

Irregular Victims: Investigating the Immigration Status Decisions of Post-NRM Victims of Human Trafficking, the Availability of Eligible Benefits and the Related Impact on Victims of Trafficking – Journal of Modern Slavery Volume 4 Issue 2 (December 2018)

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Abstract

Human trafficking is connected to migration as it often involves crossing international borders. This article argues that by failing to view the issue of human trafficking through the lens of migration, the current framework for assisting victims of human trafficking fails to ensure the protection of the individuals concerned. This article offers an innovative perspective by analysing the specific legal position of victims of human trafficking in the context of UK domestic law and international agreements, and tracing this to survivor experiences. The extent to which non-UK national survivors of human trafficking are able to access the rights that they are entitled to in the UK is explored, as well as what factors influence the accessibility of these rights. Utilising an interdisciplinary approach, encompassing scholarship of law and politics, this article links a review of the current legal

landscape relating to immigration status for trafficking victims with empirical work exploring the experiences of non-UK national trafficking survivors.

Key words

Human trafficking, modern slavery, immigration law, victim impact

Introduction

Whilst the crime of human trafficking has been foregrounded in human rights discourse within the UK, and its victims positioned by the media, campaigners, and Government as being in need of assistance and protection, when the measures put in place to do so are unpicked it becomes clear that there are serious gaps in provision. One predominant area in which these gaps can be identified is within the entitlement given to those who are non-UK nationals to remain in the UK, and their ability to access help and support. Currently, an identified victim of trafficking will enter a process called the ‘National Referral Mechanism’ (NRM), which will be discussed in detail below. This process theoretically lasts for forty-five days, after which time Government mandated provision ends. As the needs of victims often do not end simultaneously with this end of provision, this has created a space for the provision of various aspects of support and care, into which a number of charities and NGOs have moved. At this point, when Government provision ends, a non-UK national, without a pre-existing entitlement to reside in the UK, becomes at risk of deportation.

This research explores the specific legal position of non-UK national victims of human trafficking in the context of UK domestic legislation and relevant international agreements, particularly the Council of Europe Convention on Action Against Trafficking in Human Beings. For the purposes of this article, the definition used for human trafficking is that found in the Palermo Protocol,

““Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”¹

As will be discussed, the UK falls short of meeting international obligations stemming particularly from the Council of Europe Trafficking Convention, including in its provision of assistance for non-UK nationals of irregular status, meaning without specific entitlement to

¹ UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000

live, work, or access welfare in the UK.² Specific case law will be used to track the implementation of international obligations and the development of domestic policies within the UK context. Once the legal landscape has been established, using the case examples, there will be an empirical analysis of the impact of the legal landscape on non-UK nationals that have been through the NRM.

The empirical data gathered for this study consists of interviews conducted with eight caseworkers that work specifically with victims of human trafficking. These semi-structured interviews were carried out over a period of one month. Prior to the interview each caseworker was asked to consider a number of cases that they had dealt with, where the client had received a positive Conclusive Grounds (CG) decision but was not a UK citizen, and the resultant experience of that client. The term ‘client’ will be used when discussing caseworker interviews as this is the denomination used by caseworkers to describe the individuals they are working with. Some direction was given to the interviewees as to the type of information that was relevant to the study, for example specific legal obstacles they had encountered in applying for legalised immigration status, experiences of accessing benefits and the personal impact of irregular status on the individual. A total of twenty-eight anonymised cases were discussed over the course of the interviews. In some situations different caseworkers discussed different parts of the same client’s case, where the caseworkers were from the same organisation. Full ethical approval was received from the relevant bodies and procedures put in place to ensure the anonymity of caseworkers and their clients. The article concludes by discussing the previous points in the context of the development of the Modern Slavery (Victim Support) Bill and how this may or may not address issues both within the legal sphere and ‘on the ground’ for the individuals involved.³

Bridget Anderson argues that in relation to the immigration status of trafficking victims there is an inherent irony; whilst consistently using the language of ‘protection’, it is the state’s own border control that constructs the vulnerability of migrants.⁴ This dichotomous relationship with migrants frames the state response to trafficking specifically. For example, the UK Modern Slavery Act (2015) arguably reflects this in that the sole provision for leave to remain for an identified victim concerns domestic workers who came to the UK on a visa that effectively tied them to an abusive employer.⁵ The Act states that they should be granted leave to remain to enable them to work for another employer. For this to be singled out in this way implies an element of ‘reward’ for not having come to the UK illegally in the first place. Kiril Sharapov develops a related argument: the problems of the UK system, which is based on ‘illegal immigrant’ identification and organized crime, are highlighted in comparison with Ukraine’s system, which emphasizes the exploitation and infringement of the human rights of

² Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197,

³ Modern Slavery (Victim Support) Bill [HL] (2017)

⁴ Bridget Anderson, “Where’s the Harm in That? Immigration Enforcement, Trafficking, and the Protection of Migrants’ Rights”, *American Behavioral Scientist* 56 no. 9 (September 2012): 1247.

⁵ UK Modern Slavery Act (2015), Part 5, 53

‘irregular migrants’.⁶ Sharapov does however point out that there is little difference in the financial commitment of the two countries to eradicate trafficking, despite their operational differences. This dichotomy is further reflected internationally, for example in the European Union (EU) response to trafficking. Whilst the EU has developed a number of strategies and policies for dealing with human trafficking, Heli Askola argues that the EU Returns Directive constructs even the most vulnerable, including trafficking victims, as a threat.⁷ This has detrimental consequences for many.

Dependent on the narrative framing utilized in understanding human trafficking, a range of different remedies will appear appropriate to policy makers. If one understands trafficking as a crime committed by ‘evil’ traffickers against ‘innocent’ victims that were forcibly moved across borders for nefarious purposes, then it would perhaps seem natural that these victims would wish to be repatriated and restored to their home countries.⁸ If, however, trafficking is perceived to be a continuum of exploitation that occurs as individuals attempt to cross borders that they have no way to cross legally, then simply sending them home does not address the problem: the motivations the individuals had to migrate initially are unlikely to have changed.⁹ Stoyanova concurs by demonstrating that both internationally and domestically there was a prevalent presumption that people wanted to return home as quickly as possible.¹⁰ Developing the problematic nature of this argument further, Stoyanova claims that regardless of the original intention of the victim, the trafficking experience may have created a number of barriers to returning their country of origin.¹¹ For example, they could be at risk of reprisals or retaliation, they may be vulnerable to shame or honour-based violence (this is particularly pertinent for women that have been forced into prostitution), or there may be inadequate medical or other support mechanisms in their home country to ensure their safety and welfare.

Many scholars have argued that the lack of an automatic legal immigration status for victims of human trafficking leads to further harm towards an already very vulnerable group.¹² Martina Pomeroy, in a review of a number of different countries’ anti-trafficking regimes, states that this harm is compounded by the complexity of accessing legal residence within many countries.¹³ Even if a country technically has a route to legal status, it is often so convoluted and inaccessible that it becomes exclusionary. Shannon Clancy argues that the US immigration system is so complex that it is difficult for anyone to navigate, but particularly

⁶ Kiril Sharapov, “Giving us the ‘Biggest Bang for the Buck’ (or not): Anti-trafficking government funding in Ukraine and the United Kingdom”, *Anti-Trafficking Review* 3 (September 2014): 18.

⁷ Heli Askola, “‘Illegal Migrants’, Gender and Vulnerability: The Case of the EU Returns Directive”, *Feminist Legal Studies* 18, no. 2 (August 2010): 168.

⁸ Robert Uy, “Blinded by Red Lights: Why Trafficking Discourses Should Shift Away from Sex and the Perfect Victim Paradigm”, *Journal of Gender, Law and Justice* 26, no. 1 (2011): 210.

⁹ Julia O’Connell Davidson, “Will the Real Sex Slave Please Stand Up?”, *Feminist Review* 83 (2006): 4-22.

¹⁰ Vladislava Stoyanova, “Complementary Protection for Victims of Human Trafficking under the European Convention on Human Rights”, *Journal of International Law* 3, no. 1 (January 2011): 798.

¹¹ *Ibid*, 803.

¹² Farrah Bokhari, “Falling Through the Gaps: Safeguarding Children Trafficked into the UK”, *Children & Society* 22, no. 3 (May 2008): 201-211.

¹³ Martina Pomeroy, “Left Out in the Cold: Trafficking Victims, Gender and Misinterpretation of the Refugee Convention’s ‘Nexus’ Requirement”, *Journal of Gender & Law* 16 (January 2010): 453.

someone in vulnerable circumstances.¹⁴ Clancy also makes the point that the way the system is set up creates an exclusionary legal space within which migrants are held that keeps them from many of the protections that US citizens are guaranteed by the Constitution.¹⁵ Anette Brunovskis claims that a similar situation exists in Norway, as identified trafficking victims can fall into different ‘administrative categories’, each with different legal standings and open routes to regularizing their status.¹⁶ Here, identified victims that do not have the right to remain in Norway are not automatically entitled to welfare, but their status gives them ‘inroads’ to accessing it through other routes; potentially creating gaps in support if the system is not easily navigable. Donald Kerwin states that in the USA Temporary Protection Programs that award a fixed term legal residency have the potential allow space for the working out of long-term solutions to problems faced by victims.¹⁷ Currently this is discretionary, however if this was enshrined for trafficking victims this could potentially be a very positive step. Technically, victims could apply for refugee status in many countries. However, as the refugee system is not designed to deal with trafficking victims, they frequently fail to reach ‘nexus’ requirements needed to be granted asylum.¹⁸ This highlights that human trafficking policy is inadequate in this respect as victims are forced to utilise policies that were not designed for their particular situation, due to a lack of specific provision.

Within the literature explored, it is clear that the current situation of victims in relation to immigration status is complex and often problematic. What emerges repeatedly is that a lack of specific routes to assistance for non-national victims of trafficking and the necessity of attempting to utilise pathways designed for other purposes, such as asylum, raise a number of difficulties. Within this context, we will now outline the specific UK legal position, exploring specific legal issues therein, and particularly highlighting where the UK is failing to meet its international obligations. The impact of these failures on victims of trafficking will then be explored in the analysis of a series of interviews with trafficking caseworkers, demonstrating the need for bespoke legal provision.

Found only to be abandoned: The National Referral Mechanism and Victims of Modern Slavery and Human Trafficking in the UK

The National Crime Agency (NCA) reported that in 2017 there were 5145 victims of human trafficking or modern slavery identified in the United Kingdom.¹⁹ This figure was comprised of 116 different nationalities. Of these victims, 4,325 were from outside the United

¹⁴ Shannon Clancy, “Immigration and Modern Slavery: How the Laws of One Fail to Provide Justice to Victims of the Other”, *University of Baltimore Law Review* (Spring 2017): 48.

¹⁵ *Ibid*, 48

¹⁶ Anette Brunovskis, “Special rights within universal welfare: Assistance to trafficking victims in Norway”, *Journal of Comparative Social Work* 11, no. 1 (2016).

¹⁷ Donald Kerwin, “Creating a More Responsive and Seamless Refugee Protection System: The Scope, Promise and Limitations of US Temporary Protection Programs”, *Journal on Migration and Human Security* 2, no. 1 (2014): 44-72.

¹⁸ Kathleen Mallon, “Assessing the Board of Immigration Appeals’ Social Visibility Doctrine in the Context of Human Trafficking”, *Chicago-Kent Law Review* 89, no. 3 (2014): 1169-1190.

¹⁹ National Crime Agency, National Referral Mechanism Statistics – End of Year Summary 2017

Kingdom.²⁰ This therefore represents the possibility that 84% of potential victims may experience issues relating to their immigration status. Victims in the UK are identified and processed via a system called the National Referral Mechanism (NRM), which operates as a gateway to protection and support for potential victims. The term ‘modern slavery’ is used widely in the political, academic and charitable sectors, and it operates as an umbrella term under which a wide range of exploitative practices is grouped. The statistics provided for the NRM by the NCA are for victims of modern slavery and human trafficking. The NCA defines modern slavery as encompassing human trafficking, slavery, servitude and forced labour. Human trafficking is a process defined by the Palermo Protocol²¹. As discussed in the introduction the definition involves three elements an action, the means and the purpose (exploitation).

Thus it can be seen that human trafficking is a process, which may or may not result in a number of exploitative outcomes including slavery, servitude and forced labour. Further to this, the crimes of slavery, servitude and forced labour²² are legally distinct categories, which can occur independent of human trafficking. Nicole Siller has commented that the international legal frameworks demonstrate that practices such as slavery are distinct from human trafficking.²³ It has been observed that in the last decade there has been a “rebranding of global anti-trafficking” as ‘modern slavery’ in legal and academic discourse.²⁴ The NCA annual reports on the NRM make no explicit reference to what percentage of victims have or have not been subjected to human trafficking, the reports only group victims via form of exploitation.

The UK’s NRM operates on a three-tier model. At the initial level are the first responders. These include local authorities, enforcement agencies, and NGOs who have the power to make an initial referral to a competent authority. These authorities constitute the second tier; there are two bodies in the UK with competent authority status, the UK Human Trafficking Centre (UKHTC) and the UK Visas and Immigration (UKVI), a Home Office agency with responsibility for considering immigration applications. It falls to the competent authority to determine whether there are reasonable grounds to consider a person a victim of trafficking. If an individual receives a positive decision, they are then accommodated for a reflection and recovery period of forty-five days. At the end of this period, stage three, a conclusive decision is made about an individual's status. When a decision has been made, in the instance

²⁰ Ibid 7-10

²¹ UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000, Article 3, see fn 1 for definition of trafficking

²² The definitions of the three practices can be found across a number of international legal instruments, the definition of slavery can found in League of Nations 1926 Slavery Convention (Article 1), the definition of servitude can be located in the United Nations Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (Article 1) and the definition of forced or compulsory labour is provided by the International Labour Organisation Forced Labour Convention No 29 (Article 2)

²³ Nicole Siller, ‘Modern Slavery’, *Does International Law Distinguish between Slavery, Enslavement and Trafficking?* (2016) 14, *Journal of International Criminal Justice*, 405

²⁴ Janie Chuang, *Exploitation Creep and the Unmaking of Human Trafficking Law*, (2014) 108, *American Journal of International Law*, 146–149

of a negative decision an adult has forty-eight hours to leave the accommodation provided for them. Initially in the case of a positive decision, the victim would be provided fourteen days additional support. In October 2017 it was announced by Sarah Newton (Parliamentary Under-Secretary for the Home Department) that this window of support has now been extended to forty-five days.²⁵ This means that in total in the instance of a positive conclusive grounds decision a victim has access to at least ninety days of support. Data published by the National Crime Agency in June 2017 shows that of the 3,804 victims referred into the NRM in 2016, 24% (907) had received a positive conclusive grounds decision.²⁶ The NRM, therefore, has been described as a system, which “finds victims of modern day slavery, only to abandon them.”²⁷ Thus this figure therefore, represents 907 individuals who have been proven to be victims of exploitation, who are then left adrift – possibly in relation to insecure immigration status – when their time in the safe house ends.

Navigating the Maze of Immigration Status: Accessing Discretionary Leave to Remain

For victims in the UK the granting of a positive conclusive grounds decision does not represent a complete solution. In reality, life after a safe house remains perilous, and a significant barrier to stability concerns the provision of leave to remain.²⁸ The current system in the UK presents a problem whereby recognition as a victim of exploitation carries no immediate right to remain and therefore no simple point of access to protection and support.

Discretionary Leave to Remain

There is no specific provision under the UK Immigration Rules relating to the granting of leave on the basis of ‘modern slavery’.²⁹ The High Court provided clarity on the issue of discretionary leave in *R (On the Application Of K) v Secretary of State for the Home Department*.³⁰

‘With conclusive status, there is no automatic grant of discretionary leave for one year and one day, although this may be granted if the individual is co-operating with the Police or owing to their personal circumstances (under Article 14 of the Trafficking Convention). Leave to remain as a victim is without prejudice to any other entitlement to leave as a refugee (a category of immigration leave).’³¹

Thus, while there is no automatic grant of discretionary leave, there exists a narrow set of grounds on which leave can be granted. In line with the circumstances discussed in *R v*

²⁵ HC Deb Vol 630 Col 513

²⁶ 2017 Annual Report on Modern Slavery (October 2017) 8

²⁷ Day 46: Is there Life After the Safe House for Survivors of Modern Slavery (Human Trafficking Foundation)

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²⁸ Ibid 13

²⁹ *Immigration Rules (last amended July 2008)* [], HC 395 (as amended), 23 May 1994,

³⁰ *R (On the Application Of K) v Secretary of State for the Home Department* [2015] EWHC 3668

³¹ Ibid para 53

Secretary of State for the Home Department, the advice provided to the Competent Authorities in 2016 outlines three grounds on which discretionary leave to remain may be granted.³² The first ground is the pursuit of compensation against traffickers. In accordance with the Council of Europe Convention, those who possess a positive conclusive grounds decision must have access and support to the pursuit of compensation claims.³³ However, the fact that an individual may be pursuing compensation is not solely sufficient to obtain a discretionary leave decision. It must be determined by the Home Office that leave to remain is necessary for the claim to advance.³⁴ The second potential ground for discretionary leave to remain is co-operation with on going police investigations. The Council of Europe Convention creates an obligation to provide a residency permit to victims with a positive conclusive grounds decision who are aiding police enquiries.³⁵ Finally, perhaps the most opaque ground is personal circumstances; as required by the Convention, permits must be granted if leave to remain is necessary due to personal circumstances.³⁶ Discretionary leave to remain may be granted on an individual case-by-case basis for a minimum of twelve months and a maximum of thirty months.³⁷ There is no legal obligation to provide indefinite leave to remain.³⁸ Further to this the most concrete ground for leave to remain is that of police co-operation, this is reflective of the emphasis placed on criminal justice responses within the modern slavery framework in the UK, as evidenced in the approach taken in the Modern Slavery Act 2015 and the Home Office Modern Slavery Strategy³⁹. This is problematic and illustrative of the broader approach to anti-trafficking/slavery in the UK, whereby criminal justice elements take precedence to effective victim protection and support.⁴⁰ In the case of DLR the current grounds on which leave may be granted seem to suggest that victims only need to be protected and given immigration status security when they are tool which can be used by the State.

Breaching Obligations and Opening the Door: PK and LL

As discussed above, the policy guidance provided by the Home Office regarding the grounds for discretionary leave to remain outside of the Immigration Rules provides a limited scope of opportunity for victims post NRM. However, recent legal developments regarding the

³² Victims of Modern Slavery – Competent Authority Guidance (Home Office 2016) 75

³³ Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197, Article 15

³⁴ Victims of Modern Slavery – Competent Authority Guidance (Home Office 2016) 75

³⁵ Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197, Article 14

³⁶ Ibid

³⁷ Victims of Modern Slavery – Competent Authority Guidance (Home Office 2016) 75

³⁸ Ibid 122

³⁹ Home Office, Modern Slavery Strategy (Crown Publication 2014)

⁴⁰ See for example Modern Slavery Act s 45, under this section the principle of non-punishment is intended to protect victims of modern slavery crimes from prosecution for crimes committed during the course of exploitation. However, schedule 4 provides a large list of exemptions including, modern slavery, theft and immigration offences.

policy have potentially increased options for victims by making it more possible for discretionary leave to remain to be awarded.

In February 2018 the Court of Appeal in *PK (Ghana) v Secretary of State for the Home Department* ruled that the policy set out by the Home Office for assessing discretionary leave applications was in breach of international obligations,⁴¹ particularly in relation to the Council of Europe Convention. The appeal focused on the requirement under Article 14 to provide a renewable residence permit if necessary due to personal circumstances.⁴² The applicant (PK) had been sold into slavery in his home country (Ghana) at the age of three.⁴³ In 2003 at the age of 25, the applicant was trafficked into the UK. Upon arrival he was detained, subjected to forced labour for up to fifteen hours per day, subjected to mental and verbal abuse, and given limited amounts of food.⁴⁴ The applicant, who had initially entered the country as a student migrant, was later convicted of possessing improperly obtained identification documents and then detained with a view to removal from the country.⁴⁵ The appeal in question was in relation to a negative discretionary leave to remain decision relating to the applicant's personal circumstances. It was submitted by the Secretary of State that;

“in Article 14(1)(a), there are no restrictions upon the concept of "necessary", and thus, the Convention gives the Secretary of State as competent authority discretion which is both broad and untrammelled or open-ended. That is underscored by the fact that Article 14(1)(a) refers, not to an absolute requirement, but only that the competent authority "considers that their stay is necessary" ... the exercise of that discretion, the Secretary of State is entitled to have a policy that the discretion will only be exercised in favour of the victim of trafficking if there are compelling personal circumstances in his or her case.”⁴⁶

The Court concluded that the Secretary of State's guidance regarding personal circumstances did not properly reflect the nature of Article 14 of the Convention⁴⁷. Further to this, the Convention states that a renewable residence permit will be granted where “their [the victim's] stay is necessary”.⁴⁸ Lord Justice Hickinbottom stated that ‘necessary’ in the context of Article 14 means “required to achieve a desired purpose, effect or result” and this must be seen through the “prism of the objectives of the Convention.”⁴⁹ Thus the only necessary objective to assess owing to the personal circumstances is the objective to protect and assist victims of trafficking. The Convention provides clear obligations regarding the

⁴¹ *PK(Ghana) v Secretary of State for the Home Department* [2018] EWCA Civ 98

⁴² Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197

⁴³ *PK(Ghana) v Secretary of State for the Home Department* [2018] EWCA Civ 98, para 23

⁴⁴ *Ibid* para 24

⁴⁵ *Ibid* para 26

⁴⁶ *Ibid* para 41

⁴⁷ Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197, Article 14

⁴⁸ *ibid*

⁴⁹ *PK(Ghana) v Secretary of State for the Home Department* [2018] EWCA Civ 98, para 45

protection and support of victims in relation to identification, physical, psychological and social recovery and safety and protection.⁵⁰ Ultimately the guidance in place failed to engage with the relevant Convention criteria. There is no requirement under Article 14 for the Competent Authority to engage the purpose for which it is necessary for the victim to remain in the country. Thus the Court ruled there should be no requirement for the victim to demonstrate compelling circumstances.

“ I consider, the provision does not give an open-ended discretion, but rather requires an assessment of whether it is necessary for the purposes of protection and assistance of the victim of trafficking (or one of the other objectives of the Convention) to allow him to remain in the country. In this case, the Secretary of State's guidance neither requires nor prompts any such engagement. As a result, in my view, it does not reflect the requirements of Article 14(1)(a), and is unlawful.”⁵¹

Following the delivery of this landmark judgment, the opportunity for victims in receipt of positive conclusive grounds decisions to acquire leave to remain has been enhanced. To this effect, the Home Office has issued interim guidance regarding discretionary leave.⁵² The current advice from the Home Office is to pause all discretionary leave decisions in which the decision reached will be negative.⁵³ The Modern Slavery Victim Support Bill⁵⁴ looks to address the issues surrounding conclusive ground decisions and discretionary leave to remain. The main aim of the Bill is to ensure that those in possession of a positive conclusive grounds decision have an extended rest and reflection period of twelve months once the ninety-day period under the NRM ends.⁵⁵ Further to this, the Work and Pensions Committee have made a recommendation regarding automatic discretionary leave to remain. It was commented that the lack of automatic entitlement upon a conclusive grounds decision was a “ludicrous situation”.⁵⁶

“It is an extremely unattractive anomaly and an extremely expensive process putting a person through the NRM to get a positive outcome that everybody accepts that person is the victim of an appalling crime. At that stage, having spent all that money, having gone through all that process, there is no result except a piece of paper.”⁵⁷

The Committee recommended that all victims be granted a minimum of twelve months leave to remain to allow a period to “receive advice and support, and give them time to plan their

⁵⁰ see Article 10, 12

⁵¹ PK(Ghana) v Secretary of State for the Home Department [2018] EWCA Civ 98, para 51

⁵² Interim operational guidance: Discretionary leave for victims of modern slavery (February 2018)

⁵³ Ibid 4

⁵⁴ Modern Slavery (Victim Support) Bill [HL] (2017) The Bill has currently completed the Lords stages and was presented to the House of Commons on the 18th May and is due for its second reading on the 23rd November 2018.

⁵⁵ Ibid 48(b)(3)

⁵⁶ House of Commons Work and Pensions Committee, Victims of Modern Slavery – Twelfth Report Session 2016-2017 (April 2017) 40

⁵⁷ Ibid

next steps.”⁵⁸ However, the Government’s response to this recommendation does not signal any imminent positive changes to the policy on discretionary leave to remain;

“The decision about whether an individual is a victim of modern slavery and their immigration status are, and must remain separate decisions. The Government does not accept that all confirmed victims of modern slavery should be given at least one year’s leave to remain in the UK.”⁵⁹

Nevertheless, despite the uncompromising position of the Government in their response to the Committee’s recommendation, it must be considered that this response was given prior to the judgement in *PK*. Thus in light of the interim decision to suspend all negative decisions there remains the possibility that a change in direction in relation to discretionary leave to remain is still yet to come.

Amidst the earthquake resulting from *PK*, a further breach emerged regarding the requirement to provide legal aid to victims of ‘modern slavery’. Under the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) 2012, victims are entitled to free legal aid. However, the case of *LL* saw the Government concede that it had refused free legal aid to the applicant who was in possession of a positive reasonable grounds decision.⁶⁰ The applicant had sought expert legal advice while it was considered whether or not she would receive a positive conclusive ground decision, to be told that due to changes in policy regarding legal aid, there was no entitlement for advice during the identification process. Further to this, there was no automatic entitlement for those seeking discretionary leave.⁶¹ It was conceded before the hearing that legal aid would be available to those with a reasonable grounds decision, so as to aid in obtaining a conclusive grounds decision, and those seeking discretionary leave to remain.⁶²

Impact on Victims: An Empirical Analysis

Having discussed the legal position of non-UK nationals who have exited the NRM, consideration will now be given to the experiences of those who have been forced to navigate this legal context due to their circumstances. This will highlight deficits in provision and the resultant difficulties; as well as the impact of this on the recovery of the individual who has been through the NRM and received a positive Conclusive Grounds decision. As referenced above, the Human Trafficking Foundation, in the report “Day 46: Is there Life After the Safe House for Survivors of Modern Slavery,”⁶³ identify the three most commonly encountered difficulties with the current support system:

⁵⁸ Ibid 45

⁵⁹ Victims of modern slavery: Government Response to the Committee’s Twelfth Report of Session 2016–17 – 30th November 2017 (<https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/672/67202.htm>)

⁶⁰ R (on the application of LL) v Lord Chancellor CO/3581/2017

⁶¹ <http://atleu.org.uk/news/legalaidimmigrationadvice>

⁶² R (on the application of LL) v Lord Chancellor CO/3581/2017, 1 (a),(b)

⁶³ Day 46: Is there Life After the Safe House for Survivors of Modern Slavery (Human Trafficking Foundation)

1. Finding suitable accommodation
2. Accessing on-going professional support and advocacy
3. Stabilised immigration status, therefore one year of automatic discretionary leave to remain is recommended by the report.

In view of these findings, this study seeks to further explore the lived experiences of trafficking victims in navigating the UK system as a non-UK national. This will be done by undertaking semi-structured interviews with caseworkers, who will each discuss a selection of anonymised cases, particularly discussing the various impacts that a lack of leave to remain in the UK has on the life of the individual. Having previously analysed the particulars of UK policy for non-UK national victims of trafficking, and the ways in which the UK is failing to meet its international (and self declared) obligations, these interviews and subsequent analysis will demonstrate the impact of the UK policy on victims, and further support the argument that the UK Government is failing to fully meet its obligations to protect victims.

After the interviews had been completed and transcribed, each was analysed to capture emerging themes using NVivo Computer Assisted Qualitative Data Analysis Software (CAQDAS). From this analysis, ‘top level’ or overarching themes were identified. Each top-level theme was then re-analysed to further categorise into ‘micro-themes’ that emerged.

The top-level themes that emerged from this analysis were:

- The emotional impact of lack of regularized status
- Issues within the immigration system legal processes
- Home Office decision making
- The impact of lack of regular status on dependent children
- Navigating the welfare system as a non-UK national
- Policy Suggestions

Each of these emergent themes will be explored with regards to the identified micro themes within each section. Particular micro themes that merit further explanation or expansion will be discussed in greater detail within each section. This will enable specific linkages to be made connecting the experiences of victims to Government policy. The authors acknowledge that this is not a definitive list of the problems faced by victims, but an overview that comes from the particular experiences of those caseworkers interviewed.

Emotional Impact of Lack of Regular Status

Identified within the broad theme of the emotional impact of the lack of regular status were eleven micro themes:

1. Feelings of shame and isolation
2. Coercion into returning to origin country against initial wishes
3. Exacerbation of substance misuse issues
4. Fear of destitution
5. Fear of the future
6. Instability in circumstance and emotional health
7. Lack of coping with normal life
8. Negative impact on mental health
9. Homelessness
10. Impact of lengthy processes on emotional wellbeing
11. Victimhood perpetuated

One caseworker, referring to a female client that was currently awaiting an asylum decision, stated, “It keeps her isolated, basically, so that’s a big impact – both on the financial side it stops her accessing stuff and the emotional/shame side as well.”⁶⁴ Feeling that there was a stigma attached to not having a regularised status caused repeated emotional distress to a number of the clients that were discussed. One lady specifically stated she would have preferred to be waiting for a Discretionary Leave to Remain (DLR) decision rather than an asylum decision, as she was upset at the stigma of being an “asylum seeker”.⁶⁵ Rather than apply for DLR based on their status as a victim of trafficking, caseworkers will often pursue asylum claims on the basis of danger in returning to their country of origin – something reported by at five of the caseworkers in further clarification discussion.

Connected to this, a negative impact on clients’ mental health emerged as a frequent theme. In one particular case an Albanian woman who had been a victim of sex trafficking and had two children had been awaiting an asylum decision for three years. During this time she had reportedly been recovering well and had become engaged in a number of programs at the support centre, whilst effectively parenting her children. Having finally received a negative asylum decision her caseworker reported a serious detriment to her mental health, requiring intensive mental health care intervention and social services intervention to safeguard her children. She was also considered at risk of suicide. This was precipitated by the fear of reprisal in returning to her country of origin as well as the mental and emotional upheaval of moving her children alone away from the support networks she had developed.⁶⁶ The precariousness of the situation that those denied permanent residence face was reported to be, in some cases, highly injurious to the mental health of a number of clients, who are at higher risk of mental health issues due to their traumatic experiences.⁶⁷ In several cases, suicidal thoughts were discussed during the waiting process or upon receiving a negative decision.

⁶⁴ Case worker 1, interview, 12th February 2018

⁶⁵ Case worker 1, interview, 12th February 2018

⁶⁶ Case worker 2, interview 12th February 2018

⁶⁷ Case worker 8, interview, 12th February 2018; Case worker 4, interview, 26th February 2018; Case worker 5, interview, 5th March 2018

A particular adverse effect in terms of emotional state referred to the ongoing victimisation caused by an uncertain immigration position. This is linked to the emotional uncertainty of not being able to plan for the future adequately. As a caseworker elaborated,

“I think when people first come out of their exploitation (my general experience is) that they’re really keen to work, really keen to move forward, keen to accept all the help they can, but if you’re kept in a sort of a bit of a holding bay or you’re just left uncertain for so long, it just kind of - you lose that motivation, that drive, and almost just become like a long term victim because that’s how people have been treating you.”⁶⁸

The inability of the client to work when they wished to, as part of their recovery, was stated by three of the caseworkers as a problem that contributed to a perpetuation of victimhood.

In a discussion about needs of clients, one caseworker argued that precarious immigration status immediately pushed almost all clients into a high-needs, complex casework category. Dependent on the individual, their personal circumstances and the level of trauma they had suffered, needs ranged from low to high, with differing levels of the necessary input of resources. The interviewee stated that often, once immigration issues were settled, a ‘high needs’ client would immediately drop down into a ‘low needs’ requirement. From a funding and resourcing standpoint, this is highly significant if the UK Government is considering extending the support offered beyond the initial forty-five day period. By removing insecurity around the right to remain, there is potential to enable more accurate ongoing assessment and the correct level of support for each individual and promote recovery.

Issues within the Immigration System Legal Processes

This was expected to be a common theme to emerge throughout the interviews, as already shown in the literature the system is complex and often not designed for victims of trafficking. Within this top-level theme, thirteen micro-themes emerged:

1. The difficulties with processing asylum claims
2. The complex issues of individuals’ circumstances requiring specialist legal work
3. The difficulties in exercising EU Treaty Rights
4. Cases of dependence of DLR applications on discretion of individual Police officers
5. The problem of DLR not automatically being considered for EU citizens
6. The gaps in support caused by inconsistencies within the bureaucratic system
7. The negative impact of the 2014 Immigration Act
8. Concern about the potential negative impact of Brexit
9. Individuals being wrongly incarcerated or deported
10. The lack of legal advice given within a useful timeframe, particularly whilst still in NRM, often due to lack of availability of Legal Aid

⁶⁸ Case worker 8, interview, 12th February 2018

11. The lack of specific legal definitions of the terms used within legislation
12. The use of prevention orders
13. The prosecution of victims for crimes committed in the course of trafficking experience

In a high proportion of cases, the legal complexity, combined with the lack of available legal advice, became a barrier for achieving correct legal outcomes. One caseworker referred to the case of a Vietnamese woman that had been facing deportation after having a particularly complex history, however once a specialist legal team were able to “unpick” the case, she was awarded over two years of DLR and they are looking into permanent status for her. That an understanding of this complexity is not reflected within current Government policy could be seen as a failure to engage with the specific needs of victims of trafficking. Due to the crime not being temporally discrete and involving many different facets, even once the victim has escaped the exploitative situation they are likely to have chaotic circumstances, such as a lack of stable housing, for some time. This is compounded when the person does not have a solid grasp of the English language and has no experience of navigating the State bureaucracy.⁶⁹

As discussed previously, DLR can be granted on the basis of cooperation with Police enquiries and ongoing prosecutions. In such instances, the police officer leading the investigation is in a position to submit the DLR application, pursuant to the individual’s cooperation with their case. This raised a number of issues for different clients, specifically that it created an ‘ad hoc’ situation where DLR could become dependent on the particular practices of an individual officer. For example, situations were described where officers could be very helpful and submit applications in good time, with a time period that extended beyond the court case to allow time for extensions to be applied for.⁷⁰ However, in some cases due to a lack of awareness the officer would not know that this action was beneficial to the client.⁷¹ It was also reported that in some cases Police officers had specifically made decisions based on personal inclinations about the claiming of welfare. One caseworker stated,

“And there’ll be various battles with different officers. Some officers will be ‘oh right, I guess they didn’t tell you. We’ll get that in place’ or others, ‘no, they just need to get a job if they’re going to live here’ and people’s personal opinion can come into it, so it definitely isn’t the same situation for everyone.”⁷²

An issue that was raised by every caseworker was the impact of cuts to legal aid. Related to this was the difficulty of finding solicitors within a particular geographical locale that were able to take immigration cases, even more so if trying to find a solicitor who had experience

⁶⁹ Case worker 1, interview, 12th February 2018

⁷⁰ Case worker 4, interview, 26th February 2018; Case worker 3, interview, 26th February 2018

⁷¹ Case worker 1, interview, 12th February 2018

⁷² Case worker 1, interview, 12th February 2018

with cases of trafficking.⁷³ This resulted in clients having to attend tribunals or immigration hearings, usually prior to their engagement with their current caseworker, without adequate advice or representation. A caseworker at a safe house was asked specifically if any client had arrived having received prior immigration advice – he responded that according to the paperwork he had and interviews with clients, none had received specialist immigration advice whilst in the NRM.⁷⁴ This not only increases the risk of deportation and lack of access to welfare, but may also serve to exacerbate the complexities that are inherent within cases of trafficking.

Home Office Decision Making

This theme encompasses the interaction between victims, caseworkers and Home Office officials, particularly the decision making process and identified problems therein. Within this top-level theme, eight micro-themes were identified:

1. The degree of bias evident within decision making based on the choices of the client
2. The complex or confused decision making and justification of decisions
3. The delays in decision making
4. The procedures leading to the potential infringement of human rights
5. The lack of training on, or awareness of, issues surrounding human trafficking
6. The necessity of extensive advocacy work to navigate the immigration and welfare systems
7. The preponderance of negative decisions
8. The risks of repatriation not being fully considered

The picture emerging from each interview when discussing navigating the Home Office immigration decision making process was one of opaque, and at times inconsistent, decision making and a lack of understanding of the predominant issues faced by trafficking victims. An example of this is a reported lack of consideration of the risk factors associated with repatriation. One caseworker described an Albanian lady who had been trafficked by a group connected to her family that operated from several cities within Albania, who was facing deportation with her children after a negative asylum decision. That she had testified and contributed to the prosecution of some members of the group and could be at risk of reprisal was not considered sufficient to trigger principles of non-refoulement.

Another caseworker reported several cases of, as she perceived it, bias against women who had been sex workers in their home countries before being trafficked and exploited in the UK. Encompassing concerns about lack of training and awareness in the Home Office, she related cases of two women who were asked in their Home Office interview what they had done in their home country (sex work) and what they had been doing in this country (sex work). When this was the answer given the case would have been rejected, had an advocate

⁷³ Case worker 7, interview, 26th February 2018

⁷⁴ Case worker 5, interview, 5th March 2018

not interceded and asked further questions that exposed the exploitative nature of their experience with their traffickers in the UK.⁷⁵

As has been discussed within other emerging themes, the length of the decision-making process has been reported as having a deleterious effect on the recovery of clients. It was noted by several caseworkers that there appeared to be little accountability over delays.⁷⁶ One reported a conversation with a Home Office official who blamed staff churn and inadequate handover procedures meaning cases could end up ‘at the bottom of the pile’ for a long time. By failing to ensure adequate management of cases, the resultant delays and, at times, incorrect decision making, undermine Government aims to support and protect victims.

The Impact on Connected Children

Within the top-level theme of impact on connected children, the following micro-themes were identified:

1. Lack of coping with parenthood resultant from instability of immigration status
2. Lack of financial support potentially adversely affecting children’s development
3. Need for Social Services involvement with children
4. Risk of deportation to unknown ‘country of origin’ for children

It is not uncommon for individuals that have been through the NRM to be supporting children, potentially children that were conceived during their time of exploitation.⁷⁷ A number of issues were reported by caseworkers specifically relating to the children of clients. There were several reported cases of women who had been coping well with parenthood, but due to emotional instability caused by negative immigration decisions had degenerated mental health that precipitated potential removal orders of their children. In one particular case, social services only had to become involved in safeguarding the welfare of the children after a negative decision caused the mother to become unwell.⁷⁸

Difficulties in accessing benefits that the client was entitled to had a potentially detrimental effect on children’s wellbeing, as one parent was unable to afford to take her child to appointments related to his health and development needs.⁷⁹ In the case mentioned above, the impact of moving from a country that had been ‘home’ for the child’s entire life, to a country where they did not speak the language and was completely unfamiliar was seemingly not considered within the negative asylum decision.⁸⁰ Even more seriously, the threat of reprisals from traffickers against the children was also not considered as adequate reason to grant

⁷⁵ Case worker 8, interview, 12th February 2018

⁷⁶ Case worker 5, interview, 5th March 2018, Case worker 6, interview, 5th March 2018, Case worker 2, interview 12th February 2018, Case worker 7, interview, 26th February 2018, Case worker 3, interview, 26th February 2018

⁷⁷ Case worker 1, interview, 12th February 2018

⁷⁸ Case worker 1, interview, 12th February 2018, Case worker 2, interview 12th February 2018

⁷⁹ Case worker 2, interview 12th February 2018

⁸⁰ Case worker 8, interview, 12th February 2018

asylum.⁸¹ This is arguably a safeguarding issue for the children concerned, and one that highlights the lack of prioritisation of the needs of victims. In an intra-UK setting, a child would not in normal practice be allowed to live in a setting that was considered dangerous. Yet, seemingly because the danger is extraneous to the UK, the safeguarding of the child has not been adequately considered.

Navigating the Welfare System as a Non-UK National

Within the top-level theme of issues connected to accessing welfare, from further analysis emerged six micro-themes:

1. The risk of support failure due to the complexity of accessing benefits for non-UK nationals
2. The impact of the Immigration Act 2014 changes to benefit access for EU nationals
3. The potential impact of Brexit
4. A lack of awareness and training in Department of Work and Pensions (DWP) and Local Authority officials
5. People left destitute or homeless due to gaps or failures in support
6. The re-traumatizing effects of navigating system

A number of caseworkers reported the issue of the lack of ‘portability’ of a CG decision or even a DLR decision. In almost all reported cases that discussed accessing benefits or other welfare provision, there was a lack of knowledge about what some of these documents and statuses meant or what they entitled the individual too.⁸² Therefore high levels of advocacy were needed again to ensure that the client actually received the support they were entitled to. In some cases, this caused gaps in support that led to temporary, or in some cases permanent, homelessness and destitution., In at least one case this connected directly to the premature death of the individual.⁸³

Connected to this, the lack of knowledge of officials and the seeming lack of ‘portability’ of documents also led in several cases to reports of re-traumatizing of victims who were repeatedly asked inappropriate questions by officials that were not trained in dealing with such issues. An example was given of a housing official who was asking for specific details of the sexual exploitation suffered by a client in order to progress her housing application, despite this information being irrelevant to her entitlement.⁸⁴

⁸¹ Case worker 7, interview, 26th February 2018

⁸² Case worker 5, interview, 5th March 2018, Case worker 6, interview, 5th March 2018, Case worker 4, interview, 26th February 2018, Case worker 2, interview 12th February 2018

⁸³ Case worker 2, interview 12th February 2018

⁸⁴ Case worker 1, interview, 12th February 2018

It was also noted that the 2014 changes (such as the need for EU citizens to have worked in the country for three months prior to claiming welfare) to various benefits had made it significantly more difficult for victims of trafficking to access support.⁸⁵ Developing this idea, it was discussed by several caseworkers that the implications of Brexit on those who are going through the NRM and those who have exited the NRM with a positive CG decision needs serious consideration.⁸⁶

Policy Suggestions

From the policy suggestions made by the interviewed caseworkers five micro themes emerged:

1. The automatic discretionary leave to remain
2. Individualised, needs-based support
3. A need to introduce a specific offense of exploitation
4. The development of stronger legal definitions within existing legislation
5. Support for the Lord McColl Bill⁸⁷

The suggestion was made by all caseworkers that automatic DLR upon a positive CG decision would have an immediate positive effect on outcomes. One caseworker expressed the idea that by giving an automatic DLR for at least a year would provide the space to begin recovery and put tools in place to rebuild the client's life without the pressure of immigration proceedings.⁸⁸ As an automatic entitlement to twelve months DLR has been included in Lord McColl's Private Member's Bill, this legislative development was broadly welcomed, although some expressed that they felt it did not go far enough in a number of ways.⁸⁹ One caseworker mentioned that they felt a particular offense of "exploitation" would be beneficial, as this could create a more tiered approach to combatting this issue legally. They stated that there are times when offenses do not quite meet the threshold for "Modern Slavery" in the UK, but that exploitation has still occurred, which should itself be criminalised.

Thinking more broadly about the needs of clients, it was expressed that there was sometimes a tendency from within Government to develop a 'one size fits all' approach to victim support and care needs.⁹⁰ This underestimates the spectrum upon which trafficking offenses exist and is likely to lead to under or over provision of support. This could either overly

⁸⁵ see Immigration Act 2014, sections 38-47 detail a number of changes to benefit entitlements including the NHS, Bank Accounts, Work and Driving Licenses.

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⁸⁷ Modern Slavery (Victim Support) Bill [HL] (2017)

⁸⁸ Case worker 8, interview, 12th February 2018; Case worker 7, interview, 26th February 2018

⁸⁹ Case worker 3, interview, 26th February 2018

⁹⁰ Case worker 8, interview, 12th February 2018

stretch the system, or lead to support gaps, which lead to further and potentially more complex problems developing.

Conclusion

From both the legal analysis and the exploration of victims' experiences, it seems clear that the UK is not meeting its obligations to provide support for victims of trafficking, either morally or legally. As argued by a number of the caseworkers interviewed, the provision of an easier route to regularised status would aid the recovery and rehabilitation of their clients immeasurably, and in myriad ways. What would be considered as basic rights, for instance access to housing, employment and welfare, become much more attainable once the question of immigration status has been resolved.⁹¹ This is so even if on a fixed term basis of one year. The Case of *PK* demonstrated that by not providing this relief the Home Office was in breach of its obligations; therefore the onus is on the Government to permanently rectify this situation. The case of *LL* also demonstrated that one of the issues the empirical analysis showed to be particularly problematic for victims, the lack of access to legal aid, was again a result of the Government being in breach of its obligations. Were this to be rectified, an on-going injustice would be remedied. There is little doubt that the system as it currently stands fails in fully achieving its necessary aim of aiding recovery and restoration.

The current response to this emerging from Parliament is the Modern Slavery (Victim Support) Bill.⁹² This includes both twelve months of DLR and a requirement for "legal assistance" to be granted. These would be positive steps. However, the exact nature of the legal assistance would need further clarification; as we have identified that expert immigration law advice, given in a timely fashion, is specifically needed to remedy some of the particular issues victims are facing. What does not seem to be explicitly covered in the Bill are steps to make navigating the system of UK bureaucracy easier for those that have been awarded a CG decision. The lack of 'portability' of the CG paperwork, coupled with a lack of awareness and training within various Government and local Government departments, continually acts as a roadblock to accessing support. Specific measures aiming to counter this would be a welcome addition to current policy. Even more concerning, there are signs that the Victim Support Bill⁹³, may not have a positive reception in the House of Commons.⁹⁴ It is to be hoped that the tension between protecting victims and protecting borders finds some resolution that enables the human beings affected to receive the support that they are both morally and legally entitled to.

⁹¹ Case worker 6, interview, 5th March 2018; Case worker 8, interview, 12th February 2018; Case worker 4, interview, 26th February 2018

⁹² Modern Slavery (Victim Support) Bill [HL] (2017)

⁹³ Ibid

⁹⁴ <https://publications.parliament.uk/pa/cm201719/cmselect/cmworpen/672/672.pdf>

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Interviews

1. Case worker 1, interview, 12th February 2018 (S –SD)
2. Case worker 2, interview 12th February 2018 (R- SD)
3. Case worker 3, interview, 26th February 2018 (E – HFJ)
4. Case worker 4, interview, 26th February 2018 (L – HFJ)
5. Case worker 5, interview, 5th March 2018 (P – Med)
6. Case worker 6, interview, 5th March 2018 (A – med)
7. Case worker 7, interview, 26th February 2018 (P – HFJ)
8. Case worker 8, interview, 12th February 2018 (L-SD)

Response to feedback and comments:

- Corrections made to the referencing within the text as suggested by the reviewers.
- References have been included to the empirical data, references to the specific interviews added in to text.
- The piece has been restructured in light of the suggestions regarding the placement of the methodology; empirical methodology has now been moved to earlier part of article as part of introduction.
- Amendments have been made to sentence structure in marked places.
- Amendments to empirical analysis as per suggestions in track changes (further introduction to each theme before discussing micro themes).
- The review of literature amended to develop stronger links to article theme, as suggested by the reviewers.