

ILPA to Chief Inspector for Inspection on Human Trafficking

The Immigration Law Practitioners' Association (ILPA) is a registered charity and a professional membership association. The majority of members are barristers, solicitors and advocates practising in all areas of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Founded in 1984, 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 advisory and consultative convened by Government departments, public bodies and non-governmental organisations.

The role ILPA plays in the identification and support of potential victims of trafficking

ILPA members provide legal advice and representation to trafficked and enslaved persons and may be involved in referring them to specialist lawyers in other areas or for other support. NGO members of ILPA may identify and provide support services to victims of trafficking and modern slavery and make referrals to firms and organizations providing legal advice and representation.

Immigration law practitioners play an important role in identifying persons who have been trafficked or enslaved among those in need of advice on their immigration status. Persons may be among clients presenting with immigration problems or referred to them for advice on immigration by other agencies. They may be identified in advice surgeries in immigration detention centres.

The support legal representatives provide is to try to obtain the best possible immigration status and support for the trafficked or enslaved person so that they are empowered to leave the situation of exploitation and make their own choices. Legal representatives are also involved in compensation claims.

The removal of immigration advice from the scope of legal aid with the coming into force of the Legal Aid Sentencing and Punishment of Offenders Act 2012 in April 2013 presents a significant barrier to the identification of trafficked and enslaved persons because, in our experience, people are not usually identified at the border and are unlikely to self-identify there. A person may claim asylum and thus qualify for legal aid if they fear persecution or a violation of their human rights on return to their country but not all trafficked or enslaved persons will have such fears.

One exception to the general lack of legal aid is ostensibly for trafficked persons¹, and the Modern Slavery Act 2015 s 47 reproduces this for victims of slavery or forced and compulsory labour. The exceptions for both trafficked and enslaved persons apply to those who have

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

successfully navigated the National Referral Mechanism² and obtained a reasonable grounds decision with a conclusive grounds decision pending or in their favour. See the discussion of the National Referral Mechanism below. But before presenting to the authorities, including the statutory services such as the police who are “first responders”, many trafficked and enslaved persons want to know what their options are.

At present, judicial review work in trafficking and slavery cases is still funded by legal aid.

Trafficked and enslaved persons may not approach officials, for fear of return. They require advice to make the decision as to whether it is in their best interests to approach the Home Office in the first place. Many are understandably intimidated and with good reason: they could be liable to detention and immediate removal if the Home Office does not consider there are reasonable grounds to believe they may have been trafficked or enslaved.

How effective Border Force is at identifying potential victims of trafficking at the border and how it could be improved

We urge the enquiry to consider the activities of the Border Force and its work on identification in the light of recognized indicators of trafficking.

There may be opportunities to rescue persons at the border. An example would be where a person is identified entering with different children, making similar claims in each case, on subsequent days. But if trafficked persons are to be assisted a rescue paradigm cannot be the only one used; it may be through what a trafficked person says that it is possible to identify and assist them. It is necessary to look at whether the work of the Border Force assists in empowering them to do so, whether at the border or subsequently.

Your views on how potential victims of trafficking are treated at ports of arrival into the UK.

We assume that this question relates to potential victims of trafficking who are identified at the border. We do not have enough experience of this to comment because most of the cases we see are of persons identified subsequently. We have had the advantage of reading the response of the Human Trafficking Foundation in draft and as they explain therein, the National Crime Agency’s Strategic Assessment on the Nature and Scale of Human Trafficking in 2014 records that in this year 17 of the 30 potential victims encountered on entry to the UK were refused entry to the UK due to these suspicions and returned to the country from where they had travelled.³ Such returns militate against persons coming forward at the border and create a risk that persons are returned to situations in which they will face breaches of their human rights.

We draw particular attention to our work and that of others during the passage of the Immigration Act 2016 on overseas domestic workers. As per the joint briefing issued by the

² See ILPA’s evidence to the National Referral Mechanism Review: <http://www.ilpa.org.uk/resource/29120/ilpa-submission-to-the-review-of-the-national-referral-mechanism-endorsed-by-the-anti-trafficking-le> (accessed 31 May 2015).

³ <http://www.nationalcrimeagency.gov.uk/publications/656-nca-strategic-assessment-the-nature-and-scale-of-human-trafficking-in-2014/file>

Anti Trafficking Monitoring Group, Anti Trafficking and Labour Exploitation Unit, Anti-Slavery International, Justice 4 Domestic Workers, Kalayaan, Liberty, Walk Free and ILPA⁴, information to overseas domestic workers will not of itself empower workers. Information describes their rights and the complexity and conditionality of those rights is likely to determine whether the worker comes forward. The same point can be made about other cases of exploitation. Information empowers where it informs persons of clear and concrete rights which they can exercise.

Whether the treatment of potential victims of trafficking is consistent at all ports of arrival.

This question divides into two parts, identification and actions taken consequent to identification. We do not consider that identification is consistent at all ports; levels of expertise and resources vary.

In his review of the domestic worker visa, Mr Ewins QC recommended

5. The Home Office should develop and implement clear policy and practice which will ensure the effective feed-back of information and intelligence drawn from the entry/exit data and change of employer/renewal applications to the application process itself.

and set out

15. ... with the introduction of entry/exit data from UKVI, it should be possible to collate such data with information drawn from overseas domestic workers visa applications, as well as applications to change employer and renew the visa as well as data from overseas domestic workers who enter the NRM. This review strongly urges the Government to collate and analyse such data to provide a clearer quantitative understanding of how the visa operates. 16. Further, implementation of this review's recommendations will provide data, information and intelligence which will enable the police, Immigration Enforcement or the proposed Director of Labour Market Enforcement, to take intelligence-led steps to investigate and pursue those who abuse overseas domestic workers with criminal, civil or immigration sanctions. Tasking such entities to take active steps to initiate enquiries into such abuse will require other measures beyond the scope of this report. However, it is the clear finding of this review that none of the basic protections of overseas domestic workers' fundamental rights should be conditional upon the worker initiating any such enquiry themselves, especially where the Home Office will have sufficient

We recommend that the inspectorate examine whether these recommendations have been implemented.

ILPA's views on the process of referral to the National Referral Mechanism

We recommend that particular attention be paid to practice in the devolved administrations, where practice differs from that in England, for example in respect of guardians for trafficked children.

⁴ 26 April 2016, see <http://www.ilpa.org.uk/resources.php/32088/joint-briefing-on-lords-amendment-60-on-overseas-domestic-workers-21-april-2016-updated-26-april-2016>

We draw attention to the National Referral Mechanism pilots as described in the Home Office *Victims of modern slavery: competent authority guidance*.⁵

We are pleased to see a pilot on ‘Slavery Safeguarding Leads’ in different public authorities acting as ‘competent authorities’ making the ‘reasonable grounds’ decision as heretofore the UK’s approach to identification of trafficked persons has been one of centralised authorities separating sheep from goats, a far cry from the Office for Security and Cooperation in Europe’s original concept of “competent authorities”: each public authority skilled up and doing its utmost to combat human trafficking in its field of competence.⁶ ILPA has long been critical of this approach⁷ and has advocated for each authority taking responsibility for matters within its competence.

Both the Council of Europe Anti-Trafficking Convention and the EU Anti-Trafficking Directive are structured so that potential trafficked persons are first identified⁸ and provided with support⁹ then questions of immigration control¹⁰ and involvement in criminal proceedings¹¹, if relevant, are dealt with. The terms “competent authority/competent authorities” are used in other areas of national and international law including in the Office for Security and Cooperation in Europe’s National Referral Mechanism handbook¹² to describe the State and make reference to the arm of State with responsibility for a particular area. The Explanatory Memorandum to the Council of Europe Anti-Trafficking Convention states at paragraph 194:

“By “competent authorities” is meant the wide range of public authorities with which victims may have their first contact with officialdom”

Lawyers have the potential to be involved in advice that empowers a person to approach the National Referral Mechanism in the first place. But in practice they often arrive on the scene too late. Most immigration matters are now not within the scope of legal aid, so the chances of a person being identified in the course of being advised on other immigration matters are reduced. There is legal aid for trafficked persons, but not at the early stages. At Lords Report of the Bill which became the Modern Slavery Act 2015, Baroness Kennedy of the Shaws and others argued that a positive “reasonable grounds” decision under the National Referral Mechanism should not be the gateway to legal aid. The Lord Bates replied for the Government:

⁵ Version 3, 21 March 2016. For a concise explanation see also paragraph 2.3 of the *National Referral Mechanism Pilots: Multi-Disciplinary Panel guidance* Version 2, 2 June 2016 at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/527391/2016-06-02_panel_guidance_v2.pdf

⁶ See further Office for Security and Cooperation in Europe 13 May 2004 *National Referral Mechanisms - Joining Efforts to Protect the Rights of Trafficked Persons: A Practical Handbook* available at <http://www.osce.org/odihr/13967> (accessed 5 June 2015).

⁷ See, for example ILPA’s Trafficking and National Referral Mechanisms: ILPA paper following the UK Border Agency workshop of 12 May 2008 <http://www.ilpa.org.uk/resource/13090/uk-border-agency-trafficking-and-national-referral-mechanisms-ilpa-paper-following-the-uk-border-age> and ILPA’s submission to the Home Office Review of the National Referral Mechanism, endorsed by the Anti-Trafficking Legal Project, 31 July 2014, available at <http://www.ilpa.org.uk/resources.php/29120/ilpa-submission-to-the-review-of-the-national-referral-mechanism-endorsed-by-the-anti-trafficking-le> (both accessed 5 June 2015).

⁸ Directive 2011/35/EC Article 11; Council of Europe Anti-Trafficking Convention Article 10.

⁹ Directive 2011/35/EC Article 11, 13 and 14, CoE Anti-Trafficking Convention Article 10.

¹⁰ Directive 2011/35/EC Article 11, Council of Europe Anti-Trafficking Convention Article 13.

¹¹ *Ibidem*.

¹² Available at <http://www.osce.org/odihr/44346>

“... we are open to changes from the existing system. We have committed to piloting a range of changes to the N[ational] R[eferral] M[echanism] in light of recommendations made by the recent review, which will include incorporating the “reasonable grounds” decision into the initial referral. In practice, this would have the effect of providing earlier access to legal aid because “reasonable grounds” is the trigger by which that would happen. Any changes to the N[ational] R[eferral] M[echanism] would be reflected in the provision of legal aid and could be made through secondary legislation. ¹³

The descriptions of the pilots suggest that persons are still not getting access to a lawyer early enough. We consider that identification would be supported if entitlement to legal aid could be triggered by an assessment that the standardised indicators of trafficking or enslavement as per the National Referral Mechanism referral form are met. The reason given by the Lord Bates for resisting a pilot to try this was

“I am concerned that providing access to legal aid without any link to the N[ational] R[eferral] M[echanism] may encourage some victims to not opt for the support available to them. Opening up legal aid to those not in the process would not only risk incorrect use of the system but would mean that individuals could bypass the safeguarding system in place for them, and risks individuals remaining in situations of exploitation. ...” ¹⁴

This is confused. As identified in the final report of the review of the National Referral Mechanism¹⁵ not everyone will want to enter the National Referral Mechanism. But with advice on their immigration position and a realistic assessment of their chances of regularising the stay in the UK, some trafficked and enslaved persons may conclude that engaging with both the immigration authorities and with the National Referral Mechanism is rational and appropriate.

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 made provision for a system of exceptional funding for cases that would otherwise be outside the scope of legal aid. This was held to be operating unlawfully in the case of *Gudanaviciene*.¹⁶ Examples of cases refused exceptional funding cited therein include cases of persons lacking capacity two pre-“reasonable grounds decision” trafficking cases. The Court of Appeal said in its judgment on exceptional funding for legal aid in *Gudanaviciene*:

There is force in the argument that without legal advice some (perhaps many) potential V[ictims] O[f] T[rafficking] will keep away from the N[ational] R[eferral] M[echanism] process when they would otherwise have entered it.

The Government’s review of the National Referral Mechanism said

6.3.11 The proposed changes to the National Referral Mechanism require consideration of provision of legal advice on referral rather than at reasonable grounds decision. Access to legal aid is available for asylum seekers on application for asylum and as a result human trafficking victims may claim asylum as a way of obtaining early legal aid. There is unlikely to be a huge increase in the cost of legal aid because a large majority of non-EEA victims are already claiming it through the asylum process.

¹³ HL Report 23 Feb 2015, col 1526.

¹⁴ *Ibid.*

¹⁵ *Op.cit* at 4.2.9.

¹⁶ [2014] EWCA 1622.

Uneven patterns of referral¹⁷ suggest that not all first responders are aware of the established¹⁸ trafficking indicators and the trigger for a referral into the National Referral Mechanism.

It is our experience that practice varies considerably between different police forces in different areas. Trafficked persons have inappropriately been subject to prosecution including for offences which are a manifestation of their exploitation. See e.g. *R v O* [2008] EWCA Crim 2835; *R v L and Ors* [2013] EWCA Crim 991.

There are documented problems with the quality of National Referral Mechanism decisions.¹⁹ There is no right of appeal against this decision; the only way to challenge it is through judicial review. These means less oversight of the quality of decisions. Fewer decisions by courts and tribunals mean fewer opportunities for feedback from that source on the quality of decisions.

Children

The exploitation of children is child abuse and that any response to it must be embedded within existing child protection systems. We underscore, as we have done so many times before, the importance of guardians for trafficked children *inter alia* competent as a matter of law to give instructions in the child's best interests to legal representatives where the child is not able to do so.

From a child protection point of view, consideration of a referral is the point at which a child has been flagged up as showing indicators of trafficking. The care planning process thus must be alive to the risks posed to them in this context, particularly the risks of re-trafficking, which are live even before they are formally identified as having positive Reasonable Grounds decisions.

The frequency of age disputes in the UK risks undermining the protection afforded to trafficked children. Where children are identified, the response should be immediate, as described in the UN Committee on the Rights of the Child General Comment No. 6.

4.1 Wherever unaccompanied minors are detected, they should be separated from adults, to protect them and sever relations with traffickers or smugglers and prevent (re)victimisation. From the first encounter, attention to protection is paramount, as is early profiling of the type of minor, as it can help to identify the most vulnerable unaccompanied minors. Applying the different measures provided for by the legislation and building the trust are indispensable to gain useful information for identification and family tracing, ensuring that unaccompanied minors do not disappear from care, identifying and prosecuting traffickers or smugglers. Unaccompanied minors should always be placed in appropriate accommodation and treated in a manner that is fully compatible with their best interests.

In England, the evaluation of the pilot of advocates for trafficked children has concluded that they should not be provided²⁰, despite the independent evaluation of the trial, conducted by the

¹⁷ *Hidden in plain sight*, *op.cit.* at 2.2.

¹⁸ See e.g. UN Office of Drugs and Crime *Human Trafficking Indicators* http://www.unodc.org/pdf/HT_indicators_E_LOWRES.pdf (accessed 22 July 2014)

¹⁹ Anti-Trafficking Monitoring Group, 2013, '*Hidden in plain sight*'.

²⁰ See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486693/53019_Un-num_Report_PRINT.pdf

University of Bedfordshire²¹, finding that the service was important in “ensuring clarity, coherence and continuity” for children and the services around them. It stated the advocates’ trial was “successful” and noted a number of beneficial outcomes for children. Most importantly, children themselves found the role of the advocate was positive.

The extent of ILPA’s engagement with Border Force and what more they could be doing

We have little to no engagement with the Border Force through set piece meetings and, as described above, limited experience of cases where trafficked persons have been identified at the border. We are aware from such experience as we do have that there have been cases where it has been in the course of carrying out other work, such as intense surveillance for national security purposes, that trafficked persons have been identified, underscoring the importance of training all Border Force officials on indicators of trafficking.

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²¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/486138/icta-horr86.pdf