

**Briefing on Legal Aid Amendments (no. 144 and 145)
Modern Slavery Bill, House of Commons Report Stage
4 November 2014**

Briefing endorsed by the Refugee Children's Consortium and Amnesty International UK

Proposed Amendments

Clause 52

Page 33, line 19, leave out "and (3)" and replace with ", (3) and (4)"

Page 33 line 21 at end insert:

“(3) Section 40 shall come into force on a day to be appointed, that day being no earlier than the day on which an order made by the Lord Chancellor under section 9(2)(a) of the Legal Aid, Sentencing and Punishment of Offenders Act in respect of civil legal services for victims of slavery and victims of human trafficking comes into effect.”

Re-number accordingly.

Purpose

Provides that Clause 40, which prevents the Anti-Slavery Commissioner from examining individual cases, cannot come into force until an order has been made dealing with legal aid for trafficked persons and victims of slavery. The nature of such order is left open, save that it must extend, and not reduce, legal aid for those groups.

Briefing

This is a probing amendment with two aims. The first is to query the Minister's reasons for preventing the Commissioner from examining individual cases. The Commissioner's remit should be as wide as possible to ensure that s/he is able to fulfil her intended role in tackling trafficking and slavery. We are concerned that unless there is legal aid for all victims of trafficking, individual cases will fall through the cracks. **There is currently a protection gap.**

This gap should be filled with the full restoration of legal aid for this group. Oversight of individual cases by the Commissioner, desirable and necessary in its own right, is also necessary as a minimum to address the gap. That is the reason for linking the two matters in this manner in the probing amendment although our preferred outcome would be both the restoration of legal aid and oversight of individual cases by the Commissioner.

The object of the amendment is to obtain Ministerial assurances that legal aid will be restored for all trafficked and enslaved persons. With the coming into force of the Legal Aid Sentencing and Punishment of Offenders Act 2012 in April 2013, legal aid was removed from all immigration cases, with only narrow exceptions. One of those exceptions is ostensibly for trafficked persons¹, but applies only to those who have successfully navigated the National Referral Mechanism.

The National Referral Mechanism should not be the gateway to legal aid. Firstly, not all trafficked persons approach the National Referral Mechanism.² It is often only with the support of a legal representative that a trafficked person is referred to the National Referral Mechanism in the first place. Secondly, a person is less likely to be correctly identified without the assistance of a legal representative. Delays are endemic in the National Referral Mechanism and there are wrong decisions³. Legal representatives can assist the decision-maker to reach the correct decision and can challenge unlawful decisions when they happen. However there is currently no legal aid prior to a person's approaching the National Referral Mechanism or until the reasonable grounds decision has been reached, and in their favour. By which time other immigration decisions may have been taken, or the relevant stages of evidence gathering completed. The approach impedes or prevents access to justice for trafficked persons.

Under the proposed residence test for legal aid⁴ which, following a successful legal challenge⁵, (currently the subject of a Government appeal⁶) has not been brought into effect, legal aid would be preserved for such trafficked persons as currently enjoy it, for initial applications and appeals, but denied those without lawful status for judicial review, for which it is currently available to them.⁷ Because there is no right of appeal against a negative "reasonable grounds" decision, judicial review is the only means by which such a decision can be challenged. Another Catch 22.

Many trafficked persons will not have lawful immigration status in the UK. They require legal aid for advice on their options and to assist them in regularising their status, if appropriate. It is the Government's intention to ensure that this group is provided with legal aid. However the way in

¹ Section 32 of Schedule 1 to the Legal Aid Sentencing and Punishment of Offenders Act 2012

² Under-reporting is a huge problem in this area. The Anti-Trafficking Monitoring Group collected information about more than 130 individuals in a 12 month period who were not referred to the National Referral Mechanism, despite being identified by a support agency as a victim of trafficking: *Wrong kind of victim? One year on: an analysis of UK measures to protect trafficked persons*, Anti-Trafficking Monitoring Group Report (2010), page 2. In 2012, around two-thirds of trafficking victims identified by the Serious Organised Crime Agency (SOCA) had not been referred to the National Referral Mechanism (and we assume that victims not identified by SOCA had also not been referred): see SOCA, *A Strategic Assessment on the Nature and Scale of Human Trafficking in 2012*, August 2013, p6 (paragraph 8) available at: <http://www.nationalcrimeagency.gov.uk/publications/15-ukhtc-strategic-assessment-on-human-trafficking-in-2012/file>

³ See Report by the Anti-Trafficking Monitoring Group *Hidden in plain sight: three years on, updated analysis of UK measures to protect trafficked persons*, October 2013, which reported that the average wait for a 'reasonable grounds' decision was 40 days and the average wait for a 'conclusive determination' is 164 days, despite targets of 5 days and 45 days, respectively, for those decisions.

⁴ See Ministry of Justice Transforming Legal Aid consultation, all documents available at <https://consult.justice.gov.uk/digital-communications/transforming-legal-aid-next-steps> .

⁵ *R(PLP) v SSHD* [2014] EWHC 2365 (Admin)

⁶ See document at note 5.

⁷ For more information see ILPA's evidence to the Joint Committee on Human Rights' enquiry into the implications for access to justice of the Government's proposed legal aid changes, 30 September 2013, available at <http://www.ilpa.org.uk/resources.php/21039/ilpa-evidence-to-the-joint-committee-on-human-rights-enquiry-into-the-implications-for-access-to-jus>

which this has been done has left trafficked persons in a Catch 22 situation: the individual is not identified as trafficked because s/he is unrepresented, and because s/he has not been identified as trafficked, cannot get representation.

Under s. 9(2)(a) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the Lord Chancellor has the power to make orders bringing categories of persons into the scope of legal aid (it is 9(2)(b) that deals with taking cases out of scope). We seek Ministerial assurances that legal aid for trafficked and enslaved persons will be restored, in particular by:

- (a) Ensuring that as soon as there are grounds to believe that someone may be a trafficked person, legal aid is provided for civil matters (including immigration) and for assistance in navigating the National Referral Mechanism;
- (b) Ensuring that enslaved persons are also provided with legal aid. Some trafficked persons may find it difficult to prove the travel involved in their case, but can prove that they were exploited – this group currently has no access to legal aid whatsoever. Persons without lawful status can be preyed upon within the UK and subjected to slavery; again, this group has no protection. If there are grounds to believe that a person may be or have been enslaved, such a person should be protected by having recourse to legal aid for civil matters from that point.
- (c) Ensuring that legal aid continues to be available for judicial review challenges of wrongful National Referral Mechanism decisions.

For further information please get in touch with Alison Harvey, Legal Director, ILPA alison.harvey@ilpa.org.uk 0207 251 8383 and Shauna Gillan, Legal Officer shauna.gillan@ilpa.org.uk in the first instance.

This Briefing is endorsed by the **Refugee Children's Consortium (RCC)** and **Amnesty International UK**.

The Refugee Children's Consortium is a group of over 40 NGOs working collaboratively to ensure that the rights and needs of refugee children are promoted, respected and met in accordance with the relevant domestic, regional and international human rights and welfare standards. Our membership includes leading children's and refugee NGOs, bringing together a significant body of expertise in dealing directly with asylum-seeking and trafficked children, and safeguarding and promoting children's welfare.

Members of the RCC are: Action for Children, Asphaleia Action, Asylum Aid, Association of Visitors to Immigration Detainees (AVID), Bail for Immigration Detainees, The British Association of Social Workers (BASW), Brighter Futures, British Association for Adoption and Fostering (BAAF), Catch22 National Care Advisory Service, Children and Families Across Borders (CFAB), Coram Children's Legal Centre, Children England, Child Poverty Action Group (CPAG), Children's Rights Alliance for England, The Children's Society, DOST, ECPAT UK, Family Rights Group, The Fostering Network, Family Service Units (FSU), Freedom from Torture, Gatwick Detainees, Kent Refugee Action Network, Klevis Kola, The Immigration Law Practitioners' Association (ILPA), Islington Law Centre, JCORE, Law Centres Network, Medical Justice, NCB, NSPCC, The Prince's Trust, RAMFEL, Refugee Action, Refugee Council, Refugee Support Network, Royal College of Paediatrics and Child Health, Scottish Refugee Council, Student Action for Refugees (STAR), UNICEF UK, Voice, The Who Cares? Trust, and Welsh Refugee Council.

Barnardo's, British Red Cross, Office of the Children's Commissioner (England) & UNHCR all have observer status.
<http://www.refugeechildrensconsortium.org.uk/>