

## Human Trafficking

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# Human Trafficking: Iconic Victims, Folk Devils and the Nationality and Borders Act 2022

Jason Haynes\* 

On 28 April 2022, the Westminster Parliament passed the controversial Nationality and Borders Act. The Act is the single biggest overhaul of the UK's immigration system in decades. The Act aims to deter illegal entry into the UK; remove more easily those with no right to be in the UK; and increase the overall fairness of the system. Notwithstanding these seemingly laudable objectives, however, this article argues that the Act represents a retrograde step in the protection of victims of human trafficking. Relying upon Nils Christie's 'ideal/iconic victims' and Stanley Cohen's 'folk devils' critique, the article contends that, in an age of heightened securitisation and moral panics, the Act will create 'folk devils' of victims of trafficking who do not self-identify, and unduly penalise victims of trafficking who have committed offences in the course, or as a consequence, of being trafficked.

## INTRODUCTION

The Nationality and Borders Act was enacted in April 2022 to address the increasing numbers of people who are alleging that they have been trafficked, as well as to stop misuse of the protection mechanisms in the UK, whilst disincentivising 'dangerous people' from coming to the UK. Part 5 of the Act deals with the issue of modern slavery, of which human trafficking is a specific manifestation.<sup>1</sup> Human trafficking is a global phenomenon,<sup>2</sup> and one of the fastest growing and most lucrative forms of criminal activity today.<sup>3</sup>

In the UK, the Home Office has reported that, over the last ten years, there has been a steady increase in the number of referrals of potential victims of trafficking to the National Referral Mechanism (NRM). The NRM is the national framework for identifying and referring potential victims of modern

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- 1 *Basfar v Wong* [2022] UKSC 20 at [73]. Human trafficking involves the commission of certain acts (recruitment, transportation, transfer, harbouring, or receipt of persons) through certain means (threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving or receiving payments or benefits to a person to achieve the consent of a person who has control of the victim) for the purpose of exploitation (including slavery, sexual exploitation, forced labour or slavery or servitude).
- 2 Navid Pourmokhtari, 'Global Human Trafficking Unmasked: A Feminist Rights-Based Approach' (2015) 1 *Journal of Human Trafficking* 156.
- 3 'Human Trafficking: People for Sale' (United Nations Office on Drugs and Crime, 2021) at <https://www.unodc.org/toc/en/crimes/human-trafficking.html> [<https://perma.cc/247F-4LHR>].

slavery and ensuring they receive the appropriate support in the UK.<sup>4</sup> In fact, in 2013, there were 1,746 referrals while in 2021, 12,727 potential victims of modern slavery were referred.<sup>5</sup> Data from *Hope for Justice* estimates that 40 per cent of its caseload are victims of trafficking who have committed criminal offences with a sentence of least 12 months imprisonment.<sup>6</sup> It is against the backdrop of the increasing number of people who are claiming to be victims of trafficking in the UK, the need to ‘reduce the potential for misuse of the National Referral Mechanism (NRM) system’, and the need to remove ‘those who pose a threat to the UK’,<sup>7</sup> that the Westminster Parliament enacted Part 5 of the Nationality and Borders Act.

Section 58 of the Nationality and Borders Act 2022 requires that persons who allege that they are victims of human trafficking provide the competent authority, before a specified date, with relevant information related to their status. If the person supplies the requested information late or has no good reasons for why the information is provided late, or does not provide the information at all, the competent authority, in making a reasonable grounds decision or conclusive grounds decision, may treat this as damaging the person’s credibility. Separately, section 61 of the Act reduces the recovery and reflection period from 45 days to 30 days. Meanwhile, section 63 of the Act provides for the disqualification from protection and removal of several categories of victims of trafficking, including those who have been convicted of a terrorist offence or persons in relation to whom there are reasonable grounds to suspect that they have been involved in terrorism-related activity; those who have been convicted of an offence listed in Schedule 4 of the Modern Slavery Act 2015 (MSA 2015) anywhere in the UK, or of a corresponding offence committed abroad; non-British citizens who have been convicted in the UK of an offence and have been sentenced to a period of 12 months imprisonment; ‘serious criminals’ who have been convicted outside the UK and have been sentenced to a period of imprisonment of at least 12 months; persons who have been deprived of their British citizenship; persons who pose a risk to the national security of the UK; and those who otherwise pose a threat to public order.

Relying upon Nils Christie’s ‘ideal/iconic victims’ and Stanley Cohen’s ‘folk devils’ critique, this article argues that Part 5 of the Nationality and Borders Act will concretise a dangerous dichotomy between ‘iconic victims’ and ‘folk devils’, and represents a regressive step in the protection of the rights of victims of trafficking in the UK. It begins by situating the UK’s ongoing legislative efforts to create a hostile environment for migrants within a securitisation framework, which is characterised by moral panics. The ways in the Nationality and Borders Act falsely dichotomises victims of trafficking as ‘iconic victims’ and ‘folk devils’ are considered next. Finally, the article goes on to present an assessment of the

4 Nationality and Borders Bill Explanatory Notes (9 December 2021) at [572].

5 The report does not disaggregate data on the different forms of modern slavery. ‘Modern slavery’ is a term that includes any form of human trafficking, slavery, servitude or forced labour, as set out in the Modern Slavery Act 2015.

6 Reported by Sara Thornton, former Independent Anti-Slavery Commissioner. See below n 114.

7 *ibid* at [38].

implications of these legislative developments for victims, as well as their impact on the UK's compliance with its obligations under international law.

## BACKGROUND AND CONTEXT

The Nationality and Borders Act 2022 is part of the legislative framework that addresses human trafficking in the UK. Prior to the enactment of the Nationality and Borders Act, the Modern Slavery Act 2015<sup>8</sup> was heralded in some quarters as a 'landmark'<sup>9</sup> and 'historic'<sup>10</sup> piece of legislation. It substantively implements the UK's anti-trafficking obligations under the UN Palermo Protocol,<sup>11</sup> the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT),<sup>12</sup> and the EU Anti-Trafficking Directive (Directive 2011/36/EU),<sup>13</sup> although section 68 of the Nationality and Borders Act now requires that the latter be disapplied in so far as it is incompatible with any provisions in the new Act. The MSA 2015 seeks to achieve three objectives: preventing trafficking in persons, prosecuting perpetrators, and protecting victims. It is a progressive development<sup>14</sup> in a field which was hitherto dominated by an arguably minimalist approach to the regulation of human trafficking.<sup>15</sup>

The MSA 2015 criminalises the offence of human trafficking;<sup>16</sup> imposes a maximum sentence of life imprisonment on those who commit the offence;<sup>17</sup> allows for the confiscation of the assets of exploiters;<sup>18</sup> and enables the Crown Court to order traffickers to pay reparation to victims.<sup>19</sup> It also places a requirement, under section 50, on the Secretary of State to issue Guidance on assistance and support to potential adult victims of human trafficking. This provision has been amended by section 64 of the Nationality and Borders Act, so

8 Modern Slavery Act 2015, c 30.

9 'Landmark Modern Slavery Bill Passes' (CARE UK, 25 March 2015) at <http://www.care.org.uk/news/latest-news/landmark-modern-slavery-bill-passes> (last visited 1 July 2015).

10 'Historical Law to End Modern Slavery' (Home Office, 26 March 2015) at <https://www.gov.uk/government/news/historic-law-to-end-modern-slavery-passed> (last visited 19 March 2023).

11 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2237 UNTS 319. Ratified by Great Britain and Northern Ireland on 9 February 2006.

12 Council of Europe Convention on Action Against Trafficking in Human Beings (adopted 16 May 2005, entered into force 1 February 2008) CETS 197. Ratified by the UK on 17 December 2008.

13 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims and replacing Council Framework Decision 2002/629/JHA. The UK opted into this Directive on 18 October 2011. The Directive became directly applicable in UK Law in December 2013.

14 Jason Haynes, 'The Modern Slavery Act (2015): A Legislative Commentary' (2016) 37 *Statute Law Review* 33.

15 See for example Group of Experts on Action against Trafficking in Human Beings (GRETA), *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom* (Strasbourg, Council of Europe, 2012) 6.

16 MSA 2015, s 2.

17 *ibid*, s 5.

18 *ibid*, s 7.

19 *ibid*, s 8.

that necessary assistance and support may be provided to victims of trafficking if the Home Secretary considers that ‘it is necessary for the purpose of assisting the person receiving it in their recovery from any physical, psychological or social harm arising from the conduct which resulted in the positive reasonable grounds decision in question.’<sup>20</sup> Despite significant argument in Parliament for such support and assistance to be extended for at least 12 months after a conclusive grounds decision that a person is a victim of trafficking is made, the Nationality and Borders Act restricts support and assistance to a 30-day ‘recovery and reflection’ period.<sup>21</sup> The MSA 2015 also created a statutory defence for victims who have been compelled to commit other offences: known as the ‘non-punishment’ provision.<sup>22</sup> It also contains protections for victims who are required to act as witnesses within the context of the criminal justice system to avoid secondary victimisation,<sup>23</sup> makes provision for the appointment of Independent Child Trafficking Advocates,<sup>24</sup> and establishes the office of an Independent Anti-Slavery Commissioner.<sup>25</sup>

Sandwiching the MSA 2015 are the 2014 and 2016 Immigration Acts, which together represent the ‘UK’s ever-restrictive and punitive immigration and asylum regime – the “hostile environment” – and its use of “stratified rights”’.<sup>26</sup> Hodkinson and others argue that ‘the Immigration Acts 2014 and 2016 create new compulsions to enter, new points of vulnerabilisation within, and new barriers to exit forced labour situations’<sup>27</sup> by:

[making] it easier to deport irregular migrants from the UK through streamlining the removals process, reducing legal challenges to removal decisions, and creating a ‘deport now, appeal later’ power. It has also led to: the criminalisation of both the act of working with irregular immigration status and those who employ irregular migrants; the removal of financial and accommodation support for refused asylum seekers and certain other migrant categories; and restricting access to private sector housing and other essential services such as healthcare, personal banking and a driving licence. Finally, migrants’ entry into the UK has also been made more difficult through taking action to prevent so-called sham marriages and civil partnerships. Overall, basic survival has become much harder for irregular migrants and refused asylum seekers as a result of it being far more difficult to work in the UK.<sup>28</sup>

20 Nationality and Borders Act 2022, s 64. A reasonable grounds decision is arrived at when, having regard to all the circumstances of the case, there are reasonable grounds to believe the individual is a victim of modern slavery.

21 The recovery and reflection period refers to the period from the date of a positive reasonable grounds decision until a conclusive grounds decision is made, which is at least 30 days. During this time, the potential victim is provided with appropriate support, including safe accommodation, legal advice, and protection from reprisals.

22 MSA 2015, s 45.

23 *ibid*, s 46.

24 *ibid*, s 48.

25 *ibid*, s 40.

26 Stuart Hodkinson and others, ‘Fighting or Fueling Forced Labour? The Modern Slavery Act 2015, Irregular Migrants, and the Vulnerabilising Role of the UK’s Hostile Environment’ (2021) 41 *Critical Social Policy* 68, 74.

27 *ibid*, 81–82.

28 *ibid*, 81.

For Hodgkinson and others, these policies have promoted an ‘increasingly securitised, bio-political form of “carceral cosmopolitanism” in which migration and migrants themselves are ever more closely controlled and monitored.’<sup>29</sup> This notion of securitisation is a recurrent theme in anti-trafficking discourse.

## SECURITISATION, MORAL PANICS AND FOLK DEVILS

The Nationality and Borders Act 2022 reinforces in no uncertain terms that we live in an age characterised by what scholars from the Copenhagen School would describe as ‘securitization’.<sup>30</sup> According to McDonald, securitisation is a discursive construction of particular issues as security threats. It involves the ‘positioning through speech acts (usually by a political leader) of a particular issue as a threat to survival, which in turn (with the consent of the relevant constituency) enables emergency measures and the suspension of “normal politics” in dealing with that issue.’<sup>31</sup> For scholars belonging to the Copenhagen School, issues become security threats through language. It is language that characterises certain actors as existentially threatening to a particular political community, thereby enabling securitisation.

In the immigration context, terrorist fighters and asylum seekers,<sup>32</sup> and people traffickers have been collectively characterised by the UK’s political elite as existentially threatening public order.<sup>33</sup> The debates accompanying the passage of the Nationality and Borders Bill were replete with references to ‘dangerous individuals’. In a letter dated 2 November 2021 to the Chairpersons of the Nationality and Borders Bill Committee of the House of Commons, Tom Pursglove MP, a vocal proponent of the then Bill, explained that NRM referrals for Foreign National Offenders (FNO) and foreign nationals held on remand were rising, with an average of 85 per month in the first five months of 2021 (compared to 19 per month in 2018).<sup>34</sup> He argued that this raised legitimate concerns that some referrals are being made late in the process to frustrate immigration action and that legitimate referrals are not being made in a timely way. The Nationality and Borders Bill had been designed to address

<sup>29</sup> *ibid.*, 73.

<sup>30</sup> Matt McDonald, ‘Securitization and the Construction of Security’ (2008) 14 *European Journal of International Relations* 563.

<sup>31</sup> *ibid.*, 567.

<sup>32</sup> *ibid.*

<sup>33</sup> Nachman Ben-Yehuda, ‘Moral Panics and Folk Devils’ (2019) *Oxford Research Encyclopaedia of Criminology and Criminal Justice* 1.

<sup>34</sup> Tom Pursglove, ‘Nationality and Borders Bill, Committee Stage Line by Line’ (2 November 2021) at [http://data.parliament.uk/DepositedPapers/Files/DEP2021-0849/Committee\\_Stage\\_Letter\\_28th\\_October\\_and\\_2nd\\_November.pdf](http://data.parliament.uk/DepositedPapers/Files/DEP2021-0849/Committee_Stage_Letter_28th_October_and_2nd_November.pdf) [<https://perma.cc/SXW2-GA9F>]. Pursglove cited in his submission, ‘Update on Modern Slavery Referrals from Detention and Prisons’ (Home Office, 19 July 2021) <https://www.gov.uk/government/publications/issues-raised-by-people-facing-return-in-immigration-detention/update-on-modern-slavery-referrals-from-detention-and-prisons> (last visited 19 March 2023). The Report notes that ‘the Home Office analysis published in March 2021 showed that NRM referrals had risen sharply from 2018 to 2019, with the number of referrals from people detained following immigration offences rising from 718 (5% of detentions) to 1,767 (16% of detentions). Numbers were lower for FNOs in detention, but also rose from 79 (1% of detentions) to 182 (3% of detentions)’.

these concerns.<sup>35</sup> In parliamentary debates, Pursglove argued that the Bill's provisions on the disqualification from protection and exclusion of those victims of trafficking who have a history of criminality are intended to ensure that these 'dangerous individuals can be removed'<sup>36</sup> from the UK. In a similar vein, Lord Stewart of Dirleton contended that 'it is right that the Government should be able to withhold the protections afforded in the NRM ... from dangerous individuals.'<sup>37</sup> The-then Secretary of State for the Home Department, Priti Patel, similarly asserted that: 'There has been an alarming increase in the number of illegal entrants and foreign national offenders, including child rapists and people who pose a national security risk seeking modern-day slavery referrals to avoid immigration detention and frustrate removal from the UK.'<sup>38</sup> She sought to juxtapose how the Bill intended to treat 'real victims' compared to the treatment of 'dangerous foreign criminals': 'it is right that we pool all our resources into helping genuine victims of modern slavery and that we do not allow dangerous foreign criminals, who are effectively pushing aside real victims, to go on to abuse the system for their own despicable means.'<sup>39</sup>

In her remarks, the former Home Secretary also expressed broader concerns about the state of the immigration system in the UK:

The British people have had enough of open borders and uncontrolled immigration; enough of a failed asylum system that costs the taxpayer more than £1 billion a year; enough of dinghies arriving illegally on our shores, directed by organised crime gangs; enough of people drowning on these dangerous, illegal and unnecessary journeys; enough of people being trafficked and sold into modern slavery; enough of economic migrants pretending to be genuine refugees; enough of adults pretending to be children to claim asylum; enough of people trying to gain entry illegally ahead of those who play by the rules; enough of foreign criminals, including murderers and rapists, who abuse our laws and then game the system so that we cannot remove them.<sup>40</sup>

Similarly, Sir John Hayes asserted that 'the system is being gamed by all kinds of unscrupulous people ... the risk is that modern-day slavery is one way of gaming the system',<sup>41</sup> while Tom Hunt MP, welcoming the Bill, noted that 'those who come here illegally should immediately be deported to the country from which they came'.<sup>42</sup>

Many of these so-called 'dangerous individuals' may be genuine victims of trafficking but compelled to commit criminal offences in the course, or as a consequence, of being trafficked. However, the language of dangerousness used to describe these persons was deliberately intended to cause moral panic.

35 *ibid.*

36 HC Deb vol 711 col 285 22 March 2022 (Tom Pursglove).

37 HL Deb vol 699 col 1930 4 April 2022 (Lord Stewart of Dirleton).

38 HC Deb vol 699 col 716 19 July 2021 (Priti Patel).

39 *ibid.*, col 717.

40 *ibid.*, col 705.

41 HC Deb vol 699 col 745 19 July 2021 (Sir John Hayes).

42 HC Deb vol 711 col 277 22 March 2022 (Tom Hunt).

The notion of moral panic was first articulated by Stanley Cohen in his now infamous 1972 monograph, *Folk Devils and Moral Panics*.<sup>43</sup> He argued that a moral panic arises where:

A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved... or resorted to.

Sometimes the panic passes over and is forgotten, except in folk-lore and collective memory; at other times it has more serious and long-lasting repercussions and might produce such changes as those in legal and social policy or even in the way society conceives itself.<sup>44</sup>

Cohen's research on two youth subcultures in 1960s Britain, the 'Mods' and 'Rockers', presented a compelling argument about how a particular social group that may have engaged in certain deviant behaviour (in this case, minor acts of vandalism) may be essentialised by the political elite and media as 'folk devils' against whom the public, being outraged, demand that the authorities take repressive measures. The media played, and continues to play, an active part in painting these folk devils with a broad brush. Cohen's research revealed that the press repeatedly published highly exaggerated reports about the extent of the alleged deviant behaviour, and thus the threat posed by the folk devils, which resulted in punitive measures being imposed.

Folk devils are an integral feature of Cohen's work on moral panics. For Cohen, these individuals or groups are stripped of all favourable characteristics and are presented exclusively as evil personas. They are perceived as an ongoing existential threat to society: 'social types' that serve as 'visible reminders of what we should not be.'<sup>45</sup> Hall et al define the folk devil in the following way: 'He is the reverse image, the alternative to all we know: the *negation*. He is the fear of failure that is secreted at the heart of success, the danger that lurks inside security, the profligate figure by whom Virtue is constantly tempted, the tiny, seductive voice inside inviting us to feed rations.'<sup>46</sup>

For Goode and Ben-Yehuda, folk devils are perceived as the 'personification of evil'.<sup>47</sup> Meanwhile, Frederiksen and Knudsen have argued that: 'the folk devil for Cohen was not necessarily a biblical phenomenon or a figure related to actual devils. Rather, the folk devil term was coined to signify a perceived dis-

43 Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (Abingdon: Routledge, 1972).

44 *ibid.*, 9.

45 *ibid.*, 10.

46 Stuart Hall and others, *Policing the Crisis: Mugging, The State and Law and Order* (London: Bloomsbury Publishing, 2017) 16.

47 Erich Goode and Nachman Ben-Yehuda, 'Moral Panics: Culture, Politics, and Social Construction' (1994) 20 *Annual Review of Sociology* 28.



turbance of social order that manifests itself through accusations of wrongdoing or evil.<sup>48</sup>

In contemporary British society, they argue that folk devils take on different forms, including refugees, Roma, hipsters, and economic migrants. Arguably, with the increase in referrals to the NRM, which in part underpins the passage of the Nationality and Borders Act, foreign victims of trafficking who have a criminal record, even if compelled to commit an offence in the course, or as a consequence, of being trafficked, have been added to the list of folk devils. These demonised individuals – refugees, economic migrants, Muslims,<sup>49</sup> and now victims of trafficking with a criminal history, have one thing in common: their behaviour is exaggerated, and they are effectively scapegoated to appease the collective outrage of the political elite. Those politicians who supported section 63 of the Nationality and Borders Act 2022 – a provision that will operate to disqualify from protection and exclude from the UK victims of trafficking who are deemed to be a threat to public order, or who are deemed to pose a risk to the national security, or who have a criminal history – arguably ‘mann[ed] moral barricades’,<sup>50</sup> to use the words of Cohen. They sought to use ‘moral barricades’ – the labelling of certain victims of trafficking as ‘dangerous individuals’ (seemingly a synonym for folk devils) – so as to ensure that the Act upholds agreed upon ‘ideals’ and ‘norms’ about who an ideal victim is: a passive and helpless victim who self identifies as such and who has no criminal antecedents. In her contribution to the debate on the Nationality and Borders Bill, Holly Lynch MP took issue with her colleagues’ characterisation of the ‘perfect victim’. She contended that the Bill ‘relies entirely on a misconstruction of what we consider to be a perfect victim: an individual who self-identifies as such and can fully disclose their experience in one setting. That has been widely discredited by the evidence presented at every stage and by victims’ own testimonies. There are many reasons why a victim might be unable to disclose evidence immediately, including the impact of trauma and fear of reprisals against them or their family by their traffickers.’<sup>51</sup>

Much of the existing literature treats folk devils as *only* relevant during times of moral panic. Indeed, some moral panic scholars argue that a necessary prerequisite for a moral panic is a folk devil.<sup>52</sup> Cohen, for example, argues that there are three main features of moral panics: they involve *distortion*, that is societal exaggeration of the seriousness of events;<sup>53</sup> *prediction*, that is the assumption that

48 Martin Demant Frederiksen and Ida Harboe Knudsen (eds), *Modern Folk Devils: Contemporary Constructions of Evil* (Helsinki: Helsinki University Press, 2021) 1.

49 Prina Werbner, ‘Folk devils and racist imaginaries in a global prism: Islamophobia and anti-Semitism in the twenty-first century’ in Nasar Meer (ed), *Racialization and Religion* (London: Routledge, 2015) 66.

50 Cohen, n 43 above.

51 HC Deb vol 711 col 270 22 March 2022 (Holly Lynch).

52 See for example Jarmila Androvičová, ‘The Migration and Refugee Crisis in Political Discourse in Slovakia: Institutionalized Securitization and Moral Panic’ (2016) 16 *Acta Universitatis Carolinae Studia Territorialia* 39.

53 Cohen, n 43 above, 31.

what has happened in the past will inevitably happen again;<sup>54</sup> and *symbolisation*, that is, the stereotyping of the folk devil.<sup>55</sup>

In her work on migration and the refugee crisis in Slovakia, Androvičová relies upon Goode and Ben-Yehuda's definitional criteria to problematise how moral panics work in practice in the migration context. First, she argues there will be a heightened level of concern over certain behaviour (or supposed behaviour) of a group and the consequence that such behaviour will have for the rest of society. The concern, in this context, among both politicians and the general public alike, is that 'you never know' who can be dangerous, and thus every person who is a part of the group should be treated as suspect. Second, she recalls that in the migration context, there is an increased level of hostility towards the group who are perceived as engaging in threatening behaviour.<sup>56</sup> This hostility is not simply sudden expressions of disgust or rejection, but is rather 'a more radicalized dichotomization between "them" and "us", including generating stereotypical "folk devils on the one hand and "folk heroes" on the other.'<sup>57</sup> Third, she notes that there is a certain minimum level of agreement in society as a whole or in designated segments of society that the threat posed is real, serious and attributable to the behaviour or wrongdoing of group members.<sup>58</sup> This sentiment is usually widespread, although the proportion of the population that feels this way need not make up a majority.<sup>59</sup> Fourth, there will be exaggerations or overestimation of the scope of the problem.<sup>60</sup> This overestimation results from the generation and dissemination of numbers and evidence that are imprecise or that are misinterpreted. Finally, there is volatility in the sense that the moral panic erupts suddenly, often remaining latent for long periods of time, and reappearing from time to time, and then nearly as suddenly subsiding.<sup>61</sup>

While most traditional moral panic scholars have argued that there is a dialectic relationship between moral panics and folk devils, contemporary scholars, such as Hayle, have theorised that conceptualising folk devils and moral panics as *always* interconnected may have negative consequences. These include: folk devils being poorly defined; folk devils being under-theorised and under-examined; folk devils being confused with other types of 'deviants'; and folk devil concepts being judged based on the success of moral panic models.<sup>62</sup> Hayle's research on folk devils in Canada reveals that there is not always an inevitable relationship between moral panics and folk devils. The latter can exist without the former.<sup>63</sup>

In the context of the Nationality and Borders Act, whether one takes the view that folk devils are inextricably linked to moral panics or not, it is

54 *ibid.*, 38.

55 *ibid.*, 40.

56 Androvičová, n 52 above, 56.

57 *ibid.*, 57.

58 *ibid.*

59 *ibid.*

60 *ibid.*

61 *ibid.*, 58.

62 Steven Hayle, 'Folk Devils without Moral Panics: Discovering Concepts in The Sociology of Evil' (2013) 6 *International Journal of Criminology and Sociological Theory* 1125.

63 *ibid.*, 1129.

certainly arguable that there is a heightened level of concern over migration, and, in particular, victims of trafficking increasingly being referred into the NRM, which has resulted in increased hostility towards them. This ‘continued and intensified hostility’, as described by Griffiths and Trebilcock,<sup>64</sup> has had the effect of generating and sustaining fear, concern, and ultimately panic by presenting these persons as folk devils. There is volatility in the sense that the panic around the abuse of the NRM erupted suddenly just before the passage of the Modern Slavery Act in 2015, but then receded, and it has now reappeared with greater intensity.<sup>65</sup> Indeed, in his contribution to the parliamentary debates on the Nationality and Borders Act, Sir Iain Duncan Smith contextualised the circumstances surrounding the eruption of the panic:

We should be pushing to make the Modern Slavery Act 2015 even more focused and even better, but my suspicion is that some are looking at it and saying, ‘This is full of ways to come in illegally through the backdoor.’ I have heard some say that there is an increase in the number of people coming into the NRM, which therefore suggests that this change will become a pull factor. First, whether we agree or disagree about the 12 months being a pull factor, relatively, the numbers are absolutely tiny compared with the number of asylum claims ... [I]t is frustrating that the Government do not appear to be listening – not to their Independent Anti-Slavery Commissioner, anti-slavery charities, medical professionals, social workers or survivors – and that everything is being seen through the prism of migration enforcement.<sup>66</sup>

Holly Lynch MP shared a similar concern, arguing that in its haste to revamp the immigration system ‘the Government [had] fail[ed] to recognise that identifying victims of modern slavery or human trafficking is a safeguarding, not an immigration, matter.’<sup>67</sup>

The characterisation of human trafficking as solely an immigration or law enforcement issue is not a recent phenomenon. In fact, since the early 2000s, scholars have articulated concerns about the ‘moral crusade’ against human trafficking, which, they argue, has had the effect of privileging the creation of a hostile environment underpinned by stringent immigration/law enforcement policies over the interests of victims of trafficking. Weitzer, for example, has argued that the core of the moral crusade against trafficking in persons is characterised by the conflation of sex work and trafficking, the characterisation of persons involved in trafficking as the personification of evil, the presentation of only the worst cases and universalisation of these cases and the inflation of the magnitude of the problem.<sup>68</sup> These claims may begin as mere rhetoric, but

64 Clare Griffiths and Julie Trebilcock, ‘Continued and intensified hostility: The problematisation of immigration in the UK government’s 2021 New Plan for Immigration’ (2022) 43 *Critical Social Policy* 1.

65 David Gadd and Rose Broad, ‘Troubling Recognitions in British Responses to Modern Slavery’ (2018) 58 *The British Journal of Criminology* 1440.

66 HC Deb vol 711 col 274 22 March 2022 (Sir Iain Duncan Smith).

67 HC Deb vol 711 col 271 22 March 2022 (Holly Lynch).

68 Ronald Weitzer, ‘The Social Construction of Sex Trafficking: Ideology and Institutionalization of a Moral Crusade’ (2007) 35 *Politics & Society* 447.

over time are translated into hostile institutionalised policies and even legislation, which only serve to confirm that ‘the ideological convergence of the crusade and the State is striking.’<sup>69</sup> In this regard, Weitzer accepts that: ‘All of the hallmarks of a moral crusade are evident – framing a condition as an unqualified evil; creation of folk devils; zealotry among leaders who see their mission as a righteous enterprise; presentation of claims as universalistic truths; use of horror stories as representative of actors’ experiences; promulgation of huge and unverified numbers of victims; and attempts to redraw normative boundaries by increased criminalization.’<sup>70</sup> Moral crusades, argues Weitzer, have several negative externalities, chief among which is the characterisation of an iconic victim: ‘the innocent, young girl dragged off against her will to distant lands to satisfy the insatiable sexual cravings of wanton men.’<sup>71</sup>

Gadd and Broad share the view that the anti-trafficking discourse has transcended into a moral panic in which a dangerous dichotomy is created between innocent victims and folk devils.<sup>72</sup> Tracing the development of anti-trafficking policies in the UK, they argue that the extant moral panic has come about as a result of various techniques employed by NGOs, which have captured the attention of the political elite, namely:

- (1) outlining the horrors trafficking perpetrates; (2) presenting the victims of those horrors as ‘innocent’ – or ‘ideal’ in Nils Christie’s (1986) terms – and thus in no way to blame for their plights; (3) linking such stories to (highly questionable) statistical evidence suggesting that trafficking is becoming, pervasive within Western countries; (4) evoking a fear of ‘overspill’ as traffickers who learnt to ply their trades in the most desperate corners of the world are said to be sneaking unseen into Western countries; and (5) suggesting that everyone should play a part in stopping it.<sup>73</sup>

While Gadd and Broad accept that human trafficking is a problem that needs to be appropriately confronted through, for example, addressing the structural conditions that create an enabling environment for trafficking, they are aware that the techniques used by the political elite to engender a moral panic have an inherently racist character in that ‘foreign nationals are scapegoated as a threat to societal values and interests.’<sup>74</sup> Hostile legislative measures enacted to respond to this moral panic only ‘serve to separate a subsection of the global poor – genuine victims of modern slavery – who are deserving of (limited) rights from a much larger populace of “illegal immigrants”, who are by definition “offenders”, whether “slave masters” or merely those denied leave to remain.’<sup>75</sup>

Similar sentiments resonate with scholars writing in the context of Northern Ireland. Ellison, for example, argues that concerns that Northern Ireland was being ‘swamped’ by immigrants, as well as the work of advocacy coalitions,

69 *ibid*, 461.

70 *ibid*, 467.

71 *ibid*.

72 Gadd and Broad, n 65 above.

73 *ibid*, 1447.

74 *ibid*, 1450.

75 *ibid*, 1452.

lobbyists, politicians, and ‘expert’ opinion-formers in presenting the situation as representing just the ‘tip of the iceberg’ have resulted in ‘cracking down hard from above’.<sup>76</sup> ‘[L]aw enforcement agencies and legislators [have sought to] curry public favour and “get tough” on whatever activity spawned the panic in the first place’,<sup>77</sup> which has given rise to a moral panic: ‘[E]lements of Cohen’s thesis resonate clearly with developments in Northern Ireland: we have had the emergence of a “problem” – sex trafficking that is conflated with prostitution – that has been hyped by the media and cracked down on hard by the authorities, plus we have had the emergence of “expert” opinion-formers and advocacy groups who insist – in spite of evidence to the contrary – that the problem is bigger than anyone could ever imagine.’<sup>78</sup> In summary, a moral panic has undoubtedly enveloped the anti-trafficking discourse in the UK.

### ‘ICONIC VICTIMS’ V ‘FOLK DEVILS’ THROUGH THE PRISM OF THE NATIONALITY AND BORDERS ACT

Relying upon Stanley Cohen’s ‘folk devils’ critique in the context of moral panics, the remaining section of this article argues that the Nationality and Borders Act 2022 will concretise a dangerous dichotomy between ‘iconic victims’ and ‘folk devils’, and so represents a retrograde step in the protection of the rights of victims of trafficking in the UK. Cohen’s ‘folk devil’ is the anthesis of the ‘ideal’ or ‘iconic’ victim. Norwegian sociologist, Nils Christie, has described the ‘ideal victim’ as: ‘a person or a category of individuals who – when hit by crime – most readily are given the complete and legitimate status of being a victim. The ideal victim is, in my use of the term, a sort of public status of the same type and level of abstraction as that for example of a “hero” or a “traitor”’.<sup>79</sup>

Using the frail old woman versus man at bar analogy, Christie presents an insightful picture of how victimhood is characterised. The little old lady, who, on her way home in the middle of the day after having cared for her sick sister, and who is hit on the head by a big man who thereafter grabs her bag and uses the money for liquor or drugs, is characterised as an ‘ideal victim’ because:

- (1) [She] is weak. Sick, old or very young people are particularly well suited as ideal victims.
- (2) [She] was carrying out a respectable project – caring for her sister.
- (3) She was where she could not possibly be blamed for being – in the street during the daytime.
- (4) The offender was big and bad ...
- (5) The offender was unknown and in no personal relationship to her.<sup>80</sup>

76 Graham Ellison, ‘Criminalizing the Payment for Sex in Northern Ireland: Sketching the Contours of a Moral Panic’ (2017) 57 *British Journal of Criminology* 194, 199.

77 *ibid.*

78 *ibid.*, 210.

79 Nils Christie, ‘The Ideal Victim’ in Ezzat Fattah (ed), *From Crime Policy to Victim Policy* (Basingstoke: Palgrave Macmillan, 1986) 17, 18.

80 *ibid.*, 19.

By contrast, a young man hanging around in a bar, who is hit on the head by an acquaintance who took his money may be considered ‘a far from ideal victim’, even though his head might be more severely hurt than that of the old lady, because:

- He was strong.
- He was not carrying out any respectable project.
- He could and should have protected himself by not being there.
- He was as big as the offender.
- And he was close to the offender.<sup>81</sup>

In Christie’s estimation, society – and, indeed, the justice system – treats the little old lady far better than it would treat the man because of the pervasive belief that the ideal victim is ‘weak compared to the unrelated offender, as well as having put a reasonable energy into protecting herself against becoming a victim.’<sup>82</sup> Because the man exercised independence, however, ‘less credibility is given to [his] claim of victim-status as a result of weakness or lack of possibilities for self-protection.’<sup>83</sup>

Applying this approach to broader social contexts, Christie argues that for a person to be considered an ideal victim, ‘she (or sometimes he) must be strong enough to be listened to, or dare to talk. But she (he) must at the very same time be weak enough not to become a threat to other important interests. A minimum of strength is a precondition to being listened to, but sufficient strength to threaten others would not be a good base for creating the type of general and public sympathy that is associated with the status of being a victim.’<sup>84</sup> Notwithstanding this, Christie considers the non-ideal victim to be the ‘one that is prevalent in our type of society’;<sup>85</sup> that is, ‘the ignorant victim, the one victimized without knowing. Or rather, the many victimized without knowing, neither that they are victimized, nor the source.’<sup>86</sup> He or she ‘hang[s] around in crime-exposed areas, but do at the same time know, by personal observation, that crime after all is only a minor phenomenon in these areas, minor compared to all other life activities that go on’.<sup>87</sup>

In the context of human trafficking, Srikantiah builds upon Christie’s characterisation of the ‘ideal victim’. She argues that the ‘ideal’ or ‘iconic victim’ is:

a victim of sex trafficking who passively waits for rescue by law enforcement, and upon rescue, presents herself as a good witness who cooperates with all law enforcement requests.

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81 *ibid.*

82 *ibid.*

83 *ibid.*, 21.

84 *ibid.*

85 *ibid.*, 23.

86 *ibid.*, 27.

87 Jayashri Srikantiah, ‘Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law’ (2007) 87 *Boston University Law Review* 157.

At the beginning of the iconic victim narrative, the victim is forced, defrauded, or coerced into trafficking for forced sex, not forced labor. The force, fraud, or coercion must be severe enough for an investigator or prosecutor to subsequently deem the victim a good witness for prosecuting the trafficker. Once in the trafficking enterprise, the victim must remain passive until rescued by law enforcement, as reflected in the regulatory preference for rescue over escape. She must then fully reveal her story to law enforcement upon rescue, given the regulatory requirement of the LEA [Law Enforcement Agency] endorsement.<sup>88</sup>

Thus, the iconic trafficking victim is one who suffered harm through no fault of her own, and who is therefore deserving of pity, compassion, and legal remedy. Srikantiah, however, suggests that in the real world ‘victims are not perfectly innocent, and perpetrators are not perfectly evil.’<sup>89</sup> Nonetheless, she notes that the idea of the iconic victim can be found in various contexts, including welfare, domestic violence, violent crime, disaster relief and discrimination cases.<sup>90</sup>

Gadd and Broad’s research on human trafficking in the UK similarly rebuffs the binary characterisation of ‘ideal’ victims and ‘folk devils’.<sup>91</sup> In this respect, they argue for a more nuanced understanding of the complexities of victimhood:

while modern slavery policy makes a folk devil of the unscrupulous foreign slaver, the ‘politics of pity’ directed at trafficked women and children also obscures the wider context in which migrants struggle – without documentation, rights, or legal protections – to make better lives in political economies that stack the odds almost impossibly against them. This pitying rhetoric is highly circumscribed. Those who do not appear morally innocent – because they entered prostitution of their own accord, pose a threat to public health, committed crimes themselves or failed to rehabilitate once rescued – and ‘let’ themselves be trafficked again – risk becoming recast as culpable in their own plights, as ‘illegal immigrants’ unworthy of further help and hospitality.<sup>92</sup>

For Gadd and Broad, the binary characterisation of ‘ideal’ victims and ‘folk devils’ fails to properly account for the reality that ‘the choices of those who become exploiters are neither freely made nor immediately liberating ... some female traffickers exploit others while being exploited themselves as cleaners, waitresses, beggars or sex workers.’<sup>93</sup> Similarly, young people who are vulnerable to persuasion and who may not know that they are in fact participating in criminal activities, such as the cultivation of cannabis, may be subject to prosecution for these activities in circumstances where they are characterised as ‘folk devils’.<sup>94</sup> In short, Gadd and Broad see a fundamental challenge in the ‘binary between innocent victim and evil offender, upon which criminal justice processes trade,

88 *ibid.*, 187.

89 *ibid.*, 196.

90 *ibid.*, fn 213.

91 Gadd and Broad, n 65 above.

92 *ibid.*, 1450.

93 *ibid.*, 1453.

94 *ibid.*

[which] renders it impossible for many of those working in the system to foresee and contemplate the many ways in which multiple vulnerabilities intersect with global inequalities in the commission of immigration-related crimes.<sup>95</sup>

The following discussion demonstrates how the Nationality and Borders Act 2022 creates a dangerous dichotomy between ‘iconic victims’ and ‘folk devils’. The Act affords victims of trafficking who present themselves as morally innocent, who are passive and cooperative with the authorities, and who do not have a criminal record, the privilege of recognition and protection by the state. On the other hand, however, those who exercise agency in search of opportunities in the UK, and those who are uncooperative with the authorities or have a criminal record are essentialised by the Act as ‘dangerous’ individuals who are not only disqualified from protection, but also required to leave the UK.

### FOLK DEVILING AND THE TRAFFICKING INFORMATION NOTICE

Section 58 of the Nationality and Borders Act 2022 provides that a ‘slavery or trafficking information notice’ may be served on a person, which requires that person to provide the Secretary of State and any other competent authority, before a specified date, relevant information related to his or her status. The Act defines ‘relevant status information’ as information that may be relevant for the purpose of making a reasonable grounds decision<sup>96</sup> or a conclusive grounds decision that the person is a victim of human trafficking.<sup>97</sup> If the person is unable to provide the requested information by the specified date, he or she will be obliged to provide a statement setting out the reasons for not providing the requested information. Under section 59, should the recipient supply the relevant status information late or have no good reasons for why the information is provided late, the competent authority, in making a reasonable grounds decision or conclusive grounds decision, may treat this as damaging the person’s credibility. The Explanatory Memorandum accompanying the Act states that this provision is intended to ascertain the factual account of previous experiences that can give rise to a referral as a potential victim of trafficking, which can overlap with the factual accounts used to determine a protection or human rights claim.<sup>98</sup> More pointedly, the Memorandum explains, considering all claims and information at the same time ‘will support both Home Office and judicial decision makers as well as victims by speeding up processes and considering all grounds collectively.’<sup>99</sup>

While, on the face of it, obtaining information from victims of modern slavery that could assist in their correct identification is a laudable objective, it

<sup>95</sup> *ibid.*

<sup>96</sup> This is the initial decision by a competent authority when it has ‘reasonable grounds to believe’ that the person is a victim of trafficking. Where a positive reasonable grounds decision is given, the individual qualifies for a minimum 30-day reflection and recovery period.

<sup>97</sup> Nationality and Borders Act 2022, s 58(3). A conclusive ground decision is issued if the competent authority, after reviewing the circumstances of the person in question and any available evidence, believes, on the balance of probabilities, that the person is a victim of trafficking.

<sup>98</sup> Nationality and Borders Bill Explanatory Notes (6 July 2021) 60.

<sup>99</sup> *ibid.*



is the potential for the notice to be misused that is problematic. Indeed, it is well-documented that many foreign victims of modern slavery face multiple intersecting praxes of vulnerability<sup>100</sup> that may prevent them from describing themselves as victims and providing information about their exploitation and exploiters in a timely fashion.<sup>101</sup> Among other things, many victims of modern slavery do not speak English well, are poorly educated, have little or no familial support in the jurisdiction, are threatened with reprisals from their traffickers, and have a strong mistrust of the authorities.<sup>102</sup> Many victims of modern slavery may not, because of the novelty of their experience and its severe emotional toll,<sup>103</sup> be able to fully articulate the nature and extent of the exploitation committed against them in a coherent fashion.<sup>104</sup> Furthermore, inasmuch as they may be genuine victims of modern slavery, they may, because of cultural barriers and the ‘Stockholm syndrome’,<sup>105</sup> simply not provide what may be characterised by the competent authority as ‘good reasons’ for the late submission of relevant information.

The requirement that the potential victim of trafficking provide relevant information in a timely fashion to the authorities, under the pain of their credibility being damaged if they do not do so, may in fact serve as a disincentive to disclose information. The requirement may be viewed as synonymous with state-sponsored coercion, even if subtle, similar to the coercion experienced at the hands of traffickers. Victims may believe that the state is only concerned with ascertaining as much information as possible to assist in its prosecution of the trafficking offence, rather than being genuinely interested in their well-being as exploited individuals.

More troublingly, the provision may also operate to shift the burden of investigation from the state to victims of trafficking to prove their situation. This would be inconsistent with the judgment of the European Court of Human Rights (ECtHR) in *S.M. v Croatia*,<sup>106</sup> which confirmed that competent national authorities are under a positive obligation under Article 4 of the ECHR to institute and conduct an effective investigation capable of leading to the establishment of the facts and of identifying and – if appropriate – punishing those responsible for the trafficking offence. Furthermore, ‘in accordance with their procedural obligation, the authorities must act of their own motion once the matter has come to their attention. In particular, they cannot leave it to the

100 See for example *Reyes v Al-Malki* [2017] 3 WLR 923; *Basfar v Wong* n 1 above.

101 Jill Domoney and others, ‘Mental Health Service Responses to Human Trafficking: A Qualitative Study of Professionals’ Experiences of Providing Care’ (2015) 15 *BMC Psychiatry* 1.

102 Virginia Mantouvalou, ‘“Am I Free Now?” Overseas Domestic Workers in Slavery’ (2015) 42 *Journal of Law and Society* 329; Jason Haynes, ‘Revisiting the Relationship between Human Trafficking and Diplomatic Immunity’ (2023) 139 *LQR* 204.

103 Awaliyah Muslimah Suwetty, Asti Melani Astari, and Titin Andri Wihastuti, ‘Mental Health of Human Trafficking: A Systematic Review’ (2019) 6 *Research Journal of Life Science* 130.

104 Sukran Altun and others, ‘Mental health and human trafficking: responding to survivors’ needs’ (2017) 14 *BJPsych International* 21.

105 Siobhán Mullally and Cliodhna Murphy, ‘Double Jeopardy: Domestic Workers in Diplomatic Households and Jurisdictional Immunities’ (2016) 64 *The American Journal of Comparative Law* 677.

106 Application No 60561/14, Merits and Just Satisfaction, 25 June 2020.

initiative of the victim to take responsibility for the conduct of any investigatory procedures.<sup>107</sup>

The Court explained that ‘as the prosecuting authorities are better placed than a victim to conduct the investigation, any action or lack of action on the part of the victim cannot justify a lack of action on the part of the prosecuting authorities.’<sup>108</sup> It held that the investigation obligation required that ‘the authorities must take whatever reasonable steps they can to collect evidence and elucidate the circumstances of the case. In particular, the investigation’s conclusions must be based on thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of inquiry undermines to a decisive extent the investigation’s ability to establish the circumstances of the case and the identity of those responsible.’<sup>109</sup>

Similar sentiments were articulated by the ECtHR in *V.C.L. and A.N. v United Kingdom*.<sup>110</sup> In this case, the Court noted that, irrespective of whether there are shortcomings on the part of a victim’s legal representatives or the victim him or herself does not self-identify, the obligations under Article 4 of the ECHR are triggered when there exist circumstances giving rise to a credible suspicion that an individual has been trafficked. The Court confirmed that the positive obligation to investigate is not triggered by ‘a complaint made by or on behalf of the potential victim’.

The State cannot, therefore, rely on any failings by a legal representative or indeed by the failure of a defendant – especially a minor defendant – to tell the police or his legal representative that he was a victim of trafficking. As the 2009 CPS guidance itself states, child victims of trafficking are a particularly vulnerable group who may not be aware that they have been trafficked, or who may be too afraid to disclose this information to the authorities ... Consequently, they cannot be required to self-identify or be penalised for failing to do so.<sup>111</sup>

By demanding that victims of trafficking provide relevant information under the pain of damage to their credibility, sections 58 and 59 of the Nationality and Borders Act 2022 appear to provide the state with the opportunity to soften its positive obligation to conduct effective investigations by placing the onus on victims to provide as much information as possible about their experiences at the earliest possible opportunity. It may be argued that victims of trafficking, because of their well-documented resistance to cooperate with the authorities in the institution of criminal proceedings, may require a ‘nudge’ in that direction. However, this view fails to take account of the obvious fact that it is the state – not the victim – that is ultimately responsible for evidence gathering, and that victim-less prosecutions are indeed possible. In short, the approach taken will

107 *ibid* at [314].

108 *ibid* at [336].

109 *ibid* at [316].

110 Application Nos 77587/12 and 74603/12, Merits and Just Satisfaction, 16 February 2021.

111 *ibid*.

likely only serve law enforcement purposes,<sup>112</sup> and is far from a genuine attempt to ensure that the complexities of victimhood are understood and accounted for.

More troublingly, sections 58 and 59 of the Nationality and Borders Act 2022 create a dangerous dichotomy between iconic victims of trafficking – those who are passive, cooperative, and eager to supply as much information as they can to the authorities at the earliest possible opportunity, and ‘folk devils’ – those who supply information late or not at all. The provisions implicitly assume that the latter groups of victims are not credible and therefore they should not be considered as genuine victims of trafficking and should accordingly be disqualified from protection and/or removed from the UK. In keeping with Cohen’s account in the context of moral panics, in the determination of whether there are reasonable or conclusive grounds to believe that they are victims of trafficking, these folk devils are likely to be stripped of everything favourable about their case. Rather than being presented as ‘frightened, numb, confused, or still under the psychological control of the trafficker’<sup>113</sup> at the relevant time, they will be demonised as hostile, uncooperative, and only interested in abusing the NRM or asylum process to benefit from support services. In turn, if the credibility of these folk devils is so damaged that a negative reasonable or conclusive grounds decision is made, these individuals will not benefit from any support services, and will likely be deported from the UK with haste.

In light of the complexities of vulnerability and victimhood that typically attend a trafficking situation, victims’ credibility should not be damaged because they are so overwhelmed by the exploitation that they have had to endure that they are not prepared, at least not at the very outset, to supply the information requested by competent national authorities. Dame Sara Thornton, the former Independent Anti-Slavery Commissioner, has noted that: ‘Narratives are likely to emerge piecemeal, becoming more coherent as trusting relationships are established and victims feel able to speak about their experiences more openly.’<sup>114</sup>

She further explains that trauma can lead to memory loss and inconsistencies in recalling experiences. It may result in delayed disclosure, difficulty recalling facts, or symptoms of post-traumatic stress disorder, which the slavery and trafficking notice regime appears oblivious to. In this connection, during the passage of the Bill through Parliament, she argued:

for those who have experienced trauma, it can often take a considerable amount of time before they feel comfortable to disclose fully what has happened to them. It is therefore problematic that the Bill does not specify the timescales within which individuals would be required to provide this information. The proposal that late compliance may be interpreted as damaging to credibility also fails to take into account the severe trauma suffered by some victims.<sup>115</sup>

112 Bo Cooper, ‘A New Approach to Protection and Law Enforcement under the Victims of Trafficking and Violence Protection Act (TVPA)’ (2002) 51 *Emory Law Journal* 1041 (arguing that the TVPA, s 107 serves a purely law enforcement purpose).

113 See Srikantiah, n 87 above, 180.

114 Sara Thornton, ‘The Nationality and Borders Bill’ (Letter from the Independent Anti-Slavery Commissioner to the Home Secretary, 7 September 2021) 2.

115 *ibid.*, 3.

Similar insights, based on their empirical work, have been expressed by Domoney et al who explain that recent or on-going traumatic experiences in relation to trafficking and ongoing police investigations may negatively impact on victims' willingness to provide information related to their trafficking experience. Furthermore, social stressors, such as the risk of deportation and unstable housing, fear of the risk of disclosure on their own safety or the safety of their families, or the likelihood of deportation, feelings of shame or guilt and the effects of traumatic experiences on memory may all impact on a victim's ability to recall the timing, details, or chronology of events.<sup>116</sup> The ECtHR in *S.M. v Croatia*<sup>117</sup> has also noted the impact of trauma on a victim's account.

Finally, another practical implication of sections 58 and 59 is that competent authorities may ultimately ascribe minimal weight to a late statement provided by a victim of trafficking. This will be based on a deadline rather than judging the statement on its probative value. In other words, these provisions may operate to prioritise process over valuable evidence that may be helpful in the prosecution of traffickers. It is unacceptable that victimhood is premised on whether a person has provided information within a stipulated timeframe. Folk devils will suffer most from the inclusion of these provisions in the Nationality and Borders Act. Iconic victims, on the other hand, who supply the requested information on time will be praised and rewarded for their diligence, their initiative and cooperative spirit, even where the probative value of their evidence is weaker than that of the folk devils.

### Folk deviling and the recovery and reflection period

The recovery and reflection period is essential to enabling potential victims of trafficking to escape the influence of their traffickers, recover from the trafficking ordeal, and make an informed decision as to whether to cooperate with competent authorities.<sup>118</sup> Article 13 of the ECAT lays down a minimum period of 30 days. However, the national Modern Slavery Guidance<sup>119</sup> recognised that this is a floor rather than a ceiling, given the multitude of intersecting vulnerabilities potential victims of trafficking experience that may impact the speed of their recovery. The Guidance provided that where a reasonable grounds decision was positive, the potential victim was entitled to at least 45 days of support<sup>120</sup> from the national Victim Care Contract (VCC), through which victims could access outreach services including legal, practical, and emotional support, and safehouse accommodation, if they were destitute.

Section 61 of the Nationality and Borders Act 2022 reduces the recovery and reflection period to 30 days. The period ends on the later date of either i) the

116 Domoney and others, n 101 above.

117 *S.M. v Croatia* n 106 above.

118 Ryszard Piotrowicz, 'The European Legal Regime on Trafficking in Human Beings' in Ryszard Piotrowicz, Conny Rijke and Baerbel Heide Uhl (eds), *Routledge Handbook of Human Trafficking* (Abingdon: Routledge, 2017) 41.

119 Modern Slavery: Statutory Guidance for England and Wales (Version 2.10).

120 *ibid* at [11.23].

day on which a conclusive grounds decision is made in relation to the identified potential victim or ii) 30 days from the day on which the positive reasonable grounds decision was made. The Explanatory Memorandum makes it clear that the 30-day recovery and reflection period does not amend the minimum 30-day recovery period for victims provided for under the ECAT.<sup>121</sup> However, it is arguable that section 61 represents, at least from a human rights perspective, ‘a regressive measure’<sup>122</sup> that privileges the state’s formal compliance with its international obligations over the multiple intersecting and long-term needs of victims of trafficking. Indeed, while this minimum period might be sufficient in some cases, its blanket application to all victims of trafficking, irrespective of the magnitude of the exploitation to which they have been subject, is deeply problematic. It is rooted in the idea that all victims have the same experiences and needs, and that these foreign folk devils do not deserve more than the floor level of protection. This should not come as a surprise, however, when one considers that victims of trafficking have increasingly been demonised as folk devils by the political elite, who not only enthusiastically whittled down the recovery and reflection period under the cloak of formal compliance, but who also argued against the grant of a further recovery and reflection period. The Act gives effect to the idea that because folk devils are increasingly being referred into the NRM, they should be taught an important lesson that will strip them of those ‘privileges’ they previously enjoyed, which will in turn disincentivise them from claiming victim status, even in circumstances where they are genuine victims of trafficking. The unacknowledged, but likely, effect of the provision will be to progressively make the regulatory environment as hostile as possible such that the UK becomes no longer a place of refuge for people who are identified as victims of trafficking but who do not present as passive, cooperative or morally innocent.<sup>123</sup> This concern is reflected in a joint statement by four UN Special Rapporteurs:

the reduction from 45 days to 30 days would be a regressive measure, lowering the standard of human rights protection and protection afforded to potential victims of trafficking or contemporary forms of slavery currently provided by the State. As such, it would be contrary to the object and purpose of international law on human trafficking and contemporary forms of slavery, to ensure effective protection of the human rights of victims and to ensure non-regression in human rights protection.<sup>124</sup>

In short, reducing the recovery and reflection period does not advance the interests of victims of trafficking.

121 *ibid* at [544].

122 Siobhán Mullally and others, ‘The Nationality and Borders Bill and its Compliance with the State’s Obligations under International Law’ (Mandates of the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, OL GBR 11/2021, 5 November 2021) 7.

123 Gadd and Broad, n 65 above, 1451.

124 Mullally and others, n 122 above, 7. 7.

## The folk deviling of persons disqualified from protection

Section 63 of the Nationality and Borders Act 2022 is arguably one of its most controversial provisions. It empowers the state to remove a person in relation to whom a positive reasonable grounds decision has been made from the UK, and precludes the grant of limited leave to remain in the UK if that person is a threat to public order or has claimed to be a victim of human trafficking in bad faith.<sup>125</sup> While the Explanatory Memorandum accompanying the Act gives the impression that section 63 is doing nothing more than implementing the UK's obligations under Article 13(3) of the ECAT, it is the practical application of the provision, in an age of heightened securitisation and moral panics, that raises concerns. The provision treats victims of trafficking who do not present as passive, helpless, or cooperative with the authorities or who have criminal antecedents as dangerous people: a threat to public order. These persons are not only deemed to be unworthy of support services, but are subject to immediate removal from the UK. The blanket denial of protection to these persons who are characterised by the state as folk devils may be contrary to Article 4 of the ECHR. The ECtHR, first in *Rantsev v Cyprus and Russia*,<sup>126</sup> and later in *S.M. v Croatia*, has held that: '(potential) victims need support even before the offence of human trafficking is formally established; otherwise, this would run counter to the whole purpose of victim protection in trafficking cases.'<sup>127</sup>

The Nationality and Borders Act 2022 identifies several categories of victims of trafficking who are deemed to be a threat to public order, and who are thus essentialised as folk devils in the ways described below.

### *Terrorist Suspects/Offenders*

Pursuant to sections 63(a) and (d) of the Nationality and Borders Act, a person with a reasonable grounds decision who has been convicted of a terrorist offence or there are reasonable grounds to suspect that he or she is or has been involved in terrorism-related activity (whether or not the terrorism-related activity is attributable to the person being, or having been, a victim of slavery or human trafficking) will be subject to removal from the UK. The Act does not appear to require any serious inquiry into whether the person in question is a child who has been exploited by non-state armed groups. This is a point of concern that has in the past been raised by Siobhán Mullally, the UN Special Rapporteur on trafficking in persons, who has noted that: 'Children detained for association with armed groups, including designated terrorist groups, should be recognized as victims of grave violations of human rights and humanitarian law. Recovery, reintegration and family reunification should be prioritized, not punishment.'<sup>128</sup>

125 Nationality and Borders Act 2022, s 63(1)(b).

126 *Rantsev v Cyprus and Russia* Application No 25965/04, Merits and Just Satisfaction, 10 May 2010.

127 *S.M. v Croatia* n 106 above.

128 Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally, *Implementation of the non-punishment principle* A/HRC/47/34 (17 May 2021) at [40].

Nor does it spare a thought for those victims of trafficking who have committed a terrorist offence in the course, or as a consequence, of being trafficked. This is especially problematic when viewed against the backdrop of research conducted by the United Nations Office on Drugs and Crime (UNODC) which reveals that children in a number of jurisdictions, including the UK, because of their ‘young age and psychological malleability’, have been recruited and forced to commit criminal activities, including carrying equipment and weapons, detonating bombs and planting explosive devices, and videotaping attacks for propaganda purposes.<sup>129</sup> In this connection, UNODC has cautioned against stigmatising children’s association with terrorist groups and the imposition of penalties by law enforcement and military forces, having regard to the non-punishment principle. Similar sentiments have been expressed by the Group of Experts on Action against Trafficking in Human Beings (GRETA). GRETA has pointed to the fact that the ‘links between the fight against terrorism and the fight against trafficking in human beings raise a number of complex issues’,<sup>130</sup> and accordingly admonished the UK to ‘ensure that victims of trafficking are identified as such and receive the support and assistance provided for by the Convention, and applying the non-punishment principle.’<sup>131</sup>

The Act also treats terrorist suspects who have a criminal record because of an unsafe conviction as folk devils, thereby automatically disqualifying them from protection and subjecting them to removal from the UK, even if their claim to be victims of trafficking is legitimate. Indeed, while terrorism is, of course, a very serious offence, it is not uncommon that a victim of trafficking who has been compelled to commit such an offence in a foreign jurisdiction may have experienced an unfair trial that is intended to keep them silent and tarnish their criminal record, thereby delegitimising any subsequent claim to victimhood.<sup>132</sup> In this regard, in adopting a blanket approach to victims of trafficking who have committed or are suspected of having committed terrorist offences, even if the offences might have been committed a long time ago and they might now be rehabilitated, the Act essentially characterises these persons as a homogenous group – folk devils, who are to always be known by their past criminality rather than by their present victimhood.

In relying on their criminal antecedents as a basis for excluding them from the jurisdiction, the NRM is freed of folk devils – including vulnerable women and girls from the Global South who are viewed as nothing more than ‘dangerous individuals’. Indeed, the uneven impact of counter-terrorist legislation and policies on women and girls has been long highlighted by Fionnuala Ní Aoláin, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism,<sup>133</sup> as an area of concern

129 *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System* (Vienna: United Nations Office on Drugs and Crime, 2017).

130 GRETA, *Evaluation Report: United Kingdom’s Third Evaluation Round* (Strasbourg: Council of Europe, 2021) at [49].

131 *ibid.*

132 Ben Saul, ‘The Legal Relationship Between Terrorism and Transnational Crime’ (2017) 17 *International Criminal Law Review* 417.

133 Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, *Human rights impact of*

in her 2021 report, when she noted that ‘the counter-terrorism arena is often mistakenly viewed as gender-neutral, both in its practices and consequences.’<sup>134</sup>

Meanwhile, commenting on the then Draft Nationality and Borders Bill, four UN Special Rapporteurs issued a joint statement noting, *inter alia*, that they were particularly concerned that: ‘the “threat to public order” provision would exclude protection to victims of trafficking groomed online or in person who may have travelled to conflict sites – particularly those where designated terrorist groups are active – and experience a range of human rights violations as a victim of trafficking but be denied protection based on the status of the trafficker with whom he/she was associated.’<sup>135</sup>

These concerns do not appear to have been considered in the parliamentary debates leading up to the enactment of the Nationality and Borders Act 2022. Instead, the MPs who supported the Act were only concerned with clearing the NRM of folk devils: those terrorist suspects, including female suspects from the Global South, who do not present as passive, helpless, and cooperative victims of trafficking. These ‘dangerous individuals’ have been essentialised and scapegoated as the main reason for the NRM’s dysfunction. They have, as a consequence, been stripped of every favourable characteristic, including their legitimate claim to victimhood. By contrast, iconic victims – those who are passive, helpless, and cooperative with the authorities and have no prior affiliation to terrorist groups – are treated with dignity and respect, and afforded appropriate support and protection, including leave to remain in the UK. This binary characterisation between ‘iconic victims’ and ‘folk devils’ fails to account for the reality that victims are not always perfectly innocent, and perpetrators are not always perfectly evil.

### *Persons with Criminal Antecedents*

The second way in which the Nationality and Borders Act 2022 contributes to the folk devilling of victims of trafficking is the manner with which it treats victims with criminal antecedents. Under the Act, these persons may be removed from the UK, even if there is a positive reasonable grounds decision in relation to them, if they have been convicted of an offence listed in Schedule 4 of the MSA 2015 anywhere in the UK, or of a corresponding offence committed abroad.<sup>136</sup> Schedule 4 of the MSA 2015 lists, *inter alia*, kidnapping, manslaughter, murder, piracy, wounding with intent to cause grievous bodily harm and malicious wounding. These are serious offences which may raise legitimate concerns that a victim of trafficking poses an immediate, genuine, present, and sufficiently

*counter-terrorism and countering (violent) extremism policies and practices on the rights of women, girls and the family* A/HRC/46/36 (22 January 2021).

134 *ibid* at [4].

135 ‘The Nationality and Borders Bill and its compliance with the State’s obligations under international law’, Joint letter of the Mandates of the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of slavery, including its causes and consequences and the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, OL GBR 11/2021 (5 November 2021) 8.

136 Nationality and Borders Act 2022, s 63(b).



serious threat to public order. However, there are other offences mentioned in Schedule 4 whose gravity and the surrounding circumstances underlying their commission should not automatically warrant this characterisation. For example, a victim of trafficking who has used drugs to commit or assists in the commission of an indictable offence, or who has abandoned children, or who has injured persons by furious driving or who has assaulted a police officer with intent to resist arrest may have been convicted, whether in the UK or elsewhere, but in circumstances where they were compelled to commit these offences, or prosecutors may have applied the wrong evidential or public interest test or the nature and conduct of the proceedings for whatever other reason make the conviction unsafe and thus an abuse of process. In these circumstances, despite strong mitigating circumstances, the person may be characterised as a folk devil, whose criminal antecedents operate to delegitimise his or her victimhood. As Holly Lynch MP said during the parliamentary debates on the Nationality and Borders Act:

It will drive more people underground and make it significantly harder for the police and authorities to investigate the perpetrators of human trafficking without the trust and support for victims in place. It also sends a clear message to perpetrators of human trafficking that they are free to exploit vulnerable people with a criminal record, knowing they will now be exempt from protection. Clause 6[3] represents a massive step backwards in our shared ambition to see more traffickers before the courts if it passes unamended.<sup>137</sup>

Although it has been argued that a conviction for a Schedule 4 offence is not inevitable given that prosecutors retain discretion to not prosecute victims of trafficking who have committed said offences in circumstances where they committed these offences in the course, or as a consequence, of being trafficked,<sup>138</sup> empirical research shows that there is a high degree of inconsistency in the application of prosecutors' discretion, which typically results in convictions. GRETA has found that there are a 'number of cases where the non-punishment provision was not applied, and victims of trafficking were sentenced', and that 'in many cases, the status of victim of trafficking is acknowledged only during the sentencing phase'.<sup>139</sup> It explained this state of affairs by pointing to a 'very low level of awareness among prosecutors, police, and defence solicitors of the non-punishment provision for children, as well as little monitoring of the use of the presumption against prosecution or the statutory defence across the UK'.<sup>140</sup> Empirical research conducted by Nogah Ofer supports GRETA's assessment.<sup>141</sup> Ofer, having analysed government publications, publications of domestic arms-length bodies (inspectorates and

137 HC Deb vol 711 col 273 22 March 2022 (Holly Lynch).

138 Frank Field, Maria Miller and Baroness Butler-Sloss, 'Fourth Interim Report: Legal Application of the Modern Slavery Act' (London: The Home Office, 2019) [4.3.2].

139 GRETA, n 130 above.

140 *ibid* at [162].

141 Nogah Ofer, 'Implementation of the Non-Punishment Principle in England: Why Are Victims of Trafficking Not Benefiting from the Protection from Prosecution Provided by International Law?' (2019) 11 *Journal of Human Rights Practice* 486.

other semi-independent bodies), publications of international bodies at European level, NGO reports, legal publications, and case law, supplemented by key informant interviews, found that: ‘lack of awareness of the non-punishment principle appears to play a prominent part in continuing prosecutions, despite CPS guidance going back to shortly after the UK signed the Convention in 2007. The very guidelines of which prosecutors seem unaware require them to ensure, of their own initiative, that enquiries are made by the police into a suspect’s trafficking situation.’<sup>142</sup>

In light of these and other concerns surrounding prosecutors’ exercise of their discretion in respect of Schedule 4 offences, Piotrowicz and Sorrentino have cautioned that:

While the principle is expressed as a discretionary one, that discretion, it is argued, exists to accommodate the particular requirements of national legal systems. It is a discretion about how to apply the principle, not a discretion about whether to apply it or not. States which fail to use that discretion in the appropriate manner will be in violation of their international obligation to ensure that victims of trafficking are not punished for offences they were compelled to commit.<sup>143</sup>

Not only are persons covered by Schedule 4 of the Modern Slavery Act to be removed immediately from the UK, but under section 63(3)(f) of the Nationality and Borders Act, victims of trafficking who are classified as ‘foreign criminals’ within the meaning of 32(1) of the UK Borders Act 2007 may also be removed.<sup>144</sup> These are non-British citizens who have been convicted in the UK of an offence and have been in this regard sentenced to a period of 12 months imprisonment. The provision also captures individuals who are considered ‘serious criminals’ under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002; that is, persons who were convicted outside the UK of an offence, and who were sentenced to a period of imprisonment of at least 12 months, and where those persons could have been sentenced to a period of imprisonment of at least 12 months had the conviction been a conviction in the UK for a similar offence. This provision casts a broad net, while introducing a troublingly low threshold of 12 months imprisonment as characteristic of a ‘serious criminal’. The challenge in this regard is that many victims of trafficking who have been compelled to commit immigration and prostitution related offences (whether in the UK or abroad) are captured by this provision, which may in turn mean that they are not treated as genuine victims. Instead, they, including children whose vulnerability might be deliberately exploited by traffickers, are demonised as folk devils. As Dame Sara Thornton, the former Independent Anti-Slavery Commissioner, has said:

this is a low threshold and will encompass a wide range of offences. Sentences given outside the UK may not reflect the sentencing guidelines in the UK which may

142 *ibid.*, 495.

143 Ryszard W. Piotrowicz and Liliana Sorrentino, ‘Human Trafficking and the Emergence of the Non-punishment Principle’ (2016) 16 HRLR 669, 698–699.

144 Nationality and Borders Act 2022, s 63(f).

draw in minor offending to this provision. Data from Hope for Justice demonstrates that of their current live caseload, 29% of individuals have committed offences that would meet the criteria for exemption under public order grounds. A further 13% have committed wider offences that may/may not meet the criteria for a public order exemption and 3% have a conviction but the details of this are unknown.<sup>145</sup>

Thornton further noted that traffickers already have a modus operandi of recruiting individuals with offending history, including those who have recently left prison, who are less likely to engage with authorities and seek support. Should this cohort be prevented from accessing support through the NRM, she argues, they are likely to be increasingly targeted by traffickers.<sup>146</sup> This view was shared by Sir Iain Duncan Smith in the parliamentary debates, when he noted that: ‘those who already have a criminal record are frequently specifically targeted for trafficking. If we allow the Government to have their way, it is the victims who will be worse off and the traffickers who will gain a new tool for coercion.’<sup>147</sup>

The potential application of the provision to delegitimise the victimhood of children, in particular, who have committed offences in the course, or as a consequence, of being trafficked has rightly been identified by Richard Fuller MP as problematic:

Is it right that we should continue to have a provision that someone who in their past has undertaken a crime under duress should be liable to the protections being taken away? The Minister has argued that it is important to define this, so that the issues of public order can be applied, and I see some relevance there, but why is it important to rely so heavily on information that relates to an individual’s past, rather than take into account their circumstances and the potential risk they pose today? That balance has not been struck correctly.<sup>148</sup>

Section 63 may also fall foul of the ECtHR’s judgment in *V.C.L and A.N. v United Kingdom*.<sup>149</sup> In this case, two Vietnamese minors were arrested, charged, and convicted for being concerned in the production of cannabis, a controlled drug in the UK. Regarding the first applicant, from the very outset, there were doubts as to his age but neither the police nor the Crown Prosecution Service (CPS) referred him to a competent authority to be assessed as a victim of trafficking. On advice of his legal representative, the first applicant pled guilty to the charge. Later, the CPS reviewed its decision to prosecute when the case was adjourned, but ultimately concluded that there was no creditable evidence of him being a victim of trafficking. Nonetheless, a conclusive grounds decision was later made by the Competent Authority.<sup>150</sup> This was, however, disregarded by the CPS, who did not discontinue the proceedings because, *inter alia*, the

145 Sara Thornton, ‘The Nationality and Borders Bill’ n 114 above, 6.

146 *ibid.*

147 HC Deb vol 711 col 276 22 March 2022 (Sir Iain Duncan Smith).

148 HC Deb vol 711 col 280 22 March 2022 (Richard Fuller).

149 *V.C.L. and A.N.* n 110 above.

150 To be referred to the NRM, potential victims of trafficking must first be referred to one of the UK’s two Competent Authorities which are responsible for making conclusive decisions on

offence was serious and there was no clear evidence of trafficking nor of the first applicant being under duress. When the first applicant refused to vacate his guilty plea relying on counsel's advice, he was convicted and sentenced. On appeal, the Court of Appeal held that the decision to prosecute was justified as the first applicant was not a victim of trafficking nor did he commit the offence in issue as a direct result of having been trafficked. It considered that, in addition to the apparent inconsistencies in his evidence, he had cash and a mobile phone, and was found in a house and not makeshift prison, having been provided with weekly groceries.

Similar circumstances confronted the second applicant. He too was found at a cannabis factory in the UK, after having initially been smuggled to the UK. Although a competent authority found him to be a victim of trafficking, the CPS did not accept this finding. The CPS considered that he could have escaped; he had some money; and he was not physically injured. His conviction was upheld by the Court of Appeal.

Before the ECtHR, the applicants alleged a breach of Article 4 (prohibition of slavery, servitude and forced labour) and Article 6 (right to fair trial) of the ECHR. The Court held that, as a general rule, Member States are not prohibited from prosecuting victims of trafficking, including child victims, who have committed serious offences. It accepted that the decision to prosecute is within the State's margin of appreciation but cautioned that Article 4 of the ECHR may constrain the exercise of this discretion in appropriate cases. In this regard, prosecution should be avoided in circumstances where a child victim of trafficking was compelled to commit the offence in the course, or as a consequence, of being trafficked. The Court ruled that:

It is axiomatic that the prosecution of victims of trafficking would be injurious to their physical, psychological and social recovery and could potentially leave them vulnerable to being re-trafficked in future. Not only would they have to go through the ordeal of a criminal prosecution, but a criminal conviction could create an obstacle to their subsequent integration into society. In addition, incarceration may impede their access to the support and services that were envisaged by the Anti-Trafficking Convention.<sup>151</sup>

The Court acknowledged that Article 4 of the ECHR imposes a positive obligation requiring early identification of potential victims of trafficking on the part of competent authorities. In this connection, once the authorities are aware of circumstances giving rise to a credible suspicion that an individual who is suspected of having committed a criminal offence may have been trafficked, 'he or she should be assessed promptly by individuals trained and qualified to deal with victims of trafficking.'<sup>152</sup> In this context, the CPS must think twice before departing from a positive finding of victimhood by individuals trained

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whether a person has been trafficked for the purpose of exploitation. The Competent Authorities are the UK Human Trafficking Centre, within the National Crime Agency, and the Home Office.

151 *V.C.L. and A.N.* n 110 above at [159].

152 *ibid* at [160].

and qualified to deal with victims of trafficking. If no cogent reasons or irrational reasons are provided by the CPS for its departure, the State may find itself in breach of Article 4 of the ECHR, namely the positive obligation to take operational measures to protect victims of trafficking.

One of the interesting points of contention emanating from *V.C.L. and A.N.* was the argument advanced by the CPS, which was affirmed by the Court of Appeal, that the first applicant was not a real victim because his evidence was inconsistent, he had cash and a mobile phone, was not held in a makeshift prison and was provided with groceries. The ECtHR appears to have wholly rejected the notion of an iconic victim in this regard by ruling that these factors, without more, could not negate the conclusion that the first applicant had been trafficked.

While the ECtHR's ruling in *V.C.L. and A.N.* is, of course, an important one, it should be appreciated that the applicants in this case may have been disentitled to protection had the Nationality and Borders Act 2022 been in operation at the relevant time. In fact, they, and countless other victims of trafficking with criminal antecedents, may well have been removed from the UK even before the ECtHR would have had the opportunity to hear the matter.<sup>153</sup>

Regrettably, the question of the prosecution of victims of trafficking, especially children, for engaging in the cultivation and sale of cannabis has been a particularly problematic one since about 2005 when UK authorities began to see a perceptible increase in the number of Vietnamese children who were being trafficked for this purpose. This situation resulted in the Child Exploitation and Online Protection Command (CEOP), a body within the UK's National Crime Agency, issuing several insightful reports on the topic, which make it clear that Vietnamese children are particularly vulnerable to trafficking to work in cannabis farms.<sup>154</sup>

Under the Nationality and Borders Act, these children are among the core group of persons who may first be removed from the UK. However, as Maria Grazia Giammarinaro, former UN Special Rapporteur on Trafficking in Persons, has noted, even though Article 13(3) of the ECAT empowers a State to refuse to grant the recovery and reflection period to a victim of trafficking 'if grounds of public order prevent it', it does not specify that the commission of serious offences warrants removal from the jurisdiction in *all* circumstances. In her view, 'the more traffickers can rely on a State's criminal justice system to arrest, charge, prosecute and convict trafficking victims for their trafficking-related offences, whether criminal, civil or administrative, the better are the conditions

153 Note, however, the ECtHR may, under Rule 39 of its Rules of Court, indicate interim measures to any State Party to the Convention. Interim measures are urgent measures which, in accordance with the established practice of the Court, apply only where there is an imminent risk of irreparable damage.

154 'A Scoping Project on Child Trafficking in the UK' (Child Exploitation and Online Protection Centre (UK), June 2007) <https://polis.osce.org/scoping-project-child-trafficking-uk-june-2007> [<https://perma.cc/UWP9-94C3>]; 'Strategic threat assessment child trafficking in the UK 2010' (Child Exploitation and Online Protection Centre, 2010) <https://lx.iriss.org.uk/content/strategic-threat-assessment-child-trafficking-uk-2010> [<https://perma.cc/9MT6-Q6AT>].

for traffickers to profit and thrive, unencumbered in their criminality and undetected by the authorities.<sup>155</sup> She further argues that:

Any trafficking-related unlawful activity carried out by a victim of trafficking must be covered by a guarantee of non-punishment, regardless of the gravity or seriousness of the offence committed. The more serious the offence, the more probing the enquiry will need to be to establish the circumstances in which the offence was committed and whether the right to non-punishment can validly apply. Far from entailing a sort of 'blanket immunity', such safeguard responds to (1) the necessity of identifying the true circumstances in which an offence is committed, (2) enables victims to be diverted into safeguarding and assistance features, to which they are entitled to receive and (3) encourages the investigation of the crime of human trafficking to take place, resulting in increasing the prosecution of traffickers and decreasing the prosecution of victims for offences they committed when they were subject to other's dominant influence or exploitation.<sup>156</sup>

In short, the ECAT implies that only when the State is *prevented*, by virtue of the person's conduct, from granting the recovery and reflection period that they may be excused from complying with Articles 13(1) and (2). In this regard, though a person may have committed an offence warranting a penalty of 12 months imprisonment, this should not, without more, *prevent* the grant of a recovery and reflection period. It might be that there are extenuating circumstances that would mitigate the person's situation, namely that the offence in question was committed as a direct result of the trafficking situation. This point was articulated by the Joint Committee on Human Rights:

Article 13 ECAT only permits these exceptions where 'grounds of public order prevent it' – therefore even for those individuals who may fall within one of the limbs in clause 62(3), the competent authority will additionally need to show that that individual presents such an ongoing risk to public order that the UK needs to avail itself of the exception in Article 13 ECAT.

It is difficult to see how such a case will be made out if applied to historic offending, minor offending, unsafe convictions from overseas, cases of suspicion only, or convictions for activity the person was compelled to do as a victim of slavery or human trafficking.<sup>157</sup>

In light of the moral panic around the abuse of the NRM by victims of trafficking with criminal antecedents, the parochial approach of the new Act should not come as a surprise. The Nationality and Borders Act 2022 is evidently less

155 Maria Grazia Giammarinaro Special Rapporteur on trafficking in persons, especially women and children, 'The importance of implementing the non-punishment provision: the obligation to protect victims' (United Nations, Human Rights, Special Procedures, 30 July 2020) at <https://www.ohchr.org/sites/default/files/Documents/Issues/Trafficking/Non-Punishment-Paper.pdf> [<https://perma.cc/KLM3-ZT6V>].

156 *ibid* at [41].

157 House of Commons House of Lords Joint Committee on Human Rights, 'Legislative Scrutiny: Nationality and Borders Bill (Part 5) on Modern Slavery' Eleventh Report of Session 2021–22, HC 964 / HL Paper 135 (15 December 2021) at [68].

concerned with the genuineness of victimhood – that is, the extent to which there are conclusive grounds to believe that the person is a victim of trafficking – and more concerned with creating a limited safe space for the few victims who are morally blameless (iconic victims).

#### *Persons who are ‘Not Conducive to the Public Good’*

Under section 63(3)(g) of the Nationality and Borders Act 2022, the Secretary of State may ‘deprive a victim of trafficking of their citizenship status if it is believed that the deprivation is conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom.’ This provision has the potential to disproportionately impact victims of trafficking from the Global South who have obtained British citizenship but who, because they have exercised agency or do not cooperate with the authorities in the institution of criminal proceedings against their traffickers, will be deemed to have acted in a manner seriously prejudicial to the interests of the UK. While it will operate to assure iconic victims that their passivity and cooperation will be met with the retention of their status as citizens, the opposite message is sent to folk devils, who will not only be deprived of protection and assistance, but may be rendered stateless, should they have no other place of citizenship.

Regrettably, in failing to appreciate the adverse impact of depriving victims of trafficking who exhibit characteristics of folk devils, legislators, in an era of securitisation and moral panics, have once again demonstrated a strong preference for the iconic victim.

#### *Miscellaneous Offenders*

Sections 63(3)(i) and 65(6) of the Nationality and Borders Act 2022 allows for the removal of a person who has received a positive reasonable grounds decision from the UK if they ‘otherwise pose a risk to the National security of the United Kingdom’.<sup>158</sup> In the same vein, victims of trafficking who have received a conclusive grounds decision may not be granted leave to remain in the UK, and if such leave has been granted, it may be revoked, in circumstances where the person is deemed to be a threat to public order.<sup>159</sup> It is submitted that this approach again contributes to the folk deviling of victims of trafficking by creating a false dichotomy between those who are deemed to be passive, helpless and morally blameless on the one hand, and those who exercise agency and are not morally innocent, on the other hand.

While it is, of course, undisputed that States have a margin of appreciation in their determination of whether an individual poses a threat to public order, there is a real risk that the deliberate vagueness of sections 63(3)(i) and 65(6) will be used as a weapon against victims of trafficking who are perceived as folk devils because they do not share the characteristics of an iconic victim.

158 Nationality and Borders Act 2022, s 63(3)(i).

159 *ibid*, s 65(7)(b).

Indeed, without the qualification ‘immediate, genuine, present and sufficiently serious threat’,<sup>160</sup> this provision runs the risk of creating a potentially broad category of ‘miscellaneous folk devils’ who will likely be at the mercy of the state’s assessment of national security risks in an age of heightened securitisation and moral panics.

Interestingly, Lord Coaker had moved for an amendment to be made to section 63 to ensure that, in making a determination as to whether one poses a risk to public order, and, in particular, national security, a rigorous proportionality analysis is first conducted. Although the proposed amendment was ultimately defeated, it is worth recalling that Lord Coaker had called for the inclusion of the phrase ‘immediate, genuine, present and serious threat to public order’,<sup>161</sup> and had argued that depriving an individual of the recovery and reflection period on national security grounds should only be made in exceptional circumstances, where such action is necessary and proportionate to the threat posed, and following an assessment of all the circumstances of the case. His proposal would also have required the competent authorities to assess whether their decision to deprive an individual of the recovery and reflection period on account of their posing a risk to national security would involve a breach of that person’s rights under the ECHR, ECAT, and the Refugee Convention. Regrettably, in the absence of such rigorous benchmarks, it is likely that the national security carve out may be used as a weapon against those who are perceived to be folk devils.

One of the obvious consequences of such a characterisation is that these individuals may be removed from the UK under the UK’s controversial transfer arrangement with Rwanda, which, at the time of writing, is being challenged before the Court of Appeal.<sup>162</sup> Indeed, as the current UN Special Rapporteur on trafficking in persons has noted: ‘Transferring asylum seekers to third countries does nothing to prevent or combat human trafficking, in fact it is likely to push desperate people into riskier and more dangerous situations ... Rather than reducing trafficking in persons, it is likely to increase risks of exploitation.’<sup>163</sup>

Although the High Court has ruled that the scheme is lawful,<sup>164</sup> the United Nations High Commissioner for Refugees (UNHRC) has issued a statement expressing concern about the ‘externalization of asylum obligations’,<sup>165</sup> reiterating the Special Rapporteur’s view that the UK–Rwanda arrangement

160 HL Deb vol 818 col 1867 10 February 2022 (Lord Coaker suggested this amendment, but it was rejected by the House).

161 *ibid.*

162 Leave has been granted to certain claimants to appeal to the Court of Appeal challenging the UK–Rwanda deal. See Diane Taylor, ‘Judges allow partial appeal against Rwanda asylum seeker ruling’ *The Guardian* 16 January 2023.

163 ‘UN expert urges UK to halt transfer of asylum seekers to Rwanda’ (United Nations, 17 June 2022) at <https://www.ohchr.org/en/press-releases/2022/06/un-expert-urges-uk-halt-transfer-asylum-seekers-rwanda> [<https://perma.cc/ZKK7-3XTM>].

164 *AAA v Secretary of State for the Home Department (Rwanda)* [2022] EWHC 3230: the High Court ruled that the Government’s policy to send asylum seekers to Rwanda is lawful.

165 ‘UNHCR notes UK High Court judgement on transfer of asylum-seekers from the UK to Rwanda’ (UNHRC, 19 December 2022) at <https://www.unhcr.org/uk/news/news-comment-unhcr-notes-uk-high-court-judgement-transfer-asylum-seekers-uk-rwanda> [<https://perma.cc/MNU3-SPW8>].



contravenes the UK's international obligations and fails to meet the required standards relating to the legality and appropriateness of transfers of asylum-seekers.

In short, the characterisation of victims of trafficking who do not present as iconic victims as posing a national security threat to the UK, and their consequent exclusion from the UK, including under the UK-Rwanda scheme, raises searching questions about the extent to which human rights guarantees are in fact given adequate parliamentary consideration in an era of securitisation and moral panics.

## CONCLUSION

The Nationality and Borders Act 2022 will create a dangerous dichotomy between 'iconic victims' and 'folk devils', which will only reinforce the hegemonic assumption that a 'real' victim is a passive, helpless and cooperative individual who has no criminal antecedents.<sup>166</sup> Indeed, as Gadd and Broad and Srikanthiah have respectively argued, the articulation of an 'iconic victim', which has 'seeped into prosecutors' and investigators' identification of victims of trafficking, will likely have tragic consequences for victims who do not describe their stories consistently with it.<sup>167</sup> By describing victims of trafficking as completely blameless and traffickers as maximally culpable,<sup>168</sup> the government has privileged 'iconic victims' as the perfect representation of what victimhood looks like. Folk devils, on the other hand – who, under the Nationality and Borders Act 2022, include terrorist suspects, persons with criminal antecedents, and persons not conducive to the public good – will be automatically stripped of their victimhood, essentialised as 'illegal aliens',<sup>169</sup> denied protection,<sup>170</sup> and even punished for exercising agency. That said, it is worth remembering that 'victims are not perfectly innocent, and perpetrators are not perfectly evil.'<sup>171</sup> In short, then, it is regrettable that the approach of the Nationality and Borders Act 2022 will result in victims of human trafficking being '[j]udged while seeking justice. Criminalised while fleeing criminals. Expelled while being exploited. Scapegoated while escaping some of the worst violations against human dignity or human rights.'<sup>172</sup>

The fact that human trafficking information notices appear to shift the burden of victim identification onto trafficked victims, while the recovery and

166 Jason Haynes, *Caribbean Anti-Trafficking Law and Practice* (Oxford: Hart, 2019) ch 2.

167 See Srikanthiah, n 87 above, 160.

168 *ibid.*, 161.

169 Kevin Johnson, 'Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement' (1993) 4 *Boston University Law Review* 1139, 1234 (arguing that victims of trafficking who do not fit established criminal justice criteria fall into the category of 'illegal aliens').

170 Kathy Richards, 'The Trafficking of Migrant Workers: What are the Links between Labour Trafficking and Corruption?' (2004) 42 *International Migration* 147 (citing instances where these victims' 'testimonies have been intentionally ignored or destroyed to protect certain powerful alliances').

171 Srikanthiah, n 87 above, 196.

172 HC Deb vol 699 col 757 19 July 2021 (Rachael Maskell).

reflection period is stripped to its bare minimum, reinforces the point that we live in an age characterised by securitisation and moral panics. This is an age in which rights take second place behind national security concerns. Indeed, governments around the globe, including the British government, are increasingly ignoring the many complexities that characterise victimhood in their quest to create a 'hostile' and 'tough' environment for those who are perceived to be 'dangerous people', or 'folk devils'. This is a deeply concerning trend that is only likely to get worse as moral panics continue to take on greater significance in anti-trafficking discourse. With the continued evisceration of victimhood, one wonders whether in a few decades every victim of trafficking will be characterised and treated as a folk devil. This is a truly frightening proposition.