

IMPACT OF THE NATIONALITY AND BORDERS ACT: CHANGES TO THE REASONABLE GROUNDS THRESHOLD

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Thank you to members of the National Network Coordinators Forum and their partners, to the Anti-Slavery London Working Group and to the London Modern Slavery Leads Network who gave their time and invaluable insights to produce this briefing. As there were concerns that cases may be identifiable, we have kept the names of contributors anonymous.

BACKGROUND

The Modern Slavery Statutory Guidance was updated on 30th January 2023 to reflect many of the changes introduced through Part 5 of the Nationality and Borders Act 2022.¹ One of these is a change to the Reasonable Grounds (RG) decision threshold, which is the initial decision made by the Home Office when a First Responder refers an individual into the National Referral Mechanism. First Responder Organisations are Law Enforcement, Local Authorities, Border Force, UKVI, Immigration Enforcement and certain Non-Governmental Organisations (NGOs). A positive RG decision can lead to tailored support for adults under the Modern Slavery Victim Care Contract. Previously, the Home Office made the Reasonable Grounds decision based on the threshold that they 'suspect but cannot prove' that the person is a victim of modern slavery. Now this decision is made 'based on objective factors but falling short of conclusive proof'.

The Statutory Guidance states that an "objective" factor is a piece of information or evidence that is based in fact, such as medical assessments, expert, or police reports. A victim's own testimony alone is no longer sufficient for a positive Reasonable Grounds decision.

The timing of the National Referral Mechanism (NRM) referral is also listed as an example of specific evidence, considered by the Single Competent Authority and Immigration Enforcement Competent Authority, which are the departments within the Home Office that make the decisions. An unexplained delay in the disclosure of a person's experience of modern slavery will be 'weighed in the balance with all other evidence and may damage their credibility'.

The Statutory Guidance states that the Home Office should take reasonable steps to gather all available information before making a decision within a 5-day timeframe. If an individual receives a positive Reasonable Grounds decision, they are entitled to a minimum 30-day reflection and recovery period, during which time they cannot be removed from the country. Following this, a Conclusive Grounds decision will be made. This second decision is based on the 'balance of probabilities' that there are sufficient grounds to decide that the individual is a victim of modern slavery. This threshold is higher than the Reasonable Grounds test, but lower than the criminal standard of proof.

¹ Modern Slavery: Statutory Guidance v3.0

IMPACT OF THE CHANGES

Between January and March 2023, 58% of individuals referred to the NRM received a positive Reasonable Grounds decision, compared to 85% in the previous quarter.²

NRM DATA SNAPSHOT³

	TOTAL NRM REFERRALS	TOTAL RG DECISIONS	POSITIVE RG DECISIONS ADULTS	POSITIVE RG DECISIONS CHILDREN	TOTAL POSITIVE RG DECISIONS	DUTY TO NOTIFY REFERRALS	POSITIVE CG DECISIONS
Jan-Mar 2022	3,773	3,644	90%	89%	89%	987	92%
April-June 2022	4,162	3,992	87%	93%	89%	1,126	91%
July-Sep 2022	4,581	4,618	86%	90%	88%	1,160	91%
Oct-Dec 2022	4,416	4,533	84%	87%	85%	1,307	84%
Jan-Mar 2023	4,746	3,528	49%	76%	58%	1,420	75%

The NRM data shows that between January-March 2023 1,058 adults – whom a First Responder from the police, a local authority, immigration officials or a specialist NGO considered to be a victim of trafficking – did not meet the threshold for a positive Reasonable Grounds (RG) decision and were therefore not entitled to specialist support, protection from removal or consideration for permission to stay in the UK as a victim of modern slavery. Whilst safeguarding procedures should still be put in place for all children where there are suspicions of modern slavery, a negative RG decision may impact the response they receive. For many of these individuals who have experienced modern slavery, it is the inability to provide objective evidence at the initial stage which has led to a negative decision.

Behind the data, what is happening to individuals with a negative RG decision? And what is the impact for organisations, both First Responders making the referrals and wider agencies working to support individuals with indicators of modern slavery? The Human Trafficking Foundation spoke with over twenty partners, including NGOs, law enforcement and local authorities, to start to understand the impact of the change in Reasonable Grounds threshold and the findings are outlined in this briefing. It is important that the ongoing impact of the Nationality and Borders Act 2022 is considered, especially given the further changes outlined in the proposed Illegal Migration Bill.

² National Referral Mechanism Statistics

³ 'Total NRM Referrals' [Modern Slavery: National Referral Mechanism and Duty to Notify statistics UK, Quarter 1 2023 – January to March: Data table 1]; 'Total RG Decisions' [Ibid, Data table 16]; 'Duty to Notify Referrals' [Ibid, Data table 25]; 'Positive RG Decisions Adults', 'Positive RG Decisions Children' and 'Total RG Decisions' [National Referral Mechanism Statistics corresponding quarters].

OBJECTIVE EVIDENCE

Partners reported that most negative Reasonable Grounds decisions received since the changes were brought in have been on the grounds of a lack of objective factors. First Responder organisations continually raised the infeasibility of victims gathering evidence during their exploitation, and one partner commented that a victim's 'priority is not to gather evidence, it is to survive'. Many individuals do not have documents to prove their exploitation; there were no witnesses to their abuse, and medical assessments take time to access. The requirement for evidence at the initial stage undermines the deliberately low threshold of the RG decision, which enables victims to receive a reflection and recovery period whilst the 'actual' identification process takes place⁴.

A key issue with the increased threshold for a Reasonable Grounds decision is the absence of consistent pre-NRM support. Gathering objective factors takes time and requires space and reflection with an individual to do so; they need to feel safe to be able to disclose their situation to the First Responder and begin to identify objective factors which could support their referral. The Government's 2017 commitment to the provision of pre-NRM 'Places of Safety' would help with this; as is evident in Scotland where accommodation and legal advice can be provided prior to a referral to the NRM, giving time for a person to assess their options, build trust and gather information for the referral⁵.

First Responders reported that explaining in the NRM referral that objective factors are on their way and why there are delays in receiving these, have seen positive RG decisions in some cases. Equally, there was a recommendation to list out all the indicators of modern slavery in answer to the question in the NRM referral, 'Why are you making the referral?' as indicators can count towards objective factors. When available, objective factors in the form of an expert report from specialist organisations or community groups with an understanding of a specific culture have been helpful in obtaining a positive RG decision. However, it is not clear who is considered an expert, as a referral from a specialist First Responder does not appear to be evidence on its own.

First Responders also reported that on occasion, a negative Reasonable Grounds decision was still issued despite the inclusion of objective factors, as the evidence did not directly mention the exploitation. For example, medical reports and letters from GPs detailing mental health conditions, including Post Traumatic Stress Disorder, still led to a negative decision as they did not provide sufficient evidence that this was directly related to the individual's experience of modern slavery. Furthermore, a partner shared that they worked on a case where a statement from a solicitor was disregarded as an objective factor as it mirrored the information the First Responder had written in the NRM form; despite the First Responder considering it would support with consistency of the individual's account.

Recommendation:

Pre-NRM Places of Safety to be implemented or an explanation provided on the retraction of the 2017 commitment.

A woman is kept in domestic servitude for many years. She works long hours with no breaks and is subject to abuse. She has no paperwork she can provide as objective evidence for an NRM referral and receives a negative reasonable decision as decision makers say she 'left' the exploiters rather than escaped.

⁴ Explanatory Report, Council of Europe Convention on Action against Trafficking in Human Beings

⁵ Modern slavery victims to receive longer period of support, Home Office, 2017

DELAYS IN DECISION MAKING

As outlined in the Modern Slavery Statutory Guidance, a Reasonable Grounds decision should be made within 5 working days⁶. First Responder organisations reported a delay in the length of time for RG decisions since the changes to the threshold were introduced. Delays could be attributed to the additional information for decision-makers to review. For adult victims, a delay in a RG decision means a delay in accessing support from the Modern Slavery Victim Care Contract (MSVCC). One First Responder reported at the end of April that they were still waiting for a Reasonable Grounds decision since early February, leaving the individual waiting months rather than 5 days for the initial decision and access to support.

First Responder organisations shared that when Reasonable Grounds decisions are made immediately, it is usually when the Immigration Enforcement Competent Authority is awarding a negative decision and a deportation order has been made for the individual. This is supported by a Civil Service Job advert for 120 new decision makers which stated that 'as a Decision Maker within the Immigration Enforcement Competent Authority, there would be a requirement to work a "late shift" (usually up to 8pm) around once a week, to cover late NRM decisions prior to planned charter flight removals.'⁷

120 new decision makers would help increase the speed at which Reasonable Grounds and Conclusive Grounds decisions are made; the latter took an average of 543 days in 2022.⁸ Unlike Conclusive Grounds decisions, the average length of time taken for Reasonable Grounds decisions are not published within the quarterly NRM statistics, making it challenging to assess the quantitative impact of the threshold changes.

Recommendation:

Publish the average length of time for a Reasonable Grounds in 2022 and going forward, to monitor the impact of the changes to the Reasonable Grounds decision threshold.

⁶ Modern Slavery: Statutory Guidance v3.0

⁷ Civil Service Job Advert

⁸ National Referral Mechanism Statistics

⁹ Modern Slavery: Statutory Guidance v3.0

INCONSISTENCY IN DECISION MAKING

Since the changes to the Reasonable Grounds threshold, First Responders reported inconsistent outcomes in decision making, with multiple NRM referrals detailing similar experiences of exploitation receiving different decisions. As the threshold only changed at the end of January, First Responders were unable to identify trends in negative decisions or recommend specific objective factors which consistently receive positive decisions. First Responders questioned whether decision makers work from additional criteria, not included in the statutory guidance, and called for this to be made public for greater transparency in how decisions are made, and the weighting given to specific evidence types.

Partners reported that in most cases, the letter from the Home Office issuing a negative Reasonable Grounds decision does not include an explanation for this decision, which creates a challenge for reconsideration requests, as the First Responder does not know the additional information required to meet the Reasonable Grounds threshold.

Despite this, First Responders reported that when they do request a reconsideration, negative decisions are being overturned. This raises the question as to why an initial negative decision was made and whether the decision maker had taken 'reasonable steps' to gather all the required information.⁹ Reconsideration requests require a proactive First Responder, support worker or solicitor, which not all individuals being referred to the NRM have, creating disparity in access to support.

Recommendation:

Provide detailed information in decision letters as to why a negative Reasonable Grounds decision was made.

Recommendation:

Make public any additional guidance for decision makers to provide clarity on how decisions are made.

Recommendation:

Publish the number of reconsideration requests and the outcome of these with the quarterly NRM statistics.

THE NRM FORM

Following the changes to the Reasonable Grounds threshold, the NRM referral form was updated in April 2023 and requires more detail than the old form. Previously, there was one large text box for information about the individual's experience of modern slavery, so many organisations welcomed the new form's prompts for more specific detail to ensure the First Responder includes the information required by the decision maker. However, partners reported the following concerns:

A	The length of the form could deter First Responders off making a referral because of the amount of time it would take them to complete it. One First Responder reported it took them 1.5 hours to complete the form, in addition to spending 2 hours with the individual gathering the information required for the referral.
B	The intrusiveness of the questions could be re-traumatising for individuals. One statutory First Responder shared that they did not make an NRM referral for someone who had been exploited because, 'the work it will take to bring the survivor to the point where they can answer the questions is ridiculously complex, it is actually part of somebody's recovery to get to that point'.
C	In the NRM referral form, the question as to whether an adult consents to the NRM referral appears after the information about their experience has been asked, and there is no longer text on the form asking for personal details not to be included in the answers. This has led to concerns about the 'Duty to Notify' process, where the form is completed anonymously when an adult does not consent to enter the NRM, and how any personal data included in the form could be stored and used without the individual's permission.
D	Two of the questions 1. 'whether this is the first chance the individual has had to report their exploitation' and 2. 'whether there are indicators or evidence that they could be acting dishonestly' come from a position of distrust. First Responders questioned the ethics of these questions and also the legal implications for them as First Responders if their comments were used to make a negative decision.
E	The NRM form does not allow the First Responder to upload the objective factors directly and they are required to send these via email following the referral, meaning that this could easily be missed.

In addition to specific concerns with a number of the questions, First Responders reported limited consultation on the new NRM form and insufficient communication from the Home Office on the changes. Members of the Home Office First Responder Forum were unaware that the new form had gone live until they started to make a NRM referral and discovered they did not have the information they needed. There are statutory First Responder organisations who still do not know that the NRM form has changed or the requirement for objective factors, which puts individuals at risk of receiving a negative decision due to incomplete or inadequate referrals.

The offline prompt sheet, which can be downloaded and provides a list of the questions in the online NRM form, has not been updated on the referral webpage; this means that First Responders do not know the information they will need to ask the individual being referred.¹⁰

Despite the Statutory Guidance stating that the person who makes a referral to the NRM is a member of a First Responder Organisation trained to discharge these functions, training is not mandatory for First Responders and the majority of those from statutory First Responder Organisations are not trained.¹¹ The only government supplied training available for all First Responders is e-learning, which is yet to be updated

since the Nationality and Borders Act came into effect.¹² First Responders reported that they ought to have been made aware of the changes to the NRM form and have been trained on this ahead of making referrals. It was also reflected that small teams can be agile but larger organisations take time to adapt to change and need more support, guidance and training.

Recommendation:

Home Office e-learning for First Responders to be updated as a priority.

Recommendation:

Offline prompt sheet to be updated as a priority.

Recommendation:

Consult with First Responders and survivors to ensure the NRM form is fit for purpose.

A man was trafficked to the UK and criminally exploited here as a child. He is detained and an NRM referral is made. A negative reasonable grounds decision is issued on the same day and he is put on a plane back to his country of origin the next morning.

¹⁰ Prompt Sheet for Working Offline

¹¹ Modern Slavery: Statutory Guidance v3.0

¹² The Home Office Training Module for NRM First Responders

IMPACT ON FIRST RESPONDERS

First Responders reported feeling they are giving false hope to victims by offering an NRM referral knowing they would not be able to find the objective factors required for a positive decision. A concern raised by partners was how the requirement for objective factors and the new NRM form expands the remit of the role of a First Responder. In addition to liaising with the individual to understand their situation and then complete the NRM form, the First Responder now has a research responsibility to gather the information required for objective factors, which can take a significant amount of time. Furthermore, the question as to whether they believe a person may be acting dishonestly expands their role even further, asking a First Responder to pass judgement. The statutory guidance explains that 'if a First Responder states a potential victim's account is credible, that is not necessarily in their gift to comment on' and yet the NRM form asks First Responders to do just that.¹³ For some First Responders, being asked to comment on the individual's credibility felt like a betrayal of trust and it was questioned how an individual can give their informed consent to a referral without knowing what had been written in this answer. The new threshold also puts pressure on organisations outside of the Modern Slavery Victim Care Contract, both to help gather objective factors and provide expert reports, and fill a gap in support if the individual receives a negative Reasonable Grounds decision and is not entitled to assistance through the MSVCC.

IMPACT ON INDIVIDUALS WITH A NEGATIVE REASONABLE GROUNDS DECISION

In reality, if an individual is unable to provide objective factors at the point of NRM referral, or if a First Responder is not aware of the requirement to provide them as they have not been trained on their duties as a First Responder; this does not automatically mean the individual is not a victim of modern slavery. If a person has experienced modern slavery, a negative Reasonable Grounds decision does not negate this fact or their needs that have arisen from the abuse; but the negative decision does prevent them from accessing support to aid their recovery.

A negative Reasonable Grounds decision also means that a person without secure immigration status in the UK is not protected from removal and can be required to leave the UK before a reconsideration request is made. Individuals who have experienced modern slavery but have not been able to provide objective factors and therefore received a negative Reasonable Grounds decision may be highly traumatised and vulnerable to re-trafficking; especially when they have tried to access help and not been believed.

Partners reported that adults who were destitute when entering the NRM and provided with safehouse accommodation under the MSVCC prior to a Reasonable Grounds decision are required to leave the safehouse if they receive a negative decision. Whilst this has always been the procedure, the increase in negative Reasonable Grounds decisions due to a lack of objective factors provided at the initial stage, is leading to more people in this situation. Safehouses struggle to move individuals on without making them homeless, and partners reported that extension requests to the Home Office are not regularly being granted.

Overall, there is limited intelligence on the impact of negative Reasonable Grounds decisions on individuals themselves. Without wraparound support and subsistence provided through the MSVCC, and little alternative, individuals with negative RG decisions are at risk of disengaging from services and can become vulnerable to re-trafficking, and become victims of modern slavery if they were not already.

¹³ Modern Slavery: Statutory Guidance v3.0

CONCLUSION

The full impact of the changes to the Reasonable Grounds threshold is still unknown, and the sharp decline in positive Reasonable Grounds decisions between January-March 2023 only shows part of the picture. Changes to the Reasonable Grounds threshold were implemented on 30th January, a month into this quarter. As such, the average number of positive decisions for February and March may be even lower. Given the challenges in gathering objective factors outlined in this briefing, it is important to consider how the NRM data is interpreted. The sharp decline in positive RG decisions in the first quarter of this year is likely a reflection of these challenges, rather than a rise in people being referred to the NRM who have not experienced modern slavery.

In addition to the increase in negative RG decisions, there has been a rise in adults choosing not to be referred to the NRM. The majority of Duty to Notify referrals in 2022 were made by immigration officials who identified that a person had indicators of modern slavery and but their offer of a referral to the NRM was declined.¹⁴ Exploring the reasons for not consenting to enter the NRM is outside the scope of this briefing but partners made clear that recent legislation is creating an environment where victims of modern slavery are unable to come forward and access support; and when they do request assistance through an NRM referral it is increasingly unlikely to be provided.

Before the impact of the Nationality and Borders Act 2022 has been fully assessed, further changes have been outlined in the Illegal Migration Bill currently making its way through Parliament.¹⁵ The Bill introduces new measures, which mean that anyone who entered the UK via irregular means since 7th March 2023 can be subject to detention and removal from the country, and excluded from support as a victim of modern slavery. This will deter people from escaping exploitation and speaking to the authorities as there is no incentive for them to do so; the legislation makes clear they will not be supported and are at risk of removal from the country. This is a disturbing shift in the treatment of victims of crime. Furthermore, due to the backdating of the bill, First Responders may be currently making NRM referrals for victims of modern slavery who will be disqualified from support if the Illegal Migration Bill passes. This creates a dilemma for statutory First Responder Organisations such as local authorities, who have a legal duty under the Modern Slavery Act 2015 to notify the Secretary of State when they identify a potential victim of modern slavery but under the Illegal Migration Bill risk handing victims of modern slavery to the Home Office for removal. It is vital that foreign national victims receive legal advice before they consent to a referral to the NRM.

Survivors, organisations working to tackle modern slavery, and parliamentarians have called on the Illegal Migration Bill to be halted and the impact of the Nationality and Borders Act 2022 to be fully assessed prior to further legislation.^{16, 17} The Human Trafficking Foundation will continue to work with partners to assess the ongoing impact of the changes and make recommendations to ensure people who have experienced modern slavery are able to access the support they need.

RECOMMENDATIONS FOR GOVERNMENT:

- 1 Pre-NRM Places of Safety to be implemented or an explanation provided on the retraction of the 2017 commitment.**
- 2 Publish the average length of time for a Reasonable Grounds decision in 2022 and going forward, to monitor the impact of the changes to the RG threshold.**
- 3 Provide detailed information in NRM decision letters as to why a negative Reasonable Grounds decision was made.**
- 4 Make public any additional guidance for Competent Authority decision makers to provide clarity on how decisions are made.**
- 5 Publish the number of reconsideration requests and the outcome of these with the quarterly NRM statistics.**
- 6 Home Office e-learning for First Responders to be updated as a priority.**
- 7 Offline prompt sheet to be updated as a priority.**
- 8 Consult with First Responders and survivors to ensure the NRM form is fit for purpose.**

¹⁴ National Referral Mechanism Statistics

¹⁵ Illegal Migration Bill

¹⁶ 'Ignoring Slavery, Punishing Survivors' Sector letter to the Prime Minister, March 2023

¹⁷ The Rt Hon. Theresa May, Illegal Migration Bill Committee Stage, March 2023