



FLEX

Working Paper: 02

ACCESS TO JUSTICE FOR VICTIMS OF TRAFFICKING

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Focus on Labour Exploitation (**FLEX**) works towards effective responses to trafficking for labour exploitation that prioritise the needs and voice of victims and their human rights. **FLEX** seeks to achieve this vision through research and analysis that promotes greater accountability and a stronger focus on victims' voiced needs.

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ACCESS TO JUSTICE FOR VICTIMS OF TRAFFICKING

Summary

Access to justice for trafficked persons is fundamental to a rights-based response to human trafficking or 'modern day slavery'. The ability of victims to access legal remedies promotes their rehabilitation, prevents re-trafficking, and contributes to the punishment of traffickers. Yet around the world weak laws and a lack of political commitment to victims' rights mean that justice is rarely a reality for victims.¹

There are substantial barriers to victims' access to justice in the UK. These include:

- A lack of clarity and awareness of the avenues to compensation;
- Limited access to legal assistance;
- Lack of secure immigration status; and
- Inability to appeal decisions under the National Referral Mechanism (NRM).

Thus far, a commitment to victims' legal rights has been largely absent from UK law and policy, and is reflected in the government's failure to collect and publish data on legal remedies. In order to provide victims with comprehensive and effective access to justice, the UK government must take a broad approach to justice, addressing each of the above barriers, and cannot rely on prosecutions alone.

¹ Gallagher, A., 2010, 'The right to an effective remedy for victims of trafficking in persons: A survey of international law and policy', Consultation of the United Nations Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo on The Right to An Effective Remedy for Trafficked Persons, p. 2.

Recommendations

In order to provide victims of human trafficking with access to justice, the UK should:

“We need to make full use of criminal, labour, administrative and civil tools to uphold the rights of trafficked persons... We need to scale up the scope and quality of legal assistance available to trafficked persons in order to support them in effectively claiming their rights, and especially the right to compensation for harm suffered, including payment of unpaid wages.”

Maria Grazia Giammarinaro, OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings.²

1 Make victims’ access to justice a priority

2 Provide clear avenues to compensation

- a) The right of victims to adequate and effective compensation should be confirmed and outlined in UK law and policy.
- b) The government should ensure that undocumented workers are able to enforce basic labour rights.
- c) The Criminal Injuries Compensation Scheme should be amended to ensure victims of trafficking can access compensation.
- d) All official service providers should have knowledge of the legal rights of victims and should be required to inform and assist victims to access compensation.

3 Ensure potential victims have immediate and effective access to legal assistance

- a) Potential victims should be provided with legal assistance without delay and prior to referral to the National Referral Mechanism (NRM).
- b) Legal aid should be available for all challenges to negative NRM decisions and for applications to the Criminal Injuries Compensation Authority.

4 Provide clear and accessible immigration remedies

- a) UK law and policy should clearly provide for leave to remain for victims of trafficking.

5 Provide a right to appeal or otherwise challenge negative NRM decisions

² Giammarinaro, M., Speech at the OSCE Human Dimension Implementation Meeting, Warsaw, 10 October 2011, available at <http://www.osce.org/odihr/83808>



Make access to justice a priority

The ability of victims of trafficking for labour exploitation to access justice is important for three core reasons:

1. To acknowledge and compensate for the damage suffered by the victim as a result of the victim's exploitation. This includes providing victims with the finance and security of status required to allow them to recover and rehabilitate, reducing their vulnerability and preventing their re-trafficking.
2. Justice for victims contributes to the punishment of traffickers. Financial compensation recognises and targets the large profits gained by exploiters at the expense of victims, providing a direct and powerful deterrent to trafficking.
3. Access to justice for trafficking victims is an obligation to which the UK has committed itself under international and EU law.³

Access to legal remedies, including compensation, has not been a priority for the UK government. There is no mention of compensation or other legal remedies in the government's 2011 Human Trafficking Strategy, or in the 2013 report of the Inter-Departmental Ministerial Group on Human Trafficking. While the new Modern Slavery Act 2015 and Modern Slavery Strategy do address compensation, both focus narrowly on criminal reparation orders that are accessible to a very small proportion of victims. The UK government also does not collect data on the award of either civil or criminal compensation to trafficking victims.⁴ As a result, the UK is currently failing to provide victims with access to justice.

“Trafficked persons are often seen as ‘instruments’ of criminal investigation, rather than as holders of rights. In many States, trafficked persons do not receive remedies in a holistic manner as a matter of right, but are only provided with ad hoc measures which are effectively by-products of criminal investigation...”

*Joy Ngozi Ezeilo, Special Rapporteur on Trafficking in Persons*⁵

³ Article 15 of the Council of Europe Convention on Action Against Human Trafficking (the European Trafficking Convention), requires States to guarantee compensation for victims, and to provide free legal aid to victims. See <http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm>. Articles 12 and 17 of the EU Directive on preventing and combatting human trafficking and protecting its victims (the EU Trafficking Directive) also require that victims of trafficking have access “without delay” to legal advice, and have access to existing compensation schemes. See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>

⁴ See parliamentary answer, HC Deb, 9 January 2014, c277W, available at <http://www.theyworkforyou.com/wrans/?id=2014-01-09a.181074.h>. The Criminal Injuries Compensation Authority started recording the categories of crime for awards in November 2012, but only records human trafficking where it is for the purpose of sexual exploitation (parliamentary answer, HC Deb, 6 February 2014, c340W).

⁵ Ezeilo, J., 2011, Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, UN Doc A/HRC/17/35.



Provide clear avenues to compensation

There are four possible avenues for compensation for victims of trafficking in the UK, yet each of these is flawed and none guarantees compensation in accordance with the European Trafficking Convention. The four avenues are:

a. Compensation order following criminal proceedings

Under section 8 of the new Modern Slavery Act 2015 a court must consider making a reparation order against a person who has been convicted of human trafficking, forced labour or slavery, if a confiscation order has also been made. A reparation order is an order requiring the offender to pay compensation to the victim “for any harm resulting from that offence”. It is unclear whether “any harm” would cover the unpaid wages owed to victims of trafficking for labour exploitation.

This route to compensations is very limited, as it relies on successful prosecutions and the making of a confiscation order. From 2011 to 2013 only 68 cases of non-sexual exploitation and 38 cases of forced labour were brought in the UK, and of these only 12 resulted in convictions.⁶ There is no available data on how many of these convictions resulted in compensation orders, but victim support providers report that such orders are rare. Unlike the law in the USA (see box), prosecutors in the UK are currently not obliged to request, and courts not obliged to award, compensation to trafficking victims in criminal cases.

b. Civil claims (County Court)

Victims may bring claims in the County Court based on civil causes of action such as harassment, false imprisonment, and breach of contract. Such claims are generally lengthy and complex and effectively rely on the victim being legally represented. Cost in these cases is a significant barrier, and it can be difficult for victims to recover the full amount of their loss.⁷

Mandatory restitution for trafficking victims in the USA specifically includes unpaid wages

In the USA, Sec. 1593 of the Victims of Trafficking and Violence Protection Act (2000) requires courts to order restitution, compelling the defendant to pay the victim “the full amount of the victim’s losses”. The full amount of the victim’s losses specifically includes the value of the victim’s labour as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act, ensuring that victims of trafficking for labour exploitation are fully compensated for the work they are forced to perform.

⁶ HM Government, 2013, Second report of the Inter-Departmental Ministerial Group on Human Trafficking, p. 25-26.

⁷ Information provided by Elaine Banton, 7 Bedford Row Chambers, 23 May 2014.

*Allen v Houna*¹⁰

Mary Houna was brought from the Nigeria to the UK to work as a domestic servant in 2007. At that time she was approximately 14 years old and had been promised schooling and £50 a month in wages, but received neither. Instead she was forced to work, subjected to serious physical abuse, and finally thrown out of the house. She eventually sought help, and the authorities found there were reasonable grounds to believe she was a victim of trafficking. Yet her claims for compensation were ultimately rejected by the Court of Appeal, because at the time of her exploitation she had no right to work in the UK. While the Supreme Court ultimately allowed Ms Houna to claim damages for discrimination, she was unable to recover the unpaid wages owed to her.

c. Labour claims (Employment tribunal)

Employment tribunal claims for failure to pay the national minimum wage, for unlawful deductions, and for discrimination, have provided some victims of trafficking for labour exploitation with significant remedies. Without the risk of cost orders and with simplified procedures, employment tribunals provide a more accessible form of justice, yet significant barriers remain for victims. These include:

- Recently introduced fees for employment tribunal cases;⁸
- The 'family worker exemption' from national minimum wage for domestic workers;⁹ and
- Difficulties in enforcing tribunal awards, including lack of legal aid for enforcement.

In addition, under current law victims who do not have the right to work in the UK at the time of their exploitation are unable to claim compensation for labour law breaches in either civil courts or employment tribunals. This is the case regardless of the extent of the abuse or the situation of the victim, as the case of *Allen v Houna* (see box) demonstrates.

The current law aims to discourage illegal working, however it instead serves to encourage unscrupulous employers to hire and exploit irregular migrants, who have limited bargaining power without access to basic labour rights.¹¹ This creates a culture of impunity that allows modern slavery to thrive and denies victims access to justice.¹²

The government should ensure that undocumented workers are able to enforce basic labour rights, as a crucial element of both preventing and remedying trafficking for labour exploitation.

8 For detail see <https://www.gov.uk/government/publications/employment-tribunal-fees>

9 National Minimum Wage Regulations 1999, Regulation 2(2).

10 *Allen v Houna* [2014] UKSC 47

11 Bogg, A. & Mantouvalou, V., 13th March 2014, 'Illegality, Human Rights and Employment: A Watershed Moment for the United Kingdom Supreme Court?' U.K. Const. L. Blog, available at <http://ukconstitutionallaw.org/>

12 See Robinson, C., 2014, 'Preventing Trafficking for Labour Exploitation', FLEX Working Paper: 01, p. 9.

d. Criminal Injuries Compensation Authority

The Criminal Injuries Compensation Authority (CICA) should be the primary avenue for victims to claim compensation,¹³ yet in practice it does not provide a comprehensive or accessible remedy. As trafficking or forced labour are not specifically listed as ‘crimes of violence’,¹⁴ victims must demonstrate that their exploitation involved violence or fear of violence. Victims can only receive compensation for physical or mental injuries, or for loss of earnings as a result of those injuries, but not for unpaid wages or deprivation of liberty. Other problems with accessing remedies through CICA include:

- Denial of awards if victims fail to report to police “as soon as reasonably practicable” or fail to fully cooperate with police investigations;¹⁵
- Ineligibility for awards if victims have a criminal record;¹⁶
- Difficulties in securing required psychological evidence,¹⁷ without legal assistance or other support; and
- Lengthy delays.¹⁸

Crucially, legal aid is not available for CICA applications, despite the above-mentioned difficulties and complexities in making claims in trafficking cases.

Victims denied compensation on the basis of insufficient cooperation with police

Victims of trafficking are commonly refused compensation by the Criminal Injuries Compensation Authority (CICA) when they are deemed to have failed to fully cooperate with law enforcement agencies. In one case, a victim of trafficking reported her trafficking experience to the police and provided initial information. However, her family in her home country subsequently received threats, and out of fear for their safety, she did not pursue the case against her traffickers. As a result, her claim for compensation was rejected by CICA.¹⁹ This approach fails to understand the risks to victims of trafficking, and contravenes the principle of non-conditionality.²⁰

¹³ EU Trafficking Directive, Article 17.

¹⁴ Ministry of Justice, Criminal Injuries Compensation Scheme 2012, Annex B, available at <https://www.gov.uk/criminal-injuries-compensation-a-guide>

¹⁵ Ibid, Paragraph 22-23.

¹⁶ Ibid, Paragraph 26.

¹⁷ Ibid, Annex E.

¹⁸ Information provided by Rachel Mullan-Feroze, Ashiana Sheffield, 12 May 2014.

¹⁹ Information provided by Jamila Duncan-Bosu, ATLEU, 23 May 2014.

²⁰ European Trafficking Convention, Article 12.

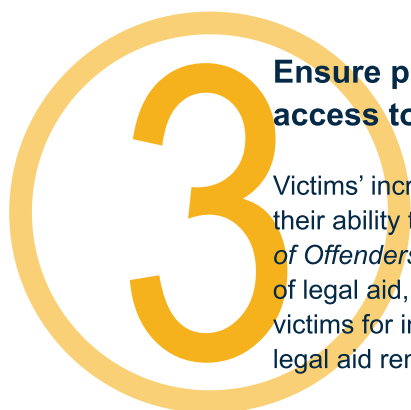
The Joint Committee on the Draft Modern Slavery Bill recommended that the Criminal Injuries Compensation Scheme be amended to (a) add modern slavery as a crime of violence, and (b) add a specific tariff for modern slavery.²¹ **The Scheme should also be amended to (c) remove the requirement for police cooperation and good character, and (d) provide for legal aid for applications by trafficking and forced labour victims.**

In order to ensure victims' access to justice, the right of victims to adequate and effective compensation should be confirmed and outlined in UK law and policy.

Furthermore, some service providers contracted to support victims of trafficking are not always aware of or do not understand these avenues to compensation. As a result, victims are not being informed of their rights to compensation, and compensation is rarely pursued.

All service providers contracted by the government should have knowledge of the legal rights of victims, and should be required to inform and assist victims to access compensation

²¹ Joint Committee on the Draft Modern Slavery Bill, 8 April 2014, Draft Modern Slavery Bill: Report, (Session 2013-14, HL Paper 166, HC 1019), paragraph 142.



Ensure potential victims have immediate and effective access to legal assistance

Victims' increasingly limited access to legal aid is a fundamental barrier to their ability to access justice. The *Legal Aid, Sentencing and Punishment of Offenders Act 2012* ('LASPO'), which reduced the general availability of legal aid, made specific provision for the grant of legal aid to trafficking victims for immigration and civil compensation claims. However access to legal aid remains problematic for the following reasons:

a. Legal aid is not available for advice on identification and referral

Victims of trafficking are only entitled to legal aid once they have received a positive identification decision under the NRM. This prevents victims from receiving legal advice and assistance on the NRM referral itself. Yet, referral into the NRM has significant legal consequences for trafficking victims, particularly for those with irregular immigration status. The decision to refer, and the preparation of the referral itself, often require specialist legal advice.

The EU Trafficking Directive requires that victims of trafficking have access to legal advice "without delay",²² and also requires that victims provide their informed consent to assistance. By limiting legal aid to victims who have been referred and received a positive decision, the UK fails to ensure that potential victims are able to make informed and comprehensive claims for victim status, seriously risking the non-identification of valid victims.

b. Legal aid for judicial review is limited

Changes are underway to limit legal aid funding for judicial review applications to those applications that are ultimately given permission to proceed.²³ This requires lawyers to take financial risks on preparing cases, and therefore makes it less likely that lawyers will take on judicial review cases for trafficking victims.

The introduction of a 'residence test' also makes a person ineligible for legal aid unless they have been lawfully resident in the UK for at least 12 months. Victims of trafficking are exempt from the residence test only for certain immigration and civil compensation claims covered by LASPO. As the Joint Committee on Human Rights has pointed out, this exemption is too narrow and means that non-EU victims will be unable to access to legal aid to contest NRM decisions.²⁵

Risk of non-identification without early legal assistance

N, a Nigerian male, was persecuted in Nigeria before being trafficked to the UK, where he was exploited over a period of years. Due to lack of knowledge of their duties under the NRM, N had difficulty convincing the local authority to refer him into the NRM as a victim of trafficking. It took a significant amount of unpaid work by a specialist legal service, the Anti-Trafficking and Labour Exploitation Unit, to establish his case and convince another first responder to make the referral. N was subsequently found by the Home Office to be a victim of trafficking. Without the intervention of legal representatives to enable his referral, N would never have been referred or identified.²⁴

²² EU Trafficking Directive, Article 12.

²³ Ministry of Justice, February 2014, Judicial Review – proposals for further reform: The Government response, paragraph 45.

²⁴ Information provided by Jamila Duncan-Bosu, ATLEU, 23 May 2014.

²⁵ Joint Committee on Human Rights, 11 December 2013, The implications for access to justice of the Government's proposals to reform legal aid, (Session 2013-14, HL Paper 174, HC 868), paragraph 130.

c. Legal aid is not available for CICA applications

Applications to CICA are specifically excluded from the scope of legal aid available to victims of human trafficking.²⁶ This is despite the complexities associated with applications, including the requirement for victims to demonstrate that their case falls within the definition of ‘violent crime’ and to prove that their injuries fit those prescribed.

Potential victims should be provided with legal assistance without delay and prior to referral to the NRM. Legal aid should be available for all challenges to negative NRM decisions and for applications to CICA.

26 Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1, Part 2, paragraph 17.



Provide clear and accessible immigration remedies

Victims' access to appropriate immigration remedies is critical to their ability to recover, to pursue compensation, and to be protected from re-victimisation. Insecurity of immigration status deters victims from pursuing compensation.²⁷ In the case of migrant domestic workers, immigration restrictions on changing employers also deter victims from leaving or reporting situations of exploitation.²⁸

Yet the immigration remedies available to trafficking victims in the UK are often opaque, unsuitable, or inaccessible. The primary remedies available are discretionary leave and asylum:

a. Discretionary Leave

Under Home Office guidance, discretionary leave may be granted to a 'conclusively identified' victim of trafficking on three grounds: (1) the victim's personal circumstances "are so compelling that it is considered appropriate to grant some form of leave"; (2) the victim has lodged a legitimate compensation claim and it would be unreasonable for them to pursue the claim outside the UK; or (3) the victim is cooperating with an ongoing police investigation in relation to their trafficking case.²⁹

In practice lawyers and service providers report that most grants of discretionary leave are made on the basis of cooperation with police.³⁰ Statistics on the grant of leave are not routinely published, but the Home Office has advised that in 2011 there were 28 identified victims of human trafficking who were granted discretionary leave on the grounds of personal circumstances, and in 2012 there were 18 cases.³¹ These figures are remarkably low, given that 481 individuals were officially identified as victims in 2012.³²

It is unclear what kind and level of 'personal circumstances' are required to secure discretionary leave. There is also a lack of awareness of the availability of discretionary leave among some service providers and non-specialist lawyers, with the result that victims are most likely to apply for asylum, if they make any application at all.

²⁷ Information provided by Kate Roberts, Kalayaan, 23 May 2014 and Susan Cueva, UNISON, the public services union, 7 May 2014.

²⁸ See further, Kalayaan, April 2014, Still enslaved, the migrant domestic workers who are trapped by the immigration rules, <http://www.kalayaan.org.uk/documents/tied%20visa%202014.pdf>

²⁹ UK Visas and Immigration, 19 May 2014, Guidance: Discretionary Leave, paragraph 2.4.

³⁰ Information provided by Michelle Brewer, Garden Court Chambers, 21 May 2014.

³¹ See parliamentary answer, HC Debate, 13 January 2014, c435w, available at <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140113/text/140113w0004.htm#1401145000013>

³² HM Government, 2013, Second report of the Inter-Departmental Ministerial Group on Human Trafficking, p. 9.

b. Asylum

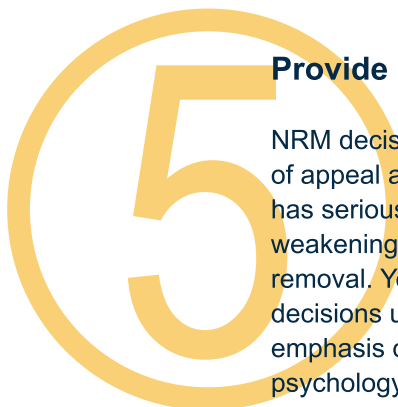
Most non-EU trafficking victims are advised to make claims for asylum, yet this is not always an appropriate remedy. In many cases this route may be justified. However there is concern among some service providers that asylum claims are being made due to a lack of clear alternatives, or in order to move victims into outreach asylum accommodation.³³ Asylum claims without strong foundation undermine the credibility of the victim, which is a serious concern given that asylum and trafficking decisions are made by the same caseworkers in the Home Office's 'NRM hub'.³⁴ Such issues are particularly problematic for victims of trafficking for labour exploitation, whose risk of harm or persecution is less likely to be recognized, and who are therefore less likely to be granted asylum by the Home Office than victims of sexual exploitation.³⁵

UK law and policy should clearly provide for leave to remain for victims of trafficking.

³³ Information provided by Jamila Duncan-Bosu, ATLEU, and Kate Roberts, Kalayaan, 23 May 2014.

³⁴ See parliamentary answer, HC Debate, 7 January 2014, c185W, available at <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140107/text/140107w0001.htm>

³⁵ Information provided by Michelle Brewer, Garden Court Chambers, 21 May 2014.



Provide a right of appeal against negative NRM decisions

NRM decisions often need to be challenged, yet there is currently no right of appeal against such decisions. A negative decision under the NRM has serious consequences for a potential victim of trafficking, including weakening any asylum claim, and leaving non-EU nationals open to removal. Yet, as the Anti-Trafficking Monitoring Group has demonstrated, decisions under the NRM are of variable quality, frequently place undue emphasis on minor inconsistencies and lack an understanding of victim psychology.³⁶

Some victims use judicial review to challenge negative decisions, yet this route only reviews the legality of the process, not the merits of the decision itself. Judicial review is also lengthy and expensive, and the availability of legal aid for such challenges is limited (see above). Victims can also request a reconsideration of the decision, though there is no guidance for making such requests and victims rely on service providers' variable willingness and capacity to assist.³⁷

UK legislation should provide a right to appeal or to otherwise challenge negative NRM decisions.

³⁶ Anti-Trafficking Monitoring Group, 2013, Hidden in Plain Sight, p. 21-26

³⁷ Anti-Trafficking Monitoring Group, Written evidence to the Joint Committee on the Draft Modern Slavery Bill, 12 March 2014, available at <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/draft-modern-slavery-bill-committee/draft-modern-slavery-bill/written/7220.pdf>.

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