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Working Paper

ACCESS TO COMPENSATION FOR VICTIMS OF HUMAN TRAFFICKING

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FLEX**

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Focus on Labour Exploitation (FLEX) is a registered charity based in the UK. FLEX works to end trafficking for labour exploitation worldwide. FLEX research and advocacy promotes rights-based responses to human trafficking for labour exploitation centred on prevention.

For more information on our work see our website, www.labourexploitation.org.



Introduction

The UK Modern Slavery Act was passed into law in March 2015. Heralded by the UK government as a ‘landmark’ piece of legislation, this law brought together measures for the prosecution and punishment of traffickers and exploiters, with measures aimed at the protection and support of victims.

During the passage of the law through parliament, the issue of compensation for victims of modern slavery received some limited but belated attention. The Modern Slavery Act, as introduced, included the ability for courts to make ‘reparation orders’ following the conviction of exploiters, but made no provision for the many cases in which prosecutions or convictions are not possible. Amendments to include a ‘civil remedy’ for victims unable to pursue criminal compensation were debated in the House of Lords, but were ultimately rejected by the Government as unnecessary.¹

This paper considers the ability of victims of human trafficking and other forms of modern slavery to access compensation, one year on from the enactment of the Modern Slavery Act. It builds upon research conducted by FLEX during the passage of the Act, to ask what has changed for victims seeking compensation, and what barriers still remain.

Access to compensation: getting justice and staying safe

Effective access to compensation can be a significant factor in the recovery process of survivors of human trafficking. Compensation awards can provide economic empowerment, facilitating reintegration into society and reducing individual victims’ vulnerability to re-trafficking. Obtaining fair compensation can contribute to a sense of justice and closure, and can play an important role in a survivor’s psychological recovery. The effective enforcement of compensation can also act as a form of punishment and as a deterrent, as it contributes to shifting the cost-benefit balance, making human trafficking a riskier, less profitable crime.

The vital role of access to compensation in achieving positive long-term outcomes for survivors of human trafficking has been recognised by the Government in its Modern Slavery Strategy, in which the Government set out to ensure “that there are avenues for victims to receive reparation and compensation”² as one of its key objectives. The UK is obligated³ by article 15 of the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT)⁴ to ensure trafficking victims’ right to obtain compensation, both from the perpetrators and from the State. Article 17 of Directive 2011/36/EU⁵ (the ‘EU Trafficking Directive’) also requires that victims of human trafficking have access to existing compensation schemes available to other victims of violent crimes. The new European Victims Directive⁶ also provides for the right of victims to obtain a decision on compensation in the course of criminal proceedings.

1 HL Deb 23 Feb 2015, vol 759, cols 1465-1466. Available at: <https://hansard.parliament.uk/lords/2015-02-23/debates/15022332000694/ModernSlaveryBill>.

2 Modern Slavery Strategy, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/383764/Modern_Slavery_Strategy_FINAL_DEC2015.pdf.

3 In *Hounga v Allen*, the Supreme Court held that these obligations are directly binding on UK courts and tribunals, and held that any English law provisions incompatible with article 15 should not be applied. See *Hounga v Allen* [2014] UKSC 47.

4 Art. 15 of the Council of Europe Convention on Action against Trafficking in Human Beings. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236093/8414.pdf.

5 Article 17 of Directive 2011/36/EU. At the time of writing the UK was still a member of the European Union and bound by the terms of the Directive.

6 Article 16 of Directive 2012/29/EU (the Victims Directive).

Galdikas and trafficking victims' uphill battle for justice

In June 2016 the High Court ruled in favour of six Lithuanian men who had been trafficked to the UK, in the first civil case of its kind against a British company.⁷ The men, represented by Leigh Day, brought a civil claim against the gangmaster firm that employed them, alleging that they had been subjected to severe exploitation, including threats and assaults, working and living in inhuman and degrading conditions, being forced to work long shifts for little or no pay, and being denied sleep and toilet breaks.

Due to the lack of a specific remedy of human trafficking in UK legislation, the litigation in this case was highly complex, and the lawyers representing the men had to bring a variety of claims. In the end, the High Court ruled that the men should be compensated by the gangmaster for its failure to pay the agricultural minimum wage, charging prohibited work-finding fees, unlawfully withholding wages, and depriving the workers of facilities to wash, rest, eat and drink. Commenting on the judgment, one of the victims said: ***“it means at last that some justice has happened. We’ve waited four years and it’s been really hard being forced to remember [the experience] all the time to prove they did wrong.”***⁸

While these victims of trafficking finally obtained compensation, the journey to get there was a challenging, uphill battle. After the men escaped, they were referred to the National Referral Mechanism and were recognized as victims of trafficking. They cooperated with the police, but no criminal charges were brought against their traffickers. The men were never introduced to lawyers who could advise them about compensation and as a result, it took two years before they were able to make a compensation claim against their exploiters. The victims also applied for legal aid in March 2015, but only four of the six clients in this case received free legal assistance. Due to the lack of information and the length of the legal process, these victims have had to wait for four years to obtain compensation. In the meantime, they have faced significant difficulties, including loss of benefits and risk of destitution due to the lack of long-term support from UK authorities.

This case represents an important step forward, and demonstrates the importance of justice to victims. However, it also highlights the difficulties faced by trafficking victims, and the fact that in spite of their legal right to remedy, few victims obtain compensation for the abuses committed against them, making them the exception rather than the norm.

⁷ See *Galdikas & Ors v DJ Houghton Catching Services Ltd & Ors* [2016] EWHC 1376 (QB), available at: <http://www.bailii.org/ew/cases/EWHC/QB/2016/1376.html>

⁸ Lawrence, F. "Court Finds UK Gangmaster Liable For Modern Slavery Victims". *The Guardian* 2016. Available at: <http://www.theguardian.com/global-development/2016/jun/10/court-finds-uk-gangmaster-liable-for-modern-slavery-victims-kent-chicken-catching-eggs>.



The Modern Slavery Act and compensation

The UK Modern Slavery Act was passed in March 2015. While the Act represents an important step forward in the UK's efforts to address modern slavery, significant gaps remain. The focus of the Act is on the prosecution of traffickers, and while the Act contains some measures for the protection of victims, its compensation provisions are limited.

During the passage of the Modern Slavery Act, it was recognised that victims of trafficking needed improved access to compensation. However, amendments seeking to introduce a general civil remedy for trafficking failed, as they were rejected by the government as unnecessary.⁹ Instead, the key measure introduced in the Modern Slavery Act to address this issue was the 'slavery and trafficking reparation orders', a specific form of compensation for victims of human trafficking awarded as part of criminal proceedings.¹⁰ Through the Act, Parliament also sought to ensure victims had access to legal aid for a range of claims.¹¹ However, as will be explained below, the way that the Legal Aid Agency has implemented this provision means that in practice victims of trafficking struggle to access legal advice and assistance to bring compensation claims.

Slavery and Trafficking Reparation Orders

Under section 8 of the Modern Slavery Act, criminal courts are required to consider making a slavery and trafficking reparation order in all cases where a person has been convicted of a) slavery, servitude or forced labour, b) human trafficking, or c) committing an offence with intent to commit human trafficking. The Court must consider making an order whether or not reparation was requested by the prosecution, and any decision by a Judge not to grant a reparation order must be explained.

For a victim to obtain compensation through a slavery and trafficking reparation order, the perpetrator must have been convicted under the Modern Slavery Act, and a confiscation order must have been made against him or her. Despite the increase in prosecutions in recent years, the high criminal threshold of proof makes it difficult to successfully prosecute, and in many cases prosecuting is not possible due to lack of evidence.

This avenue is therefore only available to a very limited number of victims of human trafficking who have seen their traffickers convicted for the abuses committed against them.

To illustrate the problem, in 2014, only 39 persons were convicted for offences related to human trafficking, forced labour and servitude.¹² Meanwhile, 2,340 potential victims of human trafficking were referred to the National Referral Mechanism in the same year.¹³

⁹ HL Deb 23 Feb 2015, vol 759, cols 1465-1466. Available at: <https://hansard.parliament.uk/lords/2015-02-23/debates/1502233200694/ModernSlaveryBill>.

¹⁰ Ss 8-12 of the Modern Slavery Act.

¹¹ S. 47 of the Modern Slavery Act.

¹² Criminal Justice System Statistics 2014, available at: <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2014>.

¹³ National Crime Agency, 2015, National Referral Mechanism Statistics – End of Year Summary 2014, available at: <http://www.nationalcrimeagency.gov.uk/publications/502-national-referral-mechanism-statistics-end-of-year-summary-2014/file>.

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Legal aid

Section 47 of the Modern Slavery Act amended the Legal Aid, Sentencing and Punishment of Offenders Act (LAPSO) 2012 to ensure victims of modern slavery, including forced labour and servitude, could bring compensation claims against their exploiters. Under the Act, victims of trafficking are entitled to legal aid for applications for leave to remain in the UK, compensation claims under employment law and claims for damages. This provision does not cover applications to the Criminal Injuries Compensation Authority (CICA).¹⁴

In the UK, legal aid services can only be provided by organisations that have a contract with the Legal Aid Agency (LAA).¹⁵ However, despite the clear and specific provision for trafficking victims' legal aid in the Modern Slavery Act, the Legal Aid Agency has not issued a specific contract for human trafficking cases. Instead, human trafficking cases have been included in a contract for "miscellaneous work", which includes around 20 other types of cases. Since 2013, the Standard Civil Contracts issued by the Legal Aid Agency have only given solicitors providing legal aid services the right to start 5 miscellaneous cases per year. This means that solicitors with Civil Contracts can only take on a very limited number of trafficking cases each year. Moreover, persistent delays in considering requests by the Legal Aid Agency result in delays of 12-18 months for many victims. This causes unnecessary frustration for victims who are often in desperate need of restitution, and who wish to move on from their experience.

The way in which the Legal Aid Agency has implemented LAPSO has created a practical barrier to access to justice for victims of trafficking. Solicitors specialised in these types of cases have been forced to limit the number of cases they can take. At the same time, the limited funding for cases available to each legal service provider discourages other solicitors from specialising in this practice and developing much needed expertise in bringing complex cases on behalf of victims of trafficking.

Many victims are unable to access legal advice because of the limited number of legal aid providers able to bring compensation claims on behalf of trafficking victims, and the limited number of claims these solicitors can bring under the current legal aid contract.

Additionally, many legal advisors are not aware that victims can access legal aid for cases involving modern slavery. At the time of writing this report, the Government was conducting a review of legal aid for trafficking and modern slavery compensation claims.¹⁶

Victor's legal aid ordeal

Victor was trafficked to the UK for the purpose of labour exploitation. He was required to work onerous hours in return for little or no payment. Victor was subjected to threats and abuse and was severely beaten.

Victor was supported by Hope for Justice, who helped Victor find a solicitor in March 2013. An application was submitted by the solicitors, ATLEU, to the Legal Aid Agency (LAA), to pursue a Protection from Harassment complaint at the County Court. The Application was initially rejected on the grounds that Victor's complaints amounted to personal injury and this was out of the scope of legal aid. A review was sought, however the LAA then rejected the application on the basis that prospects of success were minimal. Another review was sought, and LAA rejected the application again, this time on the basis that the case could be funded under a conditional fee agreement, in which a Victor would pay a fee to the solicitor if the case was successful. This is contrary to the European Trafficking Convention, which requires that victims of trafficking are given access to free legal advice.¹⁷

Victor's application was subsequently sent to an independent adjudicator.

¹⁴ See section on CICA below.

¹⁵ There are currently 8 categories of civil legal aid contracts: debt, discrimination, education, family, housing, immigration and asylum, welfare benefits and miscellaneous work.

¹⁶ Read the final consent order for the review for more information: http://www.gardencourtchambers.co.uk/wp-content/uploads/2016/03/Final-signed-consent-order-ATLEU_-LAA.pdf

¹⁷ See art. 15, Council of Europe Convention on Action against Trafficking in Human Beings, available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008371d>.



Between 2004 and 2014, 211 persons were found guilty of crimes of human trafficking (both for sexual and non-sexual exploitation) and slavery, servitude and forced labour. However, only 8 compensation orders were made with regard to those crimes during the same 11-year period, amounting to a total of just over £70,000

Other routes to compensation¹⁸

In addition to the reparation orders introduced by the Modern Slavery Act, there are four other routes to compensation available to victims of human trafficking. Each of these were in place at the time of the passage of the Modern Slavery Act, but their ability to effectively compensate victims has not improved since the Act, and in some cases has worsened:

Compensation Order

If a defendant is convicted of trafficking or of other offences, the Court may, under Section 130 of the Powers of the Criminal Courts (Sentencing) Act 2000, make an order¹⁹ requiring that the defendant pay compensation to the victim.²⁰ This avenue is still applicable in cases in which there is not enough evidence to prove a Modern Slavery Act offence but a conviction is obtained instead for other crimes committed against the trafficking victim (i.e. assault, harassment, rape, false imprisonment, fraud). Compensation can be awarded for personal injury, loss or damage resulting from an offence. Usually compensation orders do not include unpaid wages during the period of exploitation.²¹

As is the case with trafficking and slavery reparation orders, for a compensation order to be made the defendant must have been convicted of an offence, which restricts access to this form of compensation significantly. Prosecutors are not required to request a compensation order, and unlike with trafficking and slavery reparation orders, courts are not obligated to consider making a compensation order, which makes them even more rare. Between 2004 and 2014, 211 persons were found guilty of crimes of human trafficking (both for sexual and non-sexual exploitation) and slavery, servitude and forced labour. However, only 8 compensation orders were made with regard to those crimes during the same 11-year period, amounting to a total of just over £70,000.²²

CICA Claim

Victims of human trafficking may apply to the Criminal Injuries Compensation Authority (CICA), a government-funded scheme that provides victims of violent crimes committed within England, Scotland or Wales, with compensation for the physical or psychological injuries sustained as a result the crime. Access to CICA is particularly important in those cases in which compensation from the perpetrator is not possible — e.g. because the perpetrator cannot be identified, has fled the country, or has no assets. For many victims of trafficking, CICA is the only prospect of obtaining compensation for the abuses committed against them.

However, access to the CICA scheme can prove problematic for victims of trafficking. Firstly, the scheme is only available to victims of violent crimes²³ committed in Scotland, England and Wales.²⁴ Many victims of forced labour and human trafficking for labour exploitation are subjected to psychological control, such as coercion, deception or debt bondage, rather than violence.

Therefore, victims who are exploited for many years, but not subject to actual or threatened violence, will not be able to claim compensation.

¹⁸ For more detailed information on the existing avenues to compensation, please see FLEX's Guide to Legal Remedies for Victims of Trafficking for Labour Exploitation, available at: http://www.labourexploitation.org/sites/default/files/publications/d92434_f8ff939c836d4c73a4730de5776066dd.pdf.

¹⁹ Section 130 of the Powers of the Criminal Courts (Sentencing) Act 2000.

²⁰ For convictions under the Modern Slavery Act, the Court would be required to consider making a trafficking reparation order, and would therefore be expected to prefer reparation orders to the standard compensation orders in such cases. However, in cases in which the trafficking offence cannot be proved, but a conviction is obtained for other offences committed against the victim, compensation orders would still offer the victim an avenue to criminal compensation.

²¹ For more information see FLEX Guide to Legal Remedies for Victims of Trafficking for Labour Exploitation.

²² Data obtained from the Criminal Justice System Statistics 2014, available at: <https://www.gov.uk/government/statistics/criminal-justice-system-statistics-quarterly-december-2014>.

²³ Under the CICA scheme, a crime of violence is defined as a crime which involves: (a) a physical attack; (b) an act or omission of a violent nature which causes physical injury; (c) a threat against a person causing fear of immediate violence; (d) a sexual assault; or (e) arson.

²⁴ In Northern Ireland, victims may apply to a scheme with similar characteristics and eligibility criteria: the Northern Ireland Criminal Injuries Compensation Scheme.

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A significant proportion of CICA claims made by victims of trafficking are initially rejected because they are considered not to have collaborated sufficiently with the police.

In addition, in order to be eligible for CICA, victims are required to have cooperated sufficiently with the police, and must have reported the crime to the authorities within two years of the incident. This requirement is problematic in cases where victims are fearful of reporting and suffering retaliation on the hands of their traffickers, or where they can provide limited evidence to the authorities due to mental health concerns or to their own lack of knowledge or understanding of the crime committed against them. Service providers and lawyers assisting victims of trafficking have told FLEX that a significant proportion of CICA claims made by victims of trafficking are initially rejected because they are considered not to have collaborated sufficiently with the police. While many of these rejections

are overturned on appeal,²⁵ this causes victims unnecessary distress, as well as extended waits to obtain compensation.

Furthermore, under the current scheme victims could also see their compensation amounts reduced due to previous convictions.²⁶ This is likely to affect victims of trafficking who were forced to engage in criminal activity by their traffickers, or who engaged in criminal activity as a result of their trafficking experiences. Forced criminality among victims of labour exploitation in particular is common, with victims being forced to steal, beg or produce illicit drugs, while fraud and immigration offences are also commonly committed by victims, often without their knowledge.

The long wait to obtain a decision—between 1 and 3 years in most cases—is also discouraging and can cause distress to victims who are highly vulnerable and waiting to receive much-needed compensation awards.²⁷

Rose's rejection by CICA

Rose was trafficked to London from Nigeria for the purpose of sexual exploitation. She became pregnant as a result of the abuse she was subjected to, and she had to remain in the exploitative situation with her child until they finally managed to escape. Rose reported the crime committed against her to the Police in Scotland. She met with the Police on several occasions, but was unable to give her statement to police officers due to her fear of the police and her severe mental health issues—including risk of suicide. Police interviews were terminated by the police due to concerns for Rose's mental health. However, Rose's solicitors passed her statement to the police with Rose's permission.

Rose was ultimately identified by the Home Office as a victim of trafficking and granted refugee status. However, when she claimed compensation from CICA, the Police told CICA that they had not been able to investigate because Rose had not given her statement. As a result, compensation was refused on grounds of non-cooperation with the Police. Rose also claimed compensation on behalf of her child as a secondary victim, as her child had developed health problems due to being held in, and witnessing the exploitative situation. However, this was refused on the basis of insufficient evidence that the child had witnessed the abuse, or that the child's injuries were a result of the abuse.

Rose's solicitors appealed against this decision, and the compensation claim for Rose was ultimately successful on appeal. However, the amount was reduced due to her supposed lack of cooperation with the Police.

Furthermore, legal aid is not available to victims for the purpose of completing CICA claims. The CICA instead has provided guidance for applicants to help them submit their claim themselves. However, victims face a number of practical barriers due to the limited support available to make such claims including language barriers, short time limits, and difficulties identifying and proving mental injury.

²⁵ On 26 November 2015, in the case of *C v Criminal Injuries Compensation Authority*, the First Tier Tribunal found that barring a victim of trafficking from obtaining a CICA award on the basis of insufficient cooperation with a criminal investigation was contrary to EU legislation. For more information see: <http://atleu.org.uk/cases/2015/12/11/c-v-criminal-injuries-compensation-authority>

²⁶ See Criminal Injuries Compensation Scheme 2012, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/243480/9780108512117.pdf.

²⁷ Information received by FLEX from interviews with legal service providers.

Employment Tribunal

Victims of human trafficking may pursue claims before the Employment Tribunal for employment related abuses such as discrimination, unlawful deductions or failure to pay the national minimum wage. Until recently, the Employment Tribunal had been one of the main avenues to compensation for victims of domestic servitude and human trafficking for labour exploitation.²⁸ The Employment Tribunals' expertise dealing with employment matters, as well as its simpler and more worker-friendly procedures, made it particularly beneficial in eligible trafficking cases.

However, since July 2014, the Deduction from Wages (Limitation) Regulations 2014 prevent anyone — including victims of trafficking— from claiming more than two years of wages owed to them.

Before 2014, victims of human trafficking were obtaining compensation for unlawful deductions and non-payment of minimum wages for periods well over the new 2-year limit. While victims are still able to make civil claims based on non-payment of wages in the High Court or County Court (see below) such claims have significant cost implications and may be unavailable to some victims.

The impact assessment presented by the Government before the introduction of the Regulations did not consider the impact of this measure on victims of human trafficking and labour exploitation.²⁹ Yet a victim of modern slavery is very likely to have been working without pay or for very little money —below the national minimum wage— for over two years, and as a consequence victims will be restricted in their ability to recover unpaid wages under the Regulations. The effect of this limitation is not only to penalize long term victims of trafficking, but also to shift the cost-benefit balance of exploiting workers, since any benefit obtained by exploiters exceeding the two-year limit cannot be recovered.

In its impact assessment, the Government argued that workers had other avenues to recover their wages, and in particular the assessment referred to enforcement of the national minimum wage by the HMRC.³⁰ However, no evidence was provided regarding the viability of enforcement of claims relating to more than two years, and in particular of claims made by victims of modern slavery by the HMRC. The average recovery per individual by the HMRC has varied between £125 and £228 over the last five years.³¹ These low average recovery amounts suggest that the HMRC is rarely acting in cases of underpayments exceeding two years, and that few or no recoveries have been made by the HMRC on behalf of victims of modern slavery.

In addition, the recent ruling in the case of *Taiwo v Olaigbe & Onu v Akwivu*³² has further restricted access to the Employment Tribunal for undocumented victims. This recent Supreme Court ruling has established that victims of human trafficking who are exploited through abuse of their immigration status are not protected by race discrimination provisions. As undocumented workers are also not able to make claims for non-payment of wages,³³ this leaves undocumented victims of trafficking without access to a remedy at the Employment Tribunal.

Civil Claim

There is no specific civil remedy for human trafficking in UK law. However, victims of trafficking may bring a civil claim in the County Court or High Court based on civil law actions such as harassment, false imprisonment, fraud,

²⁸ Until July 2014, the Employment Tribunals had been largely regarded by specialist lawyers and organisations supporting victims of trafficking as the best avenue to compensation for victims of domestic servitude and human trafficking for labour exploitation. See ATLEU response to the Low Pay Commission consultation on the National Minimum Wage, available at: <https://static1.squarespace.com/static/50a4ce70e4b06eecd889f121/56695d0b69a91a928ff957b0/1449745675991/ATLEU+Consultation+LIVING+WAGE+21.9.15.pdf>.

²⁹ There is no mention to victims of trafficking, forced labour or servitude in the impact assessment conducted by the Government. See Government Impact assessment, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389174/bis-14-1289-limiting-backdated-claims-for-unauthorised-deduction-of-wages.pdf.

³⁰ Ibid.

³¹ All data sourced from HMRC End of year Compliance reports..

³² See *Taiwo (Appellant) v Olaigbe and another (Respondents); Onu (Appellant) v Akwivu and another (Respondents)* [2016] UKSC 31 On appeal from [2014] EWCA Civ 279, available at: [http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKSC/2016/31.html&query=\(taiwo\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKSC/2016/31.html&query=(taiwo)).

³³ See *Hounga v Allen* [2014] UKSC 47.

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Taiwo and the failures of existing legislation

Ms Taiwo and Ms Onu are both migrant domestic workers who have been officially recognised as victims of trafficking. The Employment Tribunal initially found that both claimants had been subjected to a myriad of labour abuses, including excessive working hours, non-payment of the minimum wage, harassment, threats, and physical and mental abuse; and accordingly ordered the respective perpetrators to pay both victims compensation. Referring to Ms Taiwo, the Employment Tribunal described her situation as “systematic and callous exploitation”.

On appeal, however, the Supreme Court ruled that while the victims clearly deserved a remedy for all the harm suffered, at present UK labour law does not protect victims of trafficking who are vulnerable due to their immigration status. While the Court found Ms Taiwo and Ms Onu had been mistreated because of their status as migrant workers this was not considered to meet the definition of “race discrimination” for the purposes of anti-discrimination law. The Supreme Court urged³⁴ Parliament to consider amending the Modern Slavery Act to provide effective access to redress to such victims:

“Parliament may well wish to address its mind to whether the remedy provided by section 8 of the Modern Slavery Act 2015 is too restrictive in its scope and whether an employment tribunal should have jurisdiction to grant some recompense for the ill-treatment meted out to workers such as these”.

assault, intimidation or breach of contract. A victim could also bring a claim under the Human Rights Act 1998 against a public body or against the UK in respect of failures on their part—for example, failure by the police to properly investigate their case, or failure by the authorities to protect the victim from further harm.³⁴

Civil compensation has the potential to become an empowering tool for victims of trafficking. Unlike criminal compensation orders, and the reparation orders introduced by the Modern Slavery Act, civil claims do not rely on the actions of the prosecuting authorities, and can be brought against traffickers by the victims themselves. However, due to the lack of a specific civil remedy for trafficking, victims have to resort to existing civil actions that are not always appropriate to provide compensation for victims of human trafficking. Existing civil remedies were not created for this purpose and are therefore inadequate to address the complex nature of trafficking.

This situation makes civil litigation on behalf of trafficking victims extremely long, complex and challenging, and often victims of trafficking do not have clear cases under any of the existing civil claims.

Not all victims will have been subjected to fraud, assault or intimidation that would give rise to a civil claim, but rather to subtler forms of control. Due to the nature of trafficking, victims also often engage in highly irregular work arrangements, and it may be difficult to prove the existence of a contract for a breach of contract claim. Furthermore, exploited migrant workers who are undocumented are unable to bring claims based on any employment contract, which is regarded by the Courts as being ‘illegal’ due to their irregular status.³⁵

Civil claims against traffickers also face issues in cases where certain acts have been committed outside of the UK, or where a defendant has fled the country.³⁶ In some cases it may not be possible to identify those involved in the trafficking of the victim, or it may not be possible to locate them or their assets. Corporate liability has been particularly difficult to establish, and at the time of writing of this report, there had only been one

successful civil claim against a business in the UK.³⁷ Cost can also be a significant barrier to access in civil cases, due to the complexity of these cases and the limited availability of legal aid.

³⁴ For more information see FLEX Guide to Legal Remedies for Victims of Trafficking for Labour Exploitation.

³⁵ See *Hounga v Allen* [2014] UKSC 47.

³⁶ See *Hounga v Allen* [2014] UKSC 47.

³⁷ Evans, M. Human Rights, Human Trafficking, What’s Right for the Victims?, available at: <http://thejusticegap.com/2015/09/human-rights-human-trafficking-what-rights-for-the-victims/>.

³⁸ See above at p. 2 for information about the case of *Galdikas & Ors v DJ Houghton Catching Services Ltd & Ors* [2016] EWHC 1376 (QB).

³⁹ See *Hounga v Allen* [2014] UKSC 47.



Practical barriers to compensation

In addition to the legal issues outlined above, victims of trafficking face important practical difficulties that impede their effective access to compensation. Language barriers, fear, mental health issues and a range of other vulnerabilities mean that victims often need help to navigate the legal process, from completing forms and making a written application, to responding to official letters or speaking with solicitors. However, the support available through the UK's National Referral Mechanism (NRM) is limited, as support workers are not funded to attend legal meetings or provide other legal assistance.³⁹ Support providers also report limited knowledge of the legal avenues available to victims, and rarely inform victims of their rights to compensation.⁴⁰

Additionally, while legal processes and compensation claims normally take months or even years to be completed, the NRM support is of a short-term nature and is only available to victims for 45 days.⁴¹ This means that even when support providers put the systems in place to facilitate access to compensation for victims, these applications often fail due to victims not being able to complete the process without help, and to overcome their significant barriers on their own. Long waits and delays in the legal process can also cause victims who are already highly vulnerable, unnecessary distress and suffering while they wait for much needed restitution.

The lack of a system for long-term support for victims of human trafficking also means that victims have competing urgent needs during the 45-day NRM period, which tend to take priority over claiming compensation. These often include resolving their immigration status or applying for asylum, accessing accommodation, securing a livelihood or accessing medical services. The short-term nature of the support means that victims and support providers are often forced to prioritise victims' most urgent needs, and unable to consider longer-term options such as cooperating with the police or pursuing compensation claims.

Daniel's vulnerability

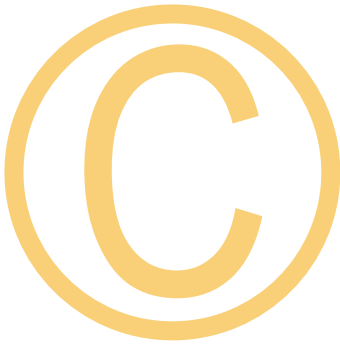
Daniel was trafficked for the purpose of forced labour. He was referred to the National Referral Mechanism and reported the matter to the police. Daniel was traumatised by his experience. During the 45-days of support and accommodation he received through the NRM system, Daniel was very afraid as he had been told that he could not access welfare assistance in the UK and his only option was to return home or be rendered homeless in the UK. He was so fearful of returning home, he thought he would prefer to be street homeless in the UK. The aftercare provider told him that he would be ineligible for follow-on accommodation as there was an uncertainty about his entitlement to Housing Benefit.

The Home Office only provided short extensions to Daniel's accommodation, which created further instability for him with each deadline. Daniel could only concentrate on his basic needs of housing and welfare. Daniel could not consider issues such as whether to pursue civil compensation until his basic needs had stabilised.

³⁹ Focus group of legal and service providers organised by FLEX.

⁴⁰ FLEX, 2015. Identification and Support of Victims of Trafficking for Labour Exploitation in the Netherlands, the UK and Romania. p. 35. Available at: <http://www.labourexploitation.org/sites/default/files/publications/FINALREPORT.pdf>.

⁴¹ Support can be extended on application, however the range of support available for longer periods is usually limited and does not include assistance with legal matters.



Conclusions

Under European and international law, victims of human trafficking have a right to receive free legal advice and compensation for the abuses committed against them, and the UK has a legal obligation to provide for this right. Article 12(2) of the European Trafficking Directive and Article 15(2) of ECAT both require the provision of free legal assistance. Under Article 15 of ECAT the UK is also required to adopt measures to guarantee compensation for victims, either from the perpetrator or from the State. Article 17 of the European Trafficking Directive more specifically requires that trafficking victims have access to compensation schemes for victims of violent crimes.

However the findings above demonstrate that one year on from the Modern Slavery Act, UK law does not ensure access to free legal advice or to compensation for victims of human trafficking.

The changes introduced by the Modern Slavery Act did not go far enough to provide effective access to compensation to victims of trafficking. As such, the UK is in breach of its obligations, and there is a strong potential for strategic litigation for victims unable to access legal aid or compensation under existing routes. Relevant and litigable failures of the Modern Slavery Act include the following:

- a) While the Act sought to protect the right of trafficking victims to **free legal assistance** for the purpose of claiming compensation, the way that the Legal Aid Agency has implemented this provision means that **in practice victims of trafficking cannot exercise this right.**
- b) The **restrictive eligibility criteria** under the Criminal Injuries Compensation Scheme continues to **obstruct trafficking victims' access to compensation from the State**, to which they are legally entitled.
- c) The **slavery and trafficking reparation orders introduced by the Modern Slavery Act are insufficient** to address the gap in access to compensation for victims of trafficking, as they are only available to a small proportion of victims who have seen their traffickers convicted, and their assets confiscated.
- d) Since the passage of the Modern Slavery Act, victims have faced increasing difficulties in bringing claims before the Employment Tribunals and have seen their **ability to recover unpaid national minimum wages unfairly restricted.**⁴²

⁴² The Deduction from Wages (Limitation) Regulations entered into force on the 8th of January 2015, with a transitional period lasting until the 1st of July 2015, meaning that any claims brought after the 1st of July will have been affected by the 2-year backstop on National Minimum Wage claims.

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A year on from the passage of the Act, **comprehensive official data on compensation awarded to victims of human trafficking is also still not being collected**. This makes it difficult to ascertain the degree to which victims of human trafficking are able to exercise their right to compensation. However, anecdotal reports and the evidence set out above indicate that the number of victims accessing compensation is very low.

The Government opposed an amendment to the Modern Slavery Act, supported by FLEX and other organisations working with victims of human trafficking, to introduce a **specific civil remedy for human trafficking and modern slavery**. Yet, the introduction of **specific avenues to compensation** for victims of human trafficking would allow the Government **to monitor the extent to which victims of human trafficking are receiving much needed compensation** for the abuses committed against them and ensure the UK is not falling short of its international commitments. It would also assist in ensuring that victims and support providers are aware of victims' rights to compensation, and are able to access adequate compensation more quickly and easily.

While the Government has argued that current remedies within and outside the Modern Slavery Act are sufficient to comply with international obligations, the evidence clearly does not support this claim, and victims continue to encounter severe difficulties in obtaining compensation.

In order to comply with its obligations, and to avoid litigation on behalf of affected victims, the Government should comprehensively review the effective access of victims of human trafficking and modern slavery to compensation in the UK.

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