

FOCUS ON LABOUR EXPLOITATION

October 2023

Submission in response to The Independent Chief Inspector of Borders and Immigration (ICIBI)'s call for evidence to inform an inspection of the Home Office's illegal working enforcement activity.

Introduction

Focus on Labour Exploitation (FLEX) is a research and policy organisation working towards an end to labour exploitation. FLEX seeks to achieve this vision through the prevention of labour abuses, protection of the rights of those affected or at risk of exploitation and by promoting best practice responses to labour exploitation through research and evidence-based advocacy.

FLEX's work builds on the understanding that labour exploitation is situated at the extreme end of a spectrum ranging from labour compliance through to labour law violations, culminating at extreme exploitation in the form of offences such as forced labour and human trafficking for labour exploitation. These are at once serious crimes, human rights breaches, and violations of labour law.

FLEX welcomes this inspection on the interaction between the UK immigration system and the agricultural sector. Our work to understand and address the structural causes of exploitation from across the continuum, or spectrum of exploitation means that we have conducted research and policy work in this area which we consider to be relevant to the inspection.

Background

The UK has certain human rights obligations with regards to preventing, identifying and protecting people who have been trafficked. This includes obligations to:

1. prohibit and prevent trafficking and related acts,
2. investigate, prosecute and punish traffickers, and
3. protect victims of trafficking.¹

The Recommended Principles and Guidelines on Human Rights and Human Trafficking 2002 issued by the UN High Commissioner for Human Rights affirm in this regard (Principle 2) that "States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons."

¹ Article 4, ECHR

FOCUS ON LABOUR EXPLOITATION

During the last decade, the UK has implemented a number of strategies aimed at addressing trafficking and modern slavery, such as creating a National Referral Mechanism for identifying victims of trafficking in 2009 and enacting the Modern Slavery Act 2015. Section 52 of the Modern Slavery Act 2015 creates a statutory duty for specified public authorities in England and Wales to notify the Home Office about suspected victims of modern slavery. UK Ministerial responsibility for slavery sits within the Home Office, currently under safeguarding.

The UK's efforts to address modern slavery have been undermined by the expansion of immigration deterrence policies that have made statutory and non-statutory stakeholders responsible for reporting migrants with insecure immigration status to the Home Office.² These policies also criminalised the act of working without required documentation. Undocumented workers are now liable for custodial sentences, fines, and can have their earnings and savings seized by the UK government "as the proceeds of crime".³ This means that many people in labour exploitation fear any contact with the authorities, as their understanding is that they have been criminalised by the act of working illegally even if under duress.

While section 45 of the Modern Slavery Act offers a defense for anyone who has committed a criminal act when they were a victim of trafficking or modern slavery, the burden of proof is still on the defendant. Additionally, many victims will be unaware of the defense or how to use it. Many victims of trafficking will not know if their exploitative work reaches the threshold of trafficking or slavery and so enable them to rely on section 45 nor will many be in a position to spend what could be years in the National Referral Mechanism for identifying victims of trafficking without permission to work. This means that in practice the Home Office's emphasis on immigration enforcement drives anyone working irregularly further underground and into the control of their exploiters. The Independent Anti Slavery Commissioner's 2020 call for evidence into use of the defense⁴ found that it was predominantly relied on in drug trafficking cases and that it offered little or nothing in the way of prevention or protection against re-trafficking.

In practice, the offence of 'illegal working' and the prioritisation of Immigration Enforcement over preventing or identifying modern slavery creates an environment in which exploitation can thrive

² Recent HO announcements - find articles

³ Home Office, Immigration Act 2016 Factsheet – Illegal Working (Sections 34-38), July 2016. - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/537205/Immigration_Act_-_Part_1_-_Illegal_Working.pdf

⁴ THE MODERN SLAVERY ACT 2015 STATUTORY DEFENCE: A call for evidence. IASC October 2023

FOCUS ON LABOUR EXPLOITATION

by pushing workers with insecure immigration status into precarious jobs in the informal economy where they are less protected against abusive employment practices and are threatened against approaching any authority for help. It also strengthens one of the main tools exploitative employers use to coerce and control migrants in abusive situations: the threat of reporting to the authorities. Another main feature of the 'hostile environment' is that the Home Office seeks help from other statutory agencies or institutions to enforce immigration policy by asking them to report cases of potential 'illegal working' and, in some cases, to conduct simultaneous operations with Immigration Enforcement. These operations seek to identify workers experiencing abuse and exploitation and to identify people in breach of the offence of 'illegal working'.

National and international evidence shows that when labour market and law enforcement agencies embrace immigration enforcement tasks, even if indirectly, they become less effective in delivering their primary functions. Given that exploitation exists on a continuum, a lack of ability to enforce rights or prevent abuse at any stage will act as a driver for exploitation more generally.

We have encountered numerous examples of situations in which labour inspectors and police officers were unable to support workers experiencing exploitation and identify their exploiters, due to these agencies' perceived, and actual, close relationship with Immigration Enforcement. Prioritisation of immigration offences is leading victims of exploitation to be arrested, detained and even removed from the UK without access to support, causing re-traumatisation, worsening of physical and mental health conditions, risks of re-trafficking or exploitation, and creating mistrust in the systems that are supposed to safeguard them.

"I would raise a complaint if I was protected in some way against deportation." Renata (Brazilian survivor of labour exploitation in the UK)⁵

While it appears no labour market enforcement agency has a legal duty to report workers with insecure status to the Home Office, legal gateways that allow for this information sharing exist and are being used. The police do not have a duty to report undocumented victims of crime to

⁵ Preventing and addressing exploitation: A guide for police and labour inspectors working with migrants. (2022) FLEX and LAWRS
https://labourexploitation.org/app/uploads/2022/02/Preventing_and_addressing_abuse_and_exploitation_FINAL-2.pdf

FOCUS ON LABOUR EXPLOITATION

the Home Office.⁶ However, if someone is not a victim of crime, it is unclear whether police officers have a duty to act on their immigration status. None of the agencies have a duty to check migrants' immigration status, yet they might become aware of this information during the course of their activities. Previous research by the Labour Exploitation Advisory Group only found evidence of the Metropolitan Police actively seeking to identify undocumented migrants during its regular activities.⁷

The Metropolitan Police (Met) makes use of the Immigration Enforcement National Command and Control Unit, a 24/7 point of contact for UK police forces to enquire about individuals' immigration status, which can be used to support victims' NRM referral or gather information on their exploiter. While the Met does not use this channel to report migrants, the Home Office confirmed that information gathered during these calls is used for immigration enforcement action.⁸

Labour market enforcement authorities such as the HMRC and EASI described referring vulnerable workers and potential victims of exploitation to the GLAA and/or police for specialist support.⁹ However, since both agencies report information about potential 'illegal working' to the Home Office, migrants' may become vulnerable to arrest, detention and removal following these referrals.

Continuum of Exploitation

There is a need to understand labour exploitation through the 'continuum of exploitation.' Labour exploitation has been recognised as part of a spectrum of experiences that ranges from decent work through minor and major labour law violations to extreme exploitation.¹⁰ The

⁶ National Police Chiefs' Council, Information Exchange regarding Victims of Crime with No Leave to Remain, 03 October 2018. -

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767718/Appendix_1.pdf

⁷ Opportunity Knocks, pp. 6-7.

⁸ UK Parliament, UK Border Agency: Written Question – 7744, 04 November 2019.

<https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-10-30/7744/>

⁹ <https://labourexploitation.org/app/uploads/2020/04/LEAG-SECURE-REPORTING-FULL.pdf> p.7.

¹⁰ Labour Exploitation Advisory Group (2020), *Opportunity Knocks: improving responses to labour exploitation with secure reporting*, p.13. Available at: <https://labourexploitation.org/publications/opportunity-knocks-improving-responses-to-labour-exploitation-with-secure-reporting/> (Accessed 20 September 2023).

FOCUS ON LABOUR EXPLOITATION

factors that produce vulnerabilities at one end of this gradient create risks across the continuum as a whole. At one end there is decent and well-paid work, with bad practices such as breaches of employment rights (such as unpaid wages, discrimination etc.) situated along the continuum, culminating at the opposite end of the continuum in severe exploitation, such as human trafficking and forced labour. This approach has been recognised by the Office of the Independent Anti Slavery Commissioner and the GLAA¹¹

However, the 'Illegal Working Offence' and the prioritisation of Immigration Enforcement over victim identification or support seriously impedes the ability to prevent or identify exploitation including trafficking for labour exploitation as it requires the exploitation that a worker has experienced to meet the high threshold of modern slavery before they are able to avail of protection and support, from law or labour market enforcement authorities. For a worker to meet the threshold and be identified as a victim of slavery they have to trust the agency they are in contact with to be able to disclose their exploitation. Ironically it is a fear of Immigration Enforcement which may prevent a worker who is, or who believes they are, working without proper permission from disclosing their situation.

Immigration Enforcement undermining prevention or safeguarding

Where victims and survivors of trafficking do not have secure migration status, they will often feel unable to report instances of abuse and exploitation to the police (or other authorities, such as labour market enforcement) due to the fear that authorities will prioritise their immigration status over the crimes that they have faced or their wellbeing. This acts to heighten their existing vulnerability, with abusers able to take advantage of this dynamic, and act with impunity. The 'Illegal Working' Offence has leads to an environment where undocumented victims of exploitation's wellbeing is subordinated to their immigration status.

This prioritisation of immigration enforcement extends to the UK's response to human trafficking including the trafficking identification system, the National Referral Mechanism (NRM). As soon as an NRM referral is received, an individual is checked on an immigration system to know if their identification decision as trafficked should be made by the Single Competent Authority (SCA) or

¹¹ See: University of Nottingham Rights Lab (2018), *Labour Exploitation in Hand Car Washes*, p.8 Available at: <https://www.antislaverycommissioner.co.uk/media/1238/labour-exploitation-in-hand-car-washes.pdf> (Accessed 20 September 2023); Gangmasters & Labour Abuse Authority (2023) *What is Modern Slavery?* Available at: <https://www.youtube.com/watch?v=Xj-c5Xo6mnU> (Accessed 20 September 2023).

FOCUS ON LABOUR EXPLOITATION

Immigration Enforcement Competent Authority (IECA). It appears that this information is acted upon for immigration enforcement purposes where the individual receives a negative reasonable grounds decision. First Responder organisations have shared that when Reasonable Grounds decisions are made immediately, this is when the Immigration Enforcement Competent Authority (IECA) has awarded a negative decision and a deportation order has been made for the individual. One civil service job advert stated that *“as a Decision Maker within the [IECA], 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.”*¹²

A negative reasonable grounds decision is not in-and-of-itself confirmation that an individual has not been trafficked, but rather that the Competent Authority did not find enough evidence of trafficking to make a positive decision. Many decisions which are initially negative are overturned following a reconsideration request.¹³ It is important to remember that prior to a Reasonable Grounds stage decision potential victims are not entitled to specialist government funded support and therefore many will not be in a position to make a reconsideration request. The fact that victims and survivors of trafficking may receive a negative reasonable grounds decision and the fact of the NRM referral and resulting data sharing with the Home Office may mean they face immigration detention and removal from the UK may dissuade individuals from consenting to being entered into the NRM. Even where an individual receives a positive conclusive grounds decision, the leave to remain grant rate is extremely low (6.5% for adults).¹⁴

We have also heard anecdotal evidence of police contacting Immigration Enforcement at the same time as completing an NRM referral for anyone with insecure immigration status, viewing this as part of their standard safeguarding process. While police officers are First Responders, enabling them to make referrals into the NRM it is important to note that there is no formal training or continued professional development requirement to qualify to be a First Responder. As a role which requires gaining the trust of a potential victim and supporting them to disclose the horrific details of their trafficking being a First Responder requires skill and a trauma informed approach. Fear of the police or the consequences of immigration enforcement will inevitably

¹²

<https://static1.squarespace.com/static/599abfb4e6f2e19ff048494f/t/64803ded7f6d6b3544d1eb85/1686126062880/HTF+Reasonable+Grounds+Threshold+Changes+Briefing+2023.pdf>

¹³ In 2021 81% of Reasonable Grounds stage reconsiderations resulted in a positive decision

<https://afterexploitation.com/2021/07/02/new-data-majority-of-trafficking-claims-later-found-to-be-positive-after-reconsideration/>

¹⁴ Recent HBF report

FOCUS ON LABOUR EXPLOITATION

undermine the disclosure process and decrease the likelihood of a positive identification as trafficked.

This is further undermined by a context in which the Home Office and relevant Ministers have repeatedly made public statements which claim, without evidence, that people are ‘gaming’ the UK’s modern slavery system in order to gain an immigration advantage. UN experts have condemned and warned against this rhetoric- highlighting that it will deter victims from coming forward and may also embolden traffickers:

“This has a chilling effect on those willing to come forward as victims and those willing to provide legal representation to victims, impeding efforts to identify and protect victims and persons at risk of trafficking and hold perpetrators accountable,”¹⁵

NRM referrals and decision making

The National Referral Mechanism for identification of trafficking (NRM) is the UK’s formal trafficking identification system, established in 2009 in order to comply with the Council of Europe Convention for Action Against Trafficking in Human Beings.

People who may be trafficked (‘potential victims’) are referred into the NRM by designated ‘First Responders’. No one can self-refer into the NRM. Adults need to give informed consent to a referral. However there is no designated statutory funding or qualification for First Responders or for support (such as legal advice, interpretation, secure accommodation) to support informed consent. In 2017 the then Home Office Minister Sarah Newton recognised the need for support prior to an NRM referral, announcing the introduction of ‘places of safety’. However these were never implemented.

As mentioned above, once an individual has been referred into the NRM, there are two NRM identification decisions, the first ‘Reasonable Grounds’ decision and then a second ‘Conclusive Grounds’ decision. These decisions are made by a ‘Competent Authority’ which sits within the Home Office. Decisions are based on evidence of trafficked provided by the potential victim or any support worker or representative they have. Given that many statutory First Responders, the NRM and the SCA sit within the Home Office, fears around Immigration Enforcement and a

¹⁵ <https://www.ohchr.org/en/press-releases/2022/12/uk-un-experts-condemn-attacks-credibility-slavery-and-trafficking-victims>

lack of independent pre NRM support inevitably affect disclosure and identification as trafficked leading to concerns that trafficked people are not identified as trafficked or not supported to move on from exploitation. Concerns include:

- Trafficked people not consenting to a referral into the NRM due to fears that the system does not work in their interest due to fears around immigration enforcement.
- Potential victims of trafficking being too fearful to approach a statutory First Responder due to fears around links to Immigration Enforcement and being unable to find a voluntary sector First Responder with capacity to make an NRM referral.¹⁶
- Trafficked people being given negative NRM decisions and so denied support and made vulnerable to continued or repeat exploitation.
- Differences in decision making depending on immigration status.
- Low grants of residence permit leading to risks of trafficking.

Example: Creation of the Immigration Enforcement Competent Authority (IECA)

When the NRM was established in 2009 it had two identification decision making bodies, or 'Competent Authorities'. In 2014, the [Government's own review of the NRM](#) found serious issues with having two separate decision making bodies (such as the conflation of asylum and trafficking matters), and in response set up a single decision making unit, the Single Competent Authority (SCA). After two years of the Single Competent Authority the Government established an additional decision maker, the Immigration Enforcement Competent Authority (IECA) suddenly and [without stakeholder consultation](#). The IECA was set up to make NRM identification decisions for adults who are subject to forms of immigration control, including any adults in respect of whom deportation is being pursued and those who are held in administrative immigration detention. In April to June 2023, the IECA rejected 66% of final stage NRM decisions, compared to 45% in October to December 2022 prior to the introduction of the NABA provisions. Additionally, despite the fact that the Government claimed [the need to streamline decision-making](#) as a reason for the creation of the IECA, the length of time taken by the IECA to make a first stage decision has increased from 19 days to 30 days. Home Office guidance states that these decisions [should be made within five days where possible](#).

¹⁶ See for example 'The National Referral Mechanism, near breaking point' Kalayaan 2023 http://www.kalayaan.org.uk/wp-content/uploads/2023/02/KALAYAAN_REPORT_UPDATED20FEB-2.0.pdf

FOCUS ON LABOUR EXPLOITATION

Ultimately, when victims are made too fearful to come forward, the police are hampered in preventing and addressing serious crime, like modern slavery, without access to the intelligence needed to identify and prosecute perpetrators. Where immigration enforcement is prioritised, many migrant victims of crime are unable to avail of safety and justice, and offenders are able to continue to drive others into exploitation. This undermines public safety as a whole. When a victim is arrested, detained or removed on the back of the police sharing their insecure migration status with immigration enforcement, the message that is being sent out to other migrants is that they are not safe to report their abuse, something that a trafficker will often threaten will happen.

Joint or ‘Simultaneous’ Inspections

While police officers and labour inspectors might not personally check individuals’ immigration status or ‘right to work’ entitlements, some agencies invite Immigration Enforcement staff to carry out immigration checks during simultaneous inspections or raids that are primarily aimed at supporting vulnerable workers.

A 2020 report by the Labour Exploitation Advisory Group (LEAG) found that despite variations in frequency and regularity, all agencies have reported migrant workers to Immigration Enforcement at least once from 2016 to the time of writing.¹⁷ Only the Health and Safety Executive has not conducted any simultaneous inspections with Immigration Enforcement during this period.¹⁸ This highlights the widespread and conflicting practice of carrying out inspections that aim at simultaneously identifying labour abuses *and* immigration offences. This practice continues in 2023.¹⁹

Such joint or simultaneous inspections can undermine trust among communities, with bodies being seen to be in active collaboration with Immigration Enforcement. Where joint or simultaneous operations take place, migrants may be unable to distinguish between agencies

¹⁷ Information acquired through Freedom of Information requests to EAS 2019/20380; GLAA 19-20 27; HSE 201910343; HMRC NMW 2019 02181.

¹⁸ Information acquired through Freedom of Information request to HSE 201910343.

¹⁹ See e.g., <https://www.cheshire.police.uk/news/cheshire/news/articles/2023/3/four-arrested-and-20-premises-visited-in-operation-to-tackle-organised-immigration-crime/>

FOCUS ON LABOUR EXPLOITATION

focused on immigration enforcement and those whose primary objective is to support them. Without a clear separation between immigration on one side and labour market and law enforcement on the other, even where labour market or law enforcement authorities do not conduct immigration checks themselves, migrants remain unsure as to whether they can trust officials and will not be penalised for reporting abuse and exploitation then, or at a later stage, when they are ready to disclose. This will ultimately hamper labour market and law enforcement's ability to identify and support those who have experienced exploitation including trafficking or modern slavery.

Regulating work visas

The Home Office's prioritisation of illegal working enforcement activity also risks undermining its regulation of work visas, particularly restrictive work visas, where migrant workers on those visas are especially dependent on their employers who are also their visa sponsors. This dependency makes workers fearful of any compliance action taken against their visa sponsor as this in turn will negatively affect their ability to work in the UK. For example, workers in the UK on the horticultural seasonal worker visa can only work where they are placed by the scheme operator who recruited them and is also their visa sponsor. If a scheme operator loses their sponsor license this creates great insecurity for workers they sponsor in the UK.

There is a confusion around responsibility for compliance on restrictive work visas with concerns that immigration compliance takes precedence over labour market enforcement, leaving workers without meaningful redress or access to UK employment law and so creating risks of exploitation. On the UK's horticultural Seasonal worker visa the confusion about roles and remit resulted in a recommendation following the ICIBI's inspection that the Home Office produce and publish a reference document for the Seasonal Worker route, clarifying who is responsible for what across the Home Office, other government departments, devolved administrations, and local authorities. This reference document should be underpinned by a memorandum of understanding between all the relevant parties. This remains unpublished at the time of writing (11 October 2023). Delivery of the scheme is through Scheme Operators who recruit and place workers and who are required to be licenced by both the Gangmasters and Labour Abuse Authority (GLAA) and the Home Office. [A parliamentary answer states that](#)

FOCUS ON LABOUR EXPLOITATION

[GLAA checks are 'intelligence led' rather than regular or proactive.²⁰](#) Another explains that the [GLAA does not routinely inspect farms employing people with Seasonal Workers Scheme visas, as the workers are employed directly by the farms or growers.²¹](#)

Recommendations

The inspection should consider the outcomes of the Home Office's approach to illegal working enforcement activity in the context of government commitments to prevent, identify and address trafficking and modern slavery.

The inspection should consider making recommendations to ensure that people with irregular status who are in exploitative work are supported to report to the authorities at every stage of the continuum of exploitation.

The inspection should consider options which would enable people to exit illegal working including with options to regularise their status.

The inspection should consider recommending the Home Affairs Committee conduct an inquiry into the impact of immigration enforcement measures on the prevention of trafficking and the identification and protection of victims of trafficking

²⁰ <https://questions-statements.parliament.uk/written-questions/detail/2022-10-10/59819/>

²¹ <https://questions-statements.parliament.uk/written-questions/detail/2022-09-20/51713/>