





# Remedies for claimants in limbo

Ronan Toal, Garden Court Chambers

11<sup>th</sup> October 2023



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# The duty to remove

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IMA s. 2 creates a duty for the Secretary of State to ‘make arrangements for the removal of a person from the UK’ if the person meets four conditions:

1. The person entered or arrived in the UK in some way unlawfully, e.g. without leave to enter or in breach of a D.O: s. 2(2).;
2. Entered or arrived on or after the day when the Act was passed (20.7.2023): s. 2(3);
3. The person did not come directly from a country in which the person’s life and liberty were threatened for a refugee convention reason: s. 2(4);
4. The person requires leave to enter or remain in the UK but does not have it: s. 2(6) (and for this purpose, leave granted as a UASC is to be disregarded: s. 2(7)).



# Inadmissible claims

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If the person makes a protection claim or a human rights claim, the Secretary of State must declare the claim inadmissible: s. 5(2).

- But note that it is only human rights claims that removal from the UK ‘to a country of which the person is a national’ or that issued a passport or id card that are to be treated as inadmissible: s. 5(5)
- A human rights claim vis-à-vis a third country is not inadmissible, but refusal of the claim is not appealable: s. 41(4).
- A claim that removal from the UK to any country in the world would breach the person’s human rights (e.g. because the person has family / private life in the UK or the UK has ECHR art 4 obligations to permit the person to stay) is not one that can be declared inadmissible.



# Albanian and EU claimants

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- Nationality, Immigration and Asylum Act 2002, s. 80A

(1) The Secretary of State must declare an asylum claim or a human rights claim made by a person who is a national of a state listed in section 80AA inadmissible.

(2) A claim declared inadmissible under subsection (1) cannot be considered under the immigration rules.

(3) A declaration under subsection (1) ... is not a decision to refuse the claim and, accordingly, no right of appeal under s. 82 ... arises



# Appeal rights

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- A declaration that a claim is inadmissible is not appealable under NIAA s. 82
- A decision on a HR claim of a kind that cannot be declared inadmissible is appealable under Nationality, Immigration and Asylum Act 2002, s. 82
- Once there is an appeal under s. 82, the T can consider ‘any matter’ ‘relevant to the substance of the decision’: NIAA s. 85(4).
- Arguably at least, that would include the question whether the person is a refugee or entitled to HP



# Consideration of inadmissible claims

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A protection or human rights claim declared inadmissible cannot be considered under the immigration rules: s. 5(3)

But see IMA s. 30, introducing new s. 8AA into IA 1971 which applies to ‘a person who has ever met the four conditions in s. 2’ as if condition 2 was the person entered or arrived on or after 7.3.2023

s. 8AA(4) says:

The Secretary of State may give the person limited leave to remain in the United Kingdom if – (a) the Secretary of State considers that failure to do so would contravene the United Kingdom’s obligations under the Human Rights Convention or any other international agreement to which the United Kingdom is a party



# Interim remedies

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## Section 54

(1) This section applies to any court proceedings relating to a decision to remove a person from the United Kingdom under this Act (whether the proceedings involve consideration of a convention right or otherwise)

(2)...

(3) The court or tribunal may not grant an interim remedy that prevents or delays, or that has the effect of preventing or delaying, the removal of the person from the United Kingdom in pursuance of that decision





# Thank you

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## Illegal Migration Act:

### *Unaccompanied Children & Age Assessments*

Ollie Persey, Garden Court Chambers

11 October 2023



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# Contents

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- *Recap*: ‘Status quo’ for age assessments
- Nationality and Borders Act 2022
- Illegal Migration Act 2023
- Tactics and strategy



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***The Fundamentals:  
Outline of Age Assessment Law***



## Age Assessments, what happens now?

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- Home Office age assessment - upon port of entry/ seeking asylum
- Local authority age assessment - referral to children's services

### *Why does age matter?*

- Detention/removal, e.g. current protections in the Immigration Act 2014
- Children Act 1989
- Children and Families Act 2014
- Regulated/unregulated accommodation: The Care Planning, Placement and Case Review (England) (Amendment) Regulations 2021 (SI 2021 No. 161)



## Merton-compliant age assessments

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### ***B v Merton LBC* [2003] EWHC 1689 (Admin)**

- Guidelines for assessment of age by LAs
  - Must be conducted by two qualified and experienced social workers
  - Comprehensive and holistic assessment
  - Neither physical appearance nor demeanour alone are determinative of age
  - Must put adverse inferences to a YP so they can clarify / rebut matters held against them (*R (FZ) v LB Croydon* [2011] EWCA Civ 59)
  - YP should receive the benefit of the doubt
  - Fairness is key: may have appropriate adult



## Age assessment law: outline

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### Age as a precedent fact: R (A) v LB of Croydon [2009] UKSC 8

- Age is an objective fact which admits of only one answer
- Therefore, age assessment JRs are *\*not\** like normal JRs
  - Do not need to show conventional error of law in LA's approach (can still plead same, but do not need to)
  - Helpful to show that the LA's assessment is flawed as this will reduce weight to be placed on it



## Merton-compliant age assessments

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- LA must give adequate reasons for concluding YP is not a child. R (AS) v LB of Croydon [2011] EWHC 2091 (Admin):

*“(9) The conclusions reached by the assessors should be explained with reasons which, although they may be brief, should explain the basis of the assessment and any significant adverse credibility or factual finding.*

*(10) The reasons should be internally consistent and should not exhibit any obvious error or inadequate explanation for not accepting any apparently credible and consistent answers of the child”.*





## Merton-compliant age assessments

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## Court's approach to age assessment JRs

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### Physical appearance and demeanour unreliable

- *NA v LB of Croydon* [2009] EWHC 2357 (Admin):  
*‘physical appearance alone is a notoriously unreliable basis for assessment of chronological age. The extensive literature and guidance on the subject says so’.* (§27)
- *AM v Solihull*: “almost all evidence of physical characteristics is likely to be of very limited value. ... There is no clear relationship between chronological age and physical maturity in respect of most measurable aspects of such maturity” (§15) (also includes helpful comments re demeanour at §19)



***Resets what is required for a “fair process” in age assessments***

A lawful age assessment decision must be the product of a fair procedure. Swift J revisited *R (B) Merton L.BC [2003] 4 All ER 280* and the elements of a fair procedure

(5510-11):

(1) When a LA needs to determine whether a person is a child for the purposes of its duties under the Children Act 1989, there is no burden of proof and no assumption that a person is a child or an adult.

(2) The assessment decision must be based on a Tameside duty of enquiry: the LA "*Must take the steps reasonable in the case in hand to obtain the information needed to take the decision it is required to take*".

(3) Where further enquiry requires an interview: (i) interviews must be undertaken fairly, (ii) credibility issues dealt with head-on, (iii) where a person is considered to be lying, that must be put to them, and an opportunity given to respond.

(4) What is fair depends on the particular circumstances of each case; there is no strict set of requirements and no "check-list" (as in *V u Home Office [2014] EWHC 2483 (QB)* and *R (AB) u Kent County Council (2020)* PTSR 746): fairness in this context, as in any other, is a matter of substance and not simple form" (513)

The distinction between 'short-form' age assessments and full Merton-compliant assessment is a "*legally irrelevant*" distinction (531) and people can reasonably disagree on the limits of the class of an obvious case (542).



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# *Nationality and Borders Act 2022*



## **Section 49. Interpretation of Part etc**

### ***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
- National Age Assessment Board - newly constituted – consisting of HO employed social workers



**Section 50:** Persons subject to immigration control: referral or assessment by local authority etc.

- 28 April 2022 - Present

***An age assessment under section 50 applies when:***

- (i) An LA needs to know the age of an age-disputed person, OR
- (ii) The SSHD notifies the LA that it has doubts as to the age of an age-disputed person that the LA has exercised functions under the Children Act 1989.

***When that occurs, the LA must either:***

- (i) Refer the age disputed person to a designated person (i.e. the NAAB)
- (ii) Conduct an age assessment themselves
- (iii) Confirm that an age assessment is not necessary



## Age Assessment: Nationality and Borders Act 2022 Pt 4

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### Section 50: continued

- When the 'designated person' conducts the age assessment on behalf of the SSHD, the outcome is binding on the LA but not the other way around.
- Section 50(4): When the LA conducts an age assessment or confirms that one is necessary, it must provide evidence to the SSHD (on request) so that the SSHD can 'consider the decision'

### *Comment*

- Unclear what happens when the LA give the age disputed person an age that the SSHD disputes. Does the SSHD have the power to direct the NAAB to conduct a further assessment of age/take over the decision?
- BASW – grave concerns over institutional pressure on social workers
- Unclear what 'consider' the decision means.
- Standard of proof - balance of probabilities
- What about burden of proof? Under UNCRC - child is supposed to be given the benefit of the doubt - no assumption whether a child or an adult.



### **Section 51:** Persons subject to immigration control: assessment for immigration purposes.

- 31 March 2023 - Present
- Section 51 applies when the SSHD needs to make a decision about 'immigration functions' in relation to an age-disputed person.
- As. 51 assessment can be undertaken where s. 50 is not relevant (unclear how) OR before the LA has referred the individual to the SSHD/ SSHD doubts the judgment of the LA.
- S. 51 is binding on the SSHD for 'immigration functions'

### ***Comment***

- Section 51 is not binding regarding LA functions on the face of the Act - does this mean the LA could find the individual a child but the SSHD an adult?





### Section 52 - Use Of Scientific Methods

- 28 April 2022- Present
- S. 52 permits the SSHD to make regulations specifying scientific methods that may be used.
- S. 52(2) provides a lot of detail on what these may constitute, e.g. 'imaging technology', analysis of DNA derived from cells, saliva, other samples.  
SSHD must 'seek specific advice' before deciding that a method is appropriate.
- Scientific methods may only be used with 'appropriate consent' BUT **s. 55(7) provides:**
- "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 specific scientific method".
  - *Amended by Illegal Migration Act: section 56*

### Comment

- What is 'imaging technology' (x-ray)?
- What does 'seek scientific advice' mean in practice? Who has to be consulted?
- What about where there is no scientific consensus?
- Is the duty to seek and act in accordance with scientific advice or just seek it?



***Interim report October 2022***

- **Recommendation 4:** Biological age assessment can be carried out using an appropriate combination of dental and skeletal methods; assessment of development of the third molar using radiography, radiography of the hand/wrist or MRI of the knee, and MRI of the clavicle.
- **Recommendation 5:** The use of ionising radiation must be limited, with the ultimate aim of eradicating its use. Continuing research into the use of non-ionising imaging, such as MRI, should be supported.
- **Recommendation 6:** Where possible, the radiation dose should be limited through the use of recent pre-existing images, providing consent for the use of these images for age assessment had been freely obtained.
- **Recommendation 7:** Further research into the impact of socioeconomic factors and their effect on growth and maturational timing, particularly those factors likely to be experienced by UASC, should be supported.



## Not yet in force: Nationality and Borders Act 2022 Pt 4

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### **“Possible changes to the First-tier Tribunal (Immigration and Asylum Chamber) Rules and the Upper Tribunal Rules arising from Nationality and Borders Act 2022”**

“The purpose of this consultation was to seek views on possible changes to the First-tier Tribunal (Immigration and Asylum) Rules and the Upper Tribunal Rules arising from the Nationality and Borders Act (NBA) 2022.

At present the government no longer intends, at least in the short term, to bring the relevant provisions of the NBA into force. Since the rules that the TPC was preparing to make arose out of the requirements of the NBA, the TPC concluded that it would be inappropriate to proceed with the rules.

The TPC has been told that the provisions in the NBA may be brought into force at a future date. If this occurs, the TPC will consider what implications this has for the First-tier Tribunal (Immigration and Asylum) Rules and Upper Tribunal Rules. The TPC has concluded that it is still appropriate and important to publish this consultation reply and associated Keeling schedules.



## Not yet in force: Nationality and Borders Act 2022 Pt 4

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### **Section 54/55:** Appeals relating to age assessments

- Date not yet set
- Key point: statutory right of appeal created - to the First-tier Tribunal.
- A date of birth must be assigned
- Where an individual leaves the UK - appeal is abandoned
- Pending the outcome of the appeal - YP to be treated as claimed age.
- FTT determination binding on LA and SSHD.

### **Section 56**

- Date not yet set
- Where 'significant new information' comes to light, a fresh age assessment must be undertaken.
- Test - 'realistic prospect that it would change the outcome of the original assessment of age.'

### **Section 57**

- Date not yet set
- Legal aid for age assessments.



# Home Office Guidance ‘Assessing Age’

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## Updated caseworker guidance – V6.0, 31 March 2023

*“This document has been amended to take into account the commencement of certain provisions of the Nationality and Borders Act 2022, including the introduction of the National Age Assessment Board (NAAB) on 31 March 2023. The NAAB is located within the Home Office and will primarily consist of expert social workers who will have responsibility for conducting age assessments on age disputed persons, upon referral from a local authority in England, Wales, Scotland or Northern Ireland, or the Home Office”*

Link:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1140168/Assessing\\_age\\_March\\_2023.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1140168/Assessing_age_March_2023.pdf)

See also: ‘Streamlined asylum processing for children’s casework, V2.0 (25 July 2023):

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1175967/Streamlined\\_asylum\\_processing\\_for\\_childrens\\_casework.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1175967/Streamlined_asylum_processing_for_childrens_casework.pdf)



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# *Illegal Migration Act 2023*



## Changes to Age Assessment Process in Illegal Migration Act 2023

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**Section 57** sets out changes to age assessment processes, including removal of the right to appeal a decision, and allows the removal of a person while any judicial review challenge is ongoing. Courts and tribunals are told that they may only decide that the decision was wrong in law and not that it was wrong as a matter of fact.

**Section 58** threatens regulations to set out the consequences of people withholding consent for scientific age tests, which may include treating the person as though they are over 18.



# Section 57 Illegal Migration Act 2023

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## Section 57 Decisions relating to a person's age

- (1) This section applies if a relevant authority decides the age of a person ("P") who meets the four conditions in [section 2](#) (duty to make arrangements for removal), whether that decision is for the purposes of this Act or otherwise.
- (2) If the decision is made on an age assessment under [section 50 or 51](#) of the [Nationality and Borders Act 2022](#), P may not bring an appeal against the decision under [section 54\(2\)](#) of that Act.
- (3) Subsections (4) and (5) apply if P makes an application for judicial review of—
  - (a) the decision mentioned in subsection (1), or
  - (b) any decision to make arrangements for the person's removal from the United Kingdom under this Act which is taken on the basis of that decision.
- (4) The application does not prevent the exercise of any duty or power under this Act to make arrangements for the person's removal from the United Kingdom.**
- (5) The court or tribunal must determine the application on the basis that the person's age is a matter of fact to be determined by the relevant authority; and accordingly the court or tribunal—
  - (a) may grant relief only on the basis that the decision was wrong in law, and
  - (b) may not grant relief on the basis that the court or tribunal considers the decision mentioned in subsection (1) was wrong as a matter of fact





## Section 58 Illegal Migration Act 2023

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### **Section 58 Age assessments:** power to make provision about refusal to consent to scientific methods

(1) The Secretary of State may make regulations about the effect of a decision by a relevant person ("P") not to consent to the use of a specified scientific method for the purposes of an age assessment of P where there are no reasonable grounds for P's decision.

(2) The regulations may provide that, in the circumstances set out in the regulations—

(a) [section 52\(7\)](#) of the [Nationality and Borders Act 2022](#) (refusal to consent to scientific methods to be taken to damage credibility) does not apply, and

(b) P is to be treated as if the decision-maker had decided that P was over the age of 18.

(3) In this section—

"age assessment" means an assessment under [section 50 or 51](#) of the [Nationality and Borders Act 2022](#);

"decision-maker" and "specified scientific method" have the same meanings as in [Part 4](#) of the [Nationality and Borders Act 2022](#) (see [section 49](#) of that Act);

"relevant person" means a person who meets the four conditions in [section 2](#) (duty to make arrangements for removal).



# Scope of support for Unaccompanied Children - Pt 3 Illegal Migration Act 2023

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## **Section 16: Accommodation and other support for unaccompanied migrant children**

(1)The Secretary of State may provide, or arrange for the provision of, accommodation in England for unaccompanied children in England.

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## **Section 17 Transfer of children from Secretary of State to local authority and vice versa**

(4)The Secretary of State may decide that an unaccompanied child who is being provided with accommodation by a local authority in England is to cease being provided with that accommodation on a certain date (the transfer date).

(5)On making that decision, the Secretary of State must direct the local authority to cease providing the child with accommodation from the transfer date.

(6)The transfer date must be a date falling after the end of the period of five working days beginning with the day on which the local authority was given the direction.

(7)When a local authority ceases providing a child with accommodation in compliance with a direction under subsection (5), the Secretary of State must arrange for the child to reside in accommodation for unaccompanied migrant children from the transfer date.



## Updates – commencement and regulations

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Most of the provisions described are not yet in force. However, the following is to be noted:

- The Government has now published the Justification Decision (Scientific Age Imaging) Regulations 2023 along with a draft explanatory memorandum (including a statement from the SSJ that in his view the regulations are ECHR compliant).
- These regulations are the prelude to the introduction of the use of x-rays for non-medical reasons on children.
- These are health and safety regs made in accordance with Reg 4 of the Justification Decision Power (Amendment) (EU Exit) Regulations 2019 and concern new classes or types of practice resulting in expose to ionising radiation. The explanatory memorandum explains that this is a new practice but deemed justified.
- As we have seen – sections 52 and 53 of NABA 2022 sets out the requirements for using these methods, including the need scientific advice.
- Paragraph 6.4 of the draft memorandum says that the SSHD has received advice from the Home Office Chief Scientific Adviser and the Age Estimation Science Advisory Committee recommending the use of MRI and radiography methods. As we have seen, the exact recommendation was that the use must be limited.
- Per s. 58 IMA (not yet in force) provides for regulations which will allow a refusal to submit to such procedures as damaging to credibility.



## More updates: Immigration (Age Assessment) Regulations 2023

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More draft regulations have been published – the Immigration (Age Assessments) Regulations 2023. These specify the four scientific methods that will be used:

- The use of radiographs to assess the mandibular third molars
- The use of radiographs to assess the bones in the hand and wrist
- The use of magnetic resonance imaging (MRI) to assess the distal femur and proximal tibia
- The use of MRI to assess the clavicle.

These regulations are provided for in section 52(1) NABA 2022.

### What now?

- Both sets of regulations are subject to the draft affirmative procedure, which means that both Houses of Parliament need to pass them via a vote.
- The Lords Secondary Legislation Scrutiny Committee will look at the details of the policy and report to the HoL before the vote and will consider external evidence.
- After this, and assuming they are passed, the Home Office will need to find medical professionals willing to undertake that work.
- Keep track here: <https://statutoryinstruments.parliament.uk/instrument/gTdcf2Ax/timeline/aHEd4YKX/>  
<https://statutoryinstruments.parliament.uk/instrument/fa2tj3Bs/timeline/I2MVgS9A/>



# Thank you

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*Illegal Migration Act 2023:  
Modern slavery and trafficking provisions*

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Garden Court Chambers

11 October 2023



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# Justification for the IMA?

## What will the modern slavery measures in the bill do?

Where someone has entered the UK illegally and is identified as a potential victim of modern slavery, we will ensure they are returned home or to another safe country, away from those who have trafficked them. The UK government is committed to supporting victims of modern slavery and will continue to do so through the National Referral Mechanism.

But it is vital that the government takes steps to reduce or remove incentives for individuals to enter the country illegally. These illegal practices pose an exceptional threat to public order, risk lives, and place unprecedented pressure on public services.

This is what the modern slavery clauses in the Illegal Migration Bill are seeking to address. We have designed this to be compliant with our international obligations. The Council of Europe Convention on Action against Trafficking in Human Beings (or what is often referred to as 'ECAT') recognises that the duty of signatory states to provide potential victims with a recovery period, appropriate support and protection from removal may be withheld on grounds of 'public order'.

Source:

<https://www.gov.uk/government/publications/illegal-migration-bill-factsheets/illegal-migration-bill-modern-slavery-factsheet>



# Section 1 IMA 2023

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- (1) The purpose of this Act is to **prevent and deter unlawful migration**, and in particular migration by unsafe and illegal routes, by **requiring the removal from the United Kingdom of certain persons who enter or arrive in the United Kingdom in breach of immigration control**.
- (2) To advance that purpose, this Act—[...]  
(d) **provides for protections and entitlements to assistance and support which are available to victims of modern slavery or human trafficking not to apply to persons who are subject to removal under this Act; [...]**
- (3) Accordingly, and so far as it is possible to do so, provision made by or by virtue of **this Act must be read and given effect so as to achieve the purpose mentioned in subsection (1)**.
- (4) In addition, this Act makes provision [...]  
(b) for **protections that apply to victims of modern slavery or human trafficking not to apply to persons who are a threat to public order or who have claimed to be victims in bad faith unless compelling circumstances apply;**  
(c) for persons who have been sentenced to a **period of imprisonment for an offence or who are liable to deportation to be deemed to be a threat to public order for the purposes of the disapplication of those protections; [...]**
- (5) Section 3 of the Human Rights Act 1998 (interpretation of legislation) does not apply in relation to provision made by or by virtue of this Act.





# Removal of potential victims of trafficking

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- Section 2(1) introduces a statutory duty on the SSHD to make arrangements for removal if four conditions met, relating to unlawful entry/absence of leave to remain.
- Where a person has a +RG and meets Removal Criteria in S 2, S 22(2) applies, and disapplies any prohibition on removal of that person under s 61 /62 NABA 2022, and any obligation to grant them limited leave to remain under s 65 NABA 2022.
- Immediate problems?
  - Persons who have been *trafficked to the UK* are affected by the broad scope of the removal conditions
  - Article 26 ECAT – non punishment principle?
  - Article 31 Refugee Convention – penalty?
  - Exacerbates an existing problem: see among the prioritized recommendation from [US State Dept Trafficking in Persons Report 2023](#): “*Ensure victims are not inappropriately penalized solely for unlawful acts, including immigration violations, committed as a direct result of being trafficked.*”



## Limited disapplication of general duty to remove – s 22 (3)

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- There is a specific carve out at s 22(3) for those who co-operate with an investigation:

*“(3) Subsection (2) does not apply in relation to a person if—*

*(a) the Secretary of State is satisfied that the person is cooperating with a public authority in connection with an investigation or criminal proceedings in respect of the relevant exploitation,*

*(b) the Secretary of State considers that it is necessary for the person to be present in the United Kingdom to provide that cooperation, and*

*(c) the Secretary of State does not consider that the public interest in the person providing that cooperation is outweighed by any significant risk of serious harm to members of the public which is posed by the person.”*

- Note that even this restrictive exception is subject to a further ‘compelling circumstances’ test for being present in the UK. What amounts to compelling circumstances is to be provided for in guidance (s 22 (5) and (6)).



## Exclusion from support (England) – s 23

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- Where a person has a + RG, meets the s 2 Removal Criteria, and the co-operation with a public authority exception does not apply, then any duty under section 50A of the Modern Slavery Act to secure any necessary assistance and support is available is disapplied by section 23(2) in relation to the person.
  
- Similar provision is made for Scotland (s 24) and Northern Ireland (s 25).



# Disqualification from Protection – s 29

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- Section 63(1) of NABA 2022 provides that a competent authority **may** determine that a recipient of a positive reasonable grounds decision can be disqualified from protection if satisfied that the person is a threat to public order, or has claimed to be a victim of slavery or human trafficking in bad faith.
- Section 29 (2) substitutes **may** for **must**

## **BUT**

- Provides that a competent authority may not determine that it is to apply to a person if the competent authority considers that there are compelling circumstances which mean that it should not apply.
- Paragraph 152 of the Explanatory Notes states: *‘In determining whether there are compelling circumstances, the Secretary of State must have regard to guidance.’*



# Threat to Public Order – s 29

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- Section 63(3) of NABA 2022 lists the circumstances where someone might be considered as a threat to Public Order
- It included foreign criminal within the meaning given by section 32(1) of the UK Borders Act 2007
- Section 29 (4) substitutes foreign criminal for those who have been convicted and sentenced to a period of imprisonment.

And adds:

- Anyone who is “liable to deportation” from the UK, including under the Immigration Act 1971. A person will be liable to deportation under the 1971 Act if the Secretary of State “deems [their] deportation to be conducive to the public good.”



## Period of Imprisonment – s 29

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- Section 29(5) (5A) provides that a person who has been sentenced to a period of imprisonment—
  - (i) does not include a reference to a person who receives a suspended sentence (unless court subsequently orders that the sentence or any part of it is to take effect), and
  - (ii) includes a reference to a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders).



# Application of Provisions – s 29

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- Section 96(6) provides that the disqualification provisions apply irrespective of whether a person has received a positive reasonable grounds or conclusive grounds decision, including if they were made before the Act came into force.



# Legality?

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- SSHD unable to make a statement of compatibility under s 19(1)(b) HRA 1998
- Section 1 (5) provides that s 3 HRA 1998 interpretation of legislation does not apply
- Disqualification from protection on basis of mode of arrival – raises numerous issues of compatibility with Articles 4, 3, 13 and 14 ECHR and ECAT, Articles 10, 12, 13, 14, 16 and 26 ECAT.
- Govt’s view in ECHR memorandum: *“The Government is satisfied that these provisions are capable of being applied compatibility with Article 4 ECHR. The Government has concluded that radical solutions are required to put a stop to the small boats crossing the Channel and the approach adopted in these provisions is therefore new and ambitious but taking such an approach means that the Home Secretary is unable to make a statement under section 19(1)(a) of the 1998 Act.”*





# ECHR risks arising as a result of the new provisions

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- Article 4 ECHR places positive obligations on the SSHD to identify, protect and facilitate the recovery of victims of trafficking: *Chowdury and Others v Greece* (App No 21884/15).
- Being trafficked and being at risk of re-trafficking are inextricably linked: see Underhill LJ in *R (TDT) v SSHD* [2018] EWCA Civ 1395 at §40: “...even if a victim has escaped, or been removed, from the immediate control of their traffickers, he or she will very commonly still be sufficiently under their influence to be at real and immediate risk of re-trafficking if not afforded proper support and protection.”
- Foreseeable breaches include:
  - Breach of the positive obligation to **identify**, by removing a person prior to CG examination.
  - Breach of positive obligation to **protect**, by removing a person from the UK, risking re-trafficking simpliciter, or by failing to provide them with the recovery and support services necessary to begin to reduce risks of vulnerability.
  - Breach of the positive obligation to **investigate**, by removing before CG stage, and drawing such a narrow carve out for investigatory co-operation which will exclude those not ready *yet* to co-operate.



# (Non)Compatibility of the provisions with ECAT

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- **Art 10(2) ECAT – prohibits removal from territory until identification process is complete.**
  - NB – this is not qualified on ‘public order’ grounds in the Convention. SSHD proceeding on a wrong reading of ECAT.
  - See GRETA’s Explanatory Report at §132 – *“Under the Convention, if there are “reasonable” grounds for believing someone to be a victim, then that is sufficient reason not to remove them until completion of the identification process establishes conclusively whether or not they are victims of trafficking.”*
  - Further, the requirement that a victim co-operate with police prior to completion of the investigation is not compatible with the duty to identify under Art 10 ECAT and Art 4 ECHR. See Explanatory Report at §134: *“The identification process provided for in Article 10 is independent of any criminal proceedings against those responsible for the trafficking. A criminal conviction is therefore unnecessary for either starting or completing the identification process.”*
- **Art 13 ECAT – minimum 30-day recovery and reflection period to be provided for in domestic law.**
  - NB – the ‘public order’ exclusion from Art 13(3) has been too broadly invoked by SSHD.
  - Explanatory Report at §§172 makes clear that *“it is intended to apply to victims of trafficking in human beings who are illegally present in a Party’s territory...”*



# Discrimination risks arising as a result of the new provisions

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- Be alive to Article 14 and EA 2010 as a means of challenge.
- SSHD is already alive to the fact that the removal carve out for those who participate with an investigation may well indirectly discriminate against persons with disabilities. See [the Equality Impact Assessment](#):

“Furthermore, an individual with certain disabilities who has made a modern slavery claim may find it more difficult or be less capable of supporting an investigation or criminal proceedings as a result of their disabilities, which would enable them to benefit from Modern Slavery support. In order to mitigate potential indirect discrimination, First Responders are trained when communicating with vulnerable potential victims. Taking into account the above, any differential impact is justified and proportionate in order to achieve the legitimate aims of controlling migration and reducing crime.”

- Seems clearly challengeable – not proportionate to achieve the legitimate aim; in fact, would probably be contrary to the aim of reducing crime.
- **Medical expert evidence is going to be, as ever, key** – victim participation and capacity.



# Thank you

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