

**Legal Aid Sentencing and Punishment of Offenders Bill**  
**ILPA briefing for House of Lords Third Reading 27 March 2012****Government Amendment to Schedule 1**  
***Victims of trafficking in human beings*****Presumed purpose**

The amendment to insert a new clause at page 160 line 2 makes provision for legal aid in the form of initial advice, assistance representation and (by virtue of the amendment to page 169 line 15) representation in the First- Tier tribunal for certain victims of trafficking in relation to certain matters. The matters in respect of which legal aid can be provided are:

- applications for leave to enter or remain in the UK (i.e. immigration applications); claims for compensation in the employment tribunal; and
- claims for damages.

Those who can be given legal aid are variously defined. In the case of employment and damages claims legal aid can be given to an individual who is a victim of trafficking in human beings, defined by reference to the Council of Europe Convention on Action Against Trafficking in Human Beings (see annexe), or, if the individual has died, to that individual's personal representative, defined by their role in administering the estate of the deceased.

In the case of immigration assistance can be given to persons where the relevant "competent authority" has made an initial determination that there are 'reasonable grounds to believe' (an expression used in the convention, see annexe) that they are victims of trafficking and has not changed this view to a final ('conclusive') determination that they are not such victims, or has reached a conclusive determination that they are such victims. The definition of 'trafficking in human beings' is taken from the Council of Europe Convention on Action against Trafficking in Human Beings, Article 4 of which also deals with the notion of a victim (see annexe). The reasonable grounds and conclusive determinations are defined by reference to Article 10 of that Convention (see annexe).

As to the matters for which legal aid can be given be given, in the case of employment and damages claims legal aid must be provided to the individual victim (or his or her personal representative) only where the claim arises in connection with the trafficking or exploitation of the individual, the latter being defined by reference to section 4(4) of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004 (see annexe).

In the case of immigration, legal aid can be provided in relation to an application by the individual for leave to enter or remain.

Thus we see that in immigration cases there is a relatively simple definition of what assistance can be given, and a complicated definition of the individual to whom it can be given; in the case of employment and damages claims the opposite is true.

ILPA is happy to discuss with peers our views on the technicalities of the amendment. We address the main themes below. The materials from which the definitions are taken are described in the annexe.

## **Briefing**

Persons who have been trafficked who fear persecution, torture or inhuman or degrading treatment or flagrant breaches of other human rights on return, are eligible for legal aid in connection with their status in the UK because legal aid has been retained for asylum cases. But there are persons who have been trafficked who do not have asylum claims, because they cannot demonstrate risk, or sufficiently high risk, on return. They may have histories of appalling ill-treatment and there may be immigration applications that they can most properly make, such as an application to remain in the UK until any civil claims have been heard and considered on the grounds of private and family life including that of any children.

Whether they have claimed asylum or not, trafficked persons may wish to claim compensation or damages from the person who has abused and exploited them.

ILPA is pleased that the Government has recognised that these persons stand in need of legal assistance and welcomes provision being made for this in this amendment. We consider that the Government amendment needs further work to ensure that it achieves its objectives for the reasons set out below.

## **Stage at which legal advice be available**

In the cases of employment and damages this appears to be at any stage, including after the death of the individual.

In the case of immigration it is more problematic. If the person is only eligible for legal aid once the competent authority has determined that there are reasonable grounds to think that the person has been trafficked then eligibility for legal aid comes too late to ensure adequate protection against injustice. Such decisions are supposed to be made within five days. In practice they take very much longer.

The Anti-Trafficking Monitoring Group in its 2010 report *Wrong Kind of Victim?*<sup>1</sup> recorded:

### ***Delays in decisions about referrals***

*While Competent Authorities are supposed to respond to initial referrals within five days and to make further inquiries during a 45-day reflection delay, in practice cases have been reported in which it took far longer ...*

*A...Freedom of Information request indicated that there were significant delays in assessing the cases of 66 of the 102 people who were referred to the*

---

<sup>1</sup> *Wrong kind of victim? One year on an One year on: an analysis of UK measures to protect trafficked persons*, anti-Trafficking Monitoring Group June 2010

*N[ational] R[eferral] M[echanism] in 2009 but who had not been notified of a 'reasonable grounds' decision by the end of 2009.<sup>2</sup>*

The report records that it became necessary to alter the Government's funding arrangements for those providing initial support to presumed trafficked persons, in recognition that the 'reasonable grounds' decision was not being made within five days.

The examples below are a mixture of cases where the person has claimed asylum and has not, but they all illustrate delays in the reasonable grounds decision.

The following examples are provided by Kalayaan, which works with migrant domestic workers, many of whom do not claim asylum.

### Examples from Kalayaan

|        | Referral sent    | 'reasonable grounds' decision received | Period from referral to receipt of decision |
|--------|------------------|--|---|
| Case 1 | 27 April 2010    | 23 November 2010                       | 7 months                                    |
| Case 2 | 29 November 2011 | 14 December 2011                       | 15 days                                     |
| Case 3 | 23 December 2011 | 31 January 2012                        | 5 weeks                                     |
| Case 4 | 14 February 2012 | 5 March 2012                           | 3 weeks                                     |
| Case 5 | 9 March 2012     | Pending (on 23 March 2012)             | 13 days and rising                          |

The examples below come from the Poppy Project. Poppy works with adult women trafficked for whatever purpose. Some of these women will claim asylum, others will not. The sample in the table is made up of cases during the relevant period where date of referral and date of reasonable grounds decision are known.

### Examples from Poppy

| Time from referral to reasonable grounds decision in period 1 April 2009 to 31 December 2011 | Number of cases |
|--|-----------------|
| 1-5 days   | 25              |
| 6 - 10 days  | 14              |
| 11 - 20 days   | 9               |
| 21 - 30 days   | 10              |
| 31 - 44 days   | 3               |
| 45 days  | 0               |
| 1 - 2 months   | 24              |
| 3 - 6 months   | 11              |
| 6 months - 1 year  | 1               |
| 1 year +   | 0               |

### Cases studies from Poppy

More details of these cases are given in the annexe.

<sup>2</sup> Freedom of Information request 20100024 by Kalayaan, inquiring about the number of decisions pending at reasonable and conclusive grounds decision stage cited in *Wrong Kind of Victim*.

**Ms O**

Referred to the National Referral Mechanism on 27 January 2012. Detained in Yarls Wood Immigration Removal Centre. Poppy project chased the decision repeatedly. Decision issued 14 March 2012; release from immigration detention in accordance with Home Office policy took until 17 March 2012. In total Ms O spent 336 days in both prison and immigration detention without being properly identified as a trafficked person. Forty-nine of those days were after the referral had been made and three of those days were after the positive 'reasonable grounds' decision had been issued.

**Ms KO**

Referred to the National Referral Mechanism on 12 March 2012 having been in immigration detention for 76 days. Medical evidence of health problems. As of 22 March 2012 a reasonable grounds decision was still awaited.

**Ms B**

In immigration detention awaiting an appeal and has been for 47 days. Her appeal has been adjourned and relisted. She has a letter from the Tribunal dated 14 March 2012, following the adjourned appeal saying "*It is not the role of the tribunal to contact the police on behalf of the appellant.*" Staff in the detention centre indicated that they had not found the allegations of trafficking to be credible, and had therefore not referred her to the National Referral Mechanism. She was referred by a non-Governmental organisation. A further adjournment has been secured, without which her appeal would have been heard.

Similarly with children's cases as complex child exploitation/trafficking investigations carried out by children services take time. In such cases both UK Border Agency and Children's Services procedures and guidance make clear that the interests of the child are of primary importance and that this is more important than the five day time limit.

That legal aid cannot be obtained until the reasonable grounds decision is made and that this may take weeks or months matters because processing of any immigration case; interviews, deadlines for submission of further evidence etc. continue apace, whether the reasonable grounds decision has been made or not. And indeed, trafficking may come to light at any stage in a case, for example the day before an interview. In the case studies above, Ms B's application for asylum had already been rejected in the accelerated Detained Fast Track asylum process before the referral to the National Referral Mechanism was heard, and it was very nearly the case that the appeal was not adjourned. Had it gone ahead, if only the immigration aspect of the case was to be pursued, or was of sufficient merit to be pursued, there would be no legal aid for representation at the appeal, not even for a lawyer who could make the case for an adjournment while the reasonable grounds decision was pursued.

A further complication in an immigration case is where the competent authority determines that the person has not been trafficked. This decision may be the subject of a judicial review, but in the meantime there will be no legal aid as the immigration case progresses, not even for a lawyer to ask for an adjournment to await the reasonable grounds decision. We already know from the asylum cases that this can be a problem.

**Ana** (name changed)

The UK Border Agency found that there were not reasonable grounds for concluding that Ana had been trafficked. Lawyers brought a judicial review against that decision. While that was on going, Ana's case came before the Immigration and Asylum chamber of the First-tier Tribunal where the immigration judge found Ana to have been trafficked for domestic servitude. Ana was given five years humanitarian protection. The judicial review was not pursued.

As the clause is drafted, in that situation Ana would not have had legal aid for the proceedings before the immigration tribunal, and hence would have been at risk of not being recognised in those proceedings as a victim of trafficking; and that might in turn have prejudiced any capacity to bring a damages case or claim compensation from her traffickers in the employment tribunal.

There is also the problem of the situation pre-referral to the National Referral Mechanism at all. As has been discussed in parliament, there is no exceptional funding available for immigration cases and there is much less free help than in other areas of law because to give advice on immigration in the course of a business, whether or not for profit, a person must be a solicitor, barrister, legal executive or regulated by the Office of the Immigration Services Commissioner.<sup>3</sup> Generalist agencies are unlikely to be so regulated.

Without advice on the implications for his/her immigration status the person may be reluctant to disclose trafficking at all or, having done so, may be reluctant or unable, because s/he does not understand the consequences, to give informed consent to a referral to the National Referral Mechanism. In the case of a child such support should be viewed holistically and funded to ensure the safety and welfare of the child and that his/her rights are protected.

If the person has no immigration status in the UK and has not claimed asylum, they may be unable, without a positive 'reasonable grounds' decision to secure housing and support. They may be at immediate risk of harm, or unable to secure the basic necessities of life. There is no legal aid to assist them in this and the Government amendment does not address it.

## **Employment appeals**

The amendment does not cover appeals before the employment tribunals (save for before the Employment Appeal Tribunal in relation to contravention of the Equality

---

<sup>3</sup> Immigration and Asylum Act 1999, section 84

Act 2010, though does permit legal aid for appeals against the decision of an employment tribunal judge to the Employment Appeal Tribunal.

### **Questions to ask the Minister and assurances to seek**

- We think that the definition of exploitation in section 4(4) of the Asylum and Immigration (Treatment of Claimants etc.) Act 2004, used in the definitions in this section, covers all forms of exploitation including labour and sexual exploitation in that 4(4)(c) appears broad enough to cover sexual exploitation.. But it would be helpful to have an assurance to this effect on the record.
- There remains the question of why section 4(4) is needed when there is a definition of exploitation in Article 4 of the Convention as part of the definition of trafficking, to which express appeal is made in the definitions section of the clause.
- Why are there different definitions of victims of trafficking for immigration cases than for employment and damages cases?
- Has the Minister any plans further to circumscribe, or that the Director of Legal Services further circumscribes, the definitions of which trafficked people can have legal aid, using regulation powers in this Bill? If so why, and which further limitations are envisaged?
- If no legal aid will be available until a reasonable grounds decision is taken, has the UK Border Agency agreed to put the immigration case on hold until the decision is made? What will happen in the meantime if the person is in detention, or without housing and food?
- What assistance will be given to local authorities to help them meet the costs of legal representation in the higher courts for trafficked children, at *inter partes* rates?

### **The bigger picture**

Without legal aid for initial advice and representation for immigration matters more generally it is likely that very many trafficked people will not be identified at all. Very often it is only once a lawyer has taken instructions that the facts that point to a person's having been trafficked become known. They may come out in an interview with the UK Border Agency, but it is more difficult for the Agency official to win the trust of a person whose case they will be deciding than it is for a lawyer to win the trust of a person whom they will be representing.

Advice to UK Border Agency staff who suspect that a child has been trafficked is to refer to social services but not to interview at that stage. This agreed good practice may result in children being among those not eligible for legal aid.

If a person is not identified, they will suffer and the State will not benefit from the assistance they could have provided to detect and prosecute traffickers. The removal of legal aid from immigration cases comes at great human cost, and is a false economy.

**For further information please get in touch with ILPA: Alison Harvey [alison.harvey@ilpa.org.uk](mailto:alison.harvey@ilpa.org.uk) 0207 251 8383 or Steve Symonds 0207 490 1553, [steve.symonds@ilpa.org.uk](mailto:steve.symonds@ilpa.org.uk)**

## **Annexe 1 Definitions used in the clause**

### **Council of Europe Convention on Action Against Trafficking in Human Beings**

#### **Article 4 – Definitions**

For the purposes of this Convention :

a "Trafficking in human beings" 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;

b The consent of a victim of “trafficking in human beings” to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

c The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in human beings" even if this does not involve any of the means set forth in subparagraph (a) of this article;

d "Child" shall mean any person under eighteen years of age;

e "Victim" shall mean any natural person who is subject to trafficking in human beings as defined in this article.

...

#### **Article 10 – Identification of the victims**

1 Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention.

2 Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been

completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2.

3 When the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age.

4 As soon as an unaccompanied child is identified as a victim, each Party shall:

a provide for representation of the child by a legal guardian, organisation or authority which shall act in the best interests of that child;

b take the necessary steps to establish his/her identity and nationality;

c make every effort to locate his/her family when this is in the best interests of the child.

#### **Article 12 – Assistance to victims**

1 Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least:

a standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;

b access to emergency medical treatment;

c translation and interpretation services, when appropriate;

d counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;

e assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;

f access to education for children.

2 Each Party shall take due account of the victim's safety and protection needs.

...

#### **Article 18 – Criminalisation of trafficking in human beings**

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct contained in article 4 of this Convention, when committed intentionally.



**Asylum and Immigration (Treatment of Claimants etc.) Act 2004. as amended by Borders Citizenship and Immigration Act 2009 in respect of baby trafficking.**

**4 Trafficking people for exploitation**

...

- (4) For the purposes of this section a person is exploited if (and only if)— .
- (a) he is the victim of behaviour that contravenes Article 4 of the Human Rights Convention (slavery and forced labour), .
  - (b) he is encouraged, required or expected to do anything as a result of which he or another person would commit an offence under the Human Organ Transplants Act 1989 (c. 31) or the Human Organ Transplants (Northern Ireland) Order 1989 (S.I. 1989/2408 (N.I. 21)), .
  - (c) he is subjected to force, threats or deception designed to induce him— .
    - (i) to provide services of any kind, .
    - (ii) to provide another person with benefits of any kind, or .
    - (iii) to enable another person to acquire benefits of any kind, or .
  - d) a person uses or attempts to use him for any purpose within sub-paragraph (i), (ii) or (iii) of paragraph (c), having chosen him for that purpose on the grounds that—
    - (i) he is mentally or physically ill or disabled, he is young or he has a family relationship with a person, and
    - (ii) a person without the illness, disability, youth or family relationship would be likely to refuse to be used for that purpose.”

## Annexe 2 Poppy Project case examples

### Ms O (Detained in HMP New Hall and at Yarl's Wood IRC)

Ms O was referred to Poppy by her solicitor as she felt there were indicators of trafficking and exploitation in forced labour. Ms O was exploited for several years until she was arrested for immigration offences. Despite disclosing indicators of trafficking throughout her encounters with the criminal justice system and the UK Border Agency, she was prosecuted for working with a false passport and served six months at HMP New Hall (11/4/11 – 11/10/11). Whilst imprisoned at New Hall she claimed asylum in June 2011, but neither those officers conducting the screening interview or the substantive interview referred her into the National Referral Mechanism. In fact Ms O's asylum refusal clearly makes reference to her situation of debt bondage, and the threats to herself and her daughters, including threats to traffic her daughters to Italy for prostitution. At the end of her sentence she was transferred to Yarl's Wood. It was not until she saw a legal rep at Yarl's Wood that someone noticed the trafficking indicators and referred her to Poppy.

Poppy carried out an assessment and **referred Ms O to the National Referral Mechanism RM on 27 January 2012**. Despite repeated efforts to contact the competent authority and competent authority lead which included numerous unanswered emails and phone calls that were not returned, a decision remained outstanding until 14 March 2012. When the competent authority spoke to the legal rep and the Poppy support worker they were told of its the view that the case was one of "blackmail" and its not knowing whether something like that could be used to influence a victim in a trafficking case. After further discussion a positive reasonable grounds decision was issued on 14 March 2012, this decision was also approved by a second pair of eyes. Home Office guidance indicates that "A positive decision will trigger a 45 day 'recovery and reflection' period during which time individuals will not be detained and removal action will be suspended. Victims will have access to certain rights, including accommodation and advice." On this basis information was sought as to when Ms O would be released. On 15 March a representative of the competent authority said that he could not comment on Ms O's continued detention. The case was referred to a senior member of UK Border Agency staff who decided against release, saying "I understand that your people think she's a victim of trafficking, but personally I don't believe it. She's been here since 2006!" It was explained that as a positive National Referral Mechanism decision had been made it was now a matter of policy that she should be released, or that a valid, legally sustainable reason for not releasing her was required, not just his personal feelings. Home Office guidance was cited. Ms O was eventually released on 17 March 2012. **In total Ms O spent 336 days in both prison and immigration detention without being properly identified, 49 of those days were after the referral had been made and three of those days were after the positive reasonable grounds decision had been issued.**

### Ms KO (Detained in Yarl's Wood Immigration Removal Centre)

Ms KO was referred to Poppy by her solicitor as she had been trafficked and exploited in both domestic servitude and forced prostitution. She was trafficked into the UK by one individual, and then later trafficked internally by a second individual. Ms KO was first arrested whilst being exploited in prostitution and despite being interviewed by the police about her experiences she was told to return to the home of the woman

exploiting her and that they would come to the house the next day. When the person exploiting her discovered she had spoken to the police she sent her to work from a flat outside London. This property was also raided a few weeks later and Ms KO was told that since this was her second arrest she would be detained. She did not see a legal rep and was given no information about her rights. She spent a few days detained by the police in Manchester and was then transferred to Yarls Wood on 28 December 2011. She has not claimed asylum, but says she was interviewed by Yarls Wood staff.

Poppy assessed Ms KO and referred her to the National Referral Mechanism on 12 March 2012. The referral clearly shows that Ms KO is in need of urgent medical attention. Ms KO was released on 13 March 2012 and dispersed to UK Border Agency initial accommodation. This release was not communicated to Poppy, or to her legal rep. They only discovered her whereabouts after her legal representative spoke to the case owner who confirmed the dispersal. Ms KO's phone was kept by Yarls Wood as it had been issued by them and she had no way of communicating with Poppy or to her legal representative. Ms KO cannot read or write. Subsequently Ms KO has been transferred to Poppy (with the help of the Salvation Army) and is now accommodated in a safe house. Ms KO is still awaiting a Reasonable Grounds decision. She spent 76 days in detention **with being identified**.

#### **Ms B (Detained in Yarls Wood and in the Detained Fast Track asylum process)**

Ms B was referred to Poppy on 20 March 2012 after disclosing to a visiting member of Yarls Wood Befrienders that she was concerned about attending her Tribunal hearing without representation, and that she wanted to be able to report her experiences of exploitation to the UK police. Poppy was concerned by this and took a referral from Ms B via telephone on the evening of 20 March. Ms B disclosed, as she had in previous interviews at Yarls Wood that she was being physically and psychologically abused by her father in her country of origin and that she was fleeing a forced marriage Ms B was brought to the UK under the assumption that she was being kept safe from this abuse and the threatened forced marriage, but in reality she was made to work as a domestic servant. She worked excessive hours for no pay, did not have humane living or sleeping facilities and was not allowed freedom of movement. She has been subject to abuse and exploitation in the UK She said she desperately wanted to tell the police what has happened to her in the UK – which is further supported by a letter given to Ms B on 14 March 2012 in which a previously scheduled Tribunal hearing was adjourned. The letter states “It is not the role of the tribunal to contact the police on behalf of the appellant.” It appears that Ms B was so desperate to contact the police that she asked the tribunal for help with that process.

When contacted about the case staff in Detained Fast Track initially responded by saying that they were familiar with the case and did not think the trafficking indicators were credible. It was explained that decision needed to be made via the NRM, not just based on one case owner's feelings. Poppy made the NRM referral and also faxed the referral and covering letter to the tribunal at Yarls Wood so that the immigration judge would at least be aware of the concerns. A few hours later the Detained Fast Track staff said that the Home Office Presenting Officer would ask for an adjournment and we review the case. The person said “I was thinking of a completely different case and I need to familiarise myself with this case.” Ms B has been in detention for 47 days.