

Non-Punishment of Victims/Survivors of Human Trafficking in Practice:

A Case Study of the United Kingdom



Marija Jovanović
Maayan Niezna



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A Case Study of the United Kingdom

Dr Marija Jovanović,
University of Essex, Essex Law School and Human Rights Centre

and

Dr Maayan Niezna,
University of Oxford, Bonavero Institute of Human Rights

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trafficking@coe.int

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AKNOWLEDGMENT

In light of the judgment of the European Court of Human Rights (ECtHR) in the case of the *V.C.L. and A.N v United Kingdom* (16 February 2021), where the Court found the UK in breach of Articles 4 and 6 of the European Convention on Human Rights (ECHR), the Anti-Trafficking Division of the Council of Europe commissioned this study to two academic researchers, Dr Marija Jovanovic and Dr Maayan Niezna. The study analyses important developments in the understanding and application of the non-punishment principle set out in Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings, and considers potential implications of these developments for the interpretation and application of the non-punishment principle in Council of Europe member States.

Dr Marija Jovanovic is a Senior Lecturer at the School of Law, University of Essex. Her research focuses on modern slavery and the way this phenomenon interacts with different legal regimes, such as human rights law, criminal law, labour law, immigration law, international trade law, and business regulation. She is the author of *State Responsibility for 'Modern Slavery' in Human Rights Law* (Oxford University Press, 2023).

Dr Maayan Niezna is a Postdoctoral Research Fellow in Modern Slavery and Human Rights at the Bonavero Institute of Human Rights, University of Oxford, and a Fellow of the Modern Slavery Policy and Evidence Centre. Her research focuses on trafficking for labour exploitation and the regulation of labour migration. She holds PhD in Law from Kent Law School and an MSc in Human Rights from LSE. Before her doctoral studies, she led the legal work on human trafficking at the Hotline for Refugees and Migrants-Israel, and worked on issues related to human trafficking at the Office of the National Anti-trafficking Coordinator within the Ministry of Justice of Israel and UNHCR.

LIST OF ABBREVIATIONS

ACTIP	ASEAN Convention Against Trafficking in Persons, Especially Women and Children
ASEAN	Association of Southeast Asian Nations
CAHTEH	Council of Europe Ad Hoc Committee on Action against Trafficking in Human Beings
CGD	Conclusive Grounds Decision
CoE	Council of Europe
CPS	Crown Prosecution Service
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GRETA	Group of Experts on Action against Trafficking
IEACA	Immigration Enforcement Competent Authority
ICAT	Inter-Agency Coordination Group against Trafficking in Persons
IMA	Illegal Migration Act 2023
JCHR	UK Parliamentary Joint Committee on Human Rights
MSA	Modern Slavery Act 2015
NABA	Nationality and Borders Act 2022
NGO	Non-Governmental Organisation
NRM	National Referral Mechanism
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
SCA	Single Competent Authority
RGD	Reasonable Grounds Decision
UN	United Nations
UNODC	United Nations Office on Drugs and Crime

EXECUTIVE SUMMARY

The study considers the operationalisation of the non-punishment principle set out in Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings (CoE Anti-Trafficking Convention) in the UK following the 2021 judgment of the European Court of Human Rights (ECtHR) in the case of *V.C.L. and A.N. v. United Kingdom*. The ECtHR found the UK in breach of Articles 4 and 6 of the European Convention on Human Rights (ECHR) for failing to identify and consider the protection needs of two Vietnamese children, despite credible suspicion they were victims of human trafficking, when they were prosecuted and convicted of drug offences in the UK. The study provides a comprehensive analysis of this decision and considers how the UK Government sought to comply with the ruling by making changes in domestic law and policy. It also reflects on recent developments in the UK's immigration law and policy which are critical for an understanding of the operationalisation of the non-punishment principle in the UK. Finally, it considers potential implications of these developments for the interpretation and application of the non-punishment principle in other Council of Europe member States.

The issue at the core of the *V.C.L. and A.N.* ruling concerns the interaction between human rights and human trafficking regimes aimed primarily at victim protection, on the one hand, and domestic law enforcement and immigration control regimes designed to safeguard other public policy goals, on the other. In all these cases, the key challenge for states is to find the right balance between the competing interests of victim protection, law enforcement, and immigration control, which call for different and often conflicting actions.

The study begins by discussing the non-punishment principle, embedded in several international instruments, which requires states to provide for the possibility of not prosecuting or punishing victims of human trafficking for their involvement in unlawful activities when such an involvement had a 'relevant nexus' with their experience of being trafficked.¹ As such, it is meant to strengthen the victim protection responsibilities of states. However, despite being widely accepted in international and domestic law, there is often no comprehensive and detailed guidance on how the authorities should balance the trafficked person's victimhood with their culpability. Accordingly, merely replicating the wording of the non-punishment provision from the international instruments into domestic law is not enough; states ought to establish a comprehensive domestic framework to bring into effect not just the letter but also the spirit and purpose of this provision.

The study then considers the ECtHR's engagement with the non-punishment principle in *V.C.L. and A.N. v. United Kingdom*. The judgment emphasizes the importance of the non-punishment principle for state compliance with the positive obligation to protect victims or potential victims of human trafficking enshrined in Article 4 ECHR. It explains that it is 'axiomatic that the prosecution of victims of trafficking would be injurious to their physical, psychological and social recovery and could potentially leave them vulnerable to being re-trafficked in future.' Still, when it comes to the question of whether the non-punishment principle represents a separate positive obligation under Article 4 ECHR, the ruling in *VC.L. and A.N.* could have been clearer. The crux of the decision concerned the correct identification of victims of modern slavery as a precondition for taking any operational measures to protect them. Accordingly, despite finding a violation of the Article 4 obligation to protect victims of human trafficking on the basis of the authorities' failure to correctly identify them, an

¹ A specific nature of such 'relevant nexus' is discussed in subsections 1 and 2 of the section I.

omission that also led to their punishment for drug-related offences, the ECtHR steered clear of considering the non-punishment principle *per se* a part of the ECHR body of law.

Following the discussion of the *V.C.L. and A.N.* ruling, the study considers the UK's response to the judgment. It begins by examining the Action Plan where the UK Government outlined steps it has taken to comply with it. Given the length of time passed between the relevant events and the two applications to the ECtHR, and the judgment in this case, many changes have already been adopted well before the ECtHR's judgment in this case. For instance, the Modern Slavery Act 2015 (MSA) came into force on 31 July 2015 – three years after the applicants submitted their cases to the ECtHR. Section 45 of the MSA introduced a statutory defence for victims of modern slavery who are compelled to commit certain crimes in England and Wales. Similar legislation was introduced in both Northern Ireland and Scotland. However, the Action Plan expressly acknowledges a lack of evidence regarding the implementation of the Section 45 defence in practice throughout England and Wales (and similarly in Northern Ireland and Scotland) and expresses commitment of the Home Office to explore how data on the use of the defence can be captured, to better understand its effectiveness.

Furthermore, as a result of *V.C.L. and A.N.*, the Crown Prosecution Service (CPS) in England and Wales has updated its modern slavery guidance to prosecutors in cases where there are suspicions that a suspect may be a victim of trafficking, and similar amendments have been made in the Lord Advocate's instructions to prosecutors in Scotland, and in the Policy for Prosecuting Cases of Modern Slavery and Human Trafficking in Northern Ireland. While the CPS Guidance replicates in full the requirements spelled out by the ECtHR in *V.C.L. and A.N.* judgment, the study shows that several important aspects of decision-making in cases of suspects in a criminal case who might be victims of trafficking are left unclear.

Furthermore, a review of domestic case law following the judgment in *V.C.L. and A.N.* reveals a failure to recognise an important distinction between the two critical decisions in the application of the non-punishment principle – the decision concerning one's victim status and the decision concerning the bearing of such a status on their prosecution and punishment. As a result, institutional competence of various authorities in charge of making these decisions is not clearly delineated, and relevant standards applicable to making such decisions are left vague.

In addition, the study reflects on critical developments in the UK regulatory framework governing immigration, reflected in the Nationality and Borders Act 2022 and Illegal Migration Act 2023, and their implications for the application of the non-punishment principle. These new developments threaten to seriously undermine the entire regime established to tackle modern slavery in the UK, as pointed out by a large number international and domestic experts and institutions. Aspects of these laws have already been found to be unlawful by the UK courts and further legal challenges remain pending.

The study concludes by outlining key issues that states need to address in domestic law and policy to comply with the requirements of Article 26 of the CoE Anti-Trafficking Convention:

- Clarify institutional competence and division of roles between the law enforcement authorities and those in charge of victim identification and support. When it comes to deciding whether or not a person is a victim of human trafficking, which is a precondition for the

application of the non-punishment principle, clear priority should be given to competent authorities who are ‘trained and qualified to deal with victims of trafficking’.²

- Specify rules that govern the application of the non-punishment principle in relation to certain categories of offences, noting the consensus among international organisations that no crime should be *a priori* excluded from consideration.
- Recognise a strong interest in encouraging victims to report abuse, and cooperating with law enforcement bodies in investigation and prosecution of perpetrators. Victim’s cooperation is a key for prosecution of perpetrators, protection of other victims, and identification of areas where prevention efforts should be strengthened.
- Stipulate the required nexus between the status of a victim and an offence committed by a victim. Guidance on this issue should clarify whether the nexus requirement is premised on causation or correlation between human trafficking and victim’s own offence and the bearing of such relevant nexus on the application of the non-punishment principle, and may also address temporal link between these offences.
- Establish rules that govern the burden of proof that the relevant nexus is established, in accordance with the obligation of states to identify victims without a requirement that victims prove such status.
- Determine the effect of the non-punishment principle and remedies available to those victims whose status has been established only after conviction, and possibly after serving the sentence.

In essence, States ought to establish rules that govern the exercise of balancing victims’ culpability and their victimhood. Such rules should recognise that individuals may simultaneously belong to different categories (victim of crime, offender, irregular migrant, asylum seeker) and clarify institutional roles of different actors involved in applying them. The study reminds that while it is not the role of GRETA nor the ECtHR to be prescriptive on how states should engage with each of these issues, the ECHR and the CoE Anti-Trafficking Convention set the parameters of state action and goals to be achieved by certain provisions leaving states to decide how best to operationalise such provisions in the domestic context. This ensures a continuous dialogue between authorities at the international and domestic levels, complementarity of their efforts, as well as shared responsibility for upholding universal human rights.

² *V.C.L. and A.N. v United Kingdom*, para 160.

INTRODUCTION

States have a duty to protect victims of human trafficking and bring traffickers to justice.³ Nonetheless, victims often face prosecution and punishment instead of guaranteed support and assistance. In some cases, the sole purpose of their being trafficked is the commission of criminal offences, which generate profit for traffickers, such as cannabis cultivation, drug trafficking, or shoplifting.⁴ In other instances, victims of human trafficking may be exploited through what appears to be a lawful economic activity, such as domestic or agricultural work, but their irregular immigration status resulting from their being trafficked makes such activity illegal. There are nonetheless situations where victim's offending does not appear to be related to their experience of human trafficking. How should states treat these individuals and reconcile their obligation to protect victims of human trafficking with their general law enforcement responsibility? The principle of non-punishment of victims of human trafficking for offences that are *related* to their victimhood (the specific nature of that relationship will be discussed below) has emerged as a tool for reconciling these two competing goals. It has been enshrined in many international instruments and domestic laws, but its operationalisation and legal effects remain opaque.

This study analyses important developments in the understanding and application of the non-punishment principle set out in Article 26 of the Council of Europe Convention on Action Against Trafficking in Human Beings (hereafter, 'CoE Anti-Trafficking Convention'). Such developments result from the 2021 judgment of the European Court of Human Rights ('ECtHR') in the case of *V.C.L. and A.N. v. United Kingdom* where the Court found the UK in breach of Articles 4 and 6 of the European Convention on Human Rights (ECHR).⁵ The study provides a comprehensive analysis of this decision and its impact on the law and policy in the United Kingdom, and considers potential implications of these developments for the observance of the non-punishment principle in other Council of Europe member States.

Specifically, the study considers the UK's response to the ruling of the Court, and evaluates the developments in the legislation, public policy and case law pertaining to domestic enforcement of the non-punishment principle. This analysis elucidates the challenges in the application of the non-punishment principle and the victim protection requirements when these interests compete with states' criminal justice and immigration control goals. The issue at the core of the *V.C.L. and A.N.* ruling concerns the interaction between human rights and human trafficking regimes aimed primarily at victim protection, on the one hand, and domestic law enforcement and immigration control regimes designed to safeguard other public policy goals, on the other. Striking the right balance between these conflicting goals is central for the correct application of the non-punishment principle. Using the UK as a case study, this analysis provides insights and guidance to other states seeking to abide by their obligations arising out of Article 26 of the CoE Anti-Trafficking Convention and considers the extent to

³ Such obligations are enshrined in the following international instruments: Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Palermo Protocol); Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008) CETS 197 (The CoE Anti-Trafficking Convention); Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L/1 (EU Trafficking Directive); The ASEAN Convention Against Trafficking in Persons, Especially Women and Children (22 November 2015).

⁴ See for instance Home Office Guidance, 'Criminal exploitation of children and vulnerable adults: county lines' (updated 7 February 2020) <https://www.gov.uk/government/publications/criminal-exploitation-of-children-and-vulnerable-adults-county-lines/criminal-exploitation-of-children-and-vulnerable-adults-county-lines>.

⁵ *V.C.L. and A.N. v United Kingdom*, Applications nos 77587/12 and 74603/12 (16 February 2021).

which the jurisprudence of the European Court of Human Rights can inform the implementation of this provision. In doing so, the study sheds light on the interaction between the two Council of Europe regimes – the human rights regime and the anti-trafficking regime.

The issues addressed in the study are important for the following reasons. First, the *V.C.L. and A.N.* case was the first time that the Court considered the non-punishment principle and there has been no comprehensive assessment of the judgement or its impact on the interpretation and application of Article 26 of the CoE Anti-Trafficking Convention. The *V.C.L. and A.N.* judgement identifies critical parameters that are meant to guide public authorities when balancing victimhood with criminal offending. These are: the requirement to provide ‘clear reasons’ when the prosecution seeks to invalidate a decision of the competent authority established to identify victims of human trafficking;⁶ the requirement to demonstrate ‘relevant nexus’ between human trafficking victimhood and victim’s own offending to justify not prosecuting victims;⁷ and the requirement to specify the required level of ‘compulsion’ that calls for a decision not to prosecute or punish.⁸ Yet, the judgement offers little guidance when it comes to the application of these criteria leaving their operationalisation to the states. The present study therefore offers critical insights on the application of the non-punishment principle in practice as well as on its interaction with human rights law.

The second reason why it is critical to analyse the *V.C.L. and A.N.* judgement and its bearing on the operationalisation of the non-punishment principle is the impact of the jurisprudence of the European Court of Human Rights, both on human rights law and anti-trafficking regimes worldwide. Therefore, even though the non-punishment principle originates from trafficking-specific international instruments, the ruling of the ECtHR, the jurisprudence of which shapes international and domestic human rights law, has a potential to embed this principle into the global and regional human rights frameworks. Notably, the judgment did not expressly proclaim that the non-punishment principle represents a states’ positive human rights obligation within the right that prohibits slavery, servitude, forced labour, and human trafficking. The ECtHR made it clear that ‘the Court’s jurisdiction is limited to the European Convention on Human Rights. It has no competence to interpret the provisions of the CoE Anti-Trafficking Convention or to assess the compliance of the respondent State with the standards contained therein’.⁹ Despite this nominal rejection of reading the non-punishment provision into the ECHR, the judgement did consider the implications of the prosecution of victims, or potential victims, of trafficking for the State’s duty to take operational measures to protect them.¹⁰ It is therefore possible and plausible to envisage the trajectory of the ECtHR’s jurisprudence, which facilitates further integration and synergy between the anti-trafficking and human rights frameworks.

Beyond informing human rights law, insights generated by this study will be an important aid in the interpretation and application of the non-punishment provisions contained in other international instruments. For example, in addition to the CoE Anti-Trafficking Convention, the non-punishment principle is also enshrined in the 2011 EU Trafficking Directive¹¹ and the 2016 ASEAN Convention

⁶ *Ibid*, para 162.

⁷ *Ibid*, para 170 and 172.

⁸ *Ibid*, para 113.

⁹ *Ibid*, para 113.

¹⁰ *Ibid*, paras 157-162.

¹¹ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L/1.

Against Trafficking in Persons, Especially Women and Children (ACTIP).¹² The study therefore seeks to contribute to a better understanding and interpretation of both general human rights treaties and international instruments that include the non-punishment principle.

The insights generated from a detailed case-study for the interpretation of international law are considerable. A comprehensive analysis of the implementation of the non-punishment principle in a specific jurisdiction, and of the broader legal and political context in which this occurs, contributes to an understanding of the challenges in applying international law on the ground.

The findings from this study are contained in the following sections. Section I provides an overview of the non-punishment principle, its origins, evolution, substantive content and relationship with human rights law. It considers challenges with its interpretation and application, emphasizing the importance of prioritising victim identification and protection over other competing interests that may be at stake, such as crime and immigration control.

Section II provides a comprehensive analysis of the ECtHR's decision in *V.C.L. and A.N.*, the first case where the Court tackled the issue of non-punishment of victims of human trafficking. The section engages with the Court's reasoning and reflects on an overly restrictive approach taken to the interpretation of the obligation to protect under Article 4 ECHR. The section then considers possibilities for expanding the interpretation of this provision that draw on the synergy between international human rights law and anti-trafficking law.

Section III examines the effect of the ECtHR's decision in the United Kingdom. It considers how the UK government sought to comply with the ruling by making changes in domestic law and policy, as well as the way domestic courts have interpreted the requirements that stem from the ECHR and the CoE Anti-Trafficking Convention. This section also reflects on recent developments in the UK's immigration regime which are critical for an understanding of the operationalisation of the non-punishment principle in the UK.

Section IV offers concluding remarks and lessons for other states that could be drawn from this study.

It must be noted at the outset that the present study occasionally refers to the concept of 'modern slavery' even though this term does not have an internationally agreed legal definition. The study uses this term to denote four practices covered by Article 4 ECHR, namely slavery, servitude, forced labour, and human trafficking. This corresponds with the definition of modern slavery used in the UK's Modern Slavery Act 2015 (MSA). Notably, the MSA does not define these underlying four concepts but refers to their well-established definitions in international law.¹³

Furthermore, while the term 'survivor' is often considered preferable to the term 'victim' and has been widely used in the scholarship and among activists, the study often uses the term 'victim' because it features in the international instruments, jurisprudence and many official documents.

¹² For a comparison between the EU and ASEAN anti-trafficking regimes, see Marija Jovanovic, 'International Law and Regional Norm Smuggling: How the EU and ASEAN Redefined the Global Regime on Human Trafficking' (2021) 68 (4) *American Journal of Comparative Law* 801. See also Marika McAdam, 'Implementation of the Non-Punishment Principle for Victims of Human Trafficking in ASEAN Member States' (Australian Aid, ASEAN – Australia Counter Trafficking, March 2022).

¹³ Marija Jovanovic, *State Responsibility for Modern Slavery in Human Rights Law: A Right Not to Be Trafficked?* (OUP 2023).

I. The 'Imperfect' Victim and Competing Goals of Victim Protection, Law Enforcement, and Immigration Control: the Emergence of the Non-Punishment Principle

Victims and survivors of human trafficking, like most other individuals, are not one-dimensional; they can wear many hats. Therefore, while they are persons in need of protection first and foremost, they may simultaneously occupy other roles: they can be criminal offenders and/or break immigration rules in a given country, even though such offences or breaches may not always result from their own volition. For example, it is not uncommon that victims of sexual exploitation 'graduate' to become recruiters and exploiters themselves.¹⁴ Also, many victims of cross-border human trafficking¹⁵ are in breach of immigration law in a destination country, often through no fault of their own.¹⁶ In addition, some victims have been trafficked with the specific aim to engage in criminal offending – a phenomenon called 'criminal exploitation'¹⁷ or 'exploitation of criminal activities'.¹⁸ Examples of such practices include Vietnamese minors trafficked to the UK to engage in illegal cannabis farming, or children trafficked to the UK to engage in pickpocketing.¹⁹ In all these cases, the key challenge for states is to find the right balance between the competing interests of victim protection, law enforcement and immigration control, which call for different and often conflicting actions.²⁰

The non-punishment principle, embedded in several international instruments discussed in the following section, essentially obliges states to consider not prosecuting or punishing victims of human trafficking for their involvement in unlawful activities when such an involvement had a relevant nexus with their experience of being trafficked. As such, it is meant to strengthen victim protection responsibilities of states by emphasising that victims' autonomy could be impaired to such an extent that their culpability is effectively extinguished. The paper issued on this subject matter by the Office of the OSCE Special Representative and Co-Ordinator for Combating Trafficking in Human Beings in 2013 refers to 'factual circumstances in which victims of trafficking act without autonomy because traffickers exercise control over them through abusive, coercive and illicit means'.²¹ As a result it is said that 'victims may act under compulsion and may be compelled to commit offences'.²² The expert

¹⁴ United Nations Office on Drugs and Crime (UNODC), *Global Report on Trafficking in Persons 2016* (United Nations publications 2016) 36-9.

¹⁵ Human trafficking does not require by default crossing the border.

¹⁶ Interaction with the refugee system and consideration of limited options for safe and legal entry.

¹⁷ Home Office Guidance, 'Criminal exploitation of children and vulnerable adults: county lines' (updated 7 February 2020) <https://www.gov.uk/government/publications/criminal-exploitation-of-children-and-vulnerable-adults-county-lines/criminal-exploitation-of-children-and-vulnerable-adults-county-lines>.

¹⁸ Paragraph 11 of the Preamble to Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L/1. ('The expression 'exploitation of criminal activities' should be understood as the exploitation of a person to commit, inter alia, pickpocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain).

¹⁹ Patrick Burland, 'Still Punishing the Wrong People: The Criminalisation of Potential Trafficked Cannabis Gardeners' in G Craig, A Balch, H Lewis, and L Waite, *The Modern Slavery*

Agenda (Policy Press 2019); Anti-Slavery International, 'Trafficking from Vietnam to the UK' (antislavery.org)

<https://www.antislavery.org/what-we-do/past-projects/trafficking-vietnam-to-uk>, Sean Seddon, 'Trafficked children 'forced to steal on London Underground' *Metro* (17 July 2021) <https://metro.co.uk/2021/07/17/trafficked-children-forced-to-steal-on-london-underground-14944473/>.

²⁰ In reality, the goals of crime and immigration control often take priority over victim protection interests. See Marija Jovanovic, 'International Law and Regional Norm Smuggling: How the EU and ASEAN Redefined the Global Regime on Human Trafficking' (2021) 68 (4) *American Journal of Comparative Law* 801.

²¹ OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, 'Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking in consultation with the Alliance against Trafficking in Persons Expert Co-ordination Team' (2013) para 70.

²² *Ibid.*

group in charge of overseeing the implementation of the CoE Anti-Trafficking Convention, GRETA, therefore emphasized that:

The criminalisation of victims of [trafficking in human beings] contravenes the State's obligation to provide services and assistance to victims because, not being treated as victims of human trafficking, they are not provided with the support and services to which they are entitled under the Convention. Furthermore, such criminalisation discourages victims from coming forward and co-operating with law enforcement agencies, thereby also interfering with the State's obligation to investigate and prosecute those responsible for [trafficking in human beings].²³

However, international instruments, which introduced the non-punishment provision, and domestic law or state practice, which sought to give effect to it, rarely contain specific and detailed guidance on its scope and legal effect.²⁴

What follows is a brief overview of the origins, content and scope of this principle, including the discussion of its rationale and relationship with human rights law, before proceeding to discuss the ECtHR's decision in *V.C.L. and A.N.* and the resulting developments in the UK's legal framework and practice.

1. The Origins of the Non-Punishment Principle and Contested Questions Concerning its Application

The non-punishment principle was first mentioned in the human trafficking context²⁵ in the 2002 Recommended Principles and Guidelines on Human Rights and Human Trafficking of the Office of the United Nations High Commissioner for Human Rights (OHCHR). Principle 7 recommended that victims of human trafficking 'shall not be detained, charged or prosecuted ... for unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons'.²⁶ The Principles further instructed states to consider '[e]nsuring that trafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons'.²⁷ The OHCHR Principles also advised states to seek to ensure that 'law enforcement efforts do not place trafficked persons at risk of being punished for offences committed as a consequence of their situation'.²⁸ However, the OHCHR Principles did not specify how the authorities should determine when unlawful activities by trafficked persons are 'a direct consequence' of their situation. Moreover, this was a non-binding instrument.

²³ Submission by the Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA) pursuant to the call for written submissions from the UN Special Rapporteur on trafficking in persons, especially women and children concerning input for the report on the implementation of the non-punishment principle (5 February 2021). See also, Group of Experts on Action against Trafficking (GRETA), '2nd General Report on GRETA's activities covering the period from 1 August 2011 to 31 July 2012', GRETA(2012)13 (Council of Europe, 4 October 2012) para 50.

²⁴ As noted in GRETA's evaluation reports, several countries have issued guidance for prosecutors and law enforcement agencies on the application of the non-punishment provision. See *inter alia* GRETA reports on Denmark, Montenegro the Netherlands, Norway, or the UK on Council of Europe, 'Country monitoring - Action against Trafficking in Human Beings' <https://www.coe.int/en/web/anti-human-trafficking/country-monitoring-work>.

²⁵ The non-punishment principle has been mentioned earlier in the context of refugee law. Therefore, 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.

²⁶ Office of the High Commissioner for Human Rights, Recommended Principles and Guidelines for Human Rights and Human Trafficking (2002) ('OHCHR Principles'), Principle 7.

²⁷ OHCHR Principles, Guidelines 2.5 and 4.5.

²⁸ *Ibid*, Guideline 5.5.

The Council of Europe's Anti-Trafficking Convention therefore became the first legally binding instrument to include an explicit reference to the non-punishment principle. Article 26 of the Convention states that '[e]ach Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so'.

The EU Trafficking Directive largely resembled this provision, clarifying further that the non-punishment principle involves '[n]on-prosecution or non-application of penalties'.²⁹ Article 8 of the Directive therefore requires Member States to 'take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2'.³⁰

Similarly, the 2014 Protocol to the 1930 Forced Labour Convention of the International Labour Organization³¹ requires in Article 4 (2) that Member States 'take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour'.

Most recently, the ASEAN Convention against Trafficking in Persons, Especially Women and Children, enshrined the obligation of states to 'consider not holding victims of trafficking in persons criminally or administratively liable, for unlawful acts committed by them, if such acts are directly related to the acts of trafficking'.³²

Many states have changed their domestic law to give effect to these international legal provisions. Such general acceptance of the non-punishment principle has led the UN Special Rapporteur on trafficking in Persons to consider it 'a general principle of law'.³³ Despite this, the domestic application of the principle remains haphazard.³⁴ Accordingly, while the non-punishment principle is firmly embedded in both international and domestic law, its interpretation and application remain ununiform. The following questions warrant clarification.

First, does non-punishment also include non-detention and non-prosecution of the victims of human trafficking? While different legal instruments contain different wording, there has been a growing consensus that the application of this principle should be considered from the earliest stage of a criminal justice process.³⁵ Still, it is important to provide express and clear guidance in domestic law to ensure that individuals are entitled to protection from the first contact with law enforcement

²⁹ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L/1, Article 8.

³⁰ Ibid.

³¹ Protocol of 2014 to the Forced Labour Convention, 1930, 103rd ILC session, adopted 11 June 2014 entered into force 9 November 2016.

³² ASEAN Convention Against Trafficking in Persons, Especially Women and Children (22 November 2015), Article 14 (7).

³³ Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally, 'Implementation of the non-punishment principle' A/HRC/47/34 (17 May 2021) para 20.

³⁴ Submission by the Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA) pursuant to the call for written submissions from the UN Special Rapporteur on trafficking in persons, especially women and children concerning input for the report on the implementation of the non-punishment principle (5 February 2021).

³⁵ Ryszard Wilson Piotrowicz and Lilliana Sorrentino, 'Human Trafficking and the Emergence of the Non-Punishment Principle' (2016) 16 (4) Human Rights Law Review 669. OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, 'Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking in consultation with the Alliance against Trafficking in Persons Expert Co-ordination Team' (2013) para. 71; Inter-Agency Coordination Group against Trafficking in Persons (ICAT), 'Non-Punishment of Victims of Trafficking' (Issue Brief 8, 2020), 1.

authorities as long as there are reasonable grounds to believe that they may be victims of modern slavery.

Second, does the non-punishment principle apply only to criminal offences or to any unlawful activities? And more significantly, does it apply to any criminal offence or should some offences be exempted due to their particularly serious nature? The latter is a particularly contested question. A further aspect of this question concerns whether the rules for applying the non-punishment principle differ based on the type of offence. For instance, should it apply differently when an offence constitutes an integral part of the human trafficking offence, which is the case with illegal border crossing, as opposed to offences ostensibly disconnected from the human trafficking process?

Third, what is the rationale of this principle? Why, in other words, should victims of human trafficking be exempted from the criminal justice system? It has been suggested that such reasons could be both instrumental and intrinsic. Therefore, crime prevention rationale and the need for victims of human trafficking to cooperate with law enforcement authorities in bringing traffickers to justice is often offered as the *raison d'être* of the non-punishment principle.³⁶ It has been established that victims are unlikely to cooperate and assist authorities to investigate the human trafficking offence and any related crimes of traffickers when facing prosecution themselves.³⁷ In addition, it could be argued that victims of human trafficking ought not to be punished because punishing them for crimes they were compelled to commit would be unfair and contrary to the interests of justice. Instead, such individuals are owed protection from both past and future harm, and the criminal justice system is not an environment conducive of this requirement.

The lack of clarity pertaining to these questions has led to inadequate and uneven practice across the Council of Europe member States, as pointed out by GRETA.³⁸ The UN Special Rapporteur on Trafficking in Persons similarly noted that 'the implementation of the non-punishment principle by States has been limited and its scope and content contested..³⁹

The following two sections consider and seek to clarify some of these contested issues in order to provide a backdrop to the ECtHR's ruling and how the non-punishment principle is addressed in practice, using the case study of the UK.

2. The Scope and Effect of the Non-Punishment Principle

Legal provisions that enshrine the non-punishment principle do not require that states must apply it in every case where a victim of human trafficking has been involved in unlawful activities. What is required is that states 'provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities' through the adoption of law and/or guidance.⁴⁰ This legal obligation is expressed in a mandatory language, which requires States to adopt measures that specifically deal

³⁶ Group of Experts on Action against Trafficking (GRETA), '9th General Report on GRETA's Activities, covering the period from 1 January to 31 December 2019' (Council of Europe, March 2020) para 178.

³⁷ 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 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 ('JCHR Report'); Anti-Slavery International, *Trafficking for Forced Criminal Activities and Begging in Europe: Exploratory Study and Good Practice Examples* (Anti-Slavery International London 2014), 34.

³⁸ Group of Experts on Action against Trafficking (GRETA), '9th General Report on GRETA's Activities, covering the period from 1 January to 31 December 2019' (Council of Europe, March 2020) para 206.

³⁹ Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally, 'Implementation of the non-punishment principle' A/HRC/47/34 (17 May 2021) para 19.

⁴⁰ Anti-Trafficking Convention, Article 26.

with the non-punishment of victims of trafficking. As noted in the Explanatory Report to the CoE Anti-Trafficking Convention, to comply with this obligation under Article 26, Parties can incorporate in their internal law a substantive criminal or procedural criminal law provision or adopt any other measure, allowing for the possibility of not punishing victims of trafficking in human beings.⁴¹ This however does not mean that the principle ought to be applied in every situation where a victim of human trafficking has been found to have been involved in unlawful activities. In other words, the obligation contained in the relevant international instruments is an obligation of means, not of result. This calls for establishing clear and specific rules about when and how this principle ought to apply.

Some countries exclude certain offences from the application of the non-punishment principle. These usually involve very serious offences such as murder and terrorism.⁴² However, it has been argued that this is contrary to the spirit of the non-punishment provision. The UN Special Rapporteur on Human Trafficking has recently noted that the principle ought to apply to '[a]ny unlawful activity carried out by a trafficked person as a *direct consequence* of their trafficking situation, regardless of the gravity or seriousness of the offence committed'.⁴³ Similarly, the Organization for Security and Co-operation in Europe (OSCE) stated that 'the duty of non-punishment applies to any offence so long as the *necessary link* with trafficking is established'.⁴⁴ Equally, GRETA stressed that the non-punishment principle 'covers all offences which victims of trafficking were *compelled* to commit, including serious offences'.⁴⁵ It furthermore emphasized that the non-punishment principle 'not only applies to criminal liability but also to administrative and other types of liability'.⁴⁶

These statements illustrate that what matters is not the type of unlawful activity committed by a victim of human trafficking but the *relationship* between the crime of human trafficking and the victim's offence. It is important to note that certain offences committed by a victim are integral to the offence of human trafficking: they may facilitate the commission of human trafficking, such as the possession of false documents or illegal entry or stay in a country, or they may represent a distinct purpose of a trafficking process, such as drugs cultivation or trafficking, or shoplifting. In such cases where the victim's offence is part of the trafficking process, the means required for a trafficking offence to be established also direct the commission of the victim's own offences. Accordingly, it would be wrong to punish a victim for acts that are an integral part of his/her victimhood. But there are also situations where the nexus between the crime of human trafficking and victims' offences is less clear cut. This is why it is crucial to specify the rules that determine what counts as the *relevant nexus* between one's status as a victim of human trafficking and their offence.

⁴¹ Council of Europe, 'Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings' (16 May 2005) CETS 197 para 274.

⁴² UK Modern Slavery Act 2015, Schedule 4, Offences to which defence in section 45 does not apply.

⁴³ Implementation of the non-punishment principle: Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally' A/HRC/47/34 (17 May 2021) para 57.b.

⁴⁴ OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, 'Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking in consultation with the Alliance against Trafficking in Persons Expert Co-ordination Team' (2013) para 57 (emphasis added).

⁴⁵ Submission by the Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA) pursuant to the call for written submissions from the UN Special Rapporteur on trafficking in persons, especially women and children concerning input for the report on the implementation of the non-punishment principle (5 February 2021).

⁴⁶ Submission by the Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA) pursuant to the call for written submissions from the UN Special Rapporteur on trafficking in persons, especially women and children concerning input for the report on the implementation of the non-punishment principle (5 February 2021). See also Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children, 'The importance of implementing the non-punishment provision: the obligation to protect victims' (30 July 2020) para 41.

As noted above, certain international legal instruments focus on ‘compulsion’, whereas others speak of a ‘direct link’, or a combination of both. But they fail to clarify the nature of compulsion or what qualifies as a direct link required to shield a victim of human trafficking from the criminal justice system.

The UN Working Group on Trafficking in Persons issued guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked which states that:

In developing and applying statutory defences, it is important that those responsible for administering the law understand who is responsible for raising the defence. While, in general, an accused person has the responsibility to raise a defence, a good practice could be to require the court to consider the availability of the defence, even in cases where such defence has not been raised by the defendant (or the prosecutor), where the evidence suggests that it might apply. Doing so can protect against unjust convictions in cases where the defence could apply and has not been raised by the parties.

An accused person should not be required to prove the existence of a defence beyond a reasonable doubt or even on a balance of probabilities, as doing so could infringe on the presumption of innocence. Once the defence has become a live issue in a trial, the prosecutor should be required to show, beyond a reasonable doubt, that it does not apply.⁴⁷

Still, practice shows that national laws do not always adhere to such advice.⁴⁸ The UN’s Inter-Agency Coordination Group Against Trafficking in Persons therefore emphasised that ‘[g]uidance on who bears the onus of raising the defence should be clear, as should the level of evidence required to do so’.⁴⁹

When it comes to the effects of the non-punishment principle, these include non-detention, non-prosecution, non-punishment, and/or mitigation of sentence. But what happens to those victims who have been identified as victims only after the conviction, and possibly after serving the sentence? What remedies are available to them? GRETA has noted that ‘convictions should be reversed and criminal records erased in an expedient manner when clear evidence subsequently emerges that a crime was committed as a direct consequence of being a victim of trafficking’.⁵⁰

As seen from this short overview, international instruments and jurisprudence do not provide detailed guidance to states on how they should balance the trafficked person’s victimhood with their culpability. The following questions remain:

- Does the non-punishment principle apply to all offences or only to some?
- The type of the relationship between the victim’s experience of trafficking and his or her offending which triggers the application of the principle (the relevant nexus)?

⁴⁷ Guidance on the issue of appropriate criminal justice responses to victims who have been compelled to commit offences as a result of their being trafficked: Background paper prepared by the Secretariat for the Working Group on Trafficking in Persons, Vienna 10 and 11 September 2020, UN Doc. CTOC/COP/WG.4/2020/2 (15 June 2020), paras 64-65.

⁴⁸ United Nations Office on Drugs and Crime (UNODC), *Female Victims of Trafficking for Sexual Exploitation as Defendants: A Case Law Analysis* (United Nations, Vienna, 2020) 6, 88-93.

⁴⁹ Inter-Agency Coordination Group against Trafficking in Persons, ‘Non-Punishment of Victims of Trafficking’ (Issue Brief 8, 2020) 5.

⁵⁰ Submission by the Council of Europe Group of Experts on Action against Trafficking in Human Beings (GRETA) pursuant to the call for written submissions from the UN Special Rapporteur on trafficking in persons, especially women and children concerning input for the report on the implementation of the non-punishment principle (5 February 2021).

- Who has the burden of proving that nexus? Under what standard of proof?
- What are the legal effects of the principle on the victim’s culpability? Does it exclude their liability altogether, or just diminish it?

Accordingly, it is clear that merely replicating the wording of the non-punishment provision from the international instruments into domestic law is not enough; states ought to develop a comprehensive domestic framework that tackles the above identified questions to bring into effect not just the letter but also the spirit and purpose of this provision.

3. The Rationale of the Non-Punishment Principle and its Relationship with Human Rights Law

Why should states not criminalise, prosecute, or punish victims of human trafficking for their involvement in criminal activities? As already noted in the previous section, such reasons can be both instrumental and intrinsic. GRETA has noted that the criminalisation of victims of human trafficking ‘contravenes the State’s obligation *to provide services and assistance to victims* because, not being treated as victims of human trafficking, they are not provided with the support and services to which they are entitled under the Convention’.⁵¹ In addition, GRETA noted that ‘such criminalisation discourages victims from coming forward and co-operating with law enforcement agencies, thereby also interfering with the State’s obligation to investigate and prosecute those responsible for [human trafficking]’.⁵²

In a similar vein, the former UN Special Rapporteur on Trafficking in Persons stated that non-punishment provisions contained in several international instruments are ‘precisely and crucially aimed at granting trafficking victims the protection they are legally entitled to, while at the same time, preventing re-trafficking and punishing the perpetrators.’⁵³ She went on to proclaim that ‘the right to non-punishment can be considered as “the beating heart” of victim’s human rights protection at the international, regional, and domestic level’.⁵⁴ The current UN Special Rapporteur on Trafficking in Persons similarly noted that ‘[t]he principle of non-punishment constitutes the cornerstone of an effective protection of the rights of victims of trafficking’,⁵⁵ suggesting that:

Failure to respect the principle of non-punishment leads to further serious human rights violations, including detention, forced return and refoulement, arbitrary deprivation of citizenship, debt burdens arising from the imposition of fines, family separation and unfair trial.⁵⁶

These statements, however, gloss over the fact that the relationship between human trafficking instruments and human rights instruments is not straightforward. Namely, while victim protection represents an important aspect of the international anti-trafficking instruments, such instruments are not human rights instruments *stricto sensu* – they do not confer individual rights upon victims in a way

⁵¹ Group of Experts on Action against Trafficking (GRETA), ‘9th General Report on GRETA’s Activities, covering the period from 1 January to 31 December 2019’ (Council of Europe, March 2020) para 50.

⁵² *Ibid.*

⁵³ Maria Grazia Giammarinaro Special Rapporteur on trafficking in persons, especially women and children, ‘The importance of implementing the non-punishment provision: the obligation to protect victims’, para 7.

⁵⁴ *Ibid.*, para 9.

⁵⁵ Siobhán Mullally, Special Rapporteur on trafficking in persons, especially women and children, ‘Report on implementation of the non-punishment principle’ A/HRC/47/34 (17 May 2021) Summary.

⁵⁶ *Ibid.*, para 19.

that human rights treaties do.⁵⁷ The relationship and interaction between these two spheres of international law must therefore be carefully considered in order to answer the question of whether and how the provisions of the anti-trafficking instruments, and the non-punishment principle in particular, can inform and shape the obligations arising out of human rights law.

For instance, it is not clear how a 'failure to respect the principle of non-punishment' amounts to a human rights violation as suggested by the Special Rapporteur on Trafficking in Persons. Is non-punishment of victims of trafficking itself a human rights obligation? Or does its non-observance violate other human rights obligations, such as a duty to protect victims or to investigate human trafficking, as suggested by GRETA? If so, what are the situations when a state punishing a victim of trafficking violates these concrete human rights provisions?

The European Court of Human Rights was presented with an opportunity to clarify these questions in the first case that concerned the issue of non-punishment of victims of human trafficking, *V.C.L and A.N. v. United Kingdom*. Despite finding a violation of the Article 4 obligation to protect victims of human trafficking on the basis of the authorities' failure to correctly identify them, an omission that also led to their punishment for drug-related offences, the Court steered clear of considering the non-punishment principle a part of the human rights body of law. The following section analyses the Court's reasoning and guidance provided to states seeking to give effect to the non-punishment principle and comply with the obligations arising out of Article 4 ECHR.

II. The ECtHR Judgment in *V.C.L. and A.N. v United Kingdom*: the Non-Punishment Principle and Human Rights Law

On 16 February 2021, the European Court of Human Rights held in *V.C.L and A.N.* that the UK had breached its obligations under Articles 4 (prohibition of slavery, servitude and forced or compulsory labour) and 6 (right to a fair trial) of the ECHR by prosecuting two Vietnamese minors for cannabis cultivation despite their being potential victims of human trafficking.

In 2009, two Vietnamese minors were discovered by police, in two separate cases, working on cannabis farms in England. Despite concerns raised by social services and assessments made by the competent authorities regarding their potential status as victims of trafficking, they were prosecuted and convicted for the drug-related offences. After their conviction, both were conclusively recognised as trafficking victims by the Competent Authority through the National Referral Mechanism – the UK's system for identifying and supporting victims of modern slavery.⁵⁸ Despite this, the UK courts refused to quash their convictions. The applicants argued before the Court that by prosecuting them, the UK failed to abide by its operational duty to protect them as victims of trafficking, which is one of the three well-established obligations arising out of Article 4 of the ECHR (these are: the obligation to put in place a legislative and administrative framework to prevent and punish trafficking and to protect victims, to prosecute perpetrators, and to take operational measures to protect victims).⁵⁹ The Court determined that the UK had violated both Articles 4 and 6 of the ECHR.⁶⁰

⁵⁷ See Marija Jovanovic, *State Responsibility for Modern Slavery in Human Rights Law* (OUP 2023) ch 2.

⁵⁸ See Home Office Guidance, 'National referral mechanism guidance: adult (England and Wales)' (update 4 August 2023) <https://www.gov.uk/government/publications/human-trafficking-victims-referral-and-assessment-forms/guidance-on-the-national-referral-mechanism-for-potential-adult-victims-of-modern-slavery-england-and-wales>.

⁵⁹ See generally, the 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).

⁶⁰ *V.C.L and A.N. v United Kingdom*, para 112.

The crux of the decision concerned the correct identification of victims of modern slavery as a precondition for taking any operational measures to protect them. The Court emphasized that the early identification ‘by individuals trained and qualified to deal with victims of trafficking’ was of ‘paramount importance’ for the prosecution of such a victim to demonstrate respect for the freedoms guaranteed by Article 4 ECHR.⁶¹ In other words, prosecuting victims of human trafficking was not prohibited per se, but any such action must not impinge on the human rights obligations established to protect them.

The ECtHR took issue with the fact that both the Public Prosecutor and the Court of Appeal ‘disagreed with the conclusions of the Competent Authority and found that the applicants were not in fact victims of trafficking’.⁶² In the UK all decisions about who is recognised as a victim of human trafficking and modern slavery are made by trained specialists in the Home Office’s Single Competent Authority (SCA).⁶³ In the ECtHR’s view:

Once a trafficking assessment has been made by a qualified person, any subsequent prosecutorial decision would have to take that assessment into account. While the prosecutor might not be bound by the findings made in the course of such a trafficking assessment, the prosecutor would need to have *clear reasons* which are consistent with the definition of trafficking contained in the Palermo Protocol and the CoE Anti-Trafficking Convention for disagreeing with it.⁶⁴

No such reasons were offered in the case at hand. The Court concluded that:

[A]t no stage did [the Prosecutor] put forward any clear reasons for reaching a different conclusion from that of the Competent Authority, and in so far as any reasons can be gleaned from the information provided to the Member of Parliament (...) and to the Court of Appeal (...), as the Competent Authority itself pointed out they related to peripheral issues and did not go to the core of the elements necessary to establish ‘trafficking’.⁶⁵

The *V.C.L. and A.N.* ruling highlights the importance of distinguishing between two separate but interconnected decisions. The first is a decision on whether or not an individual suspected of having committed a criminal offence is a victim of human trafficking. The second decision concerns the relevance of such status for initiating or continuing the prosecution of an individual in question. The latter essentially concerns the application of the non-punishment principle enshrined in the CoE Anti-Trafficking Convention, to which the UK is also a party.

Bound by the facts of the case, and the perception of the scope of its jurisdiction, which according to the Court did not extend to interpreting the provisions of the CoE Anti-Trafficking Convention, the ruling in *V.C.L and A.N.* focused on how the UK approached the victim identification process.⁶⁶ The Court noted that victim identification was a precondition to complying with the positive obligation to provide adequate protection and support to victims of modern slavery required by Article 4 ECHR. Accordingly, the Court gave a decisive weight to the assessment of the Competent Authority established to make decisions on one’s status of a victim of modern slavery. Notwithstanding this, it allowed for a possibility for the prosecution and courts to contest such a decision, but only upon

⁶¹ *V.C.L. and A.N. v United Kingdom*, para 160.

⁶² *Ibid*, para 113.

⁶³ On 29 April 2019 SCA replaced the previous Competent Authorities. See Home Office, 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 2.12 (first published 24 March 2020, last updated 24 July 2023) <https://www.gov.uk/government/publications/modern-slavery-how-to-identify-and-support-victims> (‘Statutory Guidance’)

⁶⁴ *V.C.L. and A.N. v United Kingdom*, para 162 (emphasis added).

⁶⁵ *Ibid*, para 170.

⁶⁶ *Ibid*, paras 113-114.

providing 'clear reasons'. Given that in the present case the prosecution failed to offer *any* reasons for reaching a different conclusion from that of the Competent Authority, the Court's decision was an easy one. As a result, it offered very little guidance on what kind of reasons would suffice to override a decision made by the authority designated and trained to identify victims.

Moreover, it provided virtually no guidance on the second decision articulated above – a decision on whether and how one's status of a victim of human trafficking bears upon a decision to prosecute them. In other words, even when one's status as a victim of modern slavery is not in dispute, how does it constrain the decision to prosecute or punish such a victim for their own crimes? Therefore, the Court emphasized that:

Had [the Crown Prosecution Service, CPS] accepted that the first applicant was a child victim of trafficking, it may also have been open to it to prosecute him if it considered (...) that there was *no nexus between the offence and the trafficking*.⁶⁷

However, the Court stopped short of offering any guidance on what constitutes such 'relevant nexus',⁶⁸ which would make a decision to prosecute at odds with the protective requirements enshrined in Article 4 ECHR. It did not have to do this because even though the applicants were recognised by the Competent Authority as victims of trafficking, both the Crown Prosecution Service and the Court of Appeal disagreed with that assessment without providing any reasons for such disagreement. They never moved to the second decision, which involves the nexus between one's status as a victim and their culpability for criminal offence.

It is important to note that the Court's engagement with the question of the nexus between the victim's offence and their trafficking experience appears to contradict its earlier categorical statement that it lacked competence to prescribe how countries should implement the principle of non-punishment of victims of human trafficking. That question, in the Court's view, belonged to the domain of another Council of Europe treaty – the Anti-Trafficking Convention.⁶⁹ Having made this careful forewarning in the paragraphs outlining the scope of the complaints in the present case, the Court nonetheless went on to proclaim that 'the prosecution of victims, or potential victims, of trafficking may, in certain circumstances, be at odds with the State's duty to take operational measures to protect them'.⁷⁰ It explained that the duty to take operational measures under Article 4 ECHR had 'two principal aims: to protect the victim of trafficking from further harm; and to facilitate his or her recovery' and noted that it was:

[A]xiomatic that the prosecution of victims of trafficking would be injurious to their physical, psychological and social recovery and could potentially leave them vulnerable to being re-trafficked in future. Not only would they have to go through the ordeal of a criminal prosecution, but a criminal conviction could create an obstacle to their subsequent integration into society. In addition, incarceration may impede their access to the support and services that were envisaged by the Anti-Trafficking Convention.⁷¹

As a result, the ruling in *VC.L. and A.N.* is unclear as to whether or not non-punishment of trafficking victims represents a positive obligation under Article 4 ECHR and if so, what such a duty entails. The UN Special Rapporteur on Trafficking in Persons suggests that it does, noting that 'Article 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms incorporates the non-

⁶⁷ *Ibid*, para 172 (emphasis added).

⁶⁸ *Ibid*, para 170.

⁶⁹ *Ibid*, para 159.

⁷⁰ *Ibid*.

⁷¹ *Ibid*.

punishment principle, as recognized recently in *V.C.L. and A.N. v. United Kingdom*.⁷² The Special Rapporteur explained that ‘the obligation to ensure the effective application of the non-punishment principle rests on the State, arising from its positive obligation to take protective operational measures of identification, protection and effective investigation’.⁷³

However, it would have been preferable for the ECtHR to have spelled this out clearly. Notwithstanding this ambiguity in the *V.C.L. and A.N.* ruling, there is a clear potential for future case law to develop the scope of Article 4 ECHR in this direction. While the Court correctly pointed out that it had no competence to assess the compliance of the respondent State with the standards in the CoE Anti-Trafficking Convention,⁷⁴ this does not mean that it could not develop the interpretation of the Article 4 duties to reflect developments in other areas of international law. Such an approach would be in line with the Court’s established view that the Convention does not apply in a vacuum⁷⁵ and its standard practice of drawing on other international instruments to flesh out the content of individual rights.⁷⁶

Indeed, this is precisely what the ECtHR did when it read human trafficking into Article 4 ECHR in the seminal *Rantsev v. Cyprus and the Russian Federation* case.⁷⁷ In that case, the ECtHR clarified that the extent of the positive obligations arising under Article 4 had to take account of the broader context of the Palermo Protocol and the CoE Anti-Trafficking Convention, which required not only punishment of traffickers but prevention and protection of victims.⁷⁸ Reading human trafficking into Article 4 ECHR, without clearly explaining its relationship with practices expressly mentioned in the article (slavery, servitude, and forced labour), was not an uncontroversial move.⁷⁹ Still, the subsequent development of its jurisprudence demonstrates the Court’s commitment to a dynamic and progressive (‘evolutive’) interpretation of the Convention rights, in line with the developments in other areas of international law.⁸⁰ Namely, the ECtHR consistently maintains 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, including those relating to the international protection of human rights. It noted on many occasions that the Convention must be interpreted in accordance with the rules on treaty interpretation as codified in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties, including by taking into account, together with the context, ‘any relevant rules of international law applicable in the relations between the parties.’⁸¹ When relying on rules of

⁷² Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally, ‘Implementation of the non-punishment principle’ A/HRC/47/34 (17 May 2021) para 23.

⁷³ *Ibid*, para 49.

⁷⁴ *VC.L. and A.N. v United Kingdom*, para 113.

⁷⁵ *Loizidou v Turkey* App no 40/1993/435/514 (28 July 1998), *Öcalan v Turkey* ECHR 2005-IV 131, para 163.

⁷⁶ In *Lăcătuș v Switzerland* (19 January 2021), where the Court found a violation of Article 8 against Switzerland for imposing a fine on a poor and vulnerable Roma woman for unintrusive begging, and subsequent imprisonment for five days for non-payment, the Court drew on the case law of the Inter-American Court of Human Rights and the African Commission of Human Rights, as well as legal opinions of United Nations experts, and domestic laws and practice. This wide range of external sources indicates that the court considers it important to ground its opinions in international consensus or trends.

⁷⁷ *Rantsev v Cyprus and Russia* ECHR 2010-I 65.

⁷⁸ *Ibid*, para 285.

⁷⁹ For a critique of this action see Jean Allain, ‘Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery’ (2010) 10 (3) *Human Rights Law Review* 546; Vladislava Stoyanova, ‘Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev case’ (2012) 30 *Netherlands Quarterly of Human Rights* 163; Ramona Vijayarasa and José Miguel Bello Y Villarino, ‘Modern-Day Slavery? A Judicial Catchall for Trafficking, Slavery and Labour Exploitation: A Critique of Tang and Rantsev’ (2012) 8 *Journal of International Law and International Relations* 36. For the justification of the Court’s approach in Rantsev, see Jovanovic, *State Responsibility for Modern Slavery in Human Rights Law* (OUP 2023) ch 4.

⁸⁰ See for instance, Steering Committee for Human Rights (CDDH), ‘CDDH Report on the place of the European Convention on Human Rights in the European and international legal order’ CDDH(2019)R92Addendum1 (29 November 2019).

⁸¹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 31(3)(c); *Saadi v United Kingdom* ECHR 2008-I 31, para 62; *Al-Adsani v United Kingdom* ECHR 2001-XI 79, para 55.

international law, the ECtHR has considered both international treaties ('whether or not they have been signed or ratified by the respondent State')⁸² and customary international law (as developed through State practice) to inform its interpretation of the Convention.⁸³

Accordingly, enhancing the protective obligation from Article 4 ECHR to expressly include not punishing victims of human trafficking for offences resulting from their trafficking experience would be in line with the ECtHR's regular practice.

The evidence of such practice can be found in Article 4 case law following *Rantsev*, where the Court drew expressly on the provisions of the CoE Anti-Trafficking Convention. For example, In *J. and Others v Austria*, the Court ruled that:

States are also under an obligation to put in place a legislative and administrative framework to prohibit and punish trafficking, as well as to take measures to protect victims, in order to ensure a comprehensive approach to the issue, *as required by the Palermo Protocol and the Anti-Trafficking Convention*.⁸⁴

Moreover, in *Chowdury and Others v Greece*, the Court criticised the Greek public prosecutor who:

[D]isregarded the regulatory framework governing human trafficking. Article 13 of the Council of Europe's Anti-Trafficking Convention provides for a 'recovery and reflection period' of at least thirty days for the person concerned to be able to recover and escape from the influence of the traffickers and knowingly take a decision about cooperating with the authorities.⁸⁵

The Court condemned inadequate compensation provided to the injured workers, invoking Article 15 of the CoE Anti-Trafficking Convention, which 'obliges Contracting States, including Greece, to provide in their domestic law for the right of victims to receive compensation from the perpetrators of the offence, and to take steps to, inter alia, establish a victim compensation fund'.⁸⁶ Due to these failings, it found 'a violation of Article 4 (2) of the Convention as a result of the State's procedural obligation to guarantee an effective investigation and judicial procedure in respect of the situations of human trafficking and forced labour complained of by these applicants'.⁸⁷

Overall, the V.C.L and A.N. case demonstrates an inherent tension between victim protection, criminal justice, and immigration control goals, as well as the vital role of victim identification as a first step in resolving the conflict between these goals. The judgement furthermore raises fundamental questions about the compatibility of UK law and policy on modern slavery with international human rights standards. These are:

- The question of institutional competence to identify victims of human trafficking: When can the prosecution/courts disagree with the decision of the competent authority about one's victim's status?
- The question of the required nexus between human trafficking and victims' criminality: Even if the prosecution/courts do not dispute a defendant's victim status, what is the correct approach to the nexus between trafficking and criminality in accordance with international standards?

⁸² *Demir and Baykara v Turkey* ECHR 2008-V 395, paras 76, 78.

⁸³ *Sabeh El Leil v France*, App no 34869/05 [GC] (29 June 2011), para 48; *Demir and Baykara v Turkey* ECHR 2008-V 395, paras 69-86. See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (1996) ICJ Rep 1996 226 para 21.

⁸⁴ *J. and Others v Austria* App no 58216/12 (17 January 2017), para 106 (emphasis added).

⁸⁵ *Chowdury and Others v Greece* App no 21884/15 (30 March 2017), para 121.

⁸⁶ *Ibid*, para 126.

⁸⁷ *Ibid*, paras 117 – 127.

- The importance of the non-punishment principle for the entire spectrum of positive obligations arising out of Article 4 ECHR, not just a duty to protect. Evidence suggests that the prosecution of perpetrators and prevention of trafficking are often contingent on victims' cooperation and readiness to come forward. The risk of prosecution and uncertainty about when and how the non-punishment principle applies is likely to have a chilling effect on their willingness to report their experiences.

The judgement does not offer a complete and detailed guidance on answering these questions. This is in line with the Court's express commitment to the principle of subsidiarity, which involves 'willingness to defer to the reasoned and thoughtful assessment by national authorities of their Convention obligations.'⁸⁸ It is therefore vital for states to provide adequate guidance on these questions in order to ensure the protection of human rights at the domestic level. The role of the Court is to give direction as to the goals to be achieved and it is for individual states to choose appropriate means to achieve these goals. Explaining the relationship between 'the mutually distinct, but interrelated, roles of the Strasbourg Court on the one hand and domestic courts on the other', the former President of the Court quoted with approval the UK's Lord Reed, who explained that:

[The] Strasbourg Court's aim is not to construct a code to be adopted by the 47 contracting states. It knows very well that there are important differences between the various societies and legal systems. But the Court is developing a body of high level principles which can be taken to be applicable across the different legal traditions. Bearing that in mind, in the Strasbourg law, as in our own, we need to identify the principles underlying the development of a line of authorities on a particular topic. We can then develop our law, when necessary, by finding the best way, faithful to our own legal tradition, of giving expression to those principles. If we do so, our domestic legal tradition can continue to develop.⁸⁹

In line with that, the following sections analyse how the UK has sought to engage with and give effect to the Court's ruling in the *V.C.L. and A.N.* case.

III. The Effect of the ECtHR's Ruling in the United Kingdom: Review of the Law, Policy, and Case-law

In January 2022, in response to the *V.C.L. and A.N.* judgment, the UK submitted its Action Plan to the Committee of Ministers of the Council of Europe, which supervises implementation of judgments of the ECtHR.⁹⁰ The original Action Plan was subsequently revised and the final version submitted on 10 March 2023.⁹¹ The Action Plan includes information regarding law, policies and practices that have been put in place to comply with the Court's ruling. The focus here is on the framework in place in England and Wales with additional references to the rules that apply in Scotland and Northern Ireland, where required.

The Action Plan highlights important legal and policy developments that have taken place in the UK since 2009, when the two judgments giving rise to the cases before the ECtHR were adopted. It

⁸⁸ Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 Human Rights Law Review 487, 491.

⁸⁹ Lord Reed, 'The Common Law and the ECHR', Inner Temple (11 November 2013) 15-16. Notably, the Council of Europe currently numbers 46 member States after the exclusion of the Russian Federation on 16 March 2022.

⁹⁰ Communication from the United Kingdom concerning the case of *V.C.L. and A.N. v the United Kingdom* (Application No. 77587/12), 5 January 2022 [https://hudoc.exec.coe.int/eng#%7B%22EXEIdentifier%22:%5B%22DH-DD\(2022\)39E%22%5D%7D](https://hudoc.exec.coe.int/eng#%7B%22EXEIdentifier%22:%5B%22DH-DD(2022)39E%22%5D%7D).

⁹¹ 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 ('Action Plan').

contains a range of policy and operational measures that respond to what the Government assessed are the key issues raised by the *V.C.L. and A.N.* judgment:

- i. the early identification of victims of modern slavery
- ii. investigating potential modern slavery cases
- iii. the need for prosecutors to, insofar as possible, wait for a trafficking decision before taking a prosecution decision
- iv. the need for prosecutors to record clear reasons for taking a decision to prosecute despite the individual having received a positive trafficking decision.

Consideration of the different elements of this Action Plan provided in the following section contributes to the understanding of how the non-punishment principle is implemented in practice in the UK, and may inform practitioners and policy makers in other jurisdictions.

The Action Plan, however, must be considered against the backdrop of legislation adopted in 2022 and 2023 respectively, which threatens to seriously undermine the entire regime established to tackle modern slavery in the UK.

In April 2022, the UK enacted the Nationality and Borders Act 2022 (NABA), which disqualifies from protection potential or identified victims of modern slavery who are not British nationals or lawful residents on public order grounds.⁹²

In July 2023, the UK adopted the Illegal Migration Act (IMA), which expands the scope of NABA provisions and denies protection to any potential or confirmed victim of modern slavery who arrives in the UK ‘illegally’. In addition to modern slavery victims, protection is denied to asylum seekers including children. This has provoked major criticism both domestically and internationally, including by GRETA.⁹³ The IMA is found to directly contravene both the letter and spirit of several international treaties.⁹⁴ While it is too early to document any tangible impact of the IMA, there is little doubt that its effect will be devastating to any victim of human trafficking who is not a British citizen. Their rights guaranteed under Article 4 ECHR and the Council of Europe Anti-Trafficking Convention will effectively be rendered theoretical and illusory. This would also exclude any consideration of the non-punishment principle. The ensuing analysis nonetheless remains relevant for those victims of modern slavery who are British citizens, or who have a legal right to reside in the UK.

1. The Non-Punishment Principle and the Criminal Justice System: New Legislation and Guidance for Prosecutors in England and Wales, Scotland and Northern Ireland

The Action Plan submitted by the UK Government in response to the *V.C.L. and A.N.* in March 2023 outlines changes introduced in legislation and policy relevant for victim identification, investigation,

⁹² NABA 2022, section 63. See further discussion of relevant NABA’s provisions in section 3 below.

⁹³ See Commissioner for Human Rights of the Council of Europe, Letter to the Speaker of the Houses of Parliament and Lords of United Kingdom (24 March 2023) available at: <https://rm.coe.int/commhr-2023-8-letter-to-united-kingdom-speaker-of-the-houses-of-parlia/1680aaad61>; Council of Europe GRETA, Statement by GRETA Members (29 March 2023) available at: <https://www.coe.int/en/web/anti-human-trafficking/-/uk-s-illegal-migration-bill-should-be-reviewed-to-ensure-it-complies-with-the-anti-trafficking-convention-says-council-of-europe-expert-group-on-trafficking>; United Nations High Commissioner for Refugees (UNHCR), UNHCR Legal Observations on the Illegal Migration Bill (02 May 2023 (Updated)); Parliamentary Assembly of the Council of Europe (PACE), Committee on Legal Affairs and Human Rights, A report today by Kamal Jafarov (25 May 2023) available at <https://pace.coe.int/en/news/9107/pace-committee-urges-uk-to-carefully-consider-provisions-of-recent-bills-that-risk-breaching-international-obligations->.

⁹⁴ For a legal analysis of the compatibility of the Illegal Migration Act with the European Convention on Human Rights and the Council of Europe Anti-Trafficking Convention, see Marija Jovanovic, ‘Legal Analysis of the Human Rights Compatibility of the Modern Slavery Clauses in the Illegal Migration Bill’ (Modern Slavery and Human Rights Policy and Evidence Centre, March 2023) available at: <https://modernslaverypec.org/resources/migration-bill-explainer>.

and prosecution of human trafficking offences, which underpin the UK's approach to modern slavery. In 2015, six years before the ECtHR's ruling in *V.C.L. and A.N.*, separate legislation was introduced across the four nations in the UK, leading to changes in operational policy and practice pertaining to modern slavery: the Modern Slavery Act (MSA) 2015 in England and Wales, the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 in Northern Ireland, and the Human Trafficking and Exploitation (Scotland) Act 2015 in Scotland. This section focuses on the Section 45 defence established by the MSA 2015 and the amendments to the Crown Prosecution Service (CPS) Guidance on prosecuting individuals who might be victims of modern slavery. Similar provisions are introduced in Scotland⁹⁵ and Northern Ireland.⁹⁶

The 2015 Modern Slavery Act and Section 45 Defence

This MSA, hailed by some in the UK for being the 'first of its kind in Europe' and 'world-leading',⁹⁷ emphasised the criminalisation of perpetrators and regulatory measures, and included certain provisions to protect victims. The offences that fall under the 'modern slavery' title reflect those falling under Article 4 of the ECHR as interpreted by the ECtHR: slavery, servitude, forced or compulsory labour, and human trafficking.⁹⁸

Among other provisions, the Act enshrines in Section 45 a statutory defence for victims compelled to commit certain crimes in England and Wales. This defence was unavailable to the applicants in the *V.C.L. and A.N.*, because their cases were decided long before the MSA came into force.

Section 45 provides a defence for slavery or trafficking victims who commit an offence because they have been compelled to do so, such compulsion was 'attributable to slavery or to relevant exploitation' (meaning, a direct consequence of being victim of slavery or exploitation) and that 'a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act'. Relevant characteristics for this provision include age, sex and physical or mental illness or disability.⁹⁹ For minors, the 'reasonable person' test is lower, requiring only that a person of the same relevant characteristics would do the act, not that they have 'no realistic alternative' to do so.¹⁰⁰ Also, instead of being compelled to commit criminal offences, in case of minors, the Act requires that their offence was 'a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation'.

Notably, the Section 45 defence does not apply if the offence committed was one of the serious offences detailed in Schedule 4 to the 2015 Act. The Schedule includes a lengthy list of offences, including murder, child abduction, hijacking of planes and ships, directing a terrorist organisation, sexual offences, assault and other serious offences. In its second and third evaluation reports on the

⁹⁵ Section 8 of the Human Trafficking and Exploitation (Scotland) Act 2015 places a duty on the Lord Advocate to issue and publish instructions for prosecutors about the prosecution of suspected or confirmed adult and child victims of the offence of human trafficking and the offence under section 4 (slavery, servitude and forced or compulsory labour). The Lord Advocate's Instructions were issued in 2016 and continue to be updated since.

⁹⁶ Section 22 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 creates a statutory defence for victims of human trafficking and slavery-like offences who have been compelled to commit certain offences. The defence under section 22 does not apply in respect of more serious offences.

⁹⁷ Home Office 'Historic law to end Modern Slavery passed' 26 March 2015 <https://www.gov.uk/government/news/historic-law-to-end-modern-slavery-passed>; Virginia Mantouvalou, 'The UK Modern Slavery Act 2015 Three Years On' (2018) 81 *The Modern Law Review* 1017, 1018.

Rantsev v Cyprus and Russia ECHR 2010-I 65, para 282.

⁹⁹ Modern Slavery Act, ss (45)(1)(c), 45(1)(d), 45(5).

¹⁰⁰ Modern Slavery Act, s 45(4)(c).

UK's compliance with the CoE Anti-Trafficking Convention, GRETA noted that Section 45 excludes the possibility of withdrawing prosecution and punishment for a wide list of offences and was concerned that this gave a rather narrow interpretation of the non-punishment principle.¹⁰¹ It therefore urged the UK authorities to 'ensure that the non-punishment provision was capable of being applied to all offences that victims of [trafficking in human beings] were compelled to commit.'¹⁰² While the prosecutors may still decide not to prosecute such cases if they deem that it is not in public interest to do so, as further discussed in the following section, a blanket exclusion of a long list of offences from the operation of the defence would 'preclude a genuine balancing of the interests at stake', as noted by the Court in *Lăcătuș v. Switzerland*.¹⁰³ This is because the public interest assessment relies on prosecutors' discretion while Section 45 defence is designed to oblige prosecutors to disprove the existence of the defence raised.

GRETA was also concerned that the 'reasonable person' test that applies in cases of minors, and makes the defence available only when their action was a direct consequence of their exploitation and a reasonable person in the same circumstances and with the same characteristics would do this act, 'indirectly introduces an element of compulsion that should not have to be proven in children's cases'.¹⁰⁴

When it comes to the allocation of the burden of proof in cases involving Section 45 defence, the MSA itself does not contain the rules that govern the burden of proof required to establish the defence. The Court of Appeal's ruling in *R v MK and Gega*,¹⁰⁵ which was fully transposed in the CPS Guidance, established that the burden of proof was on the prosecution to prove that an individual was not a victim of modern slavery, once the defence had been raised by that individual. If the prosecution failed to prove that the defendant could not be considered as a victim of trafficking, the burden of proof in respect of the other elements of the statutory defence fell on the defendant. However, such burden is *evidential*: '[i]t is for the defendant to raise evidence of each of those elements [of the defence] and for the prosecution to disprove one or more of them to the criminal standard in the usual way.'¹⁰⁶

While the UK Government maintained in its Action Plan that the Section 45 defence 'addresses key elements of the concerns raised by the [ECtHR]', concerns expressed by GRETA and the civil sector, as well as academic studies,¹⁰⁷ suggest that 'officers in charge of criminal law and immigration enforcement frequently fail to identify trafficking victims, and in doing so, prevent in practice the application of Section 45 of the MSA'.¹⁰⁸ A study conducted in 2022 reviewed available evidence regarding the implementation of Section 45 in practice and established that such evidence was

¹⁰¹ Group of Experts on Action against Trafficking (GRETA), 'Evaluation Report: United Kingdom, Third Evaluation Round' GRETA(2021)12 (20 October 2021) para 160.

¹⁰² *Ibid*, para 177.

¹⁰³ *Lăcătuș v Switzerland* (19 January 2021), Information Note on the Court's case-law 247, page 2.

¹⁰⁴ Group of Experts on Action against Trafficking (GRETA), 'Evaluation Report: United Kingdom, Third Evaluation Round' GRETA(2021)12 (20 October 2021) para 162.

¹⁰⁵ *MK and Persida Gega v SSHD* [2018] EWCA Crim 667, para 45.

¹⁰⁶ *Ibid*.

¹⁰⁷ Patricia Hynes et al, "'Between Two Fires": Understanding Vulnerabilities and the Support Needs of People from Albania, Viet Nam and Nigeria who have experienced Human Trafficking into the UK' (University of Bedfordshire and International Organization for Migration (IOM), 2019) https://unitedkingdom.iom.int/sites/default/files/two_fires_footnotes_final_0.pdf.

¹⁰⁸ Group of Experts on Action against Trafficking (GRETA), 'Evaluation Report: United Kingdom, Third Evaluation Round' GRETA(2021)12 (20 October 2021) paras 170-173.

‘extremely limited and much more research is required to understand how it is used in practice and whether it is fit for purpose’.¹⁰⁹

The Action Plan expressly acknowledged this lack of evidence noting that:

There is currently no data available on the use of the section 45 defence, as this is not routinely recorded by the CPS, police or the courts. The Home Office acknowledges this is an evidence gap and is committed to continuing to work with criminal justice partners to explore how data on the use of section 45 can be captured, to better understand its effectiveness.¹¹⁰

The Crown Prosecution Service Guidance on prosecuting individuals who might be victims of modern slavery

Following the adoption of the 2015 MSA, there are now three ways of giving effect to the UK’s obligation to ‘provide for the possibility of not imposing penalties on victims [of trafficking] for their involvement in unlawful activities, to the extent that they have been compelled to do so’ as set out in Article 26 of the CoE Anti-Trafficking Convention. The first is to apply a common law defence of duress, which is available to *any* defendant in criminal proceedings, and requires that such a defendant committed the offence because they genuinely and reasonably believed that there was a threat of death or serious injury to themselves, a member of their immediate family, or to a person for whose safety they reasonably regarded themselves as responsible.¹¹¹ While the defence of duress is much narrower in scope than the defence provided by Section 45, and would not apply in trafficking cases that involve no threat of death or serious injury, both defences could be run in parallel relying on the same evidence.¹¹²

The second way of giving effect to the non-punishment principle is to invoke the statutory defence established specifically for the victims of modern slavery in Section 45 of the 2015 MSA,¹¹³ considered above.

Finally, even where there is no clear evidence of duress and no clear evidence of all of the elements of a Section 45 defence or where Section 45 does not apply (because the offence is excluded under Schedule 4), the prosecutor ought to consider whether it is in the public interest to prosecute an individual who is identified as a victim of modern slavery. In doing so, the Guidance issued by the Crown Prosecution Service (CPS) requires prosecutors to consider all the circumstances of the case. For instance, it suggests that in deciding whether it is in the public interest to prosecute a person who

¹⁰⁹ Alicia Kidd, ‘Evidence Review of Section 45 of the Modern Slavery Act: Background and Context’ (Modern Slavery and Human Rights Policy & Evidence Centre, 7 April 2022). See also Alicia Heys, ‘The UK’s Statutory Defence for Victims of Modern Slavery and its Narrow Understanding of Victimhood’ (2023) *The Journal of Criminal Law* 1- 15.

¹¹⁰ Action Plan 3-4.

¹¹¹ See *R v Hasan* [2005] UKHL 22 (17 March 2005) para 21; see also CPS ‘Defences - Duress and Necessity’ <https://www.cps.gov.uk/legal-guidance/defences-duress-and-necessity#:~:text=Duress%20is%20a%20defence%20at,Howe%20%5B1987%5D%20A.C.%20417>.

¹¹² *MK and Persida Gega v SSHD* [2018] EWCA Crim 667 para 38.

¹¹³ In Northern Ireland, the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) was adopted in 2015. Section 22 of this Act creates a statutory defence for victims of human trafficking and slavery-like offences who have been compelled to commit certain offences. The defence under section 22 does not apply in respect of more serious offences. There is a different test in the defence for adults and children (those under 18 years). The tests are similar to that of Section 45 defence in England and Wales, with exception of the test for children in Northern Ireland, where a child would not need to show that a ‘reasonable person in the same situation and having the person’s relevant characteristics would commit the offence’. In Scotland, the Human Trafficking and Exploitation (Scotland) Act 2015 was introduced in 2015. Section 8 of this Act places a duty on the Lord Advocate to issue and publish instructions for prosecutors about the prosecution of suspected or confirmed adult and child victims of the offence of human trafficking and the offence under Section 4 (slavery, servitude and forced or compulsory labour). The Lord Advocate’s Instructions were issued and published in 2016 and continue to be applied by prosecutors.

is confirmed to be a victim of trafficking/slavery, prosecutors should consider among other reasons the following:

- Whether there is a *nexus* between the trafficking/slavery or past trafficking/slavery and the alleged offending; and, if so,
- Whether the dominant force of *compulsion* from the trafficking/slavery or past trafficking/slavery acting on the suspect is sufficient to extinguish their culpability/criminality or reduce their culpability/criminality to a point where it is not in the public interest to prosecute them.

However, the CPS Guidance does not explain what counts as a relevant ‘nexus’ between one’s victimhood and the alleged offending. When it comes to the ‘compulsion’ requirement, the CPS Guidance clarifies that it includes any means of trafficking included in the definition of human trafficking (threats, use of force, fraud and deception, inducement, abuse of power or of a position of vulnerability, or use of debt bondage). The CPS Guidance however does not account for different types of nexus that may exist between the human trafficking offence and victim’s own criminal offending. Namely, the level of compulsion and causal relationship between victim’s criminal behaviour and his/her trafficking experience or exploitation are different depending on the nature of the offence. Three broad categories of offences could be identified.¹¹⁴

The first category includes ‘status offences’,¹¹⁵ which are instrumental for a trafficking offence to take place. These offences involve violations of immigration laws, including using false documents, to facilitate the commission of a trafficking offence.¹¹⁶ Such offences have been recognised in Article 31 of the 1951 Refugee Convention, which protects refugees and asylum seekers from criminal liability.¹¹⁷ Moreover, even if a trafficking victim entered the country legally, she may breach the conditions of entry by overstaying or by violating labour regulations. Therefore, the scope of required protection in such cases would be broader than that guaranteed by the Refugee Convention.

The second group of offences are ‘purpose offences’ – offences that represent the reason why a victim has been trafficked in the first place. These include various exploitative practices, such as shoplifting, cannabis cultivation, or drug trafficking when the commission of such offences was the sole purpose of the trafficking act. These offences fall under the broad umbrella of ‘exploitation of criminal activities’ as one of the purposes of human trafficking expressly listed in the EU Trafficking Directive.¹¹⁸ According to the Directive, the term should be understood ‘as the exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain’.¹¹⁹

The third broad group of offences includes unlawful activities that appear detached from the original trafficking situation. They involve situations where a person commits an offence in an attempt to

¹¹⁴ This taxonomy is developed in Marija Jovanovic, ‘The Principle of Non-Punishment of Victims of Trafficking in Human Beings – A Human Rights Obligation?’ (2017) 1 *Journal of Trafficking and Human Exploitation* 41.

¹¹⁵ Inter-Agency Coordination Group against Trafficking in Persons (ICAT), *The International Legal Frameworks concerning Trafficking in Persons* (Vienna, October 2012), para 3.6.

¹¹⁶ *L & Ors v The Children's Commissioner for England & Anor* [2013] EWCA Crim 991.

¹¹⁷ Convention Relating to the Status of Refugees (28 July 1951) 189 UNTS 150, Article 31. See Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection* (A paper prepared at the request of the Department of International Protection for the UNHCR Global Consultations, October 2001).

¹¹⁸ n 16.

¹¹⁹ Anti-Trafficking Directive, Recital 11.

escape from traffickers, or to sustain his/her living following the escape. This group also includes situations where victims of trafficking become involved in trafficking and exploitation of others. A temporal and causal link between human trafficking and a victim's offence is the most challenging to establish with such offences.

Arguably, different rules ought to govern the application of the non-punishment principle in each of the identified categories of offences because of the different nature of compulsion and causal relationship between the victim's criminal offence and her trafficking/exploitation. As noted by the UK Court of Appeal in the case of *L. & Ors. v. The Children's Commissioner for England & Anor*:

In some cases the facts will indeed show that he was under levels of compulsion which mean that in reality culpability was extinguished. (...) In other cases, (...) culpability may be diminished but nevertheless be significant. For these individuals prosecution may well be appropriate, with due allowance to be made in the sentencing decision for their diminished culpability. In yet other cases, the fact that the defendant was a victim of trafficking will provide no more than a colourable excuse for criminality which is unconnected to and does not arise from their victimisation. In such cases an abuse of process submission would fail.¹²⁰

The CPS Guidance refers to this judgement specifying that '[i]dentification of a suspect as a [victim of trafficking] or [victim of slavery] may amount to (1) a reason not to prosecute; (2) mitigation; or (3) a mere excuse.' However, it fails to specify rules that ought to govern these potential outcomes when exercising prosecutorial discretion.

Victim identification process and the impact on the decision to prosecute

The Action Plan specifically addresses the question of victim identification – the key issue where the UK was found to fall short of the requirements under Article 4 ECHR. It explains that in order to further facilitate victim identification, the MSA 2015 imposed on selected public authorities acting as First Responders in England and Wales¹²¹ a statutory Duty to Notify the Home Office when they come across potential victims of modern slavery. In addition, the Action Plan highlights the new requirement under Section 49 of the MSA 2015 to adopt statutory guidance on identifying and supporting victims of modern slavery for professionals and public authorities who may encounter potential victims of modern slavery, and/or who are involved in supporting victims. Such guidance has been continuously updated and represents a blueprint for the victim identification process in the UK.¹²²

According to this regime, decisions regarding the recognition of a modern slavery victim are made in two stages, both made by the Competent Authorities established by the Home Office – the Single Competent Authority (SCA) and the Immigration Enforcement Competent Authority (IECA).¹²³ The first is whether there are reasonable grounds to suspect that a person is a victim of trafficking, slavery,

¹²⁰ *L & Ors v The Children's Commissioner for England & Anor* [2013] EWCA Crim 991, para 33.

¹²¹ First Responders are designated organisations trained to recognise victims of modern slavery; they assess a potential victim of trafficking, and if appropriate, complete an NRM referral form summarizing the evidence for believing that person to be a victim of modern slavery. First Responders include various public authorities, such as, police forces, border force, National Crime Agency, local authorities, as well as certain charities.

¹²² The most recent iteration of the Statutory Guidance was published on 24 July 2023 (version 3.4): 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 ('Statutory Guidance')

¹²³ The decision-making process followed by the SCA and IECA is the same. For concerns raised by NGO regarding the creation of IECA see Detention Taskforce, 'Bad Decisions: the creation of an Immigration Enforcement Competent Authority will undermine identifying and protecting victims of crime' (November 2021): <https://www.labourexploitation.org/publications/bad-decisions-creation-immigration-enforcement-competent-authority-will-undermine>

servitude or forced labour – a ‘reasonable grounds decision’, to be made within five days after a person’s referral to the Competent Authority. The second decision is known as ‘conclusive grounds decision’ and reflects a finding by the Competent Authority that on the balance of probabilities, the individual was a victim of trafficking, slavery, servitude or forced labour.¹²⁴ As noted above, the European Court of Human Rights did not have an issue with this regime of victim identification per se, but rather it found it problematic that the prosecution completely disregarded the decision of the Competent Authorities without providing any reasons for doing so. In that light, the Action Plan is conspicuously silent on the question of how potential disagreement between the relevant authorities within the NRM and those within the criminal justice system ought to be resolved.

Investigation of modern slavery offences and prosecution of suspects who may be victims of modern slavery

The Action Plan includes an overview of different programmes aimed at improved investigation of modern slavery offences. It also includes an important clarification of procedures that apply when evidence of potential modern slavery arises during the investigation of another offence (i.e. drug cultivation). In such cases, the police are required to investigate this evidence as part of the primary investigation, and refer the victim to the NRM.¹²⁵ It explains that the police are entitled to raise the Section 45 defence under the MSA 2015 where relevant to an offence committed by the victim.

When it comes to the prosecution of suspects who may be victims of human trafficking, the UK government noted in its Action Plan that the CPS has updated its Guidance on ‘Suspects in a Criminal Case who might be Victims of Trafficking or Slavery’ (CPS Guidance) to reflect legal developments and to comply with the ruling in *V.C.L. and A.N.*¹²⁶ According to the revised CPS Guidance, where there are indicators that a suspect or defendant in a criminal case is a potential victim of modern slavery, whether or not they make any disclosure to that effect, prosecutors, as well as the police, defence and court, have a duty to conduct necessary enquiries in order to confirm or disprove such a status. If a suspect/defendant’s status of a victim of modern slavery is confirmed by a decision of the Competent Authority, any subsequent prosecutorial decision has to take that assessment into account. While the prosecutor might not be bound by the findings made in the course of such a trafficking assessment, the prosecutor would need to have clear reasons for disagreeing with it. This requirement flows directly from the *V.C.L. and A.N.* judgment, and the CPS Guidance has followed the Court’s instruction in full. However, the CPS policy does not provide any further guidance on what such clear reasons should amount to, beyond stating that a decision to disagree should not be based on peripheral issues.

Similarly, as noted above, the Action Plan failed to address potential conflict between different public authorities about whether an individual is a victim of modern slavery. As illustrated by *V.C.L. and A.N.*, this is a real concern, which calls for clear and specific guidelines.¹²⁷ Instead, the Action Plan simply mentioned ‘the need to record clear reasons for taking a decision to prosecute despite the individual having received a positive trafficking decision’.¹²⁸ Moreover, whereas the *V.C.L. and A.N.* judgement requires prosecutors to provide clear reasons when disagreeing with competent authorities about

¹²⁴ See Statutory Guidance paras 14.128 – 14.171.

¹²⁵ UK’s Action Plan 5.

¹²⁶ *Ibid.*

¹²⁷ In 2020, the UK Supreme Court addressed a similar issue of the relationship between the decision-making processes of the NRM and the decision-making processes of the immigration appeals tribunals and the extent to which the immigration appeals tribunals are bound to accept the decisions of the NRM as to whether a person is, or is not, a victim of trafficking. See *MS (Pakistan) v Secretary of State for the Home Department* [2020] UKSC 9.

¹²⁸ UK’s Action Plan, actions 6, 9 and 10, p. 9.

whether someone was a victim of modern slavery, the Action Plan refers to prosecutors recording clear reasons ‘for taking a decision to prosecute when contrary to a NRM (trafficking) decision.’ This suggests that the Action Plan fails to distinguish between the two decisions noted previously in this study – the status decision (is a person victim of modern slavery?) and the prosecution decision (was there a relevant nexus between the persons’ experience of modern slavery and their own criminal offences?). In any case, the Action Plan did not explain what such ‘clear reasons’ could be.

Overall, the Action Plan reflects important steps taken by the UK to comply with the requirements of the judgment. For example, it correctly highlights victim identification as the heart of the *V.C.L. and A.N.* judgement, emphasizing the importance of early identification and investigation of modern slavery offences. However, it fails to tackle the vital issues identified above that guide public authorities when balancing victimhood with criminal offending (clear reasons for disagreement, relevant nexus between modern slavery victimhood and victim’s own offending, and the nature of compulsion that warrants the decision not to prosecute). Accordingly, the Action Plan leaves unaddressed the possible tension between human rights and human trafficking regimes aimed primarily at victim protection, on the one hand, and domestic law enforcement and immigration control regimes designed to safeguard other public policy goals, on the other. Striking the right balance between these conflicting goals is central for the correct application of the non-punishment principle, which does not offer a blanket immunity from the criminal justice system to victims of modern slavery, but seeks to ensure that those victims whose offending is related to their trafficking experience are duly protected.

Most critically, even though the Action Plan emphasizes the importance of parallel investigations of victim’s criminal offence and potential trafficking that may have led to that offence, when assessing public interest in continuing the prosecution of victims, the CPS Guidance does not consider the public interest in securing a conviction for the modern slavery offence and protecting the victims. As noted above, international expert bodies have raised concern that the prosecution of victims of modern slavery has a chilling effect on the investigation of modern slavery offences and punishment of those responsible because it dissuades victims from coming forward and helping the investigation and prosecution of this serious offence.¹²⁹ A better approach would involve expressly recognising a public interest in pursuing the perpetrators of modern slavery, and in encouraging victims to come forward when making a decision whether or not to prosecute a victim of modern slavery.

When it comes to the CPS Guidance, the key issue is the often imprecise language that does not provide clear instruction to prosecutors, to be implemented in a consistent manner that serves the public interest in effectively investigating cases of trafficking, prosecuting the perpetrators, and protecting the victims. An example of this is the requirement for prosecutors to ‘record clear reasons for taking a decision to prosecute when contrary to a NRM (trafficking) decision’. The requirement reflects a key issue from the *V.C.L. and A.N.* judgment, and as such is rightly included in the CPS Guidance. However, the Guidance does not elaborate on what such clear (and sufficient) reasons may amount to and as such fails to offer practical instruction to the prosecutors. For instance, the CPS Guidance requires that the prosecutors evaluate ‘whether the SCA decision considered all core relevant material in making its decision such as the existence of digital evidence revealing a different

¹²⁹ In its submission to the Court in *V.C.L. and A.N. v United Kingdom*, at 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 JCHR Report paras 50-53 citing the UK’s Independent Anti-Slavery Commissioner.

history put forward by the defendant or materially inconsistent accounts provided by the defendant to the SCA to that given to the police under caution'. This instruction directly contradicts its earlier caution that prosecutors should be aware that victims of modern slavery 'will frequently make late disclosure about their trafficking circumstances and may give an untrue account, often because they are told what to say by traffickers'.¹³⁰

Another example is the instruction in the CPS Guidance that 'once a trafficking assessment has been made by the [Single Competent Authority] any subsequent prosecutorial decision has to take that assessment into account'.¹³¹ The Guidance could have been clearer about what 'taking into account' entails in practice and in particular, the evidence required to set such a decision aside. Similarly, the CPS Guidance correctly instructs the prosecutors not to reject the SCA's positive decision based on peripheral issues, but does not explain what would be considered a peripheral issue when assessing the testimony of a victim of modern slavery or other evidence. Proper consideration of such issues should reflect the recognition among professionals that victims' statements are often inconsistent, and that the inconsistencies might result from various factors, such as trauma, fear of the traffickers, lapses in memory or lack of trust in those questioning them.¹³²

2. The UK Jurisprudence on the Non-Punishment Principle Following *V.C.L. and A.N.*

Domestic case law following the judgment in *V.C.L. and A.N.* fails to engage with the important distinction between the two critical decisions identified in Section II – the decision concerning victim status and the decision concerning the bearing of such status on their prosecution and punishment. As a result, institutional competence of the various authorities in charge of making these decisions is not clearly delineated, and the relevant standards applicable to making such decisions are left unclear.

Shortly after the ECtHR's ruling in *V.C.L. and A.N.*, the Court of Appeal of England and Wales handed down the *Brecani* judgement, which concerned the conviction of a 17-year old boy from Albania of conspiracy to supply cocaine.¹³³ The appellant argued that he had been a victim of forced criminality in Albania and the UK. The SCA accepted this claim, and made the Conclusive Grounds Decision (CGD) that the defendant was the victim of modern slavery. However, siding with the CPS, which disagreed with that finding, the Court of Appeal held that CGDs made by the SCA are not admissible as expert evidence at trial.¹³⁴ Thus, the Court of Appeal in *Brecani* proclaimed that:

'[W]e do not consider that case workers in the Competent Authority are experts in human trafficking or modern slavery (whether generally or in respect of specified countries) and for that fundamental reason cannot give opinion evidence in a trial on the question whether an individual was trafficked or exploited.'¹³⁵

¹³⁰ CPS Guidance, 'Credibility assessment' (updated 6 July 2022) <https://www.cps.gov.uk/legal-guidance/modern-slavery-human-trafficking-and-smuggling>. See also *R v JXP* [2019] EWCA Crim 1280.

¹³¹ CPS Guidance, 'The Single Competent Authority decisions and the decision to prosecute' (updated 6 July 2022) <https://www.cps.gov.uk/legal-guidance/modern-slavery-human-trafficking-and-smuggling>.

¹³² United Nations Office on Drugs and Crime (UNODC), 'Evidential Issues in Trafficking in Persons Cases – Case Digest' (2017) 12-18.

¹³³ *Brecani v R* [2021] EWCA Crim 731 (19 May 2021).

¹³⁴ For a detailed analysis of the case see: One Pump Court, 'Modern slavery after DS and Brecani – what does a Conclusive Grounds Decision mean for a criminal case?' (30 June 2021) <https://www.onepumpcourt.co.uk/news/modern-slavery-after-ds-and-brecani-what-does-a-conclusive-grounds-decision-mean-for-a-criminal-case/>.

¹³⁵ *Brecani v R* [2021] EWCA Crim 731 (19 May 2021) para 53.

This ruling is in stark contrast with an earlier judgment, which recognised that ‘the Competent Authority is a specialist authority with particular expertise and knowledge in this area of trafficking’.¹³⁶ Prior to *Breconi*, domestic courts were explicit in requiring that any disagreement with conclusions of the Competent Authority must be based on ‘sound evidential basis’, suggesting that only in the most exceptional situations should the CPS be justified in disagreeing with the former’s conclusion.¹³⁷

The Court in *Breconi* spent little time assessing whether the prosecution or courts gave clear reasons for disagreeing with the substance of the Conclusive Grounds Decision of the SCA and instead, committed to a lengthy discussion of why the SCA decision could not count as ‘expert opinion (...) admissible in criminal proceedings’.¹³⁸ There are instances in the judgement where the Court of Appeal itself tried to offer reasons why the particular SCA decision was wrong and the appellant was not in fact a victim of modern slavery. However, instead of limiting its focus to the SCA decision at hand, the Court declared all SCA decisions inadmissible in criminal trials.

The reasoning in *Breconi* suggests that the Court of Appeals confuses two separate but related decisions – whether someone is a victim of modern slavery and the relevance of such a status to his or her involvement in criminal offences. While it will be solely for the prosecutor or the jury (and ultimately courts) to determine whether one’s status as a victim of modern slavery ought to diminish or extinguish culpability, the decision on whether a person is a victim of modern slavery is primarily one for the SCA (or the IECA) to make. It is why these bodies were established in the first place. Such a decision can be challenged by the CPS, but, as explicitly ruled by the European Court of Human Rights in *V.C.L. and A.N.*, setting it aside would require ‘clear reasons’.¹³⁹ As already noted in the previous section, the CPS Guidance reiterates this request but fails to explain what such reasons might be.

In the subsequent decision in *R v AAD, AAH, and AAI*,¹⁴⁰ which concerned three appellants who had been convicted of criminal offences *prior to* being recognised as victims of trafficking, the Court of Appeal upheld the ruling in *Breconi* that SCA decisions were inadmissible at trial. It clarified, however, that a SCA decision is admissible on appeal for the purposes of reviewing whether a conviction was safe, that is whether the prosecution of a victim of trafficking was an abuse of process. In essence, the Court of Appeal explained that the principles of abuse of process jurisdiction concern the CPS’s decisions to prosecute, whereas in *Breconi*, the issue was about admissibility of evidence *only*, which belonged to the realm of disputes of fact that the jury ought to decide. Nonetheless, it clarified that even though the Conclusive Grounds Decision itself was not admissible at trial, the material underlying such a decision may well be enough to satisfy the Section 45 defence and could be presented as fresh evidence on appeal.

The Court of Appeal therefore ruled that where the CPS had taken into account relevant prosecutorial guidance, and provided a ‘rational basis’ for departing from a positive Conclusive Grounds Decision, there would likely be no successful abuse argument. In other words, the Court held that the abuse jurisdiction should be available as legal redress in the event that the CPS failed to follow its own guidance and provided no rational basis for departing from a favourable conclusive grounds

¹³⁶ *R v JXP* [2019] EWCA Crim 1280 (9 July 2019) para 54.

¹³⁷ *R v DS* [2020] EWCA Crim 285 (26 February 2020) para 42.

¹³⁸ *Breconi v R* [2021] EWCA Crim 731 (19 May 2021) para 44.

¹³⁹ *V.C.L. and A.N. v United Kingdom*, para 162.

¹⁴⁰ [2022] EWCA Crim 106 (3 February 2022). Further analysis of this case are available: One Pump Court, ‘The Court of Appeal provides guidance on prosecuting victims of trafficking’ (3 February 2022) <https://www.onepumpcourt.co.uk/news/the-court-of-appeal-provides-guidance-on-prosecuting-victims-of-trafficking/>.

decision.¹⁴¹ The Court of Appeal relied on the *V.C.L. and A.N.* judgement, which allowed the prosecution to set aside favourable Conclusive Grounds Decision concerning the defendant's status as a victim of modern slavery if it offered 'clear reasons' for such disagreement, ruling that 'rational basis' for the departure from the CGD corresponds to the ECtHR's 'clear reasons'.¹⁴² As noted above, there is no clear guidance on what counts as 'clear reasons' for disagreeing with the SCAs favourable assessment of one's status as a victim of modern slavery.

As to the second question – the question of whether one's status as a victim of modern slavery extinguishes one's culpability – the Court in *AAD, AAH, and AAI* made a reference to 'sufficient nexus between [the] status [of a victim of human trafficking] and the offending' when allowing *AAH's* appeal against conviction.¹⁴³ It found that 'there is no proper basis on which to depart from the Competent Authority's findings or that of the First-Tier Tribunal' which established that 'her offending was a direct consequence of the trafficking; and she was acting under compulsion'.¹⁴⁴

When it comes to *AAI's* conviction, the Court ruled that 'no sustainable nexus has been established between his suggested exploitation as a [victim of trafficking] and the instant offence' grounding such findings in the 'fundamental inconsistencies' in the appellant's account of being trafficked.¹⁴⁵ The Court noted that his account of his relationship with the alleged trafficker was 'beset with credibility problems. It has varied extensively over time and has frequently included descriptions of T as someone who treated him charitably, with kindness and without any form of exploitation or coercion.'¹⁴⁶ The Court found that:

[T]here is also the rank implausibility of his trafficker sending him to England under compulsion having failed to put in place any reception arrangements or any method for monies to be remitted to Sierra Leone. It is improbable in the extreme that T would have paid for the appellant to travel to Europe and to insist only that the appellant telephoned him in Sierra Leone upon arrival.¹⁴⁷

In the case of *AAD*, the Court similarly concluded that 'the CPS would have decided to prosecute notwithstanding the conclusive grounds decision, given the lack of a nexus between the offence and the trafficking, along with the indications of a lack of compulsion even bearing in mind the conclusive grounds decision'.¹⁴⁸ The Court based such findings on the facts that the appellant 'was able to leave the premises (he had a key) (...) was able to go to the police but decided not to seek their help because he did not have any papers (...) was clearly free to make arrangements to go out, (...) was able communicate freely with members of his family or friends in Vietnam, without any complaint about his situation'.¹⁴⁹

The Court's reasoning suggests that a distinction between the two decisions – the status decision and the prosecution decision – is not properly made out. The Court thus refers to the implausibility of the appellant's account of having been trafficked to show that there was no 'sufficient nexus' or the

¹⁴¹ *R v AAD, AAH, and AAI* [2022] EWCA Crim 106, para 120.

¹⁴² *Ibid*, para 130.

¹⁴³ *Ibid*, para 174.

¹⁴⁴ *Ibid*.

¹⁴⁵ *Ibid*, para 159.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid*.

¹⁴⁸ *Ibid*, para 182.

¹⁴⁹ *Ibid*, para 181.

required level of compulsion that would vitiate the decision to prosecute. If there was no trafficking, there is no reason to move to the second question, which considers the relationship between human trafficking and victim's own offence. In any case, the Court failed to explain the nature of such relevant nexus or compulsion entail.

Moreover, the Court clarified that compulsion could not be equated to causation; that is, the test did *not* require proving that the offending was *caused* by the traffickers for a Section 45 MSA defence to apply. While this is a welcome departure from the earlier ruling in *VSJ*,¹⁵⁰ which conflated the legal concepts of compulsion and causation, the Court did not give further guidance on precisely what compulsion meant.

In conclusion, neither the jurisprudence nor the relevant legal and policy developments offer clarity on the following critical questions pertaining to the application of the non-punishment principle domestically:

- What constitute 'clear reasons' that can set aside a Conclusive Grounds Decision by the Single Competent Authority concerning one's status of a victim of modern slavery? This calls for developing a clear policy on the institutional competence for identifying victims of modern slavery and resolving conflicts between different public authorities which are invited to provide such assessments.
- Even when one's victim status is not disputed, what represents 'sufficient nexus' between that status and the offending, which justifies the prosecution of victims of modern slavery?
- What criteria are to be used to determine 'compulsion to commit the act' (in case of adult offenders) or that 'the act is a direct consequence' of being subject to slavery (in case of minors) necessary to establish the Section 45 MSA defence?

3. The Non-Punishment Principle and Immigration System: The Nationality and Borders Act 2022 and the Illegal Migration Act 2023¹⁵¹

The challenges, discussed above, in giving effect to the non-punishment principle in the UK cannot be fully comprehended without understanding parallel developments pertaining to the immigration system and increasingly restrictive opportunities for safe and legal migration and obtaining asylum. The UK's approach to immigration is reflected in recently adopted legislation and policies, most notably the Nationality and Borders Act 2022 and Illegal Migration Act 2023. These are accompanied by a Memorandum of Understanding signed with the government of Rwanda, for asylum seekers to be removed from the UK to Rwanda.¹⁵²

¹⁵⁰ *R. v Joseph & Ors* [2017] EWCA Crim 36 (09 February 2017) para 21.

¹⁵¹ This section draws on the report by Marija Jovanovic, 'Legal Analysis of compatibility of new modern slavery legislation in the UK with the UK's human rights obligations' (Modern Slavery and Human Rights Policy and Evidence Centre, January 2023).

¹⁵² 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, 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 (UNHCR intervening). The UK Prime Minister Rishi Sunak said in a statement that the government would now seek permission to

Measures aimed at restricting illegal entry to the country or removing undocumented migrants could have a detrimental effect on the rights of victims of modern slavery and on their access to support and assistance. For instance, prioritisation of migration control might result in failure to identify and protect victims of trafficking,¹⁵³ whereas removal of asylum seekers could lead to their susceptibility to trafficking following deportation.¹⁵⁴ Sharing information related to labour rights and labour market enforcement with immigration enforcement bodies discourages vulnerable migrants from complaining or cooperating with labour inspectors.¹⁵⁵

Restrictive immigration policy and its detrimental effect on the protection afforded to victims of modern slavery is reflected in claims that migrants and foreign offenders are abusing the modern slavery framework in order to stay in the UK. Such claims featured in the government's 'New Plan for Immigration' from 2021.¹⁵⁶ As a result, different reports in the media illustrated the intention to reform the Modern Slavery Act, to prevent such alleged abuse.¹⁵⁷

However, the UK Government has not published evidence to demonstrate either the nature of the abuse of the MSA 2015 that is alleged to be taking place, nor the scale of any such abuse, or whether the people believed to be abusing the system are adults and/or children.¹⁵⁸ Neither has the UK Government explained what it means by 'abuse' of the MSA 2015. This has been pointed out by a number of public bodies and prominent experts. For example, the Independent Anti-Slavery Commissioner noted that there was no data to support such claims, and NGOs warned about misuse of statistics.¹⁵⁹ Similarly, the Head of Office for Statistics Regulation recently noted that 'the NRM statistics do not support the claims that people are "gaming" the modern slavery system'.¹⁶⁰ The Office for Statistics Regulation therefore raised concerns that:

[P]olicy officials in the department could not point to any specific evidence for [greater gaming of the system] when we enquired. What is more, the proportion of referrals deemed by the

appeal against the decision at the Supreme Court as he insisted that Rwanda was a safe country and said that the court had agreed with this.

¹⁵³ Katherine Soltis and Rebecca Walters, "'What's in a Name?': Mislabelling, Misidentification, and the US Government's Failure to Protect Human Trafficking Survivors in the Central American Refugee Crisis' [2018] 11 *Anti-Trafficking Review* 85, 96; Katherine Soltis and Madeline Taylor Diaz, 'Ganged Up On: How the US Immigration System Penalises and Fails to Protect Central American Minors Who Are Trafficked for Criminal Activity by Gangs' [2021] 16 *Anti-Trafficking Review* 104.

¹⁵⁴ Lior Birger, Shahar Shoham and Liat Bolzman 'Better a Prison in Israel than Dying on the Way: Testimonies of Refugees who "Voluntarily" Departed Israel to Rwanda and Uganda and Gained Protection in Europe', (January 2018) available at <https://edoc.hu-berlin.de/handle/18452/21030> 21-23.

¹⁵⁵ European Union Agency for Fundamental Rights (ed), *Fundamental Rights of Migrants in an Irregular Situation in the European Union: Comparative Report* (Publications Office of the European Union 2011) 41; International Labour Office, *Addressing Governance Challenges in a Changing Labour Migration Landscape: Fourth Item on the Agenda*. (International Labour Office, International Labour Conference 2017) 25.

¹⁵⁶ HM Government, 'New Plan For Immigration' Policy statement, March 2021 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972472/CCS207_CCS0820091708-001_Sovereign_Borders_FULL_v13_1.pdf.

¹⁵⁷ Charles Hymas 'Modern Slavery Act set for reform to tackle migrant crisis' *The Telegraph* (1 November 2022) <https://www.telegraph.co.uk/news/2022/11/01/modern-slavery-act-set-reform-tackle-migrant-crisis/>; Charles Hymas 'Ten-point migration plan to end 'Hotel Britain'' *The Telegraph* (12 November 2022) <https://www.telegraph.co.uk/politics/2022/11/12/ten-point-migration-plan-end-hotel-britain/>.

¹⁵⁸ Modern Slavery and Human Rights Policy and Evidence Centre, *Explainer: The Illegal Migration Bill modern slavery provisions* (version 1.2, 9 May 2023) paras 7 – 15.

¹⁵⁹ Letter 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> ('IASC letter') 2; 'Modern slavery data: Joint sector letter' to the Office for Statistics Regulation, 26 October 2022 <https://afterexploitation.files.wordpress.com/2022/10/osr-letter-modern-slavery-complaint.pdf>.

¹⁶⁰ Ed Humpherson to Maya Esslemont and Anna Powell-Smith: 'Modern slavery data – Office for Statistics Regulation', 8 December 2022 <https://osr.statisticsauthority.gov.uk/correspondence/ed-humpherson-to-maya-esslemont-and-anna-powell-smith-modern-slavery-data/>

Home Office to be genuine cases of modern slavery in its ‘conclusive grounds decisions’ has risen year by year from 58 per cent in 2016 to 91 per cent in 2021, which does not suggest in itself that gaming is a growing problem.¹⁶¹

Furthermore, three UN Special Rapporteurs expressly condemned such unfounded attacks on the credibility of victims and ‘the rise in unsubstantiated claims by public officials and Government departments regarding persons seeking protection under the Modern Slavery Act and the National Referral Mechanism’.¹⁶² They argued that such ‘misleading statements that exaggerate the level of fraud and abuse in the system to protect victims of trafficking and slavery, suggest that survivors of these practices are migrants in an irregular situation or criminals rather than vulnerable victims of gross human rights violations (...) and that their legal representatives are cynical opportunists rather than human rights defenders’.¹⁶³

The UK is not unique in adopting migration control measures aimed at deterring migration and removing those who enter illegally, as well as in its overall hostility towards migrants. Human rights bodies have expressed concern over migration policies reflecting hostility towards migrants and harsh treatment in Hungary,¹⁶⁴ detention and deportation of asylum seekers from Belgium,¹⁶⁵ and measures in Italy to stop asylum seekers arriving by boat and to criminalise rescue at sea.¹⁶⁶ The UK’s agreement with Rwanda for outsourcing asylum applications and protection of refugees followed similar plans in Denmark and Israel.¹⁶⁷ Such policies have a potential to negatively impact victims of trafficking and their protection. The UK provides an example of some particularly problematic trends, but in its prioritisation of migration control concerns over human rights and the protection of victims reflects broader regional and global trends. These trends should be considered as the background for the implementation of the non-punishment principle in other contexts and jurisdictions.

In line with such trends, on 28 April 2022 the UK adopted the Nationality and Borders Act amending the 2015 Modern Slavery Act 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

¹⁶¹ OSR, December 2022, Ed Humpherson to Jennifer Rubin: ‘Use of National Referral Mechanism statistics,’ 8 December 2022 <https://osr.statisticsoffice.gov.uk/correspondence/ed-humpherson-to-jennifer-rubin-use-of-national-referral-mechanism-statistics/>.

¹⁶² Press release by Mr. Tomoya Obokata, Special Rapporteur on contemporary forms of slavery, including its causes and consequences; Ms. Siobhán Mullally, Special Rapporteur on trafficking in persons, especially women and children; Mr. Felipe González Morales, Special Rapporteur on the human rights of migrants, ‘UK: UN experts condemn attacks on credibility of slavery and trafficking victims’ (Geneva 19 December 2022) <https://www.ohchr.org/en/press-releases/2022/12/uk-un-experts-condemn-attacks-credibility-slavery-and-trafficking-victims>.

¹⁶³ *Ibid.*

¹⁶⁴ UN Human Rights Council ‘Report of the Special Rapporteur on the human rights of migrants on his visit to Hungary’ 11 May 2020 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/111/59/PDF/G2011159.pdf?OpenElement>; UN Human Rights Committee ‘Concluding observations on the sixth periodic report of Hungary’ (9 May 2018) 8 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/129/41/PDF/G1812941.pdf?OpenElement>.

¹⁶⁵ For review of the situation in Belgium see e.g. Human Rights Committee ‘Concluding observations on the sixth periodic report of Belgium’ (6 December 2019) 5 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/337/58/PDF/G1933758.pdf?OpenElement>.

¹⁶⁶ OHCHR ‘Italy: UN experts condemn bill to fine migrant rescuers’ (20 May 2019); <https://www.ohchr.org/en/press-releases/2019/05/italy-un-experts-condemn-bill-fine-migrant-rescuers>; see also Angelique Chrisafis ‘France to let migrant rescue ship dock as it criticises Italy’s refusal to help’ (*The Guardian* 10 November 2022) <https://www.theguardian.com/world/2022/nov/10/france-let-migrant-rescue-ship-dock-criticises-italy-refusal-help>.

¹⁶⁷ On the Danish plan, see European Council of Refugees and Exiles ‘Denmark: Joint Statement Brings Little Clarity on Rwanda Outsourcing but Generates Renewed Critique’ (16 September 2022) <https://ecre.org/denmark-joint-statement-brings-little-clarity-on-rwanda-outsourcing-but-generates-renewed-critique/>; Zachary Whyte, ‘Hoping For Zero: Danish Externalization Plans to Rwanda and a Politics of Deterrence’ (*Border Criminologies*, 7 June 2022) <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2022/06/hoping-zero>. On the Israeli plan see Lior Birger, Shahar Shoham and Liat Bolzman ‘Better a Prison in Israel than Dying on the Way: Testimonies of Refugees who “Voluntarily” Departed Israel to Rwanda and Uganda and Gained Protection in Europe’, (January 2018) available at <https://edoc.hu-berlin.de/handle/18452/21030>.

concerning ‘Modern Slavery’. Among the various issues arising from the NABA, two are of particular importance for the principle of non-punishment: the impact of ‘late’ complaints on victims’ credibility (Sections 58 and 59 NABA), and the disqualification of certain categories of victims from protection guaranteed by of the CoE Anti-Trafficking Convention if a person is found to be ‘a threat to public order’ or has claimed the victim status ‘in bad faith’ (Section 63 NABA). The operation of the modern slavery provisions in NABA has been subject to ongoing legal challenges.¹⁶⁸

As already noted, the Illegal Migration Act, enacted on 20 July 2023, expands the scope of NABA provisions and denies 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’.

In line with these developments, the latest iteration of the Modern Slavery Statutory Guidance published on 26 July 2023, aimed at competent authority staff in any part of the UK who make decisions on whether or not an individual is a potential victim/victim of modern slavery, similarly provides for disqualification from NRM on ‘public order’ and ‘bad faith’ grounds.¹⁶⁹ In both instances, a person loses the protection from deportation and entitlement to assistance and support mandated by Articles 10, 12 and 13 of the CoE Anti-Trafficking Convention. Moreover, any ongoing process of identification is terminated and a person is not entitled to have a final decision on their status as a victim of modern slavery (Conclusive Grounds Decision or CGD).¹⁷⁰ If either a Reasonable Grounds Decision (RGD), which is the first decision in the victim identification process triggered by a low evidential threshold, or a CGD, which is the final definition on a person’s victim status made on the basis of the balance of probabilities, was already made, it would be revoked.

While these exclusions from protection appear to mirror exceptions to the recovery and reflection period guaranteed in Article 13 (3) of the CoE Anti-Trafficking Convention, they go significantly further than this article permits. They effectively entitle public authorities to opt out of the obligations to identify a person as a victim and the obligation to investigate the offence of human trafficking itself. These obligations are *not qualified* in either Article 4 of ECHR or the CoE Anti-Trafficking Convention.

The Action Plan insists that ‘the provisions in NABA 2022 are compatible with the UK’s international obligations related to modern slavery’. However, this does not reflect the views of experts within and beyond the UK expressed at the time when it was introduced in 2021 and before its final adoption in 2022. Among those expressing criticism and concern were the UN Special Rapporteur on Trafficking in Persons, the UN Special Rapporteur on the Human Rights of Migrants, the UN Special Rapporteur

¹⁶⁸ Diane Taylor, ‘Home Office ordered to change rules that restrict help for trafficking victims’ *The Guardian* (26 July 2023) <https://www.theguardian.com/politics/2023/jul/26/home-office-ordered-to-change-rules-that-restrict-help-for-trafficking-victims>.

¹⁶⁹ Statutory Guidance, paras 14.226 – 14.318.

¹⁷⁰ Statutory Guidance, paras 14.231, 14.272, 14.282 – 14.284, and 14.317 – 14.320.

on Contemporary Forms of Slavery, and the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism,¹⁷¹ the UN High Commissioner for Refugees,¹⁷² the UK's Independent Anti-Slavery Commissioner,¹⁷³ the UK Parliamentary Joint Committee on Human Rights (JCHR),¹⁷⁴ and civil society.¹⁷⁵ The relevant provisions and related concerns raised by them will be discussed in the remaining subsections.

Late complaints and credibility of potential victims of modern slavery (Sections 58 and 59 NABA)

Delays or reluctance of victims to complain are recognised by trafficking experts and specialised bodies as common, and are well-documented. The UNODC has noted that delays or reluctance might result from being traumatised after the exploitation, fear the traffickers might harm the victims or their families, or lack of trust towards the authorities.¹⁷⁶ In her report concerning the identification, protection and assistance to victims of trafficking, the second UN Special Rapporteur on trafficking in persons noted that victims might not be ready to share their experiences, especially when their abuse was of 'a humiliating, dehumanizing or sexual nature'.¹⁷⁷ Evidence suggests that male victims are particularly reluctant to self-identify as victims of modern slavery.¹⁷⁸

In the European context, the ECtHR recognised, that 'there may be different reasons why victims of human trafficking and different forms of sexual abuse may be reluctant to cooperate with the authorities and to disclose all the details of the case. Moreover, the possible impact of psychological trauma must be taken into account'.¹⁷⁹ The UK authorities recognised these considerations and the potential impact of trauma in their own guidelines on victim identification.¹⁸⁰

The NABA provisions, however, do not reflect this well-established understanding of victims' experiences. Section 58 NABA provides that the Secretary of State may serve a 'slavery or trafficking information notice' on a person who has made 'a protection claim' or 'a human rights claim'. A 'protection claim' means an asylum claim and/or a 'human rights claim' and refers to invoking protection against deportation or removal on the basis of the risk of serious human rights violations in the country of return. The 'slavery or trafficking information notice' requires the recipient of such a

¹⁷¹ Communication from the Mandates of the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (GBR 11/2021), 5 November 2021

<https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gld=26788> ('UN Experts' submission'),
¹⁷² 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>.

¹⁷³ IASC letter.

¹⁷⁴ JCHR Report.

¹⁷⁵ 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>.

¹⁷⁶ United Nations Office on Drugs and Crime (UNODC), 'Evidential Issues in Trafficking in Persons Cases – Case Digest' (2017) 27.

¹⁷⁷ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, 'Identification, protection of and assistance to victims of trafficking', A/64/290 (12 August 2009) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N09/456/04/PDF/N0945604.pdf?OpenElement>.

¹⁷⁸ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, The first decade of the mandate of the Special Rapporteur on trafficking in persons, especially women and children, A/69/269 (6 August 2014) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N14/497/61/PDF/N1449761.pdf?OpenElement>.

¹⁷⁹ *S.M. v Croatia* App no 60561/14 [GC] (25 June 2020) para 344.

¹⁸⁰ Statutory Guidance, Section 6 and Annex D.

notice to provide relevant information relating to being a victim of slavery or human trafficking within a specified period. Information provided in the notices may be used to make decisions at both reasonable grounds and conclusive grounds stages within the NRM. If information is provided late (on or after the specified date), the recipient must also provide a statement setting out the reasons for not providing the status information 'before' the specified date.

Under Section 59 (2) NABA, which only applies to those aged 18 years or more, late provision of relevant status information in response to a 'slavery or trafficking information notice' would damage the person's credibility 'unless there are good reasons why the information was provided late'. The rationale of such restrictions was offered in the Explanatory Notes to the NABA, which suggest that '[m]odern slavery matters are frequently raised after asylum or human rights grounds for remaining in the UK have been refused. This can also occur at the point of removal leading to that removal being delayed'.¹⁸¹

Section 59 (2) NABA does not specify what would be considered as 'good reasons'. Given the time it takes some victims to discuss their abuse and trauma, this is likely to reduce the chances victims will be identified.¹⁸² The UN Special Rapporteurs expressed concern that the requirement to view the late provision of status information as 'damaging to credibility' 'would fail to acknowledge the positive obligation on the State to identify victims of trafficking and contemporary forms of slavery, and would fail to recognize the impact of trauma on the provision of information relating to the status of being a victim, including for child victims'.¹⁸³ States have a positive obligation to identify victims of modern slavery *ex officio*, as soon as they have 'reasonable grounds to believe that a person has been victim of trafficking in human beings'.¹⁸⁴ There is no obligation for a victim to cooperate and provide evidence. The Government's claim that '[t]his approach seeks to support the Government's proactive duty to identify potential victims as early as possible' shifts the responsibility for victim identification onto victims, which is contrary to the victim protection duties under international law.¹⁸⁵

The explanatory notes to the NABA suggest that the '[p]rovision of late information will not bar modern slavery referrals from being considered. Whenever modern slavery grounds are raised, they will be considered'.¹⁸⁶ Furthermore, in its assessment of compatibility of the Nationality and Borders Bill with the ECHR, the Government claimed that:

[A]ppropriate safeguards are in place to ensure compliance with Article 4. There are no mechanistic or blunt provisions that automatically prevent someone from being identified as a victim, even if they raise modern slavery matters out of time. The door has been left deliberately ajar to ensure that genuine victims will still be identified as such.¹⁸⁷

However, this is insufficient to remove the statutory bias against victims presenting late claims embedded in Sections 58 and 59 because the law does not offer any guidance on how the competent

¹⁸¹ Explanatory Notes to the Nationality and Borders Act 2022, ch 36 para 595.

¹⁸² See for example, Modern Slavery Policy and Evidence Centre 'Written evidence from Modern Slavery Policy and Evidence Centre (NBB0049) (for the Nationality and Borders Bill), para 14; IASC letter; JCHR Report, paras 11-12; Anti-Slavery international 'The Nationality and Borders Bill will harm victims of modern slavery'.

¹⁸³ UN Experts' submission, 4.

¹⁸⁴ Anti-Trafficking Convention, Article 10 (2).

¹⁸⁵ See generally Jovanovic, *State Responsibility for Modern Slavery in Human Rights Law* (OUP 2023).

¹⁸⁶ Explanatory Notes to the Nationality and Borders Act, ch 36, para 592.

¹⁸⁷ Home Office, 'Nationality and Borders Bill: European Convention On Human Rights Memorandum' (6 July 2021) para 21.

authorities should assess what count as ‘good reasons’ for such late claims. This allows for significant arbitrariness in deciding who qualifies as a ‘genuine’ victim.¹⁸⁸ The government has indicated its intention to outline what ‘good reasons’ for late disclosure are within statutory guidance and to explain the potential effect of trauma on recalling or sharing traumatic events.¹⁸⁹ However, the current regime for victim identification, which the government seeks to change, does not preclude decision-makers from assessing the credibility of claims and evidence presented when making either RGD or CGD. This is in line with Article 13 (3) of the Council of Europe Anti-Trafficking Convention, which authorises states to deny a recovery and reflection period to those individuals who claim the victim status improperly. But to enact provisions that *mandate* decision-makers to consider late claims as ‘damaging the individual’s credibility’ is contrary to both the letter and spirit of international law.

The UN Special Rapporteurs therefore warned that ‘[p]lacing the burden of identification – or self-identification – on victims, fails to fulfil the State’s positive obligations arising under international human rights law, and under Article 4 of the ECHR, read in conjunction with [the Council of Europe Anti-Trafficking Convention]’.¹⁹⁰

Sections 58 and 59 of the NABA raise several important issues related to the principle of non-punishment. First, the assessment of victim status by the competent authority might be influenced by the perceived ‘late’ information. Victims who did not meet the government’s timeframe for providing information could be considered less reliable. If this is the case, the result of a possible negative decision and refusal to recognise them as victims would mean they would not be able to enjoy protection from prosecution for crimes they had been compelled to commit as part of their exploitation. Second, evidence suggests that the issue of human trafficking may arise for the first time before the prosecutor (without previous NRM referral or assessment).¹⁹¹ In that case, victims will only be referred to the competent authority at this stage, and the disclosure of information might be considered as late and therefore less reliable. Third, considering late complaints as diminishing a person’s credibility could be particularly harmful for certain victims due to their characteristics. These would include victims of sexual abuse, victims reluctant to self-identify for fear of repercussions or because of feelings of shame, and victims facing additional obstacles to making complaints, such as victims with certain disabilities. The UN Special Rapporteurs identified a particular risk to victims with disabilities ‘who may face additional barriers to reporting of trafficking, and to identification as victims’, and highlight the duties resulting from the non-punishment principle in concerning non-discrimination on grounds of disability.¹⁹² Similar concerns were also identified by the Parliamentary Joint Committee on Human Rights, highlighting the impact of trauma as well as additional barriers such as language barriers and geographical distance.¹⁹³

Disqualification of potential victims of modern slavery on ‘public order’ and ‘bad faith’ grounds (Section 63 NABA)

¹⁸⁸ Explanatory Notes to the Nationality and Borders Act, ch 36, para 37.

¹⁸⁹ Response from the United Kingdom of Great Britain and Northern Ireland to Communication OL GBR 11/2021, 5 <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?glid=36908>.

¹⁹⁰ UN Experts’ submission, 6.

¹⁹¹ Nogah Offer, ‘Implementation of the Non-Punishment Principle in England: Why Are Victims of Trafficking Not Benefiting from the Protection from Prosecution Provided by International Law’ (2019) 11 *Journal of Human Rights Practice*, 486.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*, 8-9. See also IASC letter, 4, regarding the difficulties victims who do not speak English as their first language may face.

Section 63 of the NABA 2022 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’.¹⁹⁴ Such individuals would be disqualified from the recovery and reflection period, and the entitlement to a temporary residence permit.¹⁹⁵ 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’.¹⁹⁶ Neither the NABA nor Explanatory Notes clarify the notion of a ‘threat’. Significantly, Section 29 of the Illegal Migration Act 2023 amends Section 63 (1) NABA to *mandate* rather than permit competent authorities to disqualify such victims from the recovery period unless there are compelling countervailing circumstances.

Whereas the NABA does not provide any guidance on what might count as ‘bad faith’,¹⁹⁷ 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.¹⁹⁸ GRETA however noted in its latest report on UK’s compliance with the CoE Anti-Trafficking Convention 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.¹⁹⁹

Moreover, as pointed out by the Joint Committee on Human Rights in its comments on the then Nationality and Borders Bill, the exclusion from protection would include situations where a potential victim has not yet been convicted of an offence.²⁰⁰ 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.²⁰¹ Not only would such exclusion contradict

¹⁹⁴ NABA, s 63(1).

¹⁹⁵ NABA, s 63(2).

¹⁹⁶ Explanatory Notes: Nationality and Borders Act, ch 36, para 624.

¹⁹⁷ Statutory Guidance in para 14.281 explains that ‘An 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 14.282 – 14.381.

¹⁹⁸ NABA, s 63(3)(a),(c)-(e).

¹⁹⁹ GRETA, ‘Evaluation Report: United Kingdom, Third Evaluation Round’ GRETA(2021)12 (20 October 2021), para 49.

²⁰⁰ JCHR report, para 65.

²⁰¹ JCHR report, para 66. The UN Security Council Resolution 2331 (2016) called for states to ‘implement robust victim, and possible victim, identification mechanisms and provide access to protection and assistance for identified victims without delay, also in relation to trafficking in persons in armed conflict [...], and to address comprehensively victims’ needs, [...], as well as ensure that victims are treated as victims of crime and in line with domestic legislation not penalized or stigmatized for their involvement in any unlawful activities in which they have been compelled to engage’ (para 2(d)) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/451/58/PDF/N1645158.pdf?OpenElement>. The UNSC Resolution, like other documents, emphasises trafficking for sexual exploitation in contexts of armed conflict, rather than participation in terrorist acts (see paras 8-10). For examples of the types of trafficking and exploitation taking place in the context of armed conflict or terrorist activities see e.g. OSCE, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings ‘Trafficking In Human Beings And Terrorism Where and how they intersect’ (2021) 46-49 <https://www.osce.org/files/f/documents/2/7/491983.pdf>. Examples include sexual exploitation and labour exploitation such as cooking and nursing, but also contribution to fighting. For 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

obligations under international law, 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 also excludes from protection those individuals who been convicted of offences listed in Schedule 4 to the Modern Slavery Act. As already explained in section III.1., Section 45 of the MSA provides for a statutory defence (legislative protection from prosecution) 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. 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. Whereas the involvement in offences listed in Schedule 4 of the MSA excluded victims from the protection against prosecution and punishment only, Section 63 (3) of the NABA now disqualifies such victims from *any* protection and assistance. In fact, it denies such victims the very status of victim.

As noted earlier, 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 THB were compelled to commit.’²⁰² By imposing further restrictions and indeed disqualification from victim status on the same basis, the UK risks violating its obligations under Article 4 ECHR and the CoE Anti-Trafficking Convention.²⁰³

Subsection 63(3)(f), as amended by Section 29 IMA, also disqualifies from protection anyone who is not a British citizen and has been sentenced to a period of imprisonment for *any* offence or is ‘liable to deportation from the United Kingdom under any provision of, or made under, any other enactment that provides for such deportation’. It would therefore exclude from protection victims compelled to commit criminal offences by their traffickers/exploiters and those convicted for immigration-related offences, as well as instances where victims were prosecuted and convicted due to their lack of knowledge of the availability of the defence from Section 45 MSA, which gives effect to the non-punishment principle.²⁰⁴ 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.²⁰⁵

The IMA 2023 therefore significantly broadens the list of circumstances in which a victim would be treated as a threat to public order to include cases where the person has been convicted of an offence and sentenced to a term of immediate imprisonment, regardless of the seriousness of such an offence or the length of the imprisonment. Thus, instead of the original Section 63 (3) (f) of the NABA, which stated that a person would be considered a threat to public order where ‘the person is a foreign

Connect: Dangers and Dilemmas’, *Just Security* (22 February 2019) <https://www.justsecurity.org/62658/humantrafficking-terrorism-connect-dangers-dilemmas/>.

²⁰² GRETA, ‘Evaluation Report: United Kingdom, Third Evaluation Round’ GRETA(2021)12 (20 October 2021) 169.

²⁰³ JCHR Report para 64.

²⁰⁴ See 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>.

²⁰⁵ 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.

criminal within the meaning given by section 32 (1) of the UK Borders Act 2007 (automatic deportation of foreign criminals)', the new section 63 (3) (f) disqualifies from protection:

(f) the person:

- (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.

Accordingly, contrary to the claim in the Action Plan that Section 63 NABA applies to 'individuals who have been convicted of the most serious offences', it is clear that this exclusion includes anyone sentenced to a term of immediate imprisonment, regardless of the seriousness of such an offence or the length of the imprisonment.

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.²⁰⁶

Overall, the exclusion of such a broad and loosely defined group of potential victims of modern slavery from the recovery and reflection period, as well as from access to protection, contradicts states' obligations under the ECHR and the CoE Anti-Trafficking Convention.²⁰⁷

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, assist 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 the CoE Anti-Trafficking Convention.²⁰⁸ They recalled 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 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 of the CoE Anti-Trafficking Convention.²⁰⁹ 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.²¹⁰ 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

²⁰⁶ JCHR Report, para 65.

²⁰⁷ JCHR Report, paras 62 - 75.

²⁰⁸ UN Experts' submission, 8.

²⁰⁹ *Ibid*, 11 (emphasis added).

²¹⁰ JCHR Report, paras 51-53.

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.²¹¹

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, prosecutions, and criminal proceedings.²¹² This equally applies to those denied protection due to 'illegal' entry in the UK on the basis of the IMA 2023.

Furthermore, criminal convictions and imprisonment of victims risks resulting in their further exploitation and re-victimisation. 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'.²¹³

Of particular concern is the potential disqualification from protection of victims who are minors, as child victims identified in the UK are more likely to be the victims of criminal exploitation than adults (although many child victims are British citizens and not migrants).²¹⁴

It must be noted, however, that it is not incompatible with the CoE Anti-Trafficking Convention to exclude certain individuals from protection. Article 13(3) of the Convention, which regulates 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 the CoE Anti-Trafficking Convention 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.²¹⁵

Official records of the *travaux préparatoires* of the CoE Anti-Trafficking Convention 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

²¹¹ *Ibid.*

²¹² UN experts' submission, 8; JCHR Report, 19.

²¹³ JCHR Report, 20. This is also a finding from an empirical study into the experiences of modern slavery survivors conducted by Marija Jovanovic and Patrick Burland and funded by the Modern Slavery Policy and Evidence Centre forthcoming in 2023 (<https://modernslaverypec.org/research-projects/modern-slavery-uk-prisons>).

²¹⁴ Home Office 'Official Statistics - Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK, end of year summary, 2021' (3 March 2022), especially Figure 4: 'Number of NRM referrals, by exploitation type and age group' <https://www.gov.uk/government/statistics/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2021/modern-slavery-national-referral-mechanism-and-duty-to-notify-statistics-uk-end-of-year-summary-2021#:~:text=In%202021%2C%20the%20NRM%20received,referrals%20since%20the%20NRM%20began>. See also JCHR Report, paras 76 - 79.

²¹⁵ 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.

‘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’.²¹⁶

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’.²¹⁷ 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 imply that any restrictions or denial of such protection must be amply justified by a state. This has been confirmed most recently by GRETA in its written submission to the enquiry by the Joint Committee on Human Rights conducted in relation to the Illegal Migration Bill (now Illegal Migration Act 2023), 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.’²¹⁸

Accordingly, neither the exclusion from protection nor the punishment of potential or identified victims of modern slavery are per se incompatible with international law. However, in light of the existing international obligations to identify and protect *every* victim of modern slavery and to prosecute the perpetrators of these offences, such exclusions should be made only after a careful weighing of evidence and according to explicit rules.

The most recent iteration of the Statutory Guidance from 24 July 2023 (version 3.4)²¹⁹ acknowledges this and expressly notes that ‘[t]he public order disqualification will be applied on a case-by-case basis’²²⁰ and that ‘[t]his decision should take into account whether the need for modern slavery specific support outweighs the threat to public order.’²²¹

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 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

²¹⁶ 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.

²¹⁷ 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.

²¹⁸ Joint Committee on Human Rights, Legislative Scrutiny: Illegal Migration Bill, ‘Written Evidence by the GRETA (IMB0024) to the JCHR enquiry’ paras 15 and 16. <https://committees.parliament.uk/writtenevidence/119915/html/>.

²¹⁹ 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.

²²⁰ Statutory Guidance para 14.242.

²²¹ *Ibid* para 14.243. See also paras 14.252 – 14.263.

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.

This means that anyone convicted of any criminal offence and sentenced to prison 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.²²² The onus is therefore on a victim, or presumed victim, to prove their protection needs, and not on the Government to justify the exclusion from protection.

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.²²³ 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 *overall*, beyond the issue of the potential risk of re-trafficking, will be evaluated by British courts. Namely, 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, it must be noted 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.'²²⁴

Individual assessment of each case (as opposed to a blanket exclusion) is necessary to comply with such an obligation, as both the Statutory Guidance and the High Court decision provide for. 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 requiring victims to disprove it.

IV. Concluding Remarks and Important Considerations for States Seeking to Give Effect to the Non-Punishment Principle

What does the *V.C.L. and A.N.* judgement and subsequent developments in the UK's legal and policy framework and jurisprudence tell us regarding the interpretation and application of the non-punishment principle?

²²² *Ibid* paras 14.245 – 14.251.

²²³ 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.>

²²⁴ Joint Committee on Human Rights, Legislative Scrutiny: Illegal Migration Bill, 'Written Evidence by the GRETA (IMB0024) to the JCHR enquiry' para 16.

The case put in sharp focus the importance of protecting victims of trafficking, including from prosecution and punishment. It highlighted the significance of this principle for all key aspects of anti-trafficking action: prevention of human trafficking, protection of victims, and prosecution of perpetrators are critically dependant on the correct application of the non-punishment obligation enshrined in international law. While the number of convictions for human trafficking offences remain low,²²⁵ there has been a growing evidence that many survivors of such offences end in prisons,²²⁶ leading some scholars to conclude ‘it is the people being trafficked (...) and not the traffickers, who are being punished by the criminal justice system.’²²⁷ This suggests that more needs to be done to ensure that action against human trafficking and slavery serves the purposes espoused in international instruments of bringing the perpetrators to justice and protecting the victims.

In this light, the case of *V.C.L. and A.N.* represented an opportunity to develop the interpretation of Article 4 ECHR to incorporate the non-punishment principle as an important aspect of victim protection and overall action against modern slavery. The judgment reinforced important principles concerning the need to promptly identify victims and provide effective protection. The ECtHR also recognised the potential harms resulting from prosecuting victims, and the likelihood that prosecution would be, in certain circumstances, at odds with the state’s positive obligations under Article 4.²²⁸

While the ECtHR observed its lack of competence to interpret and oversee compliance with the provisions of the CoE Anti-Trafficking Convention, the judgement nonetheless reinforced the relationship and synergy between the two Council of Europe instruments. The decision paved the way for expressly including the non-punishment principle as one of the positive obligations within Article 4 ECHR in the future case law. Such developments would reflect the Court’s standard approach to consider the ECHR as a living instrument, which does not apply in a vacuum.

Prosecuting or punishing individuals without a careful assessment of the extent to which their culpability was affected by their experience of having been trafficked undoubtedly affects States’ ability to protect actual or potential victims, as required by Article 4 ECHR. While the ECtHR may not be expected to perform such a balancing exercise itself, it is certainly permitted, even required, to lay down ground rules and review the extent to which States have struck the right balance between victim protection and law enforcement. Moreover, the empirical evidence clearly indicates that criminalising, prosecuting, and punishing victims of human trafficking reinforces their mistrust in the authorities, and reassures the traffickers that their crimes pay off. This clearly interferes with the Article 4 ECHR obligation to prosecute and punish human traffickers.

²²⁵ According to the latest report of the Office for National Statistics, ‘Modern slavery in the UK: March 2020’, in the year ending March 2019 ‘there was a total of 322 prosecutions for modern slavery-related crimes’ of which ‘around 7 in 10 (68%, 219 cases) modern slavery-related prosecutions resulted in a conviction’.

²²⁶ An ongoing research on people with lived experience of modern slavery in the UK prison system has been carried out by Marija Jovanovic and Patrick Burland. See <https://modernslaverypec.org/research-projects/modern-slavery-uk-prisons>. See also, Rose Broad and David Gadd, *Demystifying Modern Slavery* (Routledge 2022) 87-91, 161-164.

²²⁷ Patrick Burland, ‘Still Punishing the Wrong People: The Criminalisation of Potential Trafficked Cannabis Gardeners’ in Gary Craig, Alex Balch, Hannah Lewis and Louise Waite (eds), *The Modern Slavery Agenda Policy, Politics and Practice* (Policy Press 2019) 167-186, 181. See also Patrick Burland, ‘Villains not Victims? An Examination of the Punishment of Vietnamese Nationals Trafficked for Cannabis Cultivation in the United Kingdom’ (Paper presented and discussed during session 6 on ‘States and Categorizations in Mixed Migration’ at the International Seminar on Mixed Migration in Southeast Asia, 2017).

²²⁸ *V.C.L. and A.N. v United Kingdom*, para 159.

Finally, the ECtHR has continuously emphasized the importance of protecting vulnerable individuals.²²⁹ Victims and survivors of human trafficking undoubtedly qualify as vulnerable individuals, whether or not they have also been involved in criminal offences. States therefore have a heightened responsibility to ensure that any prosecution or punishment of such victims is absolutely necessary to secure other important goals such as crime prevention.

To comply with the requirements of Article 26 of the CoE Anti-Trafficking Convention, States need to adopt clear guidelines in response to the following issues:

- Clarify institutional competence and division of roles between the law enforcement authorities and those in charge of victim identification and support. When it comes to deciding whether or not a person is a victim of human trafficking, which is a precondition for the application of the non-punishment principle, clear priority should be given to competent authorities who are ‘trained and qualified to deal with victims of trafficking’.²³⁰
- Specify rules that govern the application of the non-punishment principle in relation to certain categories of offences, noting the consensus among international organisations that no crime should be *a priori* excluded from consideration.
- Recognise a strong interest in encouraging victims to report abuse, and cooperating with law enforcement bodies in investigation and prosecution of perpetrators. Victim’s cooperation is a key for prosecution of perpetrators, protection of other victims, and identification of areas where prevention efforts should be strengthened.
- Stipulate the required nexus between the status of a victim and an offence committed by a victim. Guidance on this issue should clarify whether the nexus requirement is premised on causation or correlation between human trafficking and victim’s own offence and the bearing of such relevant nexus on the application of the non-punishment principle, and may also address temporal link between these offences.
- Establish rules that govern the burden of proof that the relevant nexus is established, in accordance with the obligation of states to identify victims without a requirement that victims prove such status.
- Determine the effect of the non-punishment principle and remedies available to those victims whose status has been established only after conviction, and possibly after serving the sentence.

In essence, States ought to specify rules that govern the exercise of balancing victims’ culpability and their victimhood. These rules should recognise that individuals may have different statuses and belong to different categories (victim of crime, offender, irregular migrant, asylum seeker) and clarify institutional roles of different actors involved in applying them.

While neither the ECtHR nor GRETA may be prescriptive regarding how States should answer each of these questions, the ECHR and the CoE Anti-Trafficking Convention set the parameters of state action

²²⁹ The ECtHR jurisprudence has recognised as vulnerable the following groups: children (*A v UK* (1999) 27 EHRR 611, para 22), Roma minority (*Oršuš and Others v Croatia* ECHR 2010-II 247, para 147), persons with mental disabilities (*Alajos Kiss v Hungary* (App. 38832/06) (20 May 2010) para 42), women subject to domestic violence (*Opuz v Turkey* ECHR 2009-III 107, para 160), asylum-seekers (*MSS v Belgium* ECHR 2011-I 255, paras 232-233 and 252) or people in situations of extreme poverty (*Lăcătuș v Switzerland* (19 January 2021)). See also Lourdes Peroni and Alexandra Timmer, ‘Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law’ (2013) 11 (4) *International Journal of Constitutional Law* 1056; Agnė Limantė, ‘Vulnerable Groups in the Case Law of the European Court of Human Rights’ in Agnė Limantė, Dovilė Pūraitė-Andrikiienė (eds), *Legal Protection of Vulnerable Groups in Lithuania, Latvia, Estonia and Poland: Trends and Perspectives* (Springer 2022).

²³⁰ *V.C.L. and A.N. v United Kingdom*, para 160.

and goal(s) to be achieved by certain provisions leaving states to decide how best to operationalise such provisions in the domestic context. This ensures a continuous dialogue between authorities at the international and domestic levels, complementarity of their efforts, as well as shared responsibility for upholding universal human rights. There is no doubt, however, that compliance with obligations arising from both the ECHR and the CoE Anti-Trafficking Convention requires states to engage with these questions on a domestic level.

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The Council of Europe Convention on Action against Trafficking in Human Beings, in force since 2008, is an international treaty which provides a comprehensive framework for combating trafficking from a human-rights based and victim-centred perspective. Article 26 of the Convention lays down the principle of non-punishment of victims for their involvement in illegal activities, to the extent that they were compelled to do so.

This study considers the operationalisation of the non-punishment principle in the United Kingdom following the 2021 judgment of the European Court of Human Rights (ECtHR) in the case of *V.C.L. and A.N. v. United Kingdom*. The ECtHR found the United Kingdom in breach of Articles 4 and 6 of the European Convention on Human Rights for failing to identify and consider the protection needs of two Vietnamese children, both of whom were potential victims of human trafficking, when they were prosecuted and convicted of drug offences in the UK.

The study provides a comprehensive analysis of this decision and considers how the UK Government sought to comply with the ruling by making changes in domestic law and policy. It also reflects on recent developments in the UK's immigration law and policy which are critical for an understanding of the operationalisation of the non-punishment principle in the UK. Finally, it considers potential implications of these developments for the interpretation and application of the non-punishment principle in other Council of Europe member States.

trafficking@coe.int
www.coe.int/trafficking

www.coe.int

The Council of Europe is the continent's leading human rights organisation. It comprises 46 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

