



The Hierarchy of Victimhood: Prisons and States' Responsibility to Protect *Every* Victim of Modern Slavery and Human Trafficking

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Abstract

In 2022, the prison service in England and Wales developed state-of-the-art guidance for prisons to enable them to better identify and support modern slavery survivors. This positive development in the UK's anti-slavery regime is overshadowed by its increasingly restrictive immigration legislation, which leaves those without lawful residence and victims involved in criminal offences excluded from the support and assistance otherwise guaranteed by domestic and international law. This article presents an overview of the UK's legal obligations towards survivors of modern slavery and human trafficking, explains how the prison service in England and Wales has sought to implement them, and discusses key challenges facing prisons in doing so. These efforts are contrasted with an increasingly hostile environment for certain categories of survivors, which effectively creates a "hierarchy of victimhood", expressly prohibited by international law. In an environment where being a victim of a crime and human rights violation both matter less than the State's interest in immigration and crime control, prisons will struggle to deliver on their commitment and international obligation to protect those inmates who have been or are at risk of being exploited.

Keywords Modern slavery · Human trafficking · United Kingdom · Prisons · Public order disqualification · Illegal Migration Act 2023 · Nationality and Borders Act 2022

Introduction: The UK as a Global Leader in Anti-slavery Action?

The UK has sought to position itself as a global leader in anti-slavery action, both historically through the abolition of state-sponsored slavery in the nineteenth century and in its present-day initiatives to tackle 'modern slavery' and human trafficking (MSHT)—an umbrella term for a range of exploitative practices which persist in the twenty-first century despite being almost universally outlawed.¹

Accordingly, the Modern Slavery Act (MSA) (2015) is often praised as 'a world-leading piece of legislation' (UK Secretary of State for the Home Department, 2019, para 40). In their most recent report on the UK, the body in charge of monitoring States' compliance with the Council of Europe Convention on Action Against Trafficking in Human Beings, has noted that '[t]hrough its strong measures to identify victims,² the UK is setting an important model for Europe' (GRETA, 2021, para 18). More recently, the

¹ Modern slavery is used as an umbrella term throughout this report. It covers practices prohibited under Article 4 ECHR (slavery, servitude, forced and compulsory labour, and human trafficking) and is used interchangeably with human trafficking. This is an understanding expressly used in the Modern Slavery Act (2015). For a more detailed breakdown of the types of offences which are included under the umbrella of modern slavery please refer to UK Home Office, 2017.

² Evidence suggests the terms 'survivor of modern slavery' and 'people with lived experience of modern slavery' are generally preferable when talking about the people most directly affected by this form of exploitation. For further, refer to Asquith et al. (2022). This article uses the term 'victim' in places, given it is used in the Modern Slavery Act (2015), the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) and many other official documents and statistics.

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UK has led efforts to establish the Global Commission on Modern Slavery and Human Trafficking in order to address a widely perceived lack of political leadership and declining global attention to the issue, despite increasing numbers of victims worldwide.³ In 2023, the UK Government has also listed tackling modern slavery as one of its five pledges to mark the 75th anniversary of the Universal Declaration of Human Rights (UK Foreign, Commonwealth & Development Office, 2023).

In contrast with this professed global leadership in anti-slavery action, recent legal and policy developments designed to tackle ‘illegal’ migration tell a different story. Namely, following the publication of new immigration policy in 2021 (UK Secretary of State for the Home Department, 2022), the UK has adopted several pieces of legislation that exclude any victim of MSHT who either arrives in the UK ‘illegally’ (Sections 22–29 Illegal Migration Act, 2023) or is found to have committed a criminal offence punishable by imprisonment (known as ‘public order disqualification’ (Section 63 Nationality and Borders Act, 2022) from any protection available under domestic modern slavery legislation. This means that even those MSHT victims who were forced to commit criminal offences (a phenomenon known as ‘criminal exploitation’) as well as those who breach immigration rules because they were trafficked to the UK are made ineligible for any protection and support. By denying protection and support to these categories of MSHT victims, the UK has created a “hierarchy of victimhood” expressly prohibited by its international legal obligations—notably, Article 3 of the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) and Article 14 of the European Convention on Human Rights (ECHR). International obligations as well as domestic human rights law do not allow for a distinction between different categories of victims. Furthermore, such obligations expressly provide for *additional* protections for victims compelled to commit criminal offences and those with irregular migration status through Article 13 and 26 ECAT.

Amidst this clear paradox between public declarations of commitment to anti-slavery action and the erosion of protection for victims in practice, one aspect of the UK’s responses to MSHT deserves special attention. In 2022, a request for judicial review in relation to practices of identifying and supporting survivors of MSHT in prisons, revealed that such responses were virtually non-existent. Following this judicial review, prison authorities in England and Wales have engaged in comprehensive efforts to develop policy and guidance for prison staff on the issue of modern slavery. His Majesty’s Prison and Probation Service (HMPPS) published

Modern Slavery Guidance for prisons in England and Wales in 2023, which aimed ‘to raise awareness and inform all staff working in HM Prisons in England and Wales on how to take prompt action when modern slavery is suspected, and how to support victims of modern slavery who are remanded or sentenced’ (HMPPS, 2023, p. 3). As a result, each prison in England in Wales appointed a modern slavery single point of contact (SPOC)—a role intended to act as a focal point for support in the implementation of the Guidance. The Guidance represents a pioneering or ‘world leading’ intervention globally—with no other jurisdiction having paid a similarly comprehensive and detailed attention to the issue (Jovanović et al., 2023, pp. 29–31).

The article discusses findings from empirical research conducted in 2022–23, which investigated challenges faced by prisons in the identification and support of MSHT victims and the extent to which the newly developed Guidance has been able to respond to such challenges (Jovanović et al., 2023). This empirical research was supplemented by a comprehensive review of academic literature, reports by international organisations and nongovernmental organisations, and a doctrinal analysis of relevant domestic and international legislation and policy.

There are some limitations to this study which should be noted. Efforts were undertaken to ensure that a variety of stakeholders with different perspectives were included, however all findings emerging from the empirical research are qualitative and should be understood as indicative in nature. Furthermore, this research project focused only on adult survivors of modern slavery. As such, it captured neither the experiences of those under 18 years of age, nor did it include the perspective of staff in youth offender institutions. The research did not include immigration detention facilities within its scope. The presence of MSHT survivors in immigration detention has received more attention over the past years (e.g., Gower & Sturge, 2023; Mullan-Feroze & Dorling, 2022), and the UK Adults at Risk in Immigration Detention policy includes ‘potential [or confirmed] victims of trafficking or modern slavery’ since May 2021 which led the Home Office to publish the separate Guidance ‘Adults at risk: Detention of potential or confirmed victims of modern slavery’.⁴

Overall, this enquiry revealed that prisons in the UK are likely to house more survivors of MSHT than those who traffic them – a finding that is both alarming and unsurprising, given the low prosecution rates for MSHT related

³ For more on this, refer to International Labor Organization et al. 2022; for a UK perspective, see Anti-Slavery International 2024.

⁴ UK Home Office 2024b; UK Home Office 2024c. For more details on modern slavery and human trafficking survivors in immigration detention, see, e.g., Gower & Sturge 2023; Mullan-Feroze & Dorling 2022; or Taskforce on Survivors of Trafficking in Immigration Detention 2024.

offences. It uncovered numerous barriers experienced by victims which prevented them from accessing existing support and highlighted problems with the application of the non-punishment principle designed to protect those compelled to commit criminal offences, as enshrined in Article 26 ECAT (UK House of Commons – Home Affairs Committee, 2023). These challenges are likely to be further exacerbated by recent British immigration legislation. Still, the prison service in England and Wales have invested commendable efforts to develop a system of victim protection insulated from the negative developments in other areas of domestic law.

This article demonstrates that prisons are duty bound to identify and protect victims of MSHT including from further exploitation in prisons and upon release. The following sections present an overview of such legal obligations (Sect. “Obligations of States Towards Survivors of MSHT under International Law and the Role of Prisons”), explain how the prison service in England and Wales has sought to implement them (Sect. “The Protection of Modern Slavery Survivors in the UK Prisons – New Policy Developments”), and discuss key challenges facing prisons in doing so (Sect. “Challenges with Protecting Survivors of MSHT in the UK Prisons in Practice”). Such unique and positive efforts of the prison service in England and Wales are considered against an increasingly hostile environment for certain categories of victims, notably those with irregular migration status and victims involved in criminal offences who are disqualified from any protection guaranteed under domestic and international law (Sect. “The Erosion of Migrants’ Rights in the UK and the Impact on Survivors of MSHT”). The article concludes by noting that, while the framework developed by the prison service in England and Wales is commendable and should serve as a blueprint for other jurisdictions, it does not operate in a vacuum. In an environment where being a victim of a crime and human rights violation matters far less to the State than whether one is an ‘irregular migrant’ or an ‘offender’, the efforts of prisons have slim chances of delivering required protections to people who have been exploited in the UK and overseas.

Obligations of States Towards Survivors of MSHT Under International Law and the Role of Prisons

Under international law, most notably Article 4 of the European Convention on Human Rights (ECHR)⁵ and the Council of Europe Convention on Action against Trafficking in

⁵ The prohibition of slavery, servitude, forced labour and human trafficking.

Human Beings (ECAT), States have an obligation to protect every victim of MSHT, without discrimination and without exception.⁶ Article 4 ECHR is one of the ‘absolute’ or unqualified rights in the ECHR. Under Article 15(1) ECHR, this means that the obligations arising from such rights cannot be derogated from. Hence, they cannot be limited, modified, suspended, or balanced against broader or competing public interests, even ‘in time of war or other public emergency threatening the life of the nation’.⁷

Protective obligations towards MSHT survivors are triggered by a ‘credible suspicion’ (reasonable grounds to believe) that a person is a MSHT survivor. This means that the onus is not on the survivor to report being a victim of MSHT. Rather, ‘the authorities must act of their own motion once the matter has come to their attention’ (ECtHR, ‘Guide on Article 4’ 2022, paras 60 & 69).⁸ Notably, States parties to the ECHR—including the UK—are obliged to identify and support any suspected MSHT victim irrespective whether the individual was exploited in the country in which they were discovered or in a third country (*J and others v Austria*, 2017, paras 110–111).

In addition to protection and assistance available to any survivor of MSHT, those who have been compelled to commit criminal offences are protected from prosecution and punishment by the *non-punishment principle* enshrined in Article 26 ECAT and further reflected in a number of other international instruments (Jovanović & Niezna, 2023). The non-punishment principle is also translated domestically into UK law through Section 45 of the Modern Slavery Act (MSA) 2015, Section 8 of the Human Trafficking and Exploitation (Scotland) Act (2015), and Sect. 22 of the

⁶ When explaining and elaborating the obligations imposed by Article 4 ECHR which prohibits slavery, servitude, forced labour, and human trafficking, the European Court of Human Rights (ECtHR) draws heavily on the provisions of ECAT. For examples, see *Rantsev v Cyprus and Russia* (2010); *Chowdury and Others v Greece* (2017), para 110; *J and Others v Austria* (2017), para 106. For a discussion of obligations arising out of the ECHR and ECAT respectively, see Jovanović (2023a); and Jovanović (2023c). Protection measures required by Article 4 ECHR include ‘facilitating the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery,’ *VCL and AN v the United Kingdom* (2021), para 153; *Chowdury and Others v Greece* (2017), para 110. See also UN Office of the High Commissioner for Human Rights (UN OHCHR) (2005), para 24.

⁷ The term ‘absolute rights’ refers to rights contained in Articles 2, 3, 4(1) and 7 of the ECHR. For further discussion, see Rainey et al., (2021), p. 223. See also Mavronicola (2012); Webber (2016); *Rantsev v Cyprus and Russia* (2010), para 283.

⁸ For discussion by the ECtHR, refer to *CN v the United Kingdom* (2012); *Zoletic and Others v Azerbaijan* (2021), para 185; *SM v Croatia* (2020), para 307; *Chowdury and Others v Greece* (2017), para 116; *J and Others v Austria* (2017), para 107; *Rantsev v Cyprus and Russia* (2010), para 286 & 288; *VCL and AN v the United Kingdom* (2021), para 152.

Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015. This principle requires States to provide for the *possibility* of not prosecuting or punishing MSHT victims for their involvement in unlawful activities when such an involvement is determined to have had a ‘relevant nexus’ to their experience of being trafficked, enslaved, or exploited.⁹ While this provision does not provide immunity from prosecution, punishment, or even imprisonment for survivors of MSHT who committed criminal offences, it seeks to ensure that those victims whose offending is directly related to their trafficking experience are duly protected (Jovanović & Niezna, 2023).

However, even in cases where its application is not warranted, that is where it is established that there was no direct link between a criminal offence and the experience of MSHT, sentencing survivors to prison does not disqualify them from holding victim status and neither does it exclude them from other protection and assistance measures guaranteed by Article 4 ECHR and ECAT. In other words, survivors of MSHT in prisons are entitled to protection guaranteed to *any* survivor. Excluding them from such protection would create a hierarchy of victims which would be in direct breach of international obligations under Article 3 ECAT and Article 14 ECHR, which guarantee non-discrimination in the enjoyment of human rights overall and require that ‘the enjoyment of measures to protect and promote the rights of victims [of human trafficking], shall be secured without discrimination on any ground’. The only situation States would be justified in denying protection is when a person has claimed the survivor status illegitimately (ECAT, art 13(3); Council of Europe, 2005, para 173). It is therefore pertinent to consider the role of prisons in providing such protection.

The rights of prisoners and the duties of domestic authorities regarding the treatment of prisoners have been discussed extensively by the European Court of Human Rights (ECtHR) and other international bodies (ECtHR, 2022; Hein van Kempen, 2008). It is established that imprisonment does not lead to a loss of the rights guaranteed under the ECHR. Rather, prisons can be considered to have a heightened duty of care towards incarcerated individuals because of their vulnerability in prison and because they are entirely under the responsibility of the State (UN General Assembly, 2006, Special Rapporteur on extrajudicial, summary or arbitrary executions, para 51; *Florea v Romania*, 2010, para 50). This has been pointed out by the ECtHR, which stated that ‘persons in custody are in a vulnerable position and (...) authorities are under a duty to protect them’ (*Paul and Audrey Edwards v United Kingdom*, 2002, para 56). The

Office of the UN High Commissioner for Human Rights similarly noted that ‘prison officials are at the forefront of human rights protection on a daily basis’ (UN OHCHR, 2005, para 9).

Accordingly, even though the role of prisons in securing the rights of survivors of MSHT has not been considered either by the relevant international bodies or in academic literature,¹⁰ it is certain that prisons, like other public authorities, are bound to secure the human rights of all individuals in their care, including the rights that arise from Article 4 ECHR. In that light, the obligation to protect *every* victim of MSHT, which is envisaged to facilitate ‘the identification of victims by qualified persons and assisting victims in their physical, psychological and social recovery’, is binding on *all public authorities* irrespective of the way States organise their national mechanism for the identification and protection of survivors (*VCL and AN v United Kingdom*, 2021, para 153; see also *Chowdury and Others v Greece*, 2017, para 110).

The Protection of Modern Slavery Survivors in the UK Prisons: New Policy Developments

The UK has given effect to its international obligations pertaining to MSHT through the Modern Slavery Act (MSA) (2015) that applies in England and Wales, the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act 2015 (Northern Ireland), and the Human Trafficking and Exploitation Act (2015) (Scotland). These pieces of legislation are accompanied by the Modern Slavery Statutory Guidance (‘Statutory Guidance’) on identifying and supporting victims of modern slavery for professionals and public authorities who may encounter potential victims, and/or who are involved in supporting victims (UK Home Office, 2024a). The Statutory Guidance has been continuously updated—with the most recent amendment dating October 2024—and represents a blueprint for the victim identification process in the UK.¹¹

¹⁰ There is no academic literature on the obligations of prisons as public authorities towards modern slavery survivors. Instead, a large body of literature exists on the mental health of prisoners and the obligations of prisons to provide mental health support. See, e.g., Birmingham (2003); Lines (2006); Exworthy et al., (2012); Mills & Kendall (2016). There also exists literature on prisoners’ exploitation as cheap labour both by States and by the private sector, see, e.g., Mantouvalou (2024). There is also a growing concern about human trafficking and modern slavery survivors in immigration detention, see, e.g., Gower & Sturge (2023); Mullan-Feroze & Dorling (2022); Taskforce on Survivors of Trafficking in Immigration Detention (2024).

¹¹ There is furthermore Guidance from the Crown Prosecution Service for public prosecutors in England and Wales for situations where suspects in criminal cases are suspected of being victims of modern

⁹ For example, when a relevant nexus can be found in specific circumstances such as those previously referred to in the discussion on criminal exploitation.

One of the key features of the UK's approach to modern slavery is the National Referral Mechanism (NRM). This mechanism is designed to identify and support MSHT survivors. Adult survivors identified through the NRM in England and Wales are entitled to Government-funded support through the Modern Slavery Victim Care Contract (MSVCC). Such support includes accommodation, material assistance, financial support, translation and interpretation services, information and advice, as well as to access to legal aid for immigration advice, medical care and counselling, and assistance to return to their home country in case they are not a UK national.

Referrals to the NRM are completed by one of the designated First Responder Organisations (FROs) which include all police forces, local authorities, specific charities and non-governmental Organisations (NGOs) as well as immigration authorities in the Home Office. At present, the prison services of England and Wales, Scotland, and Northern Ireland are *not* FROs.¹² The Statutory Guidance nevertheless stipulates that prisons 'have responsibility for identifying and supporting victims [of MSHT] and raising awareness of this crime amongst prisoners/individuals in detention and staff' (UK Home Office, 2024a, para 4.32—see also paras 12.69 & 12.70). However, the Statutory Guidance does not lay out in detail how this responsibility should be discharged in practice.

In 2022, following a judicial review initiated by the Anti-Trafficking and Labour Exploitation Unit (ATLEU; *R (ATLEU and QW) v Secretary of State for Justice*, 2022), HMPPS developed Modern Slavery Guidance for prisons in England and Wales and began working on an overarching guidance for prisons, probation, and youth custody services. No similar efforts currently exist in Scotland and Northern Ireland.

The HMPPS Modern Slavery Guidance acknowledges 'a legal duty' upon HMPPS to identify and support survivors of modern slavery in prisons (HMPPS, 2023, p. 3). It emphasises that despite not being a First Responder Organisation, HMPPS 'must alert a FRO of all suspected cases of modern slavery' (HMPPS, 2023, p. 4).¹³ The HMPPS Guidance

furthermore provides a list of indicators of modern slavery to enable its staff to discharge this obligation, instructing them to be 'professionally curious and alert to signs of modern slavery when engaging with prisoners' (HMPPS, 2023, p. 4). To achieve this, prisons are required to designate a competent person as a point of contact for modern slavery (single point of contact—SPOC). Furthermore, prisons must 'ensure that FROs are facilitated to complete referrals to the NRM' and the Guidance specifies that '[a]ll potential and confirmed victims (...) should be given access to legal and other support services' (HMPPS, 2023, p. 5). The Guidance emphasises the importance of a 'trauma informed approach' when conducting interviews or speaking with potential or confirmed MSHT victims and asking sensitive questions (HMPPS, 2023, p. 17). These requirements correspond to obligations contained in the ECHR and ECAT, and if adequately discharged, would make practices in prisons in England and Wales compliant with international law.

Challenges with Protecting Survivors of MSHT in the UK Prisons in Practice

It is difficult to know the precise number of MSHT survivors currently in prison in the UK, as there are no formal government statistics available.¹⁴ The empirical research conducted in 2022–23, on which this article is based, suggests that there is a high likelihood of there being many unidentified victims of modern slavery currently in prisons.¹⁵ This calls for particular attention given their increased vulnerability due to a prison setting that many survivors compare to the experience of trafficking itself because of the environment that replicates the experience of unfreedom previously

Footnote 11 (continued)

slavery: Crown Prosecution Service (2024). Similar guidance has been embedded 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. See Crown Office & Procurator Fiscal Service (2016) and updated 2024. See also Public Prosecution Service for Northern Ireland (2022).

¹² For further discussion around the subject of prisons as first responder organisation, see Jovanović et al., (2024).

¹³ The HMPPS Modern Slavery Guidance maintains that prison staff who suspect modern slavery survivors 'should' do *inter alia*: Discuss concerns with the individual using an interpreter, if English is not their first language; Have conversations in a safe space and be patient, as the individual is likely to have difficulties in disclosing; Gather as

Footnote 13 (continued)

much information as possible to convey to the FRO. The Guidance furthermore asks prisons to ensure that a referral to Healthcare is made; the FRO is provided with the details of the prison's competent designated person to liaise with the FRO; the FRO's interview with the potential victim is prioritised and facilitated efficiently, making use of available methods including using video link, visits hall, phone calls, iPads/Teams and ensuring official translation services or other adaptations are used and organised as necessary; all relevant prison departments are made aware of the referral, including Security and Safety teams where relevant.

¹⁴ The Home Office has previously published some figures regarding NRM referrals for foreign national offenders in remand or custody. While this provides further support to the statement that the presence of survivors of modern slavery in prison is not a fringe concern, these figures also do not amount to a fully developed picture of the scale of this issue. They do not, for example, capture the prevalence of UK nationals who are in prison and have been referred to the NRM. See UK Home Office (2021). See also Norris (2024).

¹⁵ SPOC survey, discussed more extensively in the research project report Jovanović et al., (2023).

experienced as well as formal pressures to engage in very low paid work¹⁶ and the informal pressures to smuggle and trade in illicit contraband.

According to the official UK Home Office statistics on ‘Modern Slavery: National Referral Mechanism and Duty to Notify’ published in (2023), criminal exploitation was the second most common form of exploitation reported to the National Referral Mechanism (NRM) in 2022. Although victims of criminal exploitation may benefit in theory from the non-punishment principle outlined above, which is given effect in domestic law by a defence established under Section 45 of the Modern Slavery Act (2015), it is unknown to what extent exactly survivors have been able to avail themselves of this defence in practice.¹⁷ However, for those who could not benefit from this principle—either because they did not meet the formal requirements or they were not aware of it due to different reasons—the empirical research revealed numerous practical challenges hampering their access to other available protection in prison.¹⁸

For example, a lack of information sharing between different authorities resulted in cases where prison staff were unaware of survivors who had previously been referred to the NRM being in their care. In addition, a lack of trust in authorities and a lack of privacy in prisons negatively affected survivors’ preparedness to disclose their experience to prison staff. Accordingly, while the HMPPS Guidance represents an important first step in attempting to overcome some of these difficulties, an array of challenges continue to affect the ability of this subset of survivors to access protection guaranteed by international law. The challenges identified in the research study relate to the following broad areas of practice: a) identification and making referrals to the NRM from prison; and b) provision of adequate support and assistance in prison (including facilitating their access to support following bail and post-release).¹⁹

Identification and Making Referrals to the NRM from Prison

A necessary starting point to ensuring the adequate provision of support to survivors of MSHT in prison and following their release is that they be identified and that relevant authorities are aware of their status as victims. Empirical

research identified numerous challenges that create barriers to disclosure and identification in the prison environment. These included: the absence of a systematic information sharing policy between actors involved in the NRM process and prisons; a lack of private spaces in prisons for FROs to conduct interviews with potential survivors; as well as a general mistrust of authorities among survivors due to previous negative experiences. Some prison staff and those working with survivors in the prison environment noted cases of only becoming aware that an individual in their care had been referred to the NRM prior to their incarceration when a decision letter was received (Stakeholder Interviews 33 and 37 (HMPPS SPOC England) and 41 (NGO staff seconded to police in Wales at the time of interview) in Jovanović et al., (2023).

There was also a shared sense among survivors of not having been supported or believed at different points throughout their interactions with the criminal justice system:

The police they seemed rather angry with me, like I had wasted their time, and wasted lots of money.²⁰

I mean, if they ended up in prison, for a reason or another it means that they weren’t supported, because I think that’s the quickest way—for us, being victims, it’s the quickest way to put us into prison rather than support us.²¹

These negative experiences with authorities and the sense of not being supported or believed were then also evident in survivors interviewed who expressed their hesitancy to disclose their experience to prison staff. One survivor (Survivor Interview 04 in Jovanović et al., 2023, p. 35) stated, for example, that:

You’re just seen as a prisoner. For them you’re a criminal—you serve your sentence, and then you go. There’s not a system put into place to really understand.

At the time the research was conducted there was a shared sense among many research participants that prison staff had received insufficient training on how to recognise the indicators of modern slavery and that the overall awareness around this issue needed to be improved. It is difficult to establish

¹⁶ See Special Edition of the European Labour Law Journal 2024, Vol. 15(3), which examines critically the labour and social security rights of working prisoners and immigration detainees, focusing primarily on European national legal orders and European and International Labour Organisation (ILO) standards.

¹⁷ This is not routinely recorded by the Crown Prosecution Service, police or the courts.

¹⁸ Discussed further in Jovanović et al., (2023), section V.

¹⁹ Ibid. Section V of the report.

²⁰ Interview conducted with a modern slavery survivor who was previously imprisoned. The interview was part of empirical research conducted in 2022/23 by the authors of this article. A report with the detailed findings of the research can be found here: Jovanović et al., (2023).

²¹ Interview conducted with a modern slavery survivor who was previously imprisoned. The interview was part of empirical research conducted in 2022/23 by the authors of this article. A report with the detailed findings of the research can be found here: Jovanović et al., (2023).

the exact state of training that is received by prison staff because there is no centralised training on modern slavery for prison staff across the UK. Interviews with prison staff revealed some isolated examples of good training and awareness raising initiatives delivered in partnership with NGOs but indicated that, at least in 2022/23, such training lacked consistency and a systematic approach across UK prisons (Jovanović et al., 2023). This is not surprising considering that the research was conducted in 2022/23 and the Guidance which lays out that ‘Modern slavery should be included into the establishments training plan’ and ‘Awareness and training sessions should be explored with Local and National charities and providers and Trauma Informed Practice training should be considered for all staff’ (HMPPS, 2023, p. 19) was only published in 2023. This also means that the SPOCs who are involved in the organisation of such training and awareness raising only started their roles during the research.

The difficulties of identifying MSHT survivors in prison seemed to be further compounded by the fact that prisons, unlike other actors in the criminal justice system, such as the police, are not FROs and are thus unable to make referrals to the NRM themselves. With a lack of capacity among first responder support organisations operating within the prison system to efficiently address the caseload burden this was perceived as leading to substantial delays (Jovanović et al., 2023, pp. 38–41).

Provision of Adequate Support and Assistance in Prison

Even when survivors of MSHT in prison have their status formally recognised by receiving a positive conclusive decision through the NRM system, this does not automatically enable them to access the same support available to survivors in the community setting. Instead, as explained in the HMPPS Guidance, ‘where a potential or confirmed victim is within a prison, the existing services within the establishment will provide access to support services as required,’ (HMPPS, 2023, p. 13). Such support is therefore contingent on the existing services and available resources in each prison establishment.

The empirical research found that these existing services were often subject to resource constraints, were not designed to meet the unique needs of MSHT survivors, and that availability of services varied greatly among the different prison establishments. Survivors themselves, as well as those working with organisations supporting survivors, pointed to the lack of trauma informed approaches and raised concerns that the support available did not adequately address the complex mental health needs stemming from experiences of exploitation (Jovanović et al., 2023, see also Katona et al., 2015). The difficulty of providing adequate mental health support in environments that replicate the experience of unfreedom

previously experienced by survivors was highlighted by those providing support to MSHT survivors in prison:

I would say that prison, the experience of being locked up, the experience of being controlled by people absolutely parallels the entrapment that they experienced within their trafficking. (Stakeholder Interview 12 (Forensic Psychologist, England) in Jovanović et al., (2023))

[S]urvivors who have experienced abuse and trauma experience a profound loss of their sense of safety and security and a reliably safe environment is a prerequisite for recovery. (Stakeholder Interview 25 (Solicitor, England) in Jovanović et al., (2023))

A MSHT survivor also reflected on their experience of being in prison and the detrimental impact on their mental health:

You won’t be able to eat at times, to be honest, and it makes you depressed, and before you know it you’re lean, you’re getting sick. And honestly, it’s not a good place to be to be honest. Prison, detention, it’s not a good place, it changes some part of you definitely. Mentally, it’s traumatised me, because when you go to prison, it messes up your brains. Because you’re not yourself anymore. The minute you think about that it traumatises you. You just feel depressed, and sad.²²

Furthermore, those mental health resources which do exist may be overburdened due to the high demand for such services that also exists among the general prison population (Criminal Justice Joint Inspection, 2021; National Audit Office, 2017).

It should also be noted that the NRM is a consent-based system and there may be different reasons why MSHT survivors in prison may not consent to be referred—for example, a lack of trust in the system following previous negative interactions with authorities or a perception that a referral into the NRM could negatively affect an ongoing asylum claim. In that light, the passing of the Nationality and Borders Act 2022 (NABA) and the Illegal Migration Act 2023 (IMA) are likely to negatively impact on efforts to strengthen the identification and provision of support to survivors of modern slavery in prison—as will be discussed in the following section.

²² Interview conducted with a modern slavery survivor who was previously imprisoned. The interview was part of empirical research conducted in 2022/23 by the authors of this article. A report with the detailed findings of the research can be found here: Jovanović et al. (2023).

The Erosion of Migrants' Rights in the UK and the Impact on Survivors of MSHT

Any positive developments towards a better identification and support of MSHT survivors in prisons were overshadowed by increasingly restrictive immigration legislation adopted in the UK in the period between 2021 and early 2024 by the previous Conservative Government. These legal and policy measures sought to address what the Government called 'the challenge of illegal migration'²³ (UK Secretary of State for the Home Department, 2021, p 33), 'the broken asylum system' (UK Home Office & Braverman, 2022) and the alleged 'rising abuse of the National Referral Mechanism (NRM)' (UK Secretary of State for the Home Department, 2021, p 33). Accordingly, the UK passed the Nationality and Borders Act (NABA) 2022, the Illegal Migration Act (IMA) (2023), and signed the Treaty with Rwanda accompanied by the Safety of Rwanda (Asylum and Immigration) Act 2024. The Rwanda Treaty and the Safety of Rwanda (Asylum and Immigration) Act were meant to operationalise the IMA by facilitating the removal from the UK to Rwanda of those without the right to enter or remain.

These pieces of legislation have attracted considerable scrutiny from both domestic and international actors and many provisions of these Acts were considered to be incompatible with the UK's international obligations.²⁴ In particular, modern slavery provisions in the NABA, the IMA, and the Safety of Rwanda Act represent significant changes to how modern slavery victims are identified and supported in the UK. Accordingly, the HMPPS Guidance and efforts by the prison service in England and Wales must be considered

against the political and legal landscape, which effectively creates a "hierarchy of victimhood" and excludes a large subset of survivors from the protection to which they are entitled under international law (Jovanović, 2023a, 2024b).

It must be pointed out however that to date not all provisions pertaining to modern slavery in NABA and none of the modern slavery provisions in IMA have entered into force. In addition, the new Labour Government has ended the migration and economic development partnership with Rwanda, although it has not yet set out its detailed plans in respect of the Safety of Rwanda (Asylum and Immigration) Act 2024 (UK Parliament, 2024b; and UK Parliament, 2024c). It therefore remains to be seen whether the new Government will seek to repeal or not implement the provisions of the NABA and IMA considered incompatible with human rights law, including the UK's international legal obligations.

The following subsections consider two key measures that affect MSHT survivors in the UK, including those in prisons, which result from the recent changes in the immigration legislation: public order disqualification contained in Section 63 NABA, and the removal of confirmed and potential survivors from the UK without completing victim identification processes, providing relevant support, and considering the risk of re-trafficking following removal.

Public Order Disqualification

The Nationality and Borders Act (NABA) 2022 introduced in Section 63 a public order disqualification, which disqualifies from protection guaranteed under domestic modern slavery legislation a range of individuals, including those who are sentenced to a term of imprisonment of at least 12 months.²⁵ This disqualification was then extended through Section 29 of the Illegal Migration Act (IMA) 2023, which is not yet in force, to individuals sentenced to *any* period of imprisonment or those 'liable to deportation from the United Kingdom under any provision of, or made under, any other enactment that provides for such deportation'. These developments therefore risk excluding from protection victims compelled to commit criminal offences by their traffickers/exploiters who are prosecuted and convicted due to their lack of knowledge of the availability of the defence from Sect. 45 MSA, as well as those victims convicted for immigration-related offences (Independent Anti-Slavery Commissioner, 2021).

The consequence for individuals deemed to be 'a threat to public order' is the denial of victim status and resulting

²³ This article refers throughout to 'irregular migration' rather than 'illegal migration'.

²⁴ For further discussion on the scrutiny attracted by these pieces of legislation refer to UK House of Commons, House of Lord Joint Committee on Human Rights (2021)—Legislative Scrutiny: Nationality and Borders Bill (Part 5)—Modern Slavery; UK House of Commons, House of Lord Joint Committee on Human Rights (2023d)—Legislative Scrutiny: Illegal Migration Bill; UK House of Commons, House of Lord Joint Committee on Human Rights (2023a)—Legislative Scrutiny: Illegal Migration Bill, Written Evidence by GRETA; UK House of Commons, House of Lord Joint Committee on Human Rights (2023b)—Legislative Scrutiny: Illegal Migration Bill, Written Evidence by the Anti-Trafficking Monitoring Group; UK House of Commons, House of Lord Joint Committee on Human Rights, Legislative Scrutiny: Illegal Migration Bill (2023c)—Written Evidence by the International Organization for Migration; UK House of Commons, House of Lord Joint Committee on Human Rights (2024)—Safety of Rwanda (Asylum and Immigration) Bill; Communication from the UN Special Rapporteurs on trafficking in persons, especially women and children; human rights of migrants; contemporary forms of slavery, including its causes and consequences; & promotion and protection of human rights and fundamental freedoms while countering terrorism (2021); UNHCR (2022); Anti-Slavery International (2022); Jovanovic (2024b).

²⁵ For the analysis of the available data on public order disqualification decisions in the period between January and June 2023, see International Organization for Migration (2023).

protections guaranteed by both domestic and international law (Sects. 63 (2) and 64 NABA). 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’ (NABA Explanatory Notes, ch 36, para 624). Yet, neither the NABA nor Explanatory Notes clarified the notion of such ‘threat’. Moreover, the exclusion applies to anyone sentenced to a term of immediate imprisonment, regardless of the seriousness of such an offence or the length of their imprisonment, in contrast with the claim by the UK Government that Section 63 NABA applies to ‘individuals who have been convicted of the most serious offences’ (Communication from the United Kingdom concerning the case of *VCL & AN v the United Kingdom*, 2024). The adoption of this provision has sparked broad international criticism of being incompatible with the UK’s international human rights obligations (UK House of Commons, House of Lord Joint Committee on Human Rights, 2021; Jovanović, 2024a) and has led to domestic legal challenges (Matrix Chambers, 2024). At the time of writing, the effect of public order disqualification provisions on the ongoing work of the HMPPS to develop a comprehensive policy on identification and support of modern slavery survivors in prisons remains unclear.

The Removal of Survivors of MSHT from the UK Before they are Identified and Protected

In addition to disqualifying people sentenced to imprisonment governed by Sect. 63 of the NABA, the IMA 2023 disqualifies from protection anyone who has arrived in the UK ‘illegally’. It does so by creating a duty for the Secretary of State to remove individuals who have entered or stayed in the UK unlawfully, which applies regardless of whether they claim to be a victim of MSHT.²⁶ As a result, such individuals are excluded from the NRM and denied any protection and assistance. These exclusions also apply to individuals who entered or stayed in the UK illegally *against their will*, because they were trafficked and exploited.

For instance, under Section 22 of the IMA, individuals who meet the conditions in Sect. “Obligations of States Towards Survivors of MSHT under International Law and the Role of Prisons” IMA (which refer to an individual’s

entry into the UK without legitimate leave to enter or remain and arrival in the UK not directly from a country in which they face persecution on the grounds of their race, religion, nationality, membership of a particular social group or political opinion) will automatically be removed even if there are reasonable grounds to believe that they are victims of MSHT and before the victim identification process has been completed. In addition to terminating victim identification process, Sections. 23–25 IMA expressly exclude such *suspected* victims from assistance and support measures granted by the modern slavery legislation throughout the UK. These provisions violate the clear obligation stemming from Article 4 ECHR and Articles 10 (2), 12 (1) and (2), and 13 of the ECAT to identify and protect *every* victim of modern slavery before their removal to a third country or return to the country of origin could be considered (Jovanović, 2023a).²⁷

In addition to a duty to identify and protect every victim of MSHT, States have a duty to *prevent* exploitation and protect *potential* victims, which includes also the assessment of the risk of re-trafficking when making decisions to repatriate or remove them. Therefore, in the landmark *Rantsev* case, the ECtHR ruled that Article 4 of the ECHR ‘may, in certain circumstances, require a state to take operational measures to protect victims, or *potential* victims, of trafficking’ (*Rantsev v Cyprus and Russia*, 2010, para 286, emphasis added). The test outlined by the Court, which has been repeated in all subsequent caselaw on human trafficking (e.g., *CN v the United Kingdom*, 2012, para 67; *VCL and AN v United Kingdom*, 2021, para 152), expressly confirms that the protective ambit of Article 4 ECHR covers not just those who already are victims of trafficking, but also those who are ‘at real and immediate risk of being trafficked or exploited’. Accordingly, if there is a credible suspicion (‘reasonable grounds to believe’) that a person ‘was at real and immediate risk of being trafficked or exploited’, the obligation to protect them from further harm would warrant an assessment of that risk before they could be removed. The Council of Europe body in charge of monitoring States’ compliance with ECAT (GRETA, 2020, para 32) has therefore expressly stated that:

The removal of a person to a territory where they are at risk of being trafficked or re-trafficked would expose the person to a risk of being subjected to a violation of Article 4 of the European Convention on Human Rights.

This obligation is further reinforced by Article 16 of ECAT, which allows for a repatriation of identified victims

²⁶ Sect. “The Erosion of Migrants’ Rights in the UK and the Impact on Survivors of MSHT”(1)(c), and Sections 22–25 of the IMA, once in force, will expressly exclude such individuals from protection under modern slavery law and provide for their removal. Such disqualification from protection is subject to a limited exception for those co-operating with law enforcement authorities (Sections 22 (3), 24 (3) and 25 (3) IMA). However, this exemption will prove illusory in practice, because victims will have to make decisions about cooperating with law enforcement before being identified and provided relevant support and assistance. For a further discussion of these provisions, see Jovanović, (2023b).

²⁷ The Explanatory Report to ECAT makes it clear that ‘[t]he words “removed from its territory” refer both to removal to the country of origin and removal to a third country’. See Council of Europe (2005), para 133; GRETA, (2015), p. 40.

of MSHT only after an assessment of the impact of such return on ‘the rights, safety and dignity of that person’, including the risk of re-trafficking.²⁸

To enable removals of ‘illegal’ migrants envisaged by the IMA, the UK signed the UK-Rwanda Treaty 2023, which further aggravated the UK’s defiance of international law (Jovanović, 2024b). Following the ruling of the UK Supreme Court, which held that removing individuals to Rwanda would be unlawful and in breach of the UK’s international legal obligations (*R (on the application of AAA (Syria) and others) v Secretary of State for the Home Department*, 2023), the previous UK Government adopted the Safety of Rwanda (Asylum and Immigration) Act 2024. The Act introduced merely weeks after this ruling declared Rwanda as a ‘safe’ third country for the purposes of removing people from the UK.²⁹ The new UK Government has since ended its partnership with Rwanda and committed to undertaking a legislative review of immigration legislation (UK Parliament, 2024c; UK Parliament, 2024b). Notably, in her comments during the debate in the House of Commons on 22 July 2024, the Home Secretary reiterated the new Government’s commitment to acting compatibly with international law when it comes to immigration policy:

As long as it meets proper standards in terms of international law, we should be serious about what it is that works in order to tackle the complex problems that we face (UK Parliament, 2024a).

It remains to be seen whether such an overhaul of the immigration legislation will also include the modern slavery provisions of the IMA and NABA.

²⁸ GRETA emphasised that this, besides the risk of being subjected to torture or to inhuman or degrading treatment or punishment, also refers to the risk of being re-trafficked: ‘A full and competent risk assessment must be carried out before anyone is returned. Risk assessments should include an assessment of at least the risk of re-victimisation and re-trafficking, and options for reintegration and societal participation, including access to the labour market and education,’ GRETA (2020), para 44; see also GRETA (2012), p. 6, para 312; GRETA (2013), p. 16, para 198; GRETA (2014), p. 18, para 175.

²⁹ The Act requires every decision-maker to conclusively treat Rwanda as a safe country (Section 2(1) of the Act) meaning a country ‘to which persons may be removed from the United Kingdom in compliance with all of the United Kingdom’s obligations under international law that are relevant to the treatment in that country of persons who are removed there,’ Section 1(5)(a) of the Act.

Conclusion: Giving with One Hand and Taking Away with the Other

In its third evaluation report for the UK, the Council of Europe’s expert body in charge of monitoring States’ compliance with ECAT expressly referred to prisons by noting that ‘insufficient attention is being given to the issue of trafficking among the prison population’, although it did not elaborate any further on what sufficient attention would entail (GRETA, 2021, para 172). The evaluation report also mentioned that ‘prison officers are not First Responders and they need clear guidance and training in this respect’ (GRETA, 2021, para 265). Still, the report failed to acknowledge that there is currently no international guidance on the adequate role of prisons in identifying and supporting victims or provide instruction on how responsibilities of prisons in the UK could be discharged.

Similarly, comparative review of other domestic jurisdictions reveals that other States generally do not provide specific instructions to prisons on how to identify and protect survivors of MSHT, nor do they publish data on their numbers. While there are efforts to identify and support MSHT survivors in immigration detention, national action plans to combat MSHT in most jurisdictions do not address the identification or support of survivors of modern slavery in prisons.³⁰ This shows that the recent efforts in the UK to offer better protection and identification of MSHT survivors in prisons are indeed pioneering. The 2022 HMPPS Modern Slavery Guidance for Prisons in England and Wales, and ongoing efforts to develop further overarching HMPPS guidance for prisons, probation, and youth custody services in England and Wales therefore represent a unique and groundbreaking attempt to address this issue in a comprehensive way.

However, parallel to these efforts, the UK’s immigration legislation has sought to disqualify from protection any MSHT survivor who has been sentenced to a term of imprisonment and to remove both suspected and confirmed victims of MSHT without regular immigration status to Rwanda and other countries before they are identified and offered protection. These legal and policy developments further exacerbate the lack of trust and fears survivors of MSHT have towards authorities in the UK, which in turn hampers their identification and support as well as any law enforcement actions against the perpetrators. These problems will only increase if the legislation brought forward by the previous Conservative Government are not repealed.

³⁰ Exceptions identified are Italy, Austria, and the US which mention prisons in their anti-trafficking policies, although these are not comprehensive (Jovanović et al., 2023, pp. 29–31).

Accordingly, the UK's self-proclaimed role as the global leader on modern slavery is less convincing when one considers its broader regulatory environment and crackdown on the rights of migrants. In such circumstances, and with general problems of under resourcing and overcrowding in prisons, it is doubtful whether some of the most vulnerable survivors of MSHT—those who end up in custody and those without regular immigration status—are adequately cared for. The new UK Government has pledged to reform the modern slavery system by 'putting survivors first' and it remains to be seen whether such reforms will benefit all categories of survivors (UK Home Office & Phillips, 2024).

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Data Availability Due to the sensitive nature of this research study, the participants did not provide written consent for their data to be publicly shared and supporting data is not available.

Declarations

Conflict of interest There is no conflict of interest with regards to this paper on behalf of any of the three authors.

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