychological stability.'⁵⁹ The second purpose of this period is to allow victims to come to a decision on cooperating with the law-enforcement authorities in any prosecution of the traffickers.

The Explanatory Report to ECAT expressly notes that '[i]mmediate return of the victims to their countries is unsatisfactory both for the victims and for the law-enforcement authorities endeavouring to combat the traffic.'⁶⁰ It suggests that:

⁵⁶ ECAT Explanatory Report, paras 131 and 127.

⁵⁷ Ibid, para 131.

⁵⁸ GRETA has however noted in its 'Second General Report on GRETA's Activities' GRETA (2012)13 (4 October 2012) para 45 (emphasis added) that '[a]ny person *showing signs* that he/she has been subjected to (...) trafficking in human beings (...) should be considered as a victim of trafficking.' Such 'signs' are based on 'operational indicators of trafficking in human beings (as designed by several international organisations, such as ILO, IOM, UNODC and ICMPD).' This suggests that a bar for a final decision on victim status is low, comparable to the UK's reasonable ground decision.

⁵⁹ ECAT Explanatory Report, para 173.

⁶⁰ ECAT Explanatory Report, para 182.

[T]he period is likely to make the victim a better witness: statements from victims wishing to give evidence to the authorities may well be unreliable if they are still in a state of shock from their ordeal. 'Informed decision' means that the victim must be in a reasonably calm frame of mind and know about the protection and assistance measures available and the possible judicial proceedings against the traffickers. Such a decision requires that the victim no longer be under the traffickers' influence.⁶¹

Disqualification from the reflection and recovery period on public order grounds

Unlike Articles 10 and 12 ECAT and Article 4 ECHR, Article 13 ECAT is not unqualified. Therefore, Article 13 (3) ECAT allows states to not 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.' The Explanatory Report to ECAT does not provide much detail when it comes to interpreting this restriction. It merely states that:

Paragraph 3 of Article 13 allows Parties not to observe this [recovery and reflection] period if grounds of public order prevent it or if it is found that victim status is being claimed improperly. This provision aims to guarantee that victims' status will not be illegitimately used.⁶²

Official records of the *travaux préparatoires* of the ECAT are not publicly available to allow insight into the discussions that led to the formulation of Article 13 (3). Commentators who have had access to these records have noted that the United Kingdom expressed 'fundamental objections to the inclusion of a provision which calls for mandatory reflection periods, as it would provide opportunities for abuse by those seeking to circumvent immigration control or removal'.⁶³

The only available guidance pertaining to this possibility to deny or shorten the reflection and recovery period on the grounds of public order or improper claim of victim status is provided by GRETA, which has 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'.⁶⁴ This clearly requires conducting necessary investigations as part of the identification process and making a decision based on evidence that a victim status is claimed improperly.

States' positive human rights obligations to identify and protect *all* victims of human trafficking discussed in the previous section imply that any restrictions or denial of such protection must be amply justified by a state. This has been confirmed most recently by

⁶¹ Ibid, 174.

⁶² Council of Europe, 'Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings' (16 May 2005) CETS 197, para 173.

⁶³ Helmut Sax, 'Article 4: Definitions' in Julia Planitzer and Helmut Sax (eds), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings* (Edward Elgar 2020) 64 referring to the CoE Ad hoc Committee on action against trafficking in human (CAHTEH), Draft Convention of the Council of Europe on Action against Trafficking in Human Beings: Contribution by the delegations of Denmark, Germany, Italy, Liechtenstein, Norway, Sweden, United Kingdom and by the observer of European Women's Lobby, OSCE, CAHTEH(2004)13, 9 June 2004, 32.

⁶⁴ 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.

GRETA in its written submission to the inquiry conducted by the Joint Committee on Human Rights in relation to the Illegal Migration Bill, which noted that ‘the 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.’⁶⁵

Article 13 (3) ECAT has directly informed the public order disqualification provisions in Sections 22-29 IMA and Section 63 of the Nationality and Borders Act 2022.⁶⁶ The latter provides that a person with a reasonable grounds decision *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 63 (3) NABA provides a non-exhaustive list of the circumstances in which a person is a threat to public order. Such a person loses the protection from removal and entitlement to assistance and support mandated by Articles 10, 12, and 13 ECAT. Moreover, any ongoing process of identification is terminated and a person is not entitled to have a final decision (conclusive grounds decision) on their status as a victim of modern slavery.⁶⁷ The Illegal Migration Act takes these exceptions even further by imposing a duty on the competent authority (rather than a possibility) to disqualify eligible persons from protection. What is more, previously the disqualification only brought into scope individuals with a year’s prison sentence or longer. Section 29 of the IMA now applies this provision to those given a custodial sentence of any length.

Accordingly, while NABA was said to enable ‘the Department to exclude serious offenders from the National Referral Mechanism (...) on public order grounds’⁶⁸ the amendments made by the IMA to Section 63 NABA exclude from protection anyone sentenced to a term of immediate imprisonment, regardless of the seriousness of such an offence or the length of the imprisonment.⁶⁹

Furthermore, the most recent iteration of the Statutory Guidance from 24 July 2023⁷⁰ acknowledges the need for an individualised assessment emphasized by GRETA and expressly notes that ‘[t]he public order disqualification will be applied on a case-by-case basis’⁷¹ and that ‘[t]his decision should take into account whether the need for modern slavery specific support outweighs the threat to public order.’⁷²

Notwithstanding this apparent exclusion of the blanket application of the public order disqualification, 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 he or she needs to disprove – and not the other way around. Therefore, paragraph

⁶⁵ Joint Committee on Human Rights, Legislative Scrutiny: Illegal Migration Bill, ‘[Written Evidence by the GRETA \(IMB0024\) to the JCHR enquiry](#)’ paras 15 and 16.

⁶⁶ Explanatory Notes: Illegal Migration Act 2023 (chapter 37) para f.

⁶⁷ Modern Slavery Statutory Guidance, paras 14.231, 14.283 and 14.284.

⁶⁸ Explanatory Notes: Illegal Migration Act 2023 (chapter 37) para 8.

⁶⁹ The most recent published quarterly NRM statistics included, for the first time, data on the number of times the public order disqualification had been requested and the number of confirmed disqualifications. See [section 4.2](#).

⁷⁰ Statutory Guidance only concerns cases of public order disqualification under Section 63 (3) (b) (the person has been convicted of any other offence listed in Schedule 4 to the Modern Slavery Act 2015) and 63 (3) (f) (conviction for any offence resulting in imprisonment or liability to deportation under any provision or enactment) as well as cases of bad faith disqualification.

⁷¹ Statutory Guidance para 14.242.

⁷² *Ibid* para 14.243. See also paras 14.252 – 14.263.

14.255 of the Statutory Guidance expressly stipulates that:

The starting point 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. 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.

If the same approach is taken when the IMA modern slavery provisions are operationalised, it would mean that anyone sentenced to imprisonment or anyone 'liable to deportation from the United Kingdom under any provision of, or made under, any other enactment that provides for such deportation' would be automatically presumed a threat to public order, which they then need to refute, often in a limited timeframe afforded.⁷³ The onus would therefore be on a victim, or presumed victim, to prove their protection needs, and not on the Government to justify the exclusion from protection.

At the time when Section 63 was proposed in the Nationality and Borders Act, it was heavily criticised by the three UN Special Rapporteurs,⁷⁴ the UN High Commissioner for Refugees,⁷⁵ the UK's Independent Anti-Slavery Commissioner,⁷⁶ the UK Parliamentary Joint Committee on Human Rights (JCHR),⁷⁷ and civil society.⁷⁸

Overall, whereas countries are not prohibited from returning victims of modern slavery to their country of origin, as will be shown in section 4, this can only be done once the identification process is complete.⁷⁹ As noted earlier, Article 13 ECAT envisages minimum 30 days for a recovery and reflection period during which any potential victim is entitled to support and assistance as well as a deportation ban until the identification process is complete. While this period may not be observed if it turns out that a person has claimed a victim status improperly or if grounds of public order prevent it – either assessment presupposes a final decision on one's victim status. In other words, while Article 13 ECAT that guarantees a reflection and recovery period is qualified, the previous section has shown that the obligation to identify every victim of human trafficking guaranteed by Article 10 ECAT and Article 4 ECHR is not.

Furthermore, the provisions in the Act are also incompatible with the UK's obligations under Article 13 ECAT because the 'public order disqualification in Article 13(3) cannot be interpreted as applying *automatically* to all irregular migrants as a category, or to

⁷³ *Ibid* paras 14.245 – 14.251.

⁷⁴ [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.

⁷⁵ UNHCR [Observations on the Nationality and Borders Bill](#), October 2021; UNHCR [Updated Observations on the Nationality and Borders Bill](#), as amended, January 2022.

⁷⁶ Independent Anti-Slavery Commissioner, [Letter to the Home Secretary](#) (7 September 2021).

⁷⁷ House of Commons, House of Lords, Joint Committee on Human Rights 'Legislative Scrutiny: Nationality and Borders Bill (Part 5) - Modern Slavery' (15 December 2021) paras 50-53.

⁷⁸ Anti-Slavery International '[The Nationality and Borders Bill will harm victims of modern slavery](#)'.

⁷⁹ See Articles 14 and 16 ECAT discussed in Section 4.

Foreign National Offenders given a custodial sentence of any length and others liable for deportation.

The purpose of the recovery and reflection period provided for in Article 13 of ECAT is explained in the ECAT Explanatory Report which notes that:

Article 13 is intended to apply to victims of trafficking in human beings who are illegally present in a Party's territory or who are legally resident with a short-term residence permit. Such victims, when identified, are, as other victims of trafficking, extremely vulnerable after all the trauma they have experienced. In addition, they are likely to be removed from the territory.

Article 13, paragraph 1, accordingly introduces a recovery and reflection period for illegally present victims during which they are not to be removed from the Party's territory. ... Paragraph 3 of Article 13 allows Parties not to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly. This provision aims to guarantee that victims' status will not be illegitimately used.⁸⁰

This makes the purpose of the provision in Article 13(3) ECAT, permitting States not to observe the recovery and reflection period 'if grounds of public order prevent it' clear: to prevent abuse in the sense of victims' status being illegitimately used. Significantly, the scope of that exception must be interpreted in the context of the purpose of Article 13 as a whole as well as the object and purpose of ECAT. As the Explanatory Report makes clear, the whole purpose of the recovery and reflection period is to ensure protection for victims of trafficking who are also 'illegally present' in a State's territory and therefore vulnerable to being removed.

Read in that context, the public order disqualification in Article 13(3) ECAT cannot be interpreted as extending to all people who are illegally present in the State's territory, because that would be to defeat one of the very purposes of the recovery and reflection period provided for in this provision. But that is what Sections 22 – 29 of the Act do, by automatically disapplying the recovery and reflection period on the basis that all irregular migrants or anyone with a custodial sentence of any length are a threat to public order.

Such an expansive interpretation of Article 13(3) ECAT would not only frustrate the purpose of Article 13 of ECAT, it would also inevitably lead to breaches of Article 4 ECHR because it would lead to people who are recognised to be potential victims of trafficking and meet the conditions set out in Section 2 of the IMA being detained and removed or deported and thereby possibly even subjected to the risk of re-trafficking.⁸¹ The UK would not be able to rely on its contentious interpretation of Article 13(3) ECAT in response to claims that it has breached its obligations to victims under Article 4 ECHR. Article 40(4) ECAT provides:

⁸⁰ Paras 172-173,

⁸¹ See a discussion in the following subsection.

Nothing in this Convention shall affect the rights, obligations and responsibilities of States and individuals under international law, including ... international human rights law.

Legal challenges to the public order disqualification provisions

On 26 July 2023, the High Court has 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 conducts and takes account of an assessment of the risks of re-trafficking.⁸² 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. A further hearing into the legality of the policy is due to be heard at the end of October 2023.

It therefore remains to be seen how the legality of the policy on public order disqualification *in general*, beyond the issue of the potential risk of re-trafficking, will be evaluated by British courts. Notably, in addition to the need to consider whether and how public order disqualification may result in ‘a real and immediate risk of being re-trafficked’, which must be accounted for in making a decision in individual cases, it is important to remember that any disqualification from protection is an exception to an express protective obligation, and as such, ought to be very narrowly construed. In other words, even if an individual is not at risk of being re-trafficked, any exclusion from protection must be justified by the Government on public order grounds. The burden lies squarely on the Government to show that a person is a threat to public order (or has claimed the status in bad faith). This has been expressly acknowledged by GRETA, which noted that ‘[t]he grounds of public order are intended to apply in very exceptional circumstances and cannot be used by States Parties to circumvent their obligation to provide access to the recovery and reflection period.’⁸³

Individual assessment of each case (as opposed to a blanket exclusion) is necessary to comply with such an obligation, as both the Statutory Guidance⁸⁴ and the High Court decision stipulate. However, international law offers no basis for either limiting such an assessment to just the risk of re-trafficking or for making a blanket presumption in favour of disqualification and then requiring victims to disprove it.

The application of public order disqualification to British nationals

While Section 63 NABA and Sections 22-29 IMA provide a legal basis for excluding from protection individuals who are non-British nationals, the Modern Slavery Statutory Guidance appears to expand public order disqualification to *anyone* convicted of a criminal offence. Thus, the Guidance states in para 14.234 that:

⁸² Matrix Chambers, ‘[High Court orders no public order disqualifications of slavery victims may take place without a risk assessment pending trial](#)’ (27 July 2023).

⁸³ Joint Committee on Human Rights, Legislative Scrutiny: Illegal Migration Bill, ‘Written Evidence by the GRETA (IMB0024) to the JCHR enquiry’ para 16.

⁸⁴ Statutory Guidance only concerns cases of public order disqualification under Section 63 (3) (b) (the person has been convicted of any other offence listed in Schedule 4 to the Modern Slavery Act 2015) and 63 (3) (f) (conviction for any offence resulting in imprisonment or liability to deportation under any provision or enactment) as well as cases of bad faith disqualification.

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).

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',⁸⁵ while Section 63 (2) NABA envisages the following consequences for a person being considered a threat to public order:

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.

It is clear that prohibition on removing a person from the UK or providing them a limited leave to remain could only apply with respect to someone who is *not* a British national.

However, even if such disqualification only applied to non-British nationals, this would 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 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.

⁸⁵ Section 1 (1). See also Section 2 (2) IMA.

4. The procedural obligation to investigate and prosecute the perpetrators of modern slavery

In addition to creating exceptions to the obligation to identify every victim of modern slavery, established under both Article 4 ECHR and Article 10 ECAT, which is not qualified by public order grounds like the duty to provide a recovery and reflection period from Article 13 ECAT, modern slavery provisions of the IMA and NABA can lead to a breach of an obligation to investigate and prosecute the perpetrators of this offence. The latter obligation is also triggered by the existence of a 'credible suspicion' (reasonable grounds to believe) that a person is a victim of modern slavery.⁸⁶ Moreover, like the obligation to identify a victim, the obligation to investigate and prosecute a criminal offence(s) of modern slavery does not depend on a complaint from the victim or next-of-kin: 'once the matter has come to the attention of the authorities they must act of their own motion.'⁸⁷

Significantly, a positive obligation to conduct an investigation into the allegations of human trafficking under Article 4 ECHR also includes a duty to prevent deportation or removal of potential victims while the investigation is ongoing. This requirement is illustrated in the recent judgement of the UK Supreme Court (UKSC) in *MS (Pakistan) v Secretary of State for the Home Department*.⁸⁸ The UKSC considered whether, having decided that the appellant was indeed a victim of trafficking, his removal from the UK would amount to a breach of any of the positive obligations in Article 4 of the ECHR. Having summarised the relevant ECHR jurisprudence, the UKSC concluded that:

The police took no further action after passing him on to the social services department. It is not the task of the NRM to investigate possible criminal offences, although the competent authority may notify the police if it considers that offences have been committed (...) The authorities are under a positive obligation to rectify that failure. And it is clear that an effective investigation cannot take place if the appellant is removed to Pakistan: the [Upper Tribunal (Immigration and Asylum Chamber)] rightly held that 'it is inconceivable that an effective police investigation and any ensuing prosecution could be conducted without the full assistance and cooperation of the appellant. Realistically this will not be feasible if he is removed to Pakistan' (para 64).⁸⁹

As already noted in section 1 of this report, Sections 22 (3), 24 (3) and 25 (3) provide an exception from an automatic removal of individuals who satisfy the conditions required by section 2 (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). According to these provisions, removing a person from, or requiring them to leave, the UK could be set aside if the Secretary of State is satisfied that the person is cooperating with authorities an investigation or criminal proceedings in respect of their trafficking experience. Even this possibility is circumscribed by further requirements that their presence in the UK is 'necessary' and that 'the public interest in the person

⁸⁶ 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.

⁸⁷ Ibid. See also *Chowdury v Greece*, para 116.

⁸⁸ [2020] UKSC 9.

⁸⁹ Ibid, para 36.

providing that cooperation is outweighed by any significant of serious harm to members of the public which is posed by the person.’ What is more, these provisions create a legal presumption 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 only be set aside by the presence of ‘compelling circumstances’ to the contrary.

Similarly, Section 63 of the NABA, as amended by Section 29 (3) of the IMA, authorises a competent authority to not apply automatic disqualification from protection available to modern slavery victims on public order grounds if they consider that ‘there are compelling circumstances which mean that subsection (2) should not apply to the person.’

However, because individuals considered to be a threat to public order by virtue of Section 22 of the IMA and Section 62 NABA will be denied a reflection and recovery period, this means that potential victims of modern slavery need to decide whether to cooperate with law enforcement authorities immediately, without benefiting from the reflection and recovery period of 30 days. This directly contradicts the express instruction in the Explanatory Report to ECAT that the reflection and recovery period aims ‘to enable victims to recover and escape the influence of traffickers and/or to take an informed decision on co-operating with the competent authorities, the period, in itself, is not conditional on their co-operating with the investigative or prosecution authorities.’⁹⁰

The Joint Committee on Human Rights pointed out 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.⁹¹ 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.⁹²

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 obligations to prevent these crimes and to prosecute and punish the perpetrators. Exclusion of victims who have committed offences, or who are suspected of criminal offences, from the available protection would limit their involvement in any investigations,

⁹⁰ ECAT Explanatory Report, para 175. See also GRETA, ‘4th General Report on GRETA’s Activities’, GRETA (2015)1(March 2015) 47.

⁹¹ House of Commons, House of Lords, Joint Committee on Human Rights ‘Legislative Scrutiny: Nationality and Borders Bill (Part 5) - Modern Slavery’ (15 December 2021) paras 50-53.

⁹² *Ibid*, para 53.

prosecutions, and criminal proceedings.⁹³ This equally applies to those denied protection due to 'illegal' entry in the UK on the basis of the IMA.

⁹³ *Ibid*, paras 50- 53.

5. Return of victims of modern slavery with irregular immigration status

It must be noted that neither the ECHR nor ECAT provide an automatic entitlement to residence permit or an absolute protection against deportation. 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. This however 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.

The Illegal Migration Act confuses the reflection and recovery period provided for in Article 13 ECAT with the issue of the residence permit under Article 14 (1) ECAT despite the ECAT's express instruction to the contrary.⁹⁴ The IMA first creates a public order exception to the state's obligation to provide a reflection and recovery period based solely on a person's irregular immigration status (which may well be a direct consequence of having been trafficked) in Section 2 (1). This paves the way for their removal from the UK before a final decision on their victim status is made and disqualification from assistance and support measures according to Sections 22 and 23-25 respectively. The Act then carves out an exception to such a removal for individuals who cooperate with law enforcement authorities in Sections 22 (3), 24 (3) and 25 (3), despite the fact that according to Article 14 ECAT such cooperation could only serve as a basis for granting them 'renewable residence permits' after they have been identified and offered a reflection and recovery period.

Furthermore, while ECAT does not prevent the removal of victims without lawful residence, Article 16 ECAT contains important limitations to the states' ability to return such victims to their country of origin. Namely, before returning an identified victim of trafficking to their country of origin, a state ought to evaluate how such return may impact on 'the rights, safety and dignity of that person'. The Explanatory Report to ECAT clarifies that '[s]uch 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.'⁹⁵ These restrictions draw expressly on the ECtHR jurisprudence pertaining to Article 3 ECHR,⁹⁶ although the risk of re-trafficking may give rise to the same prohibition on returns under Article 4 ECHR. In addition, the returning state ought to consider how such return may impact '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.'⁹⁷ As already noted, the UK Supreme Court recently expressed a similar view in *MS (Pakistan) v Secretary of State for the Home Department*⁹⁸ where it ruled that an effective criminal investigation, which is a state obligation under both ECAT and ECHR, could not take place if the appellant was removed to Pakistan.

⁹⁴ Ibid.

⁹⁵ ECAT Explanatory Report, para 202.

⁹⁶ Ibid, para 203.

⁹⁷ Ibid, para 202.

⁹⁸ [2020] UKSC 9.

6. Obligation to establish legislative and administrative framework

Beyond obligations to identify and protect every victim of modern slavery and to investigate and prosecute the perpetrators of these crimes, states have a general obligation under Article 4 ECHR to put in place ‘a legislative and administrative framework providing real and effective protection of the rights of victims.’⁹⁹ Such a duty does not refer solely to criminal legislation but includes the general legal and administrative framework including the adequacy of immigration policy.¹⁰⁰ In *Chowdury and Others v Greece*, the European Court of Human Rights emphasised that ‘States’ domestic immigration law must respond to concerns regarding the incitement or aiding and abetting of human trafficking or tolerance towards it.’¹⁰¹ This general duty overall requires states to establish a domestic legal and administrative framework which makes the rights of victims of this serious crime practical and effective in line with the Court’s view that ‘[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective’.¹⁰²

The foregoing analysis however shows that the regime created by the Illegal Migration Act and the Nationality and Borders Act, results in human rights of victims of modern slavery being theoretical and illusory for those victims without lawful residence in the UK whose access to assistance and support guaranteed by international human rights law depend on the discretion of the Secretary of State.

According to the most recent statistics published by the Government, it is notable that the rate of positive reasonable grounds decisions made by two competent authorities – the IECA, which makes decisions in cases of certain foreign nationals, and the SCA, which is in charge of making decisions for everyone else, including child cases, differ markedly.¹⁰³ From April to June 2023, 61% (1,685) of reasonable grounds decisions made by the SCA were positive whereas only 6% (54) of reasonable grounds decisions made by the IECA were positive.¹⁰⁴ This illustrates an increasing bifurcation of the UK’s modern slavery regime where non British nationals whose circumstances render them within the IECA’s decision-making remit (e.g., those in prisons or immigration detention) were far less likely to access the protections afforded by the National Referral Mechanism, even before the IMA received Royal Assent.

⁹⁹ *Chowdury and Others v Greece*, para 87; *Rantsev v Cyprus and Russia*, para 285; *J and Others v Austria*, para 106.

¹⁰⁰ *Rantsev v Cyprus and Russia* paras 290-293.

¹⁰¹ *Chowdury and Others v Greece* (n 12) [87].

¹⁰² *Airey v Ireland*, para 24.

¹⁰³ <https://www.gov.uk/government/statistics/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-april-to-june-2023/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-quarter-2-2023-april-to-june>.

¹⁰⁴ *Ibid*, data tables 17 and 18. Note that this data captures decisions made before the relevant statutory guidance was amended on 10 July 2023, which altered references to satisfying the Reasonable Grounds decision threshold, and altered the assessments and level of information considered when making a decision. These changes may impact positive reasonable grounds decision rates moving forward.

7. Exception for potential victims of modern slavery whose exploitation took place in the UK

During a parliamentary debate of the Illegal Migration Bill on Tuesday 11 July 2023, Immigration Minister Jenrick announced that ‘the operation of the exception for potential victims of modern slavery to remain in the United Kingdom for the purpose of co-operating with law enforcement agencies in connection with the investigation of a trafficking offence will be subject to statutory guidance’.¹⁰⁵ Notably, given that the announced changes have not yet been given effect in the Statutory Guidance, the ensuing analysis is only preliminary.

The Immigration Minister explained that the guidance would provide that ‘an individual who has arrived in the UK illegally and has a positive reasonable grounds decision based on an incident that has taken place in the UK, will be afforded 30 days from that positive decision to confirm that they will co-operate with an investigation relating to their exploitation’. The second part of this statement appears to entail the recovery and reflection period and as such is in line with ECAT, which stipulates that one of the purposes of this period is ‘to take an informed decision on co-operating with the competent authorities, the period, in itself, is not conditional on their co-operating with the investigative or prosecution authorities’.¹⁰⁶

However, limiting the entitlement to this period to situations where a positive reasonable grounds decision is ‘based on an incident that has taken place in the UK’ is ambiguous and at odds with obligations arising out of ECAT and ECHR. It is not clear what is meant by ‘incident’ in this context. Human trafficking is a process, which starts with ‘recruitment, transportation, transfer, harbouring or receipt of persons’ and ends with exploitation. But it is *intended* rather than actual exploitation that is sufficient to make a trafficking offence complete (and equally to qualify a person as a victim). This is expressly noted in the Explanatory Report to ECAT,¹⁰⁷ and discussed at length in academic literature.¹⁰⁸

According to the case law of the European Court of Human Rights, states’ obligations under ECHR arise the moment when state authorities are ‘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 [ECAT]’.¹⁰⁹ To count as a victim, and to trigger states’ positive obligations towards such a victim, exploitation needs not to have started.

The Government may have wanted to distinguish between historical victims (those who were exploited in the past, but may never have been identified and supported) in another

¹⁰⁵ Jenrick, R. (2023) [‘Illegal Migration Bill’](#) HoC Deb. Vol. 76 col. 207.

¹⁰⁶ ECAT Explanatory Report, para 175

¹⁰⁷ At para 87. See also UNODC ‘Legislative Guide for the Implementation of the Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime’ (New York 2004) para 33.

¹⁰⁸ Jovanovic, *State Responsibility for Modern Slavery in Human Rights Law: A Right Not to Be Trafficked?* (OUP 2023) chapters 3 and 6.

¹⁰⁹ *Rantsev v Cyprus and Russia*, para 286. This is also established by other international courts, see Inter-American Court of Human Rights, *Workers of the Hacienda Brasil Verde v Brazil*, Preliminary Objections, Merits, Reparations and Costs, Series C No. 318, 20 October 2016, paras 323 – 324; *Malawi African Association and Others v Mauritania*, 13th Annual Activity Report (1999-2000) paras 132 – 135.

country from historical victims exploited in the UK. However, there is no legal basis in international law for such a distinction – or for any distinction between different categories of victims. 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’.

The Immigration Minister further noted that beyond this 30-day period, ‘[s]hould [eligible individuals] continue to co-operate with such an investigation, they will continue to be entitled to the support and protections of the NRM. Should further time be required in addition to the 30 days, that period is extendable so that the police and the victim have the time necessary to ensure that traffickers are brought to justice.’ According to ECAT, entitlement to protection and support *beyond* the recovery and reflection period (of minimum 30 days) is largely dependent on victims’ immigration status and for those without lawful residence, on their ability or willingness to assist in criminal investigations against the perpetrators. Thus, according to Article 12 (3) ECAT only those victims 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’. According to Article 12 (4), those with lawful residence are also entitled to ‘access to the labour market, to vocational training and education.’

Notably, Article 14 ECAT gives a wide discretion to states with regards to issuing residence permits to victims of trafficking. This provision instructs states to issue a renewable residence permit to victims 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.’ This undermines 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’.¹¹⁰ The broad discretion left to states when deciding whom to grant residence permits has therefore undermined a comprehensive set of protection measures guaranteed in other provisions.

Accordingly, the statement by the Immigration Minister that those victims with irregular migration status who continue to co-operate with criminal investigation could be entitled to further protection beyond the 30-day period does not contradict the letter of ECAT, though it may not be in line with its spirit.

In that respect, GRETA has noted that:

[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

¹¹⁰ Though in its thematic report on the provision of assistance to victims, GRETA was ‘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.’ See 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.

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.¹¹¹



The Modern Slavery and Human Rights Policy and Evidence Centre was created by the investment of public funding to enhance understanding of modern slavery and transform the effectiveness of law and policies designed to address it. The Centre is a consortium of six academic organisations led by the Bingham Centre for the Rule of Law.



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¹¹¹ GRETA, '9th General Report on GRETA's Activities' (March 2020) para 161.