



**Response to amendments made to the
Modern Slavery: Statutory Guidance for England and Wales (under
s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance
for Scotland and Northern Ireland Version 2.5**

Children's Law Centre

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Children's Law Centre
2nd Floor
127 – 131 Ormeau Road
Belfast
BT7 1SH
Tel: 028 90 245704
Fax: 028 90 245679
Website: www.childrenslawcentre.org

For further information contact:

Barbara Muldoon barbaramuldoon@childrenslawcentre.org

Maria McCloskey mariamccloskey@childrenslawcentre.org

INTRODUCTION

The Children's Law Centre (CLC) is an independent charitable organisation established in September 1997 which works towards a society where all children can participate, are valued, have their rights respected and guaranteed without discrimination and every child can achieve their full potential.

Our organisation is founded on the principles enshrined in the United Nations Convention on the Rights of the Child (UNCRC).

The Immigration Department at Children's Law Centre was formally established in September 2019. We provide advice in relation to all looked after children who are in the care of social services and whose immigration status is insecure. We also advise and represent the vast majority of unaccompanied asylum-seeking children in Northern Ireland. Children's Law Centre works in collaboration with the Health and Social Care Board and all five Health and Social Care Trusts in Northern Ireland. Our comments on this matter are based upon our experiences of representing unaccompanied asylum-seeking children ("UASC") who have been subject to the asylum application, NRM and other immigration application processes.

PURPOSE OF THIS PAPER

This paper is designed to provide an urgent response to a new development "announced" last week by the Home Office, when it updated its published guidance in relation to Modern Slavery & Human Trafficking ("MSHT") on 8 November 2021. The guidance document that was updated is **Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and Non-Statutory Guidance for Scotland and Northern Ireland Version 2.5¹**.

The updated guidance announced what will be radical and far reaching changes to who will be responsible for the identification of victims of MSHT. It is likely to have profound consequences for victims of MSHT.

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/103173/1/modern-slavery-statutory-guidance-ew-non-statutory-guidance-sni-v2.5-final.pdf

Up until the 8 November, the UK had one Competent Authority, referred to as the “Single Competent Authority”, described as “a single, expert unit.....to make decisions about whether somebody is a victim of modern slavery”².

The updated Guidance makes clear that there will now be two competent authorities. One of the two competent authorities will be a new “Immigration Enforcement Competent Authority” (“IECA”). This second authority will be responsible for determining trafficking claims from a cohort of those who are referred through the NRM.

WILL THE CHANGES IN THE UPDATED GUIDANCE AFFECT CHILDREN AND YOUNG PEOPLE?

Children’s Law Centre welcomes confirmation in the updated Home Office Guidance that it is not intended that the newly established Immigration Enforcement Competent Authority (“IECA”) will have any responsibility for determining trafficking claims for children³. However, the unfortunate reality is that UASCs may end up having their trafficking claims determined by Immigration Enforcement nonetheless.

Our experience and the almost universal experience of those who work with child victims of trafficking, is that children are often too traumatised and afraid to provide details about trafficking issues. The effects of this trauma and fear means that it is often several years before children make these disclosures. Should they turn 18 in the interim period, before they are able to make disclosures, they would have their trafficking cases determined by the IECA, in the same circumstances as any other adult victim would. That is because it is the age at *the point of referral to the NRM* that determines whether they fall under the authority of the IECA, not the age at which the exploitation took place.

Additionally, children’s vulnerability renders them more likely to fall to be victims of trafficking in the future inside the UK. This may include being exploited in a manner likely to bring them into conflict with the criminal justice system. In those circumstances, if they have turned 18 by the time that a referral is made, they too

² <https://www.gov.uk/government/news/modern-slavery-taskforce-agrees-new-measures-to-support-victims>

³ See n1, Page 43

would have their trafficking claims determined by the Immigration Enforcement Competent Authority.

Children's Law Centre are further concerned about the proposals contained in the Nationality & Borders Bill, in relation to the setting up of a national Age Assessment Board. This will have relevant consequences, in terms of it being more likely that children will have their trafficking claims determined by the IECA. The concern of many children's organisations is that children will be wrongly identified as adults and will therefore fall under the processes and procedures relating to adults; including those contained in the updated Home Office guidance in relation to the IECA.

In light of the above, it is appropriate that Children's Law Centre should raise the grave concerns that we have about this very recent development at the earliest opportunity.

WHAT SORT OF BODY IS THE IMMIGRATION ENFORCEMENT COMPETENT AUTHORITY?

I refer to the Glossary contained in the updated guidance. It states "Immigration Enforcement is part of the Home Office and is responsible for reducing the size of the illegal population and the harm it causes to protect the integrity of the immigration system"⁴. I also refer to a recent job advert for positions within the newly created IECA⁵. The job advert is for Decision Makers. In describing the unit, it states

"Immigration Enforcement's vision is to reduce the size of the illegal population and the harm it causes; This vision is supported by 3 core objectives to:

- *Prevent migrants from entering the UK illegally and overstaying*
- *Deal with threats associated with immigration offending*
- *Encourage and enforce the return of illegal migrants from the UK"*

It would appear to be an incontrovertible fact that nothing about these descriptions implies a unit or a role that is concerned with the safeguarding, welfare and protection

⁴ See Note 1, Page 13

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<https://www.civilservicejobs.service.gov.uk/csr/index.cgi?SID=dXNlcnNIYXJjaGNvbnRleHQ9MTI1NTU3MzA0Jm93bmVyPTUwNzAwMDAmam9ibGlzdF92aWV3X3ZlYz0xNzU1Njk3JnBhZ2VjbGFzc1Kb2JzJm93bmVydHlwZT1mYWlyJnBhZ2VhY3Rpb249dmld3ZlY2J5am9ibGlzdCZzZWZyY2hfc2xpY2Vfy3VycmVudD02>

from exploitation of vulnerable individuals who are the victims of MSHT, many of whom will be children, for the reasons set out above.

WHOSE TRAFFICKING CASES WILL BE DECIDED BY THE IECA?

The cohort of those who will be covered and whose trafficking claims will be determined by the IECA is set out at Page 43 of the Guidance. It is a wide-ranging list, including.

- Those who come into conflict with the criminal justice system
- Those who are determined to have committed immigration offences
- Those who are being dealt with by the Third Country Unit

Many of those whose trafficking claims will end up being considered by the IECA, will be on the above list precisely *because* they are victims of MSHT.

Those in conflict with the Criminal Justice System

Whether someone has committed a criminal offence or not, they are still entitled to be identified as a victim and to receive legal protection against MSHT.

A number of those who come into conflict with the criminal justice system, do so due to exploitation by traffickers.

The Criminal Cases Review Commission is the official independent body that investigates potential miscarriages of justice. It refers an average of 33 cases every year for a fresh appeal. This year they referred 3 trafficking cases. Last year 4 convictions of trafficking victims were quashed after referral⁶. It is clear that victims of MSHT continue to not be identified within the criminal justice system and that victims of MSHT are ending up with wrongful convictions. Some of these never come to light. Some of these are corrected on appeal. Some of these are quashed when the victim has sufficient assistance to prepare and provide details of their cases to the CCRC. It seems particularly unjust that not only would victims of MSHT end up with wrongful convictions, they would also end up in a process where they are much less likely to be identified as victims and receive the assistance and protection that they deserve.

⁶ <https://ccrc.gov.uk/case-studies/asylum-immigration-and-victims-of-human-trafficking/>

Those who are determined to have committed immigration offences

The UK now has a wide-ranging panoply of immigration offences on the statute books. The offences will be added to further if the Nationality & Borders Bill⁷ is enacted. Many of these offences are committed because there are virtually no safe and legal routes for refugees and victims of MSHT to enter the UK.

A number of those who have committed immigration offences, have entered the country or overstayed in the course of being trafficked and exploited. Many of those have entered unlawfully in circumstances where they are a refugee. CLC currently acts for 25 young people who have made claims for asylum. Many of them have already been determined by the Home Office to be refugees. Of the 25, only 1 of them entered the UK with a valid visa. 10 of the 25 have been referred to the NRM, by social workers, as potential victims of MSHT.

Any refugee who enters the UK unlawfully has a defence arising out of the non-penalisation provisions contained in Article 31 of the Refugee Convention⁸. Many refugees are never made aware that they have a defence to charges relating to immigration offending. They go through the entire process without anyone making them aware of it and without their solicitors, the prosecution service and the courts considering its relevance.

As with convictions of victims of MSHT, the Criminal Cases Review Commission's caseload has a very large component of cases relating to refugees who have wrongful convictions for immigration offences⁹. This group comprises one of the largest "case types" referred by the CCRC. The CCRC has a 1.8% referral rate of all case types. However, it has a 27% referral rate for asylum cases. The CCRC's referral processes are robust. 68% of all cases referred are quashed by the appeal court. A huge 91% of asylum cases that are referred are quashed on appeal. From those who are ably assisted to prepare and provide their cases to the CCRC, it would appear that the criminal justice system is continuing to make obvious errors and to wrongfully convict refugees for immigration offences. A refugee wrongfully convicted of an immigration offence and who is also a victim of MSHT will now have their trafficking claim managed

⁷ See Clause 37 <https://bills.parliament.uk/bills/3023>

⁸ <https://www.unhcr.org/3bcfdf164.pdf>

⁹ https://centaur.reading.ac.uk/68811/9/CCRC_Asylum_article_final.pdf

by a unit whose stated purpose is to remove them from the country. It should be uncontroversial to say that this process lacks justice and fairness and acts to deny the potential that these injustices would be corrected at a future time.

Those who are being dealt with by the Third Country Unit

The Home Office introduced new admissibility rules on 30 December 2020¹⁰. They also updated their guidance on the same date¹¹. It is now clear that anyone who has had any connection to a perceived “safe country” is liable to be dealt with by the Third Country Unit. It is almost impossible for an asylum seeker to get to the UK without at least briefly entering a perceived “safe third country”. As stated above, CLC’s Immigration Department represents 25 UASCs. Of them, only 1 would be considered to have had no link whatsoever with a perceived safe third country.

The admissibility rules are based on the notion that an asylum seeker has a legal duty to claim asylum in the first safe country in which they enter. The UNHCR recently provided a detailed legal opinion on the Nationality & Borders Bill and the proposals to further embed “third country” and “admissibility rules” in statute. It states “*Requiring refugees to claim asylum in the first safe country they reach would undermine the global, humanitarian, and cooperative principles on which the refugee system is founded*”¹².

Many of those who have entered what are perceived to be “safe third countries” are in fact not safe at all. They have entered these countries in the company of traffickers or have been ensnared by traffickers within these countries. These countries are not safe. They are where children were exploited and harmed as victims of MSHT. It should be uncontroversial to say that refugees who have no safe and legal routes to safety and who have been abused and exploited on their journeys should be safeguarded and have their welfare protected. No part of the core function of the IECA is designed to carry out that task.

¹⁰ <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum>

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/947897/inadmissibility-guidance-v5.0ext.pdf

¹² <https://www.unhcr.org/publications/legal/615ff04d4/unhcr-legal-observations-nationality-and-borders-bill-oct-2021.html>

DEVOLUTION ISSUES

Although the UK Home Office often conflates the two issues; MSHT is not an “immigration matter”. Issues relating to MSHT fall wholly within the competence of the Northern Ireland Assembly, with the Department of Justice (DoJ) taking overall responsibility for matters relating to MSHT. The Assembly exercised its competence and enacted the Human Trafficking (Criminal Justice and Support for Victims) Act (Northern Ireland) (2015). Duties under the Act fall to a number of Assembly Departments, including the DoJ, the Department of Health and others. It confers responsibilities and duties on the NI Court Service, the PSNI, the PPS, the Health & Social Care Board for NI, Health & Social Care Trusts, individual social workers, Independent Guardians and others.

As part of the Act, the DoJ publishes a MSHT Strategy. The Strategy for 2020-2021¹³ lists the following key priorities:-

- pursue offenders
- protect victims
- prevent these crimes from occurring.

The identification of victims is central to that strategy. The undermining of the identification processes, by transferring those duties on to Immigration Enforcement is likely to have a significant impact on the ability of the DoJ to meet those goals. A victim of MSHT cannot be protected unless they have been identified. This process has been weakened. The perpetrators are less likely to face justice if their victims are not identified. Traffickers will be further able to exploit vulnerable people by the threat that Immigration Enforcement will be involved in the identification process. This move cannot help but erode faith and trust in the independence of the process.

Cases of MSHT in Northern Ireland have soared by 750% since 2012¹⁴. It is widely believed that this is a gross underestimate of the true numbers. The Minister of Justice

¹³ https://www.justice-ni.gov.uk/sites/default/files/publications/justice/modern-slavery-strategy-27-05-v2_0.pdf

¹⁴ <https://www.belfasttelegraph.co.uk/news/northern-ireland/northern-ireland-human-trafficking-cases-soar-by-750-40716766.html>

has committed to making the eradication of MSHT a priority. The transfer of responsibilities for a large number of potential victims of MSHT, to a body whose main function is immigration enforcement and whose stated goal is to see them removed from the country, is likely to considerably undermine that priority.

THE CONVENTION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS AND THE PRINCIPLE OF NON-DISCRIMINATION

Article 10 of The Convention on Action against Trafficking in Human Beings (“ECAT”)¹⁵ confers a duty on the UK to identify all victims of MSHT. Article 3 obliges them to do this in accordance with the principle of non-discrimination. Even if a person is outside their country of residence, ECAT, the Palermo Protocol¹⁶ and international law is clear that a trafficked person cannot be discriminated against simply because they are a non-national¹⁷. The setting up of the IECA and the cohort whose decisions will be made by them, is a clear indication that there will now be separate treatment for those who are non-nationals. Given the priorities and stated goals of the IECA, it is clearly highly likely that non-nationals will be subject to lesser protections than UK nationals. There has been no indication of the justification for this discriminatory measure.

CONCLUSION

There has been no indication that the Home Office has consulted with devolved regions in relation to the changes to the identification of victims of MSHT, despite the impact that the changes are likely to have in terms of identifying victims. There has been no indication that the Home Office has consulted with the Statutory Guidance Reference Group, the various Modern Slavery Strategy Implementation Groups or NGOs and those working in the wider anti-slavery sector.

A recent letter from the Independent Anti-Slavery Commissioner indicates that she knew nothing of the changes until they were announced on 8 November 2021¹⁸. We

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/236093/8414.pdf

¹⁶ <https://www.ohchr.org/en/professionalinterest/pages/protocoltraffickinginpersons.aspx>

¹⁷ https://www.ohchr.org/documents/publications/fs36_en.pdf

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https://www.antislaverycommissioner.co.uk/media/1695/letter_to_home_secretary_on_ieca_11_november_2021.pdf

share her concerns that the setting up of the IECA represents a “*significant change*” and that there will be “*considerable implications for victims*”. We further share her concerns that “*There is significant risk that those victims of modern slavery whose cases are assessed by Immigration Enforcement will have their cases judged by considerations about their immigration status rather than their rights to protection as victims of serious crime*”.

At a time when the UK government is making public commitments to protect victims of MSHT, it is deeply concerning that they have made arrangements, without any public consultation process, to undermine the legal protections of this vulnerable group.