

WHO WE ARE



Human Trafficking and Modern Slavery Law and Practice

SECOND EDITION

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- Judge of the First-tier Tribunal (Immigration and Asylum Chamber).
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OVERVIEW

Part One: Identification framework - Who is a victim of Trafficking?

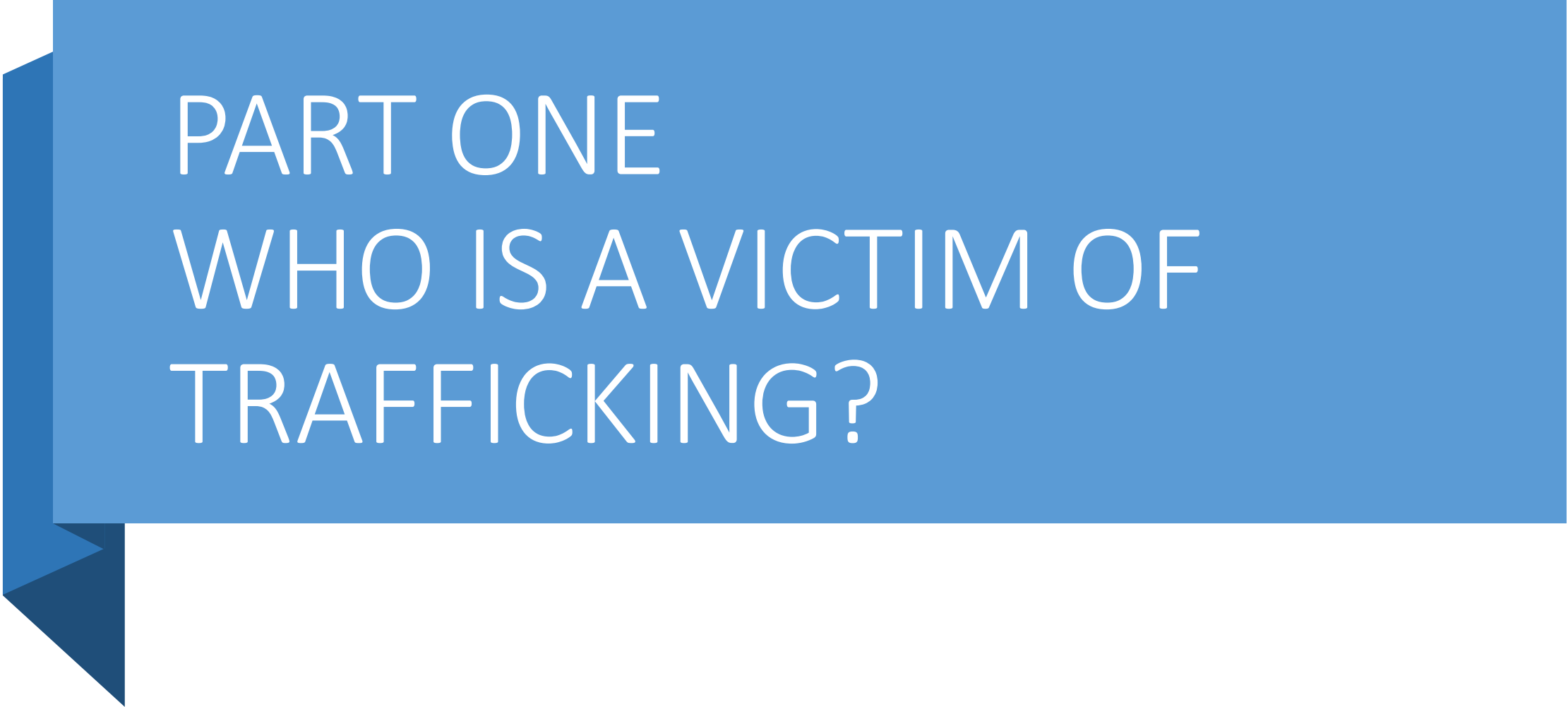
- Sources of law
- Breaking down the definition
- Resources

Part 2: UK Identification model – National Referral Mechanism

- Overview of NRM
- Duty to Notify
- Art. 4 ECHR Positive obligation to identify

Part 3: Non-punishment principle

- The principle in ECAT
- Domestic application

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PART ONE
WHO IS A VICTIM OF
TRAFFICKING?

Definition of a victim of trafficking: UK Source

- Council of Europe Convention on Action against Trafficking in Human Beings (2005) (“ECAT”): Article 4 (Definitions)

<https://rm.coe.int/168008371d>

- Directive 2011/36/EU on preventing and combating in human beings and protecting its victims (“EU Trafficking Directive”): Article 2 (Offences concerning trafficking in human beings)

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0036&from=EN>

Definition of a victim – the components

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The Act:

recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons

The Means:

the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person

For the purpose of exploitation:

as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs

First component “The Act”

- Interpreting the terms:
 - recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons
- Broad application
- Who does it apply to?
- Disjunctive reading
- Misconceptions
- Multi-nodal
- Trends

Second component

“The means”

“the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.”

- Rendering consent irrelevant
- Non-linear reading between the components
- Nexus to control
- Children and means component

Third component “Exploitation”

“as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs”

- Non-exhaustive
- Not executed
- Gendered analysis
- Child rights analysis
- Article 4 ECHR
- Criminal exploitation

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PART 2: UK IDENTIFICATION
MODEL – NATIONAL
REFERRAL MECHANISM

Identification

Where there is a credible suspicion that a person is a victim of trafficking and/or modern slavery an obligation to identify, protect and support as well as investigate arises under both the Council of Europe Convention on Action against Trafficking in Human Beings ('ECAT') and European Convention on Human Rights ('ECHR'), Art 4 .K]

The identification mechanism in place in the UK for potential victims of trafficking is the National Referral Mechanism ('NRM'). The NRM for potential victims of trafficking provides for a 'first responder' to refer a potential victim of trafficking to the 'competent authority' to make an initial reasonable grounds decision. If the decision is positive, then a 'recovery and reflection' period of at least 45 days is granted.

Following a reasonable grounds decision, the competent authorities are required to 'investigate' the claim and make a 'conclusive grounds' decision. If the conclusive grounds decision is positive the victim may require further support and assistance to aid recovery, advice in relation to compensation or in respect of a residence permit.

The UK has a Single Competent Authority ('SCA') which is the UK's decision-making body that is responsible for making decisions relevant to victims of trafficking. The SCA replaces the two historic competent authorities that existed before April 2019.

[ECHR, Art 4]

- Identification as a 'protective duty' and ECHR, Art 4
- A failure to identify correctly a victim will result in a denial of fundamental rights . The duty proactively to identify is an aspect of the obligations arising under the ECHR, Art 4 and:
- 'entails a procedural obligation to investigate situations of potential trafficking. The requirement to investigate does not depend on a complaint from a victim or next of kin: once the matter has come to the attention of the authorities they must act of their own motion' .

'The investigation must fulfil the requirements of independence and impartiality, promptness and reasonable expedition and urgency where there is a possibility of removing the individual concerned from a harmful situation. The investigation must also be capable of leading to the identification and punishment of individuals responsible ... authorities must take all reasonable steps available to them to secure evidence concerning the incident' .

Standard and Burden of proof

Standard and burden of proof

The test applied by the competent authority at the reasonable grounds stage is whether the statement 'I suspect but cannot prove' the person is a victim of human trafficking/modern slavery is true, and whether a reasonable person, having regard to the information known to the decision maker, would think that there are reasonable grounds to believe that the individual had been a victim of human trafficking or modern slavery.

The standard of proof for a conclusive grounds decision is the balance of probabilities. The test applied is whether 'on the balance of probabilities', 'there are sufficient grounds to decide that the individual being considered is a victim of human trafficking or modern slavery'. The guidance means that the competent authority must consider that it is more likely than not that trafficking or modern slavery has 'happened'. It is important to remember that the purpose of the trafficking does not have to have been achieved for a person to qualify .

First Responders

- Only a 'first responder' can make a referral to the 'competent authority'. First responders are currently:
 - • the Home Office;
 - • local authorities;
 - • Health and Social Care Trusts ('HSC Trusts');
 - • police;
 - • National Crime Agency ('NCA');
 - • Trafficking Awareness Raising Alliance ('TARA');
 - • Migrant Help;
 - • Kalayaan;
 - • Gangmasters Licensing Agency;
 - • Medaille Trust;
 - • Salvation Army;
 - • Barnardos;
 - • National Society for the Prevention of Cruelty to Children ('NSPCC');
 - • Unseen UK;
 - • New Pathways;
 - • BAWSO;
 - • Refugee Council.

Duty to notify

- Duty to notify
- From 1 November 2015, specified public authorities (police, local authorities, Gangmasters Licensing Authority, NCA) are required to notify the Home Office about any potential victims of modern slavery they encounter in England and Wales . The information to be provided during this process is set out in the Modern Slavery Act 2015 (Duty to Notify) Regulations 2015 .
- Notification can be done either by completing an online NRM form or, in the case of a person who does not consent to the NRM, by completing an online form notifying the Home Office of potential victims. Both the NRM referral process and the duty to notify process now take place online at the Modern Slavery portal: www.modernslavery.gov.uk.
- Although the duty to notify applies to both children and adults, children do not need to consent to enter the NRM, a potential child victims should be referred into the NRM in all cases .

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PART 3: NON- PUNISHMENT PRINCIPLE

INTERNATIONAL LAW - ECAT

- **Council of Europe Convention on Action against Trafficking in Human Beings**
- **Article 26 – Non-punishment provision**
- *Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.*

INTERNATIONAL LAW – EU Directive

- DIRECTIVE 2011/36/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL (2011) on preventing and combating trafficking in human beings and protecting its victims - Recital (14)
- *Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators. This safeguard should not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in.*

INTERNATIONAL LAW – EU Directive

- **EU DIRECTIVE**
- *Article 8- Non-prosecution or non-application of penalties to the victim*
- *Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.*

DOMESTIC LAW

– S.45

- S.45 MODERN SLAVERY ACT 2015 - ADULTS
- 45 Defence for slavery or trafficking victims who commit an offence
- (1) A person is not guilty of an offence if—
- (a) the person is aged 18 or over when the person does the act which constitutes the offence,
- (b) the person does that act because the person is compelled to do it,
- (c) the compulsion is attributable to slavery or to relevant exploitation, and
- (d) a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.

DOMESTIC LAW

– S.45

- S.45 MODERN SLAVERY ACT 2015 - ADULTS
- 45 Defence for slavery or trafficking victims who commit an offence
- (2) A person may be compelled to do something by another person or by the person's circumstances.
- (3) Compulsion is attributable to slavery or to relevant exploitation only if—
- (a) it is, or is part of, conduct which constitutes an offence under section 1 or conduct which constitutes relevant exploitation, or
- (b) it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation.

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 - (a) it is, or is part of, conduct which constitutes an offence under section 1 or conduct which constitutes relevant exploitation, or
 - (b) it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation.

DOMESTIC LAW – S.45

- S.45 MODERN SLAVERY ACT 2015 – ADULTS AND CHILDREN
- (5) For the purposes of this section—
- “relevant characteristics” means age, sex and any physical or mental illness or disability;
- “relevant exploitation” is exploitation (within the meaning of section 3) that is attributable to the exploited person being, or having been, a victim of human trafficking.
- (6) In this section references to an act include an omission.
- (7) Subsections (1) and (4) do not apply to an offence listed in Schedule 4.

DOMESTIC LAW – S.45

- S.45 MODERN SLAVERY ACT 2015 – CHILDREN
- (4) A person is not guilty of an offence if—
- (a) the person is under the age of 18 when the person does the act which constitutes the offence,
- (b) the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation, and
- (c) a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act.