

**Welcome to Landmark Chambers’
‘Nationality and Borders Act – Part 2’ webinar
Tuesday 24 May 2022**

The recordings may be accessed [here](#).

Your speakers today are...



Tim Buley QC (Chair)



Joseph Thomas

Topic:
Age assessments



Admas Habteslasie

Topic:
Nationality
provisions



Miranda Butler

Topic:
Trafficking

Nationality provisions



Admas Habteslasie

Structure of talk

- Context: Introduction to nationality statuses
- Provisions dealing with British Overseas Citizens and historic issues
- Deprivation of nationality
- Other provisions

Introduction: a basic timeline of nationality statuses

- Before 1 January 1949: principal form of nationality was **British subject** status, obtained by connection with a place within the Crown's dominions
- 1 January 1949 onwards: **citizenship of the UK and Colonies** (now excluding those parts of HM's dominions which became independent states & Ireland), obtained by virtue of a connection with a place within the UK and Colonies. British subjects with certain connections to a territory within UK and Colonies became CUKC by s.12 of BNA 1949
- Between 1955 and 1981, various parts of the UK and Colonies became independent states. By BNA 1981, on 1 January 1983, remaining colonies reclassified as **British dependent territories** and status of **BDTC** created
- By sections 1 and 2 British Overseas Territories Act 2002, British dependent territories and corresponding status terms **British Overseas Territories** and **BOTC**

Current nationality statuses

- Current statuses:
 - British citizen
 - BOTC
- BOTC means:
 - You hold a British passport
 - Can get consular assistance and protection
 - But (unlike British citizen) no right of abode or right to work in the UK, still subject to immigration controls

Nationality and Borders Act 2002: Sections 1 & 2

- Sections 1 to 2 introduce new provisions into Part 2 of the British Nationality Act 1981 which create a right to register for persons who would have satisfied the relevant requirements for registration as a BOTC but for:
 - the fact that their mother could not transmit citizenship; or
 - the fact that their mother was not married to their natural father at the time of their birth;
- who now are to be taken to satisfy the relevant requirement and to be entitled to be registered as BOTCs

Section 3 - Chagossians

- Section 3 makes special provisions for persons connected to the Chagos Islands/British Indian Ocean Territory (BIOT)



- Until 1965 administered as part of Mauritian colony, then (controversially) detached into separate colony (BIOT) along with islands from Seychelles
- Entire population expelled to make way for US naval base on largest island and their return prohibited by immigration ordinances
- Widely litigated: in domestic courts, ECtHR and ICJ

Section 3 - Chagossians

- Section 3 inserts new s.17H providing for a right to register as a BOTC for:
 - A person who is a direct descendant of P who was a CUKC by virtue of P's birth in the BIOT or prior to 8 November 1965 in those islands designated as the BIOT on that date
 - Have never been a BOTC or BDTC

Section 3 - Chagossians

- NB international law/status issues:
 - Lease of Diego Garcia to US stands to continue until 30 Dec 2036
 - On 25 February 2019, ICJ gave Advisory Opinion concluding that the UK's administration of the Chagos Archipelago was *“an unlawful act of a continuing character”* and that the UK *“has an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible”*
 - UK has publicly given commitment to Mauritius that when the UK no longer requires the BIOT for defence purposes, it will cede the territory to Mauritius
 - CoA has queried whether UK Govt could decide to resettle the Chagos Islands in light of ICJ opinion: ***R (Hoareau) v SSFCA*** [2020] EWCA Civ 1010 at [130]

Section 10 - Deprivation of citizenship status

- Section 10 introduces new subsections into s.40 of BNA 1981, which deals with deprivation of citizenship
 - Section 40(2): *“The Secretary of State may by order deprive a person of a citizenship status if the Secretary of State is satisfied that deprivation is conducive to the public good.”*
 - Section 40(3): *“The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of (a) fraud, (b) false representation, or (c) concealment of a material fact.”*

Deprivation of citizenship status

- Section 40(5) imposes notice requirements that must be met before SSHD can make an order: notice of order, reasons and right of appeal

- In ***R (Begum) v SSHD*** [2021] UKSC 7 Supreme Court held at [135]:

“the Court of Appeal mistakenly believed that, when an individual's right to have a fair hearing of an appeal came into conflict with the requirements of national security, her right to a fair hearing must prevail. As I have explained, if a vital public interest—in this case, the safety of the public—makes it impossible for a case to be fairly heard, then the courts cannot ordinarily hear it.”

Deprivation of citizenship status

- Regulation 10(4) of the British Nationality (General) Regulations 2003 provided that notice would be deemed to have been given if it had been placed on individual's Home Office file
- In ***R (D4) v SSHD*** [2022] EWCA Civ 33, the Court of Appeal held that provision was ultra vires s.40(5) and regulation-making power in s.41(1) (on appeal). Further, *“to dispense with service is inconsistent with the constitutional principle recognised in Anufrijeva ...it would be possible for Parliament to legislate contrary to that principle, either expressly or by necessary implication in the statute, but there is nothing in section 40(5) to suggest that notice should be given “so far as is possible” or similar”*

Deprivation of citizenship status

- New provisions:
 - Section 10(2) inserts new s.40(5A) into BNA 1981: S.40(5) does not apply if SSHD *“does not have the information needed to be able to give notice under that subsection”* (and/or?) *“reasonably considers it necessary, in the interests of national security, investigation or (ii) the investigation or prosecution of organised or serious crime, (iii) preventing or reducing a risk to the safety of any person, or (iv) the relationship between the United Kingdom and another country, that notice under that subsection should not be given.”*

Deprivation of citizenship status

- Duty will arise.... Where person makes contact with the Home Office
 - S.10(6): Failure to comply with s.40(5) does not affect and is treated as having never affected the validity of the deprivation order – this provision comes into force on passing of the new Act
-
- Provisions appear to raise rule of law/Article 6 issues

Other provisions

- Other provisions:
 - Section 4 provides for a right for persons entitled to be registered as BOTCs under new provisions to be registered as British citizens (excluding BOTCs who acquired status through sovereign base areas)
 - Section 5 amends s.17(2) of the BNA 1981 so that the period within which a child must apply to be registered as a BOTC is while the child is a minor rather than 12 months from birth; thus bringing regime for BOTC in line with parallel provision for British citizenship (s.3(2) and also brings in good character requirement

Other provisions

- Section 7 amends BNA 1981 to provide an entitlement to British citizenship for individuals who were previously unable to acquire it because their mother was married to someone other than their biological British citizen father at the time of their birth. This situation found to be contrary to Article 14 read with Article 8 in ***R (K) v SSHD*** [2018] EWHC 1834 (Admin)
- Section 8 provides for a discretionary power to register adults – current power in s.3(1) BNA 1981 only for minors. Where in SSHD’s opinion, P would have been or would have become a British citizen and/or a BOTC had it not been for (i) “historical legislative unfairness”; (ii) “an act or omission of a public authority”; or “exceptional circumstances relating to P”

Other provisions

- Section 9 and Schedule 1 introduce amendments to BNA 1981 to give SSHD power to waive certain requirements in considering applications for naturalisation
- Section 11 deals with stateless minors – introduces a requirement that a child aged 5 to 17 will not qualify for registration if they could reasonably acquire another nationality
 - “(2) A person is able to acquire a nationality in accordance with this sub-paragraph if—*
 - (a) the nationality is the same as that of one of the person's parents,*
 - (b) the person has been entitled to acquire the nationality since birth, and*
 - (c) in all the circumstances, it is reasonable to expect the person (or someone acting on their behalf) to take the steps which would enable the person to acquire the nationality in question.”*

Age assessments



Joseph Thomas

Part 4 of the Nationality and Borders Act 2022 - Structure

- Part 4 is intended to bring 'age-assessments' within the statutory immigration system. Previously, they had developed in response to case law (e.g. Merton hearings).
- Critically important to get right as detention of young people is only allowed in 'very exceptional circumstances', enhanced risk of trauma if young people are detained. In addition, there are numerous educational and social care rights which arise (particularly for unaccompanied young people).

Structure
Key Definition
The Two Assessments
Scientific Methods
Regulations
Appeals & New
Information

Part 4 of the Nationality and Borders Act 2022 - Structure

- S.49 Definitions
- S.50 Assessments undertaken by Local Authorities (and other public bodies)
- S.51 Assessments for Immigration Purposes
- S.52 Use of Scientific Methods
- S.53 Power to make Regulations
- SS.54 & 55 Appeals
- S.56 New Information
- S.57 Legal Aid

Structure

Key Definition

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Part 4 of the Nationality and Borders Act 2022 - Definition

Landmark Chambers

- Age Disputed Person
 - An individual who requires leave to enter the UK
 - Who a Local Authority/Public Authority/Secretary of State has insufficient information to be *sure* of their age.
- Designated Person
 - An individual designated by the SOS to conduct an age assessment
- Key Points
 - These procedures apply to all people who require leave, not just asylum-seekers
 - What does 'sure' mean? How sure is sure? If you sure that the person is not a child (i.e. me) but don't know my age, am I an age disputed person?
 - What qualifications will this designated person have?

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Part 4 of the Nationality and Borders Act 2022 – S.50

A s.50 assessment applies when:

- a) A Local Authority needs to know the age of an age-disputed person
- b) OR the SoS notifies the LA that it doubts the age of an age-disputed person that the LA has exercised functions under children's legislation

When that occurs, the LA **MUST** either

- a) Refer the Age Disputed Person to a 'designated person'
- b) Conduct an age assessment themselves
- c) Confirm that an age assessment is not necessary

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Part 4 of the Nationality and Borders Act 2022 – S.50

When the ‘designated person’ does the age assessment on behalf of the SOS that result is binding on the LA but not the other way round.

When an LA conducts an age assessment or confirms that one is not necessary, it must provide evidence to the SOS (on request) so that the SOS can ‘consider’ the decision.

Key Points

What happens when the LA give the Age Disputed Person an age that the SOS disputes. Does the SOS have a repeat power to direct that a ‘designated person’ takes over the decision.

What is meant by ‘consider’ by the SoS

The standard of proof is balance of probabilities, but what about burden of proof? (Under UNROC, the child is meant to be given the benefit of any doubt)

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Part 4 of the Nationality and Borders Act 2022 – S.51

S.51 applies when the secretary of state needs to make a decision about ‘immigration functions’ in relation to that person.

A S.51 assessment can be taken where s.50 is not relevant (not sure how that is possible) OR before a LA has referred an individual to the SOS or if the SOS doubts the judgment of the LA

S.51 is binding on the SoS for ‘immigration functions’.

Key Point

S.51 appears to allow the SoS to ‘call-in’ a decision, but it is not binding regarding LA functions on the face of legislation
Could the LA find the individual a child, but the SoS an adult?

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Part 4 of the Nationality and Borders Act 2022 – Scientific Methods

S.52 allows the SoS to make regulations *specifying* scientific methods that *may* be used.

S.52(2) goes into considerable detail of what these may constitute including ‘imaging technology’ (Does that include X-Rays?) and analysis of DNA derived from cells, saliva or ‘other samples’

The SoS must ‘seek scientific advice’ before deciding that a method is appropriate.

Key Points

- What is meant by imaging technology?
- What is meant by seek scientific advice mean in practice?
- Who has to be consulted?
- What if there is no scientific consensus?
- Does the SoS need to ‘seek’ scientific advice or is the duty going to be ‘seek and act in accordance with’ scientific advice?

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Part 4 of the Nationality and Borders Act 2022 – Scientific Methods - Consent

A Scientific Method can only be used with ‘appropriate consent’

BUT

s.55(7) provides that:

In deciding whether to believe any statement made by or on behalf of the age-disputed person that is relevant to the assessment of their age, the decision-maker ***must*** take into account, as damaging the age-disputed person’s credibility [...] the decision not to consent to the use of the specified scientific method.

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Part 4 of the Nationality and Borders Act 2022 – Scientific Methods - Consent

In addition, s.55(9) confirms that s.55 does not prevent the ‘decision-maker’ from using another ‘scientific method’ if they consider it appropriate (but there may be other reasons not to)

The BMA are clear that the use of X-Rays is unethical: ‘The use of ionising radiation for age assessment involves direct harms without any *medical* benefit to the individual and, as such, we do not believe it would be appropriate to expect doctors to participate in such a practice.’ (emphasis added)

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Part 4 of the Nationality and Borders Act 2022 – Scientific Methods - Other countries experiences

Sweden uses two methods – dental x-ray of wisdom teeth and MRI scan of the femur bone

However, this is used to assess the probability that the individual is under 18 – not to provide an exact age.

Moreover, the accuracy (even taken into account its different purpose) and compatibility of this scheme with the ECHR has been doubted

The Council of Europe and the UNHCR both state that scientific methods have substantial margins of error (i.e. two years either way) and the British Association of Social Workers state that they are no more accurate than ‘Merton’ assessments.

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Part 4 of the Nationality and Borders Act 2022 – Regulations

s. 53 includes a general power to make regulations regarding age-assessments. However, this power is very broad and includes:

- evidence that must be considered and *the weight to be given to it*,
- the consequences of a lack of co-operation with the assessment by the age-disputed person, *which may include damage to the person's credibility*

Key Issue

- To what extent can or should the SOS 'front-load' an assessment of an individual's credibility which will require a fact specific assessment of all the circumstances?

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Part 4 of the Nationality and Borders Act 2022 – Appeals and New Information

SS.54 and 55 include the rights of Appeal

Now the Right of Appeal is to the First-Tier Tribunal.
Critically, they *must* assign the individual a date of birth.
In some cultures, they may be particularly challenging

If the individual leaves the UK, then their appeal is abandoned.

Pending the outcome of the appeal, the person is to be treated as the age they claim to be.

The decision by the FTT is binding on the LA and SOS

Under s.56 a fresh age assessment must be undertaken on receipt of 'significant new information' (that is there is a 'realistic prospect' that it would change the outcome of the original age assessment).

S.57 extends legal aid to age assessments.

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Part 4 of the Nationality and Borders Act 2022 – Potential Challenges

Given the potential invasiveness of a ‘scientific’ assessment and the potential for ‘retraumatising’ arising from an age assessment itself, there is the obvious possibility of challenges under at least Article 3 and 8 of the ECHR.

Any invasion into a person will directly engage Article 8 and an individual’s right to privacy.

The compulsion to submit to examination may result in a breach of Article 3.

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Part 4 of the Nationality and Borders Act 2022 – Appeals and New Information

In summary,

- A lot to be clarified
- What will age assessments actually look like and to what extent will they be 'scientific'? What weight will be given to 'holistic' assessments or 'scientific' ones.
- How will the impact of an age assessment be considered and balanced? Under Part 4, an Age Assessment is obligatory... Refugee and Migrant Children's Consortium notes:
"Many young people [...] do not understand the process, and feel humiliated and damaged by it. The process itself has the potential to be quite re-traumatising, and impact children and young people's sense of identity."
- Likely challenges under Articles 3 and 8 of the ECHR
- Any age assessment may continue to be social worker led will likely have to comply with the Merton guidelines so may not be that much change in practice.
- A lot we do not know at this stage.

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Trafficking



Miranda Butler

Part 5, NABA 2022 – Modern Slavery

- Key provisions:
 - Slavery and trafficking information notices (ss. 58-59)
 - Reduction of the recovery period to one-off 30 days (ss. 61-62)
 - Disqualification from protection (s. 63)
 - Assistance and support for potential victims (s. 64)
 - Leave to remain for recognised victims (s. 65)
 - Disapplication of retained EU law (s. 68)

Purpose of new trafficking provisions

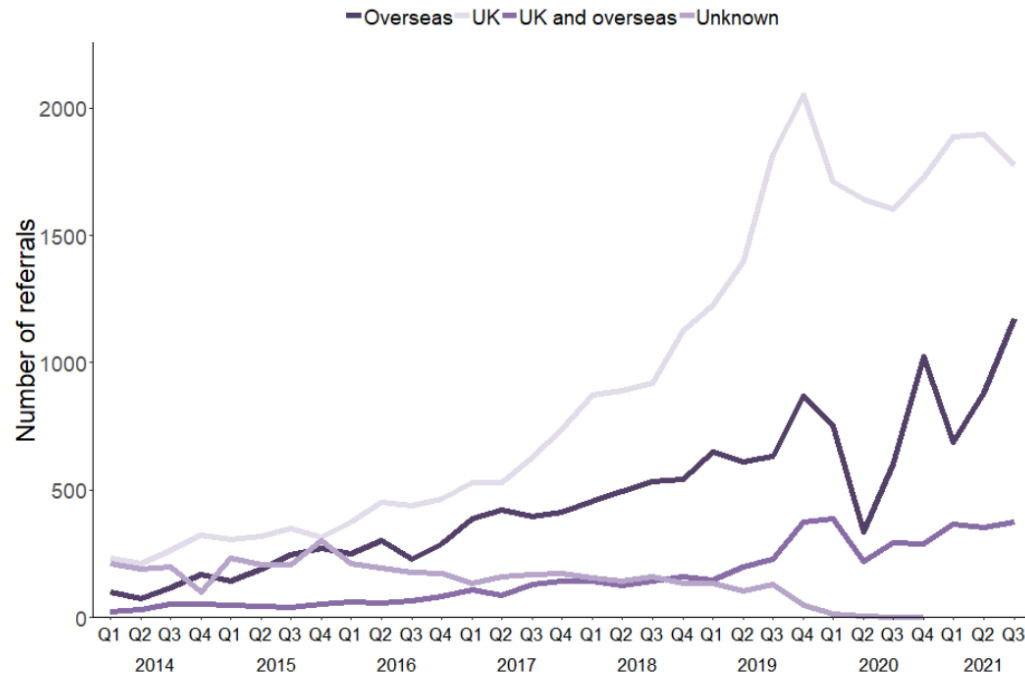
“The UK’s response to the evil of modern slavery is world-leading. The Government remains committed to ... giving victims the support they need to rebuild their lives.

However, over recent years we have seen an alarming increase in the number of illegal migrants, including Foreign National Offenders and those who pose a national security risk to our country, seeking modern slavery referrals – enabling them to avoid immigration detention and frustrate removal from our country.”

‘New Plan for Immigration: Policy Statement’ (March 2022)

Purpose of new trafficking provisions

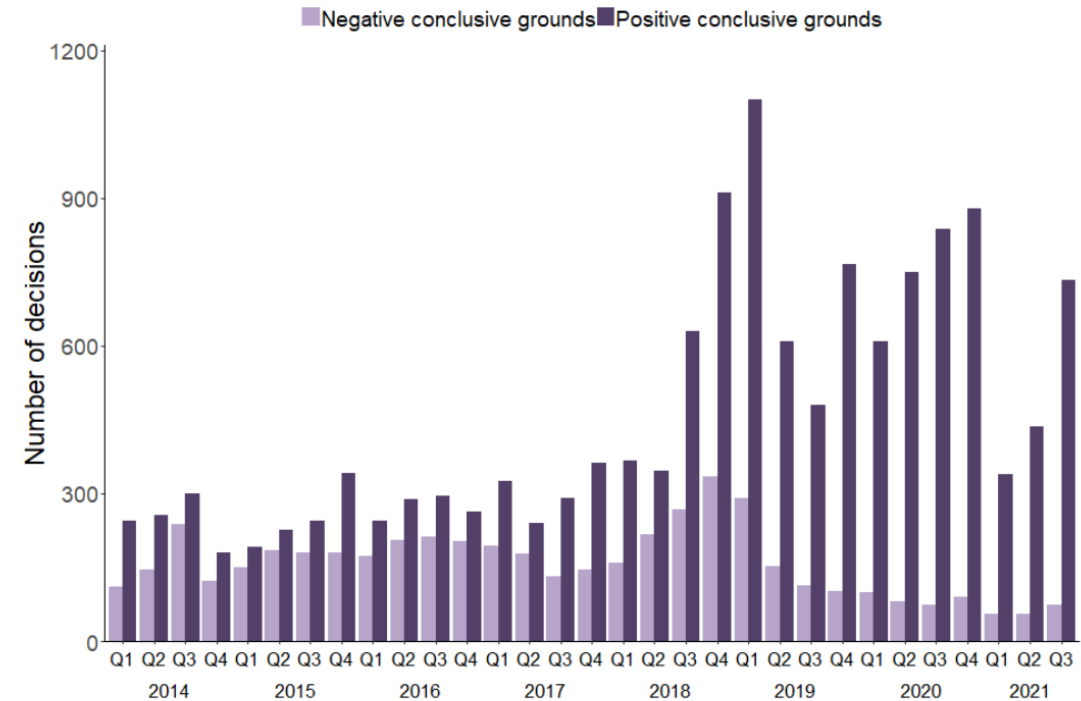
Figure 3: Number of quarterly NRM referrals by location of exploitation



Source: SCA

Notes(s): Excludes data pre-2014 due to data reliability.

Figure 9: Number of NRM positive and negative conclusive grounds decisions



Source: SCA

Notes(s): Based on the quarter in which the SCA issued their decision.

Sections 58-59: information notices

- s.58(1)-(2): SSHD may serve a notice requiring recipient to provide relevant information for making a Reasonable / Conclusive Grounds decision by a specific date.
- S. 59: Where relevant information is provided after the specific date, competent authority **must** take this into account as damaging the person's credibility unless there are good reasons for lateness

Sections 58-59: information notices

Barriers to disclosure

13.18. Victims' disclosures of historic events are often delayed. This may be due to an [unwillingness to self-identify](#), or due to the impact of trauma, particularly post-traumatic stress disorder. A key symptom of post-traumatic stress is avoidance of trauma triggers, or of those things that cause frightening memories, flashbacks or other unpleasant physical and psychological experiences. Because of these symptoms it is likely that a potential victim will not be able to fully explain their experience until they have achieved a minimum level of psychological stability. A delay in disclosing facts should not be viewed as manipulative or taken to mean these facts are untrue. The late disclosure of these facts may be the result of an effective Recovery Period and the establishment of trust with the person to whom they disclose the information. Disclosures often come slowly and in a piecemeal way, sometimes over years.

Sections 61-62

Applicants who receive a first positive Reasonable Grounds ('RG') decision are entitled to a recovery period (if not disqualified under s. 63)

Recovery period will be whichever is later of:

- 30 days from the RG decision, or
- Day on which CG is made.
- Potential victim cannot be removed during this period

Where a further RG decision is made, the competent authority **may** grant a further recovery period.

European Convention on Action Against Trafficking

ARTICLE 13

Recovery and reflection period

1 East Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities. During this period it shall not be possible to enforce any expulsion order against him or her. This provision is without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating and prosecuting the offences concerned. During this period, the Parties shall authorise the persons concerned to stay in their territory.

2 During this period, the persons referred to in paragraph 1 of this Article shall be entitled to the measures contained in Article 12, paragraphs 1 and 2.

3 The Parties are not bound to observe this period if grounds of public order prevent it or if it is found that victims status is being claimed improperly.

Section 63: disqualification from protection

Competent authority **may** determine post-RG that a person is disqualified from protection and support where:

- 1.They are a *'threat to public order'*; or
- 2.They have claimed to be a victim of trafficking *'in bad faith'*.

Threat to public order:

- Most serious offences (terrorism, inc. suspected & attributable to trafficking; Schedule 4 MSA 2015)
- ‘Foreign criminal’ within the meaning of s. 32(1) UK Borders Act 2007
 - i.e. automatic deportation: e.g. **any** 12+ month sentence
- Deprivation of citizenship where conducive to public good
- Person otherwise poses a risk to UK national security

Section 63: disqualification from protection

If excluded:

- No barrier to removal (under ss. 61-62)
- No leave to remain (under s. 65)

Unresolved questions:

- No Conclusive Grounds decision?
- No statutory defence under s. 45 Modern Slavery Act 2015?

European Convention on Action Against Trafficking

ARTICLE 26

Non-punishment provision

Each 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.

Section 63: disqualification from protection

53. Excluding certain victims from protection increases the likelihood that their cases will not be adequately investigated or prosecuted and, therefore, that action will not be taken against organised gangs exploiting these victims of slavery or human trafficking. Such an approach therefore runs counter to the UK's obligations under ECAT 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.

Joint Committee on Human Rights, HC 964

Section 64: assistance and support

- Duty to provide assistance and support to an identified potential victim where
“necessary for the purpose of assisting the person receiving it in their recovery from any physical, psychological, or social harm arising from the conduct which resulted in the positive reasonable grounds decision in question”
- Reflects ECAT Art. 13.
- Discretionary in case of further RG decisions

Section 65: Leave to remain

- Leave to remain **must** be granted following a positive CG decision where necessary in order to:
 - Assist the person in their recovery from any physical or psychological harm arising from the relevant exploitation;
 - Enable the person to seek compensation; or
 - Enable the person to cooperate with investigation or criminal proceedings into the exploitation

ARTICLE 14

Residence permit

- 1 Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both:
 - a the competent authority considers that their stay is necessary owing to their personal situation;
 - b the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.

Section 65: Leave to remain

- **However**, s. 65(4)-(5) provide that leave is not '*necessary*' where:
 - A person's needs for assistance can be met:
 - in their country of origin, or
 - any third country where they may be removed under a bilateral agreement
- Victims who are a **threat to public order** or who claimed in **bad faith** are not entitled to leave and any leave they hold may be revoked: s. 65(7)

Section 65: Leave to remain

*“Immediate return of the victims to their countries is unsatisfactory both for the victims and for the law-enforcement authorities endeavouring to combat the traffic. For the victims this means having to start again from scratch – a failure that, in most cases, they will keep quiet about, with the result that nothing will be done to prevent other victims from falling into the same trap... For law-enforcement authorities, if the victims continue to live clandestinely in the country or are removed immediately they cannot give information for effectively combating the traffic. The greater victims’ confidence that their rights and interests are protected, the **better information they will give**. Availability of residence permits is a measure calculated to encourage them to cooperate”*

Explanatory Report to ECAT (CETS 197)

Section 68: Disapplication of EU law

- S. 4 of the European Union (Withdrawal) Act 2018) ceases to apply to the Trafficking Directive (Council Directive 2011/36/EU) insofar as incompatible with the provisions of the NABA 2022
 - No retained protection under EU law for potential and recognised victims adversely affected by these changes

Commencement arrangements

- These provisions are **not yet in force**
 - See e.g. ss. 50-51 MSA 2015
- Can be brought into force **at any time** specified by SSHD

Thank you for listening

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