

Modern Slavery Bill

Briefing for House of Lords, Second Reading, 17 November 2014

Introduction

The opportunity presented by this Bill to improve the lot of trafficked and enslaved persons should be seized. Part 4 of the Bill, *Protection of Victims* should be strengthened so that its provisions tangible improvement in the lives of individuals. Additional protection measures are needed to ensure that trafficked and enslaved persons are protected in line with the UK's international legal obligations. Our four main concerns are:

- **Legal Aid** should be restored for all victims of trafficking and slavery, from the first point of contact with a lawyer
- **Clause 49 Presumption about Age** clause must be strengthened so that the presumption will remain in place for the duration of any age dispute
- The **Overseas Domestic Workers** visa should be restored so that these workers do not continue to be tied to one employer and thereby put at risk of abuse
- **Guardians** should be provided for all separated migrant children with full legal responsibility and powers to act in their best interests

(I) Legal Aid

The legal aid cuts effected by the Legal Aid Sentencing and Punishment of Offenders Act 2012 have left many trafficked and enslaved persons shut out from the ability to access legal advice and representation on immigration matters. The Act only exempts one category of trafficked persons from the cuts: those who have managed to get referred to the National Referral Mechanism and have received a positive “reasonable grounds” decision within that process, with a positive “conclusive grounds” decision pending or in their favour. Without legal assistance many persons are not identified or advised to approach the National Referral Mechanism in the first place, let alone successfully to navigate it and be correctly identified within it. **Legal aid should be restored for all potentially trafficked persons, from the first point of contact with a lawyer.**

The provision of legal aid for all victims of modern slavery offences was a key recommendation of the Joint Committee on the Draft Modern Slavery Bill¹. This does not require primary legislation; it could be done by way of an Order made by the Lord Chancellor under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 Act, which empowers him² to enlarge the scope of legal aid by adding to the categories for which

¹ Report of the Joint Committee on the Draft Modern Slavery Bill, Session 2013- 2014, HL Paper 166, HC 1019, para. 133 <http://www.publications.parliament.uk/pa/jt201415/jtselect/jtrights/62/6203.htm> .

² Section 9(2)(a) .

legal aid is available. The Joint Committee on Human Rights has recommended this approach in its report on the Modern Slavery Bill released on 13 November 2014³.

The Joint Committee on Human Rights endorsed the view of Amnesty International UK⁴ which ILPA shares, that legal advice and representation is vital to protect victims of slavery and trafficking by addressing their fears concerning their immigration status, fears that deter them from taking the necessary steps to escape their exploitation and abuse. In our experience, traffickers threaten victims that they will be detained and/or deported by the UK authorities if they seek help. These are not hollow threats: in the absence of legal assistance victims are often disbelieved, inappropriately detained and denied the protection measures to which they are entitled.⁵ **Legal aid is a vital safeguard to enable victims of trafficking and slavery to be identified as such, to access their rights and to be protected.**

(2) Presumption of age

Clause 49 introduces a statutory presumption of age, whereby if a public authority (a) has reason to believe that a person may be a victim of trafficking, and (b) is not certain of their age but has reason to believe the person may be under 18, the public authority must assume that they are a child until an age assessment is carried out by a local authority. This provision is an attempt to transpose the UK's international obligations, per Article 10(3) of the Council of Europe Convention on Action against Trafficking in Human Beings (2005) and Recital 22 and Article 13(2) of the EU Trafficking Directive⁶. We consider that it does not adequately do so, but with changes could be rendered effective:

- the presumption should remain in place until the final determination of the age dispute (including any litigation on the matter);
- the presumption should be extended to child victims of slavery;
- it should be applied to all functions of all local authorities or public bodies (to avoid differences in treatment across different State functions).

Any less than this fails to meet the UK's international obligations, which are imposed on the State as a whole, whereas the provision in its current form would only impact upon certain limited State functions. Age assessment is not a science. Many children are mistakenly treated as adults⁷ and put at risk by being detained or accommodated with adults, denied

³ Joint Committee on Human Rights, *Legislative Scrutiny (1) Modern Slavery Bill (2) Social Action, Responsibility and Heroism Bill* Third Report of Session 2014-15 (13 November 2014), para. 1.82.

⁴ *Ibid.*, para. 1.80

⁵ See further ILPA's submission to the review of the National Referral Mechanism: <http://www.ilpa.org.uk/resource/29120/ilpa-submission-to-the-review-of-the-national-referral-mechanism-endorsed-by-the-anti-trafficking-le> and see the Review of the National Referral Mechanism, Home Office, November 2014, paragraph 2.2.4.

⁶ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA

⁷ See, e.g., *J. R (on the application of) v Secretary of State for the Home Department* [2011] EWHC 3073 (Admin) (24 November 2011) Available at: www.bailii.org/ew/cases/EWHC/Admin/2011/3073.html; *Durani v Secretary of State for Home Department & Anor* [2013] EWHC 284 (Admin) (19 February 2013) Available

services as children or even removed to a place of danger. Where there is doubt about a local authority age assessment, because a putative child is challenging it, the presumption must remain in place if it is to provide any real protection for children. Otherwise the presumption will last no more than a day or two, until the date of a flawed local authority assessment.

Clause 49(2) states “*Until an assessment of the person’s age is carried out by a local authority or the person’s age is otherwise determined*” which risks implying that local authority age assessments will be routine where there is not conclusive documentary evidence of age. If a child states that they are a certain age and there is no strong evidence to the contrary, this should be accepted instead of putting the child through a formal assessment, which may lead to a dispute, litigation and stress for the child⁸. There is no obligation to carry out age assessments in such cases and one should not be indirectly imposed by this legislation.

Case study: Ibrahim*

Ibrahim was 15 years old when he arrived in London from Sierra Leone. After the murder of his father he was preyed upon by a trafficker who brought him to the UK using false documents which stated that Ibrahim was 35. On arrival in London Ibrahim was handed over to a family as a domestic slave: “*I was told that I had to look after their children and cook and clean the house. I had never cleaned or looked after children before, so when I got things wrong the parents would hit me.*”

Ibrahim was forced to sleep in a broom cupboard and was underfed and physically abused. He escaped and asked people for help and was taken to Social Services, who assessed him as over 18 the following day, and referred him to a hostel for adult migrants: “*When I was there the Home Office matched my finger prints with my forged passport and said I was 35. They told me I was a liar.*” Ibrahim’s solicitor successfully challenged the social services assessment that he was an adult and helped him get a foster placement: “*I’ve been granted asylum now and I’m at university hoping to be an engineer one day.*”

An expanded presumption of age would have protected Ibrahim from being accommodated with adults and denied child services for the duration of his age dispute. Children may be preyed upon in adult hostels and re-trafficked internally within the UK before they can be helped. Clause 49 in its current form would have resulted in the presumption that Ibrahim was a child remaining in place for only **one day**, rendering it ineffective.

**Names and identifying features have been changed to protect identity.*

(3) Overseas Domestic Workers

Domestic workers who come from overseas must be protected from exploitation. Previously, a person who had come from overseas to work in the domestic environment

at: <http://www.bailii.org/ew/cases/EWHC/Admin/2013/284.html>; AN & FA (Children), R (On the Application Of) v Secretary of State for the Home Department [2012] EWCA Civ 1636 (11 December 2012) Available at: <http://www.bailii.org/ew/cases/EWCA/Civ/2012/1636.html>

⁸ See further ILPA’s report, *When is a Child not a Child?* (2007)

<http://www.ilpa.org.uk/data/resources/13266/ILPA-Age-Dispute-Report.pdf>

was able to apply to change their employer, and had a route to settlement⁹. Thus there was a chance that they could escape from an abusive situation. In April 2012 the right of these workers to change employer was removed by changes to the immigration rules¹⁰. Now these workers are tied to one employer for the duration (now a maximum six months) of their leave. This puts them at higher risk of abuse and exploitation¹¹. The pre-2012 position should be restored. The Joint Committee on the Draft Modern Slavery Bill called for change as a matter of urgency:

“In the case of the domestic worker's visa, policy changes have unintentionally strengthened the hand of the slave master against the victim of slavery. The moral case for revisiting this issue is urgent and overwhelming. Protecting these victims does not require primary legislation and we call on the Government to take immediate action¹²...Tying migrant domestic workers to their employer institutionalises their abuse; it is slavery and is therefore incongruous with our aim to act decisively to protect the victims of modern slavery.¹³”

ILPA endorses the briefings of Kalayaan¹⁴ on this topic and recommends the adoption of the clause proposed in the Anti-Trafficking and Monitoring Group's alternative Bill¹⁵.

(4) Guardianship

The child trafficking advocates in Clause 47 fall far short of the legal guardians that ILPA and many others have been calling for over many years¹⁶. All separated children should be provided with a legal guardian and this will enable those among them who have been trafficked to be identified. Trafficked children will otherwise continue to fall through the gaps: they will not be identified and will be at risk of exploitation and abuse. Guardians are urgently required to identify and protect these children. The Joint Committee on Human Rights, in its recent report scrutinising the Bill, explicitly recommends a general scheme of legal guardianship for all separated children¹⁷.

⁹ Under provisions that operated as concessions outside the immigration rules and were incorporated into the rules by Statement of Changes in Immigration Rules Cm 5597 of 22 August 2002. As of 5 April 2012 the rules on overseas domestic workers in private households were contained in paragraphs 159 to 159G.

¹⁰ Statement of Changes in Immigration Rules HC 1888

¹¹ See *Still Enslaved: The migrant domestic workers who are trapped by the Immigration Rules*, Kalayaan, (April 2014) <http://www.kalayaan.org.uk/documents/tied%20visa%202014.pdf>

¹² *Op. cit.*, para. 5, Introduction.

¹³ *Ibid.*, para. 225

¹⁴ *Still Enslaved*, *op. cit.* See also Kalayaan's *Response to Draft Modern Slavery Bill*, December 2013 available at <http://www.kalayaan.org.uk/documents/Draft%20Modern%20Slavery%20Bill%20Response.pdf>

¹⁵ Anti-Trafficking Monitoring Group *Draft Modern Slavery, Human Trafficking and Human Exploitation Bill* http://www.antislavery.org/includes/documents/cm_docs/2014/a/atmg_modern_slavery_human_trafficking_and_hu_man_exploitation_bill.pdf

¹⁶ See e.g., Joint Committee on Human Rights, *Human rights of unaccompanied migrant children and young people in the UK*, First report of session 2013-2014, HL Paper 9, HC 196; The Children's Society, Press Release, The Children's Society welcomes draft Modern Day Slavery Bill (13 December 2013), available at:

www.childrensociety.org.uk/news-views/press-release/childrens-society-welcomes-draft-modern-day-slavery-bill; ECPAT, Press Release, Protection needs of child victims overlooked in draft Modern Slavery Bill (13 December 2013), available at: www.ecpat.org.uk/media/protection-needs-child-victims-overlooked-draft-modern-slavery-bill-0

¹⁷ *Op. cit.*, Para 1.74

The advocates provided for in this Bill would be ineffective in ensuring that trafficked children are properly represented and supported. An advocate or guardian, whichever name is used, must hold legal responsibility to provide real assistance to the child they represent. Where a separated child (i.e. a child without a guardian or parent in the UK) has an immigration case, there is in most cases no-one with the legal competence to make the difficult decisions involved in litigation on behalf of the child; the lawyer must take instructions from the child client him/herself. This creates myriad problems, not least where the child's instructions are in conflict with his or her best interests. The only way to ensure that such a child's welfare is safeguarded is by the appointment of legal guardians with full authority who can provide legal representatives with clear instructions upon which to act.

Advocates with the requisite authority to make legal decisions on behalf of the child are urgently required, as expressed in the debates¹⁸ (and vote) in the House of Lords during the passage of the Immigration Act 2014¹⁹. **We urge the House to amend this Bill to ensure that full legal Guardians are provided for every separated child, or failing that, at a minimum for every trafficked child.**

The Immigration Law Practitioners' Association (ILPA) is a professional membership association. The majority of members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government, including Home Office, and other consultative and advisory groups and has worked with parliamentarians of all parties since its inception.

We are happy to provide further explanations, information or commentary on request. **Please contact Shauna Gillan, Legal Officer Shauna.Gillan@ilpa.org.uk or Alison Harvey, Legal Director Alison.Harvey@ilpa.org.uk**

¹⁸ See HL Report, 7 Apr 2014: Column 1139 www.publications.parliament.uk/pa/ld201314/ldhansrd/text/140407-0001.htm#14040716000863 and HL Report 12 May 2014: Column 1654ff (Ping Pong) <http://www.publications.parliament.uk/pa/ld201314/ldhansrd/text/140512-0001.htm#14051211000467>.

¹⁹ At House of Lords' Report on the Immigration Bill an amendment inserted making provision for guardians for trafficked children. This was removed after parliament was promised an "enabling provision" in the Modern Slavery Bill, under which a scheme of guardians for trafficked children could be set up. HC Report, 7 May 2014, Column 219 <http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm140507/debtext/140507-0003.htm>.