



Rights and Recourse

A Guide to Legal
Remedies for Trafficked
Persons in the UK

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Abbreviations

AIA 2004	Asylum and Immigration (Treatment of Claimants, etc.) Act 2004
CPR	Civil Procedure Rules Criminal Procedure Rules
CJPA 2001	Criminal Justice and Police Act 2001
EAT	Employment Appeal Tribunal
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ERA 1996	Employment Rights Act
ET	Employment Tribunal
HRA	Human Rights Act
HSWA 1974	Health and Safety at Work Act 1974
IANA 2006	Immigration, Asylum and Nationality Act 2006
LA 1980	Limitation Act 1980
NGO	Non-Governmental Organisation
NIAA 2002	Nationality, Immigration and Asylum Act 2002
NMWA 1998	National Minimum Wage Act 1998
NRM	National Referral Mechanism
POCA 2002	Proceeds of Crime Act 2002
SCA 1981	Supreme Court Act 1981
SOA 2003	Sexual Offences Act 2003
SOCPA 2005	Serious Organised Crime and Police Act 2005
UNODC	United Nations Office on Drugs and Crime
YJCEA 1999	Youth Justice and Criminal Evidence Act 1999

Preface

This Guide aims to be a practical manual for lawyers and social service providers by presenting an overview of the legal remedies available to trafficked persons under UK and international law.

It is composed of the following chapters:

- Chapter 1 introduces the key concepts underlying the idea of compensation for trafficking victims.
- Chapter 2 presents important concepts for legal service providers to understand in the representation of a trafficking victim.
- Chapter 3 examines the nature of criminal proceedings brought against a trafficker and the victim's role in the criminal justice process.
- Chapter 4 provides an overview of the chief international and regional legal instruments focused on human trafficking, as well as the relevant UK legislation, and briefly highlights major provisions in each.
- Chapter 5 discusses the procedural and evidential issues involved in bringing a civil claim on behalf of a trafficking victim, including the burden and standard of proof, and also examines the possible remedies available to trafficking victims.

In addition, the guide contains practical annexes with examples of usage of the various methods for compensation for trafficked persons. The publication has been designed so that these annexes can be added to and detached when needed, in an attempt to make this guide a living document.

This Guide is not intended to serve as a replacement for independent research of legal claims and strategy. .

Glossary

Compensation¹	Financial payment made to an individual for the loss, injury or harm suffered as a result of his or her trafficking experience.
Legal Remedy	See definition under “Compensation”.
Tort	A wrongful act, including intentional acts and accidents, for which the legally responsible (or “liable”) party can be sued for damages in a civil court.
Trafficking Protocol	The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime.

- 1 Particularly instructive is the principle delineated in the OHCHR’s *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, which provides that compensation should be provided for any economically assessable damage, such as:
- (a) Physical or mental harm;
 - (b) Lost opportunities, including employment, education and social benefits;
 - (c) Material damages and loss of earnings, including loss of earning potential;
 - (d) Moral damage;
 - e) Costs required for legal or expert assistance, medicine and medical services, and psychological and social services.
- UN Document E/CN.4/2005/L.10/Add.11, 19 April 2005.

1 INTRODUCTION

Persons who are trafficked are subjected to a range of physical, mental and economic abuses, including emotional trauma, physical suffering and unpaid wages. Many are raped, beaten, threatened with physical violence and deportation and forced to work long hours. Consequently, the ability of a trafficked person to pursue and receive compensation is significant at a number of levels:

- At a *societal* level, awarding compensation acknowledges that trafficking is a crime;
- At an *individual* level, the victim's pain and suffering are acknowledged and compensation can constitute a first step towards overcoming trauma inflicted and abuses suffered;
- At a *practical* level, compensation can assist victims in rebuilding their lives;
- At a *retributive* level, compensation paid by traffickers can constitute a form of punishment and deter other traffickers.²

Both international and domestic law recognise the right of trafficked persons to pursue compensation for their sufferings. The UN High Commissioner for Human Rights' "Recommended Principles and Guidelines on Human Rights and Human Trafficking" state that:

Trafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies. This right is often not effectively available to trafficked persons as they frequently lack information on the possibilities and processes for obtaining remedies, including compensation, for trafficking and related exploitation. In order to overcome this problem, legal and other material assistance should be provided to trafficked persons to enable them to realise their right to adequate and appropriate remedies.³

2 United Nations Office on Drugs and Crime, *Toolkit to Combat Trafficking in Persons*, October 2008, p. 404, available at http://www.unodc.org/documents/human-trafficking/HT_Toolkit08_English.pdf [hereinafter UNODC Toolkit 2008].

3 UN Document E/2002/68/Add.1, Guideline 9, 20 May 2002.

With the ratification and implementation of the Council of Europe Convention Against Trafficking in Human Beings (CoE Convention), the issue of human trafficking has consistently been at the forefront of the Home Office's agenda. The Convention outlines specific obligations with regard to compensation for trafficked persons:

Article 15 – Compensation and legal redress

- 1. Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand.*
- 2. Each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law.*
- 3. Each Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators.*
- 4. Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims.⁴*

Whilst the Government has done much to implement laws criminalising human trafficking, it has failed to address adequately the provision of legal remedies and compensation for trafficked persons. The Joint Committee on Human Rights has recognised the shortcomings in UK policy and practice to ensure that trafficked persons have access to the necessary resources to bring compensation claims, stating that: "The failure to provide access to adequate reparation, particularly compensation, to victims of forced trafficking in the UK is an important flaw in the current legal regime that should be urgently addressed."⁵

4 Council of Europe Convention on Action Against Trafficking in Persons Explanatory Report (CETS No. 197), Article 15, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm>.

5 Joint Committee on Human Rights, *Human Trafficking: Twenty-Sixth Report of Session 2005–6*, Volume II: Oral and Written Evidence.

To date, compensation is still the exception rather than the rule for trafficked persons; only a tiny fraction has successfully received awards in the UK. Compensation remains an elusive right for a number of reasons: lack of knowledge about legal rights, limited access to legal advice, fear of reprisals from the traffickers, or exclusion from legal remedies due to irregular immigration status. In light of these obstacles and limited legal precedent, undertaking representation of trafficked persons to pursue compensation requires perseverance, creativity and dedication throughout the process.

1.1 Importance of Compensation

Trafficked persons have a right to justice through criminal and civil law. In England, criminal laws allow the state to prosecute the trafficker for the exploitation of others, while civil laws provide trafficked persons with the ability to claim compensation or restitution from their traffickers. Some of the damages and losses which a trafficked person may seek to recover through civil proceedings include:⁶

- Abuse and offences committed against the individual (i.e. physical or mental harm including pain, suffering and emotional distress);
- Money taken from the individual which he or she earned legitimately;
- Money taken from the individual which was acquired in the course of activities that he or she was instructed to carry out and worked to earn, even if the activities were not legal (e.g. through prostitution);
- Unpaid or underpaid wages or their equivalent in terms of the time which the individual was obliged to spend earning money for a trafficker or exploiter;
- Earnings or other property to which the individual was entitled but that were held by the traffickers or exploiters and not given back when the individual left their control;
- Lost opportunities, including education and loss of earnings potential;
- Harm to the reputation or dignity of the individual, including harm that is likely to continue in the future (e.g. as a result of stigmatisation);
- Medical and professional services related to physical, psychiatric or psychological care, including psycho-social counselling;
- Physical and occupational therapy or rehabilitation;
- Costs of transportation and residential care or temporary housing;
- Fees and other costs for a legal representative and expenses incurred in relation to legal proceedings by the legal representative, the individual or his or her family; and

6 UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, 2006, p. 101, available at http://www.unicef.org/ceecis/UNICEF_Child_Trafficking_low.pdf.

- Costs incurred by the individual and members of her or his family in the course of finding out what has happened to him or her or in making suitable arrangements upon leaving the trafficking situation.

Thus, civil damages sought by trafficked persons may be quite substantial. For example, in one civil case brought by a trafficked person in the United States, the jury awarded the claimant \$825,000 (£550,000), including \$551,000 in compensatory damages and \$275,000 in punitive damages. The claimant, a domestic worker, alleged involuntary servitude, false imprisonment, invasion of privacy, negligence, fraud and violations of Californian wage and hour laws, as well as assault and battery, stating that her employer regularly slapped her and pulled her hair, forced her to sleep on a dog bed and paid her only \$300 despite being forced to work 18-hour days.⁷ The total award amounted to approximately \$1.65 million under a provision in Californian law allowing for double damages where an employer has fraudulently induced an employee to change residence.⁸

1.2 Current UK Policies on Human Trafficking and Compensation

Most of the UK human trafficking legislation is still quite new and largely untested. The growing awareness, intelligence-gathering efforts and responses to the trafficking problem in the UK have focused mostly on trafficking for sexual exploitation. Significant knowledge gaps still exist with respect to labour trafficking in the UK and the scope of the problem.⁹ The first labour trafficking pilot was launched in May 2008, nearly four years after the labour trafficking law came into force, but as of January 2010, there have been only seven convictions for trafficking for forced labour.

Moreover, the anti-trafficking legislation is in need of additional refinement before it can be successfully leveraged. For example, police and prosecutors have unanimously

7 *Ruiz v. Jackson*, L. A. County Super. Ct. 26 August 2004).

8 Law Reporter, *Woman Forced into Slavery Wins Jury Verdict Against California Couple*, November 2004, available at http://findarticles.com/p/articles/mi_qa3898/is_200411/ai_n9462798.

9 See e.g., Dowling, S. et al., *Trafficking for the Purposes of Labour Exploitation: A Literature Review*, October 2007, available at <http://www.homeoffice.gov.uk/rds/pdfs07/rdsolr1007.pdf>.

reported difficulties in obtaining convictions for the offences of trafficking for sexual exploitation and trafficking for forced labour. As a result, traffickers are often prosecuted under different criminal legislation such as controlling prostitution, false imprisonment, rape and assault. Intent is difficult to prove under English law, as the prosecution must show that the defendant possessed, from the beginning of the relationship, the intent or belief that an individual would or would likely be exploited in the UK. As a July 2007 CEOP report pointed out, "Given the difficulty in proving intent to exploit of a facilitator, often many criminal cases that are possibly trafficking cases are prosecuted as simply facilitation cases," which carry less stringent penalties.¹⁰ Additionally, the legislation on trafficking of children for non-sexual exploitation, including forced labour and removal of organs, is problematic, as it requires proof that the child was requested or induced, which is not legally possible to prove with very young children and babies. Lawmakers are working to address this loophole.¹¹

Currently, there is no standard procedure in place for helping victims obtain legal redress for their injuries suffered as a result of their trafficking experiences. Information from police, lawyers and support workers indicated that compensation is approached on a case-by-case basis and victims are not consistently informed of their legal options. Additionally, it appears that the future of dedicated anti-trafficking task forces to prosecute offenders and assist victims remains unclear. In March 2010, the Metropolitan Police closed down the Human Trafficking Team (HTT), the country's only specialist operational unit, after just four years in operation, as a result of the decision to transfer responsibility to the newly created SCD9. Home Office funding for Operation Maxim, including the HTT, ended in April 2010. Funding from the Home Office has reduced over the past two years from £1.8m to the 2009/10 level of £435k. The Home Office has made it clear that there is no possibility of further funding being made available.¹²

10 Child Exploitation and Online Protection Centre (CEOP), *A Scoping Report on Child Trafficking in the UK*, July 2007, p. 19, available at <http://www.homeoffice.gov.uk/documents/ceop-child-traffick-report-0607?view=Binary>.

11 *Ibid.*, p. 55.

12 <http://www.mpa.gov.uk/committees/mpa/2010/100128/07/>

2 UNDERSTANDING THE CLIENT

The best legal representation of a trafficked person requires a comprehensive understanding of the client's background, experiences and exploitation suffered, as these factors bear directly on the type of claims and remedies that may be available to the individual to pursue. A trafficked person is first and foremost a victim of a serious human rights violation and should be viewed as such for purposes of compensation. The lawyer should exercise appropriate sensitivity and patience in all of his or her interactions with the client, understanding that the client may likely still be traumatised by his or her experiences. The level of trauma will depend on the individual and the severity of abuse or exploitation he or she endured at the hands of the trafficker.

Additionally, the need for comprehensive assistance to trafficked persons cannot be emphasised enough. As such, it is critical that any practitioner representing a trafficked person in criminal or civil proceedings ensures that, in addition to legal representation, the client has access to appropriate support mechanisms, including an interpreter, medical care, counselling, food and shelter, protection from his or her traffickers, access to immigration services, and contact with family and friends.

2.1 Difference Between Trafficking and Smuggling

Human trafficking and smuggling are often confused and sometimes incorrectly used interchangeably. The two, however, are legally distinct issues. Human smuggling is the facilitation, transportation, attempted transportation or illegal entry of a person(s) across an international border, in violation of one or more countries' laws, either clandestinely or through deception, such as the use of fraudulent documents.¹³ Beyond the country or state whose immigration laws have been broken, there is no victim in the traditional sense. Human smuggling is conducted in order to obtain a financial or other material benefit for the smuggler, and a fee is usually paid to the smuggler either in advance or upon arrival of the person at the destination. Human smuggling generally occurs with the consent of the person(s) being smuggled, who often pay large sums of money. Once in the country of their final destination they will generally be left to their own devices.

¹³ *Council of Europe Convention on Action Against Trafficking in Persons Explanatory Report* (CETS No. 197), para. I.a.7, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/197.htm>.

Unlike smuggling, which is often a criminal commercial transaction between two willing parties, human trafficking involves force, threats and deception and specifically targets the trafficked person as an object of criminal exploitation for labour or services. Thus, there is an identifiable victim who is subject to involuntary servitude, as the law does not recognise consent to being enslaved or exploited in slave-like conditions. Human trafficking does not require an illegal border crossing, nor is it necessarily transnational, such as in cases of internal trafficking.

In practice, it may be difficult to distinguish between trafficking and smuggling for several reasons:¹⁴

- Smuggled migrants may become victims of trafficking;
- Traffickers may also act as smugglers and use the same routes for both trafficking and smuggling; and
- Conditions for smuggled persons may be so bad that it is difficult to believe they consented to it.

2.2 Common Characteristics of Trafficked Persons

Traffickers often prey on individuals who may be vulnerable because of poverty, underdevelopment and lack of equal opportunity. Other vulnerable groups include migrant workers, whether foreign or national, legally or illegally present in the country.¹⁵ Included within the category of migrant workers may be domestic workers and seasonal, subcontracted or temporary workers.

These vulnerable populations share a number of common characteristics, including:

- Physically, socially and politically weak, with little or no access to social safety nets;
- Poorly organised and represented, often not at all;
- Regularly subject to discrimination, often also to abuse;
- Typically work in physical, geographical, social or cultural isolation; and
- Easily manipulated, intimidated and controlled.

Victims may be lured through false promises of good working conditions and high pay as domestic workers, factory and farm workers, restaurant or construction workers,

14 UNODC Toolkit 2008, *supra note 2*.

15 Solidarity Center, *Facts about Migration and Human Trafficking*, available at http://www.solidaritycenter.org/files/migration_factsheet3.pdf.

nannies or care givers. Many suffer a range of abuse, including physical and mental abuse, rape, sexual exploitation, beatings, starvation and threats to family members. Despite the trauma and hardships they face, an overwhelming number of trafficked persons remain undetected because perpetrators effectively employ strategies to isolate victims and prevent them from coming forward. Additionally, law enforcement may not be familiar with how to recognise or respond to trafficking victims. This failure to identify victims causes secondary victimisation and compounds the victims' trauma.¹⁶

Even once a trafficked person has been properly identified, a number of challenges must be confronted, such as establishing a relationship of trust. A trafficking victim's attitude towards law enforcement, legal practitioners and the legal system may be heavily influenced by prior interactions with authorities upon leaving or escaping his or her trafficking experience.¹⁷ For example, a trafficked person who was detained in an Immigration Removal Centre and treated as a criminal or illegal immigrant would understandably have deep-rooted concerns about whether he or she would be treated fairly by the law in the future or whether anyone in a position of authority would ever prove trustworthy again. Additionally, trafficked persons may be unclear as to the role of each of the professional support individuals who endeavour to assist them and may not perceive themselves as victims because they are unaware of their rights. Thus, legal and social service providers should be sensitive to the victim's reluctance to trust unfamiliar individuals, regardless of their role or the services they offer. Service providers should also clearly explain their role as advocate to the individual and create a non-judgmental and non-threatening environment that aims to make the victim feel as comfortable as possible.

The individual may be hesitant to speak of the trafficking experience out of fear of deportation, fear for the safety of family members and fear of being judged by others. Initial contacts with law enforcement and service providers may yield little or false information about the victim's experiences; instead the victim may repeat a story that the trafficker has coached her or him to say.¹⁸ As a result of the ongoing trauma,

16 United Nations Office on Drugs and Crime, *Trafficking in Persons: Global Patterns*, April 2006, p.75, available at http://www.unodc.org/pdf/traffickinginpersons_report_2006-04.pdf.

17 Aron, L., Zweig, J. and Newmark L., *Comprehensive Support Services for Survivors of Human Trafficking: Findings from Clients in Three Communities*, Urban Institute, June 2006, p. 10, available at http://www.urban.org/UploadedPDF/411507_human_trafficking.pdf.

18 International Association of Chiefs of Police, *The Crime of Human Trafficking: A Law Enforcement Guide to Identification and Investigation*, November 2006, available at <http://www.theiacp.org/documents/pdfs/RCD/CompleteHTGuide.pdf>.

trafficked persons are unlikely to be able to talk about their experiences in an organised, linear way. A lawyer should not expect the client to be able to tell her story in one meeting. On the other hand, the client's story may emerge in more detail as she recovers and receives counselling.¹⁹

2.3 Services and Benefits Available to Trafficked Persons

As with any crime victim, trafficked persons have multiple and wide-ranging service needs as a result of their experiences. Many trafficked persons do not speak English and have little understanding of British culture and the legal system, exacerbating their isolation and dependence on others.

At present, referrals and support services in the UK are not centralised, but rather handled by a mix of organisations. The police are generally the primary referral agency, but other bodies have also received a significant number of referrals, including NGOs, lawyers, and the UK Border Agency. Currently, there are no organisations with the sole remit of protecting and providing support to all trafficked persons. Women who have been trafficked into sexual exploitation or domestic servitude in the UK have access to support services through the government-funded scheme known as the POPPY Project, which is run by the charity Eaves. The scheme, which has capacity to accommodate 54 women and provide outreach support to a further 45 women, provides food and safe housing, access to medical and psychological counselling services, resettlement support, educational information and support accessing legal services.²⁰ Support services for women trafficked into sexual exploitation are also available through other organisations such as the Salvation Army and the Medaille Trust.

Only a fraction of the women who are trafficked into the UK for sexual exploitation have access to the specialised safe houses necessary for their recovery and rehabilitation, recognised in 2008 in the US State Department's Trafficking in Persons report.

Similarly, there is a shortage of support services available to persons trafficked for forced labour. Following a pilot to support persons who have been trafficked for labour

¹⁹ *Ibid.*

²⁰ POPPY Project, available at http://www.eaves4women.co.uk/POPPY_Project/POPPY_Project.php.

exploitation, Operation Tolerance, which ran from 1 May to 31 December 2008, formal assistance and services for labour trafficked persons have been partially implemented only.²¹ The NGO Kalayaan provides advocacy and support services for migrant domestic workers in the UK, but is able to assist those who have entered the country legally on a domestic worker visa only. The POPPY Project provides support to six women trafficked for domestic servitude, and Migrant Helpline provides support to persons trafficked for other forms of forced labour.

Support services for child trafficked persons are also inadequate. According to one Member of Parliament, “in many ways, children are treated worse than adults under the system.”²² Child victims are put into social care rather than specialised safe houses, but they often disappear from care, sometimes within days or even hours, making them extremely vulnerable to re-trafficking. A UNICEF report found that 183 of the 330 child-trafficked persons whom the police found in the UK later went missing.²³

2.4 Importance of Legal Representation for Trafficked Persons

The UK legal system does not recognise a crime victim as a party to any criminal proceedings; rather, this is the sole arena of the Crown Prosecution Service and defence counsel. Consequently, a crime victim has no right to representation and no legal status.²⁴ Nevertheless, the provision of legal assistance and representation for trafficked persons throughout criminal proceedings is critical to protect, support and inform individuals of their rights and role and to increase the likelihood of a successful prosecution. Indeed, according to the UNODC Toolkit to Combat Trafficking in Persons,

21 Home Office and Scottish Executive, *UK Action Plan on Tackling Human Trafficking*, March 2007, updated July 2008, pp.21-22, available at <http://www.homeoffice.gov.uk/documents/human-traffick-action-plan?view=Binary>.

22 House of Commons Hansard Debates for 8 July 2008, Comment of Mr Peter Bone, available at <http://www.parliament.the-stationery-office.com/pa/cm200708/cmhansrd/cm080708/halltext/80708h0006.htm>.

23 UNICEF and ECPAT UK, *Rights Here, Rights Now: Recommendations for Protecting Trafficked Children*, September 2007, p.2, available at <http://www.unicef.org.uk/campaigns/publications/pdf/rightshere.pdf>.

24 This is in contrast to the system of *partie civile* in civil law countries such as France and Italy, which recognises crime victims as a full party to a criminal case and allows them to attach civil proceedings to the criminal case and thus seek reparation through the proceedings.

“there is a clear relationship between these victims’ access to legal representation and successful prosecution outcomes.”²⁵

Trafficked persons require legal assistance when they consent to act as a witness in a criminal prosecution of the trafficker or if they have breached immigration laws upon their entry into the UK. The lawyer can directly address the client’s fears in a confidential manner and act as a buffer for the client to hostile questioning or evidence gathering methods used by defence. The lawyer also plays an important role in preparing the client if she or he is to testify as a witness at the criminal trial, informing her or him of her or his right to pursue a compensation order upon the conviction of a defendant and ensuring that she or he receives the full support of the witness service.

25 UNODC, *Toolkit to Combat Trafficking in Persons*, October 2008, p. 402, available at http://www.unodc.org/documents/human-trafficking/HT_Toolkit08_English.pdf

3 EDUCATING AND ADVISING THE CLIENT

In representing a trafficked person, a lawyer faces the challenging task of explaining the English legal system to a client with little or no legal knowledge and potential distrust of law enforcement. Educating the client about their legal options will enable him or her to make an informed choice that best meets their objectives and their needs.

3.1 Identifying the Client's Objectives

Once the client understands their options within the framework of English law, the lawyer's next task is to determine the client's legal objective. Each individual will have different needs and goals. Is it to receive financial compensation as quickly as possible in order to put the experience behind them? Is it an apology from the trafficker who caused them harm?

It should not be automatically assumed that the client is interested in pursuing compensation, as attitudes of trafficked persons may vary widely. From the victim's perspective, the need for compensation is driven by more than solely financial gain and it is rarely their first priority, as many have pressing needs involving their safety, physical or mental health. In some cases, trafficked persons are simply not interested in receiving compensation and wish to forget about their experiences. Others feel that no amount of money could compensate for the trauma and suffering they have endured or have other needs that are so pressing that they are unable to consider it. In other cases they may be desperate to recover unpaid wages as a means of supporting themselves and their family members or to escape persistent debt bondage. Some victims want recognition from society for the harm they have endured and "closure."

Even if the client's primary goal is compensation, he or she may want the compensation to come directly from the trafficker rather than from a state compensation fund. In such a case, a criminal compensation order or civil suit may best suit the client's objectives rather than seeking an award under the national Criminal Injuries Compensation Scheme (CICS), which is paid out through government funds. If the client wishes to obtain compensation as quickly as possible with minimal involvement in the legal proceedings, on the other hand, then an application for an award to the Criminal Injuries Compensation Authority may be the best option.

A client's choice will necessarily be influenced by their emotional well-being and willingness to commit time and resources to pursuing a remedy. Pursuing any legal remedy will require the client's investment of time and energy and, to some extent, may be a reminder of traumatic experiences. Thus, filing a civil suit, which would bring the plaintiff and defendant face to face in an adversarial setting, is not the appropriate legal remedy for every trafficked person.

Deciding which legal option to pursue is complicated by a number of considerations. The client's immigration status must first be considered. Under the current law, there is no specific statutory right for a trafficked person to remain in the country for legal proceedings. In the July 2008 "Updated Action Plan on Tackling Human Trafficking", the government announced its intention to implement a recovery and reflection period of 45 days for the benefit of trafficked persons. The very short duration of a 45-day reflection period, however, directly affects an individual's ability to consider and pursue remedies under UK law. As with most legal remedies, each of the options discussed below is most effectively and realistically pursued if the claimant is present in the country. A 45-day reflection period presents difficulties and logistical challenges as the trafficked person must return to her country of origin without having sufficient opportunity to consider compensation possibilities.

3.2 Immigration Relief

Under the CoE Convention the UK does now have a specific residence permit scheme for trafficked persons. Requests to stay in the UK must be based on personal circumstances or to enable the person to assist with legal proceedings. The former must be requested by the individual, and the latter usually comes from the police or the Crown Prosecution Service.²⁶ Otherwise, trafficked persons subject to immigration control are not entitled to remain in the UK purely on the basis of their status as a victim of trafficking.²⁷

26 Section 146 of the Criminal Justice and Immigration Act 2008 provides that the Secretary of State does not automatically deport a person where (s)he thinks this would be contrary to the UK's obligations under the Convention.

27 *Memorandum by the Home Office, Response to JCHR's Sixth Progress Report*, July 2006, available at <http://www.parliament.uk/documents/upload/BILLS%2006-07%2097%20Response%20to%20JCHR%20Report.pdf>.

● *Asylum*

The procedure for granting asylum in the UK has become increasingly stringent over the years. The NIAA 2002, and later the AIA 2004, narrowed down the eligibility for asylum seekers, where only persons qualifying under the 1951 Convention Relating to the Status of Refugees (the Refugee Convention) are eligible for asylum. To be recognised as a refugee, the individual must have left his or her country and be unable to return because of a well-founded fear of persecution due to:

- Race;
- Religion;
- Nationality;
- Political opinion; or
- Membership of a particular social group.²⁸

The principle of non-refoulement, or non-return, stems from Article 33 of the Refugee Convention, and prohibits the deportation of refugees to a country in which he or she may be at risk of persecution.

Additional restrictions under UK law include the introduction of reporting requirements for asylum seekers, restrictions on multiple appeals, allowing certain applicants to be deported prior to consideration of their appeals and the introduction of a list of “safe countries.”²⁹

In practice, trafficked persons are granted asylum only on a limited basis.³⁰

● *Humanitarian protection*

In light of the difficulty of obtaining asylum, humanitarian protection is generally a more realistic path for victims of trafficking. Humanitarian protection is available to those who, though not refugees, would face a serious risk to life through the death penalty, unlawful killing or torture, inhuman or degrading treatment or punishment if removed

28 United Nations Convention Relating to the Status of Refugees, 28 July 1951 (189 UNTS 137), Art. 1(A)2.

29 See e.g., Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

30 POPPY Project and Asylum Aid, *Hope Betrayed: An Analysis of Women Victims of Trafficking and Their Claims for Asylum*, February 2006, p. 10, available at http://www.eaves4women.co.uk/POPPY_Project/Documents/Recent_Reports/Hope%20Betrayed.pdf.

from the country. It is granted where the Home Office recognises that the risks fall outside the strict terms of the Refugee Convention but come within the scope of Article 3 of the ECHR prohibition of torture. Therefore, the principle of non-refoulement “applies to cases where people are likely to face torture, inhuman or degrading treatments perpetrated by non-State actors.” It has been further held that deportation of a person to a State “where he/she would be subjected to slavery or forced labour might raise issues under the prohibition of torture.”³¹

Even though many will be unable to qualify as refugees, trafficked persons to whom Article 3 of the ECHR applies are entitled to remain in the UK. Individuals granted humanitarian protection are given leave to remain for five years.

● *Discretionary Leave*

Those who are refused asylum and humanitarian protection may still be entitled to discretionary leave for a period of three years or less. However, one of the major considerations in granting humanitarian protection or discretionary leave may still be the willingness of the victim to cooperate with law enforcement authorities. Thus, those who refuse to cooperate in the investigation may be denied such protection.³²

Until the individual's immigration status is resolved, the choice of legal remedy available to him or her may be meaningless.

3.3 Involvement in a Criminal Case

Access to justice for many trafficked persons begins with an effective criminal investigation into a trafficking case. A critical aspect to ensuring an effective investigation requires informing victims and witnesses of court procedures. Moreover, establishing a productive and communicative relationship with the prosecution and police can greatly assist the individual in managing his or her fears. An informed and stable witness will be better positioned to provide factual information to the police and prosecution and respond to hostile questioning from the defence at trial.

Police officers, legal representatives and support workers should all ensure that trafficked persons are informed of their rights under the Code of Practice for Victims of

31 Joint Committee on Human Rights, *Human Trafficking: Twenty-Sixth Report, Oral Evidence*, p.144.

32 *Ibid.*

Crime throughout the criminal justice process.³³ Although crime victims have no legal standing during criminal proceedings, they are still entitled to specific information and services to support them throughout the criminal process. The Code, which came into effect in April 2006, requires criminal justice agencies to provide minimum standards of service and aims to ensure that crime victims are informed of the progress of the case, including when someone is arrested for the crime, charged, bailed and sentenced.³⁴ It also details the special services available for vulnerable and intimidated victims, which are particularly relevant to trafficked persons, who may be unwilling to testify if they feel their physical security continues to be threatened by the trafficker.

Some of the key requirements of the Code include:

- A right to information about the crime within specified time scales, including the right to be notified of any arrests and court cases;
- A dedicated family liaison police officer to be assigned to bereaved relatives;
- Clear information from the Criminal Injuries Compensation Authority (CICA) on eligibility for compensation;
- All victims to be told about Victim Support and either referred on to them or offered their service;
- An enhanced service for vulnerable or intimidated victims; and/or
- The flexibility for victims to opt in or out of services to ensure they receive the level of service they want.

3.4 Special Measures for Vulnerable or Intimidated Witnesses

Many trafficked persons are vulnerable witnesses because of the continued threats to their safety by their traffickers even after escaping or leaving a trafficking situation. Additionally, many individuals may have deep-seated fears about interacting with law enforcement and further confrontations with their trafficker in a courtroom. In most cases the police will determine whether a witness is in fear and should inform the

33 The Code of Practice for Victims of Crime is available at <http://www.homeoffice.gov.uk/documents/victims-code-of-practice?view=Binary>.

34 The agencies bound by the Code of Practice are all police forces in England and Wales, the Crown Prosecution Service, Her Majesty's Court Service, joint police/CPS Witness Care Units, Parole Board, Prison Service, Local Probation Boards, Youth Offending Teams, Criminal Injury Compensation Authority, Criminal Injuries Compensation Appeals Panel and the Criminal Cases Review Commission.

prosecutor, although occasionally the Witness Care Unit or the Victim Support Witness Service may provide information about a vulnerable witness.³⁵ Prosecutors must then liaise closely with the police to consider the range of options available to them and should seek to ensure that, wherever possible, the witness's fear is allayed and that they are given the requisite protection. Ideally, the discussion between the police and the prosecutor about the appropriate witness protection should occur at the pre-charge stage of the criminal proceedings.³⁶

Prosecutors must also have regard for a witness's rights under the ECHR, namely the right to life (Article 2), the prohibition of torture (Article 3) and the right to respect for private and family life (Article 8). As a public authority it is generally unlawful for the CPS to act in any way which is incompatible with a Convention right (section 6(1) Human Rights Act 1998).

Applications to the Crown Court for special measures should be made by the prosecutor within 28 days of committal or service of the prosecution case, although in some cases later applications may be made.³⁷ When an application is made, the Court must consider a number of factors before making a decision that the witness is eligible for assistance and it must be satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings.³⁸ The factors the Court considers include the alleged circumstances of the offence, the age and social background of the witness and any behaviour towards the witness on the part of the accused, likely accused or associates of the accused, and any views expressed by the witness.³⁹

Special measures for intimidated witnesses are set out in the Youth Justice and Criminal Evidence Act 1999 (YJCEA). These include:

- Screens to ensure that the witness does not see the defendant.⁴⁰

35 Crown Prosecution Service, *Legal Guidance: Witness Protection and Anonymity*, last updated 14 August 2008, available at http://www.cps.gov.uk/legal/v_to_z/witness_protection_and_anonymity

36 *Ibid.*

37 The Criminal Procedure Rules 2005, Rule 29.1(4)(c), available at <http://www.opsi.gov.uk/si/si2005/20050384.htm#29>.

38 Youth Justice and Criminal Evidence Act 1999 (c.23), s. 17(1).

39 *Ibid.*, s. 17(2) and (3).

40 *Ibid.*, s. 23.

- Allowing a witness to give evidence by live link from outside the courtroom.⁴¹
- Clearing the court gallery of most people to allow the witness to give evidence in private (legal representatives and certain others must be allowed to stay).⁴²
- Removal of wigs and gowns by judges, advocates (only applicable in the Crown Court).⁴³
- Allowing an interview with the witness, cross-examination or re-examination, which has been video recorded before the trial, to be shown as the witness' evidence in chief.⁴⁴
- Allowing an approved intermediary to help a witness communicate with the police, legal representatives and the court.⁴⁵
- Allowing a witness to use communication aids such as a symbol book or alphabet boards.⁴⁶

3.5 Witness Protection

It is an offence to intimidate or threaten any person (victims, witnesses or jurors) involved in the investigation of an offence.⁴⁷ The police can be held liable for breach of both Article 2 (Right to Life) and Article 8 (Right to Respect for Private and Family Life) of the European Convention on Human Rights, in circumstances where the police failed to offer protection to a prosecution witness who is subject to a serious threat.⁴⁸ It is sufficient for a claimant to show that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the witness from the criminal acts of a third party and that they failed to take measures which reasonably could have been expected of them to minimise or avoid the risk.⁴⁹

Witness protection is available for witnesses in both criminal and civil proceedings in very serious cases where the risk to them is so great that they may need to relocate to another part of the UK and/or change their identity.⁵⁰ Some police forces have Witness

41 *Ibid.*, s. 24.

42 *Ibid.*, s. 25.

43 *Ibid.*, s. 26.

44 *Ibid.*, ss. 27, 28.

45 *Ibid.*, s. 29.

46 *Ibid.*, s. 30.

47 Criminal Justice and Public Order Act 1994, s. 51.

48 *Van Colle v Hertfordshire Police*, [2007] EWCA Civ 325.

49 *Ibid.*

50 Serious Organised Crime and Police Act 2005, s. 82.

Protection Units, which are staffed by specially trained officers who provide protection measures to eligible witnesses. These units liaise with the Central Witness Bureau, a new service established in April 2007 which offers strategic and practical assistance to officers involved in cases of serious and organised crimes such as murder, human trafficking, terrorism, firearms, hate crimes and domestic violence.⁵¹

In some cases, the Crown Prosecution Service may decide not to pursue criminal charges against a suspected trafficker. This could be for a variety of reasons, including insufficient evidence, as the CPS has wide discretion in deciding which cases should be prosecuted. It is important that trafficked persons are at least aware of this possibility. Victims should also be informed that they have no right to appeal a decision by the Crown Prosecution Service not to prosecute. This scenario may be particularly relevant in cases of forced labour trafficking, a crime many prosecutors have found difficult to prosecute under the current Asylum and Immigration Act due to evidentiary hurdles. Some prosecutors have reported that labour trafficking is more successfully prosecuted under several other crimes such as false imprisonment, assault or kidnapping. Where this is the case and where the trafficker has identifiable alternatives, the victim may find that suing the trafficker for damages in a civil court to be a satisfactory alternative.

⁵¹ The Central Witness Bureau is a joint initiative of the Home Office, Ministry of Justice and the Crown Prosecution Service.

4 OVERVIEW OF INTERNATIONAL AND DOMESTIC ANTI-TRAFFICKING LEGISLATION IN THE UK

The emergence of international instruments and regional conventions has played an important role in raising the profile of human trafficking as a transnational organised crime and has spurred the development of domestic legislation. The following section discusses the most prominent international conventions and domestic laws concerning human trafficking.

4.1 International Legal Framework

This section mentions three international legal instruments most relevant to this publication.

4.1.1 Trafficking Protocol

The *Protocol to Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children* (also known as the Trafficking Protocol), which supplements the United Nations Convention against Transnational Organised Crime, is the first legally binding international instrument aimed at combating human trafficking.⁵² The Protocol establishes minimum standards that ratifying State Parties must adhere to in devising their anti-trafficking policy, but they are free to adopt stricter measures.⁵³ The Protocol has three main objectives:

1. To prevent and combat trafficking.
2. To protect and assist victims.
3. To promote international cooperation.

The Protocol also provides the first agreed, internationally recognised definition of human trafficking:⁵⁴

52 The full text of the Protocol is available at <http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>.

53 The Trafficking Protocol, which falls under the jurisdiction of the United Nations Office on Drugs and Crime (UNODC), was adopted by the General Assembly in its resolution 55/25 of 15 November 2000 and entered into force on 25 December 2003.

54 See note 52.

“Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of a 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.”

Under this definition, the three elements that comprise the crime of trafficking in persons are:

1. The *act* (what is done): recruitment, transportation, transfer, harbouring or receipt of persons;
2. The *means* (how it is done): threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or giving payments or benefits to a person in control of the victim; and
3. The *purpose* (why it is done): for the purpose of exploitation, which includes exploiting the prostitution of others, sexual exploitation, forced labour, slavery or similar practices and the removal of organs.

The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation is considered “trafficking in human beings” even if this does not involve any of the means outlined in the definition.

4.1.2 The Council of Europe Convention on Action Against Trafficking in Human Beings

The Council of Europe Convention on Action against Trafficking in Human Beings (CETS N° 197) is the first legally binding regional European treaty on human trafficking.⁵⁵

It was adopted by the Committee of Ministers on 3 May 2005 and entered into force on 1 February 2008 upon receiving its tenth ratification by a Council of Europe member

⁵⁵ The full text of the Convention is available at http://www.coe.int/t/dg2/trafficking/campaign/Source/PDF_Conv_197_Trafficking_E.pdf.

state.⁵⁶ The Convention builds upon the Trafficking Protocol and other international legal instruments and seeks to strengthen the protection afforded by those instruments, as well as to raise the standards which they lay down. It recognises trafficking in human beings as a major human rights issue and is intended to be comprehensive, with its main focus on the protection of trafficked persons and their rights.

Ratification of the Convention requires that States fully implement the rights, obligations and protections of the treaty into their domestic law. The UK signed the treaty on 23 March 2007 and ratified the Convention on 17 December 2008. It came into force throughout the UK on 1 April 2009, with the introduction of the National Referral Mechanism (NRM). The Convention defines human trafficking according to the Trafficking Protocol and applies to all forms of trafficking, both national and transnational, whether or not it is related to organised crime. It applies regardless of the victim's identity – whether male or female, adult or child.

Chapter 3, which pertains to the protection of victims, requires the implementation of a National Referral Mechanism, a procedure in which first responders – those likely to encounter a trafficked person in the first instance – make a referral to a “Competent Authority.” First responders include the police, immigration and customs, social services, health care professionals, prison and detention centre staff and a small number of non-governmental organisations such as the POPPY Project, the Medaille Trust and Migrant Helpline. Following this initial referral the Competent Authority determines if “reasonable grounds” are present to indicate trafficking. The victim identification process is intended to encourage the inclusion of a number of experts, including the multi-agency UK Human Trafficking Centre (UKHTC), UK Border Agency, local authorities (in the case of children), relevant NGOs and the police.⁵⁷ The Convention leaves it to the discretion of the Government to decide which bodies should act as competent authorities and

56 The first ten countries to ratify the Convention were Albania, Austria, Bulgaria, Croatia, Cyprus, Denmark, Georgia, Moldova, Romania and Slovakia. On 9, 11, 17 and 30 January 2008 respectively, France, Bosnia and Herzegovina, Norway and Malta deposited the instruments of ratification. The Convention entered into force with regard to these four countries on 1 May 2008. The Convention is open to all member States of the Council of Europe, non member States that have participated in the elaboration of the Convention and the European Community.

57 Foreign & Commonwealth Office, *Explanatory Memorandum on the Council of Europe Convention on Action against Trafficking in Human Beings*, 2008, available at <http://www.fco.gov.uk/en/about-the-fco/publications/treaty-command-papers-ems/explanatory-memoranda/explanatory-memoranda-2008/humantrafficking>

determine the process for identifying victims of human trafficking. Competent Authority case owners currently sit in the UKHTC and UKBA.

Following a positive “Reasonable Grounds” decision, a victim must be given a recovery and reflection period of at least 30 days to allow the person to recover and escape from the influence of the traffickers and to take an informed decision about co-operating with the competent authorities.⁵⁸ The UK has implemented a 45-day recovery and reflection period, during which time a person is authorised to stay in the country, even if he or she is subject to immigration control, in the form of temporary admission or temporary release for those in detention. The person is also entitled to support and assistance, such as appropriate and secure accommodation; psychological and material assistance; access to emergency medical treatment; counselling and information on their legal rights and services available to them; translation and interpretation services; assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings; and, for children, access to education.⁵⁹

Following the reflection period, the Competent Authority will establish conclusively whether or not an individual is a victim of trafficking. Renewable residence permits may be granted to those granted positive Conclusive Grounds decisions in one or both of the following circumstances: where it is deemed necessary owing to “their personal situation” or because a victim is co-operating with an investigation or criminal proceedings.⁶⁰ Those granted residence permits are entitled to support and assistance from the State, including necessary medical care, access to the labour market, vocational training and education.⁶¹ Since 1 April 2009 there have been a small number of permits issued, but whether or not they will be extended has yet to be tested.

To comply with the Convention, the UK instituted a number of legislative and non-legislative changes prior to ratification. These include:

- Primary legislation through an amendment in the Criminal Justice and Immigration Act 2008 to ensure that automatic deportation of trafficked persons under the UK

58 Art. 13.

59 Art. 12(1) and (2).

60 Art. 14.

61 Art. 12(1)-(4).

Borders Act 2007 cannot take place where it would breach the UK's obligations under the Council of Europe Convention against Human Trafficking.

- Secondary legislation to ensure compliance with the Convention through the National Health Service (Charges to Overseas Visitors) Regulations 2008 which will amend regulation 4(1) of the National Health Service (Charges to Overseas Visitors) Regulations 1989 (S.I. 1989/306) and ensure the UK meets obligations in relation to medical treatment under the Convention. Equivalent amendments will be made in Scotland, Wales and Northern Ireland.
- An amendment to the Asylum & Immigration (Treatment of Claimants, etc.) Act 2004 to correct a cross-reference to human tissue legislation through the Human Tissue (Scotland) Act 2006 (Consequential Amendment) Order 2008 (S.S.I. 2008/259).

4.1.3 EU Council Framework Decision on Combating Trafficking in Human Beings

The European Union (EU) Council Framework Decision 2002/629/JHA on Combating Trafficking in Human Beings required Member States to harmonise their domestic criminal legislation on trafficking by 2004 and to adopt the definition of trafficking consistent with the Trafficking Protocol.⁶²

A proposal for amendment of the decision has been put forward in 2009, including amendment of the definition to explicitly cover exploitation for begging and unlawful activities.

Other proposals for changes include extraterritorial jurisdiction, penalties and inclusion of a provision of compensation.

- Following the passage of the Lisbon Treaty in 2009, the proposal will need to be resubmitted and the amended piece of legislation would take the form of an EU Directive. This is expected for the first half of 2010.

62 The Council Framework Decision is available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002F0629&model=guichett.

4.2 UK Legislation

The United Kingdom does not have one comprehensive law against human trafficking, but instead relies on several different pieces of legislation. This section provides a brief overview of the legislation covering human trafficking and worker exploitation, as well as asset seizure, namely the:

- Sexual Offences Act 2003;
- Asylum and Immigration (Treatment of Claimants, etc.) Act 2004;
- Gangmasters (Licensing) Act 2004;
- Immigration, Asylum and Nationality Act 2006; and
- Proceeds of Crime Act 2002.

As of the end of 2009, there have been a total of 117 convictions related to trafficking for sexual exploitation under the Sexual Offences Act 2003.⁶³

4.2.1 Sexual Offences Act 2003

The Sexual Offences Act 2003 (SOA 2003) is the UK's first specific and comprehensive anti-sex trafficking law. Prior to the SOA 2003, sex traffickers were prosecuted under the Sexual Offences Act 1956 and the Nationality, Immigration and Asylum Act 2002. Sections 22 and 24 of the SOA 1956 criminalised procuring a woman to become a prostitute and detaining a woman against her will for unlawful sexual intercourse, but they carried a maximum sentence of only two years. Sections 30 and 31, which criminalise exercising control over a prostitute and living off immoral earnings of prostitution, carried a maximum penalty of seven years. The SOA 1956 did not contain any provisions recognising traffickers' use of force, deception or coercion.

The Nationality, Immigration and Asylum Act 2002 (NIA 2002) was intended as a stopgap measure pending major reform that eventually produced the SOA 2003.⁶⁴ Section 145 of the Act introduced an increased 14-year penalty to a person who, for purposes of gain, exercised control, direction or influence over a prostitute's movements

63 Convictions for Human Trafficking. <http://www.southyorks.police.uk/foi/disclosurelog/20090598>

64 Home Office, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain*, Section 5.28, p. 84, February 2002, available at <http://www.privacyinternational.org/issues/terrorism/library/uksecureborderssafehavens.pdf>.

in way that shows they are aiding, abetting or compelling the prostitution.⁶⁵ The NIA 2002, however, only defined trafficking in terms of controlling prostitution.⁶⁶

Overview

The Sexual Offences Act 2003 is divided into three parts. Part 1 contains new provisions about sexual offences and extends to England and Wales. Some provisions, including those covering trafficking for sexual exploitation, also extend to Northern Ireland. Part 2 contains measures for protecting the public from sexual harm and extends to England, Wales, Northern Ireland and, in large part, to Scotland. Finally, Part 3 contains general provisions relating to the Act.

Sections 57 through 59 of the Act provide that a person commits a trafficking offence when he or she intentionally arranges or facilitates a person's arrival in, travel within, or departure from the UK, intending or believing that a sexual offence will be committed.⁶⁷ The provisions attempt to cover a defendant's criminal acts even where it is intended to take place in another part of the world, provided that a trafficked person has entered the UK at some point and that the entry was facilitated by the defendant with the requisite intent.⁶⁸

The elements of the offence of trafficking into the UK for sexual exploitation are:

1. Intentionally arranging or facilitating the arrival into the UK of a person, where the perpetrator intends to do anything that would result in the commission of a relevant offence involving that person, or believes
2. That a third party is likely to do something to, or in respect of, a person that would result in the commission of a relevant offence involving the individual.
3. In both cases, the relevant offence must take place after the victim's arrival in the UK but may take place anywhere in the world.
4. "Relevant offence," as defined at subsection (1) of section 60 of the Act, includes acts done outside England and Wales and Northern Ireland which, if they had been done in either of those territories, would constitute an offence under Part 1 of the Act or under section 1(1)(a) of the Protection of Children Act 1978. It is irrelevant for the purposes of the definition whether the act in question also constitutes an offence in the country in which it is carried out.

65 Nationality, Immigration and Asylum Act 2002 (c. 41), s. 145.

66 *Ibid.*

67 Sexual Offences Act 2003, ss. 57–60.

68 *Ibid.*

● *Section 58: Trafficking within the UK for Sexual Exploitation*

The elements of trafficking within the UK for sexual exploitation are:

1. Intentionally arranging or facilitating travel within the UK of a person where the perpetrator intends to do anything to, or in respect of, that person that would result in the commission of a relevant offence involving him or her, or where the perpetrator believes that a third party is likely to do something to, or in respect of, the victim that would result in the commission of a relevant offence involving the individual.
2. In both cases, the relevant offence must take place during or after the journey but may take place anywhere in the world.

● *Section 59: Trafficking out of the UK for Sexual Exploitation*

The elements of the offence of trafficking out of the UK for sexual exploitation are:

1. Intentionally arranging or facilitating the departure from the UK of a person where the perpetrator intends to do anything to, or in respect of, that person that would result in the commission of a relevant offence involving the victim, or the perpetrator believes that a third party is likely to do something to, or in respect of, the victim that would result in the commission of a relevant offence involving the individual.
2. In both cases, the relevant offence must take place after the victim's departure and may take place anywhere in the world.

Other provisions of the SOA 2003 under which traffickers have been convicted include rape (s.1); sexual assault (s. 3); causing a person to engage in sexual activity without consent (s. 4); causing or inciting prostitution for gain (s. 52); and controlling prostitution for gain (s. 53).⁶⁹

The equivalent Scottish provisions are contained at Section 22 of the Criminal Justice (Scotland) Act 2003 under the offence of "Traffic in prostitution etc."

Child Trafficking

The trafficking of children is included under the trafficking offences contained in the SOA 2003. However, child-specific legislation covers the abuse of children through

⁶⁹ In 2002, Albanian trafficker Mustapha Kadiu was convicted of three counts of indecent assault on a female, one count of rape and one count of living on the earnings of prostitution. He was sentenced to ten years' imprisonment.

prostitution and pornography only.⁷⁰ These offences include paying for the sexual services of a child and causing, controlling or facilitating child prostitution or pornography.⁷¹ In Scotland, similar offences of engaging in child prostitution and pornography are found in sections 9 through 12 of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005.

Who is Covered by the Act?

The intent of the SOA 2003 to be far reaching in its application is captured by section 60 of the Act. Section 60 provides that the defendant either be a resident of the UK, a company under UK law or a British citizen under section 60(3).⁷² The defendant who is a UK citizen need not be resident within the UK.⁷³ This section, however, does not permit the prosecution of a foreign national committing sex trafficking offences abroad, even if he subsequently enters the UK, provided that he does not continue his operations in this country.⁷⁴ Section 31 of the UK Borders Act 2007 closes this loophole by expanding the scope of the SOA 2003 to trafficking offences conducted “whether inside or outside the United Kingdom.”⁷⁵ The Borders Act also amends the SOA 2003 to cover acts facilitating the arrival in or the entry into the United Kingdom.⁷⁶

Penalty

Trafficking a person into, within or out of the UK for purposes of sexual exploitation is punishable by up to 14 years’ imprisonment. Additionally, section 54 of the Violent Crime Reduction Act 2006 provides courts with the power to order forfeiture and detention of vehicles, ships and aircraft used in trafficking for sexual exploitation.⁷⁷

For child-trafficking offences, the penalty ranges from seven years to life depending on the age of the child. The offences of causing, facilitating or controlling the commercial sexual exploitation of a child in prostitution or pornography bears a maximum penalty of 14 years’ imprisonment.

⁷⁰ *Ibid.*, ss. 47-50.

⁷¹ *Ibid.*, s. 47.

⁷² *Ibid.*, s. 60(2) and (3).

⁷³ *Ibid.*, s. 60(3).

⁷⁴ Sexual Offences Act 2003: *A Current Law Statute Guide*, annotated by Jacqueline L. Thomas; London: Thomas/Sweet & Maxwell, 2004.

⁷⁵ UK Borders Act 2007, s. 31(4).

⁷⁶ *Ibid.*, s. 31(3).

⁷⁷ Violent Crime Reduction Act 2006 (c.38), s. 54.

4.2.2 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004

The Asylum and Immigration Act 2004 is the first UK law to criminalise forced labour trafficking.

Overview

The Act, which came into force on 1 December 2004, extends to England, Wales, Northern Ireland and Scotland.⁷⁸ The legislation introduced a new offence of trafficking for labour exploitation, including domestic slavery.⁷⁹ Forced labour trafficking offences that took place prior to 1 December 2004 have typically been prosecuted as immigration offences.

Under Section 4(1) a person commits the offence if (s)he:

- (a) arranges or facilitates the arrival in or the entry into the UK of an individual, or
- (b) arranges or facilitates onward travel within the UK by an individual (s)he believes has been trafficked into the UK, or
- (c) arranges or facilitates the departure from the UK of an individual;
- And, secondly, intends to exploit the person or believes another person is likely to.

For the purposes of the offence, a person is exploited if (s)he is:

- the victim of behaviour contravening Article 4 of the European Convention on Human Rights (slavery or forced labour);
- encouraged, required or expected to do something which would mean an offence is committed concerning organ removal;
- subjected to force, threats or deception designed to induce him/her to provide services or benefits or enable another person to acquire benefits; or
- requested or induced to do something, having been chosen on the grounds that (s)he is ill, disabled, young or related to a person, in circumstances where a person without the illness, disability, youth or family relationship would be likely to refuse or resist.

⁷⁸ Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s. 49.

⁷⁹ Ss. 4(1), (2) and (3).

Child Trafficking

There is no child-specific legislation covering the offence of trafficking for forced labour. Under section 4(4)(d), a loophole remains for those under 18 who have been trafficked for forced labour. A successful conviction of a child trafficker requires proof that the child was requested or induced to take part in the exploitation. However, because very young children and babies cannot be requested or induced and do not have the capacity to agree or comply, this requirement is problematic.⁸⁰

Who is Covered by the Act?

As with the SOA 2003, the Asylum and Immigration Act 2004 covers the actions of a UK resident, a company incorporated under UK law, or a British citizen, as defined in section 5(2). The Borders Act 2007 amends the law to include trafficking offences conducted outside the UK.⁸¹ Thus, a foreign national operating outside the UK may now be prosecuted under the Act for forced labour trafficking if (s)he arranges or facilitates the victim's travel to, within or from the UK. The Borders Act also amends the 2004 Act to cover acts facilitating the arrival in or the entry into the UK.⁸²

Penalty

A person found guilty of an offence under section 4 is liable, on conviction or indictment, to imprisonment for up to 14 years, to a fine or to both. A person found guilty on summary conviction, on the other hand, may face imprisonment for up to 12 months, or a fine not exceeding the statutory maximum or to both.⁸³ To date, there have been seven convictions for trafficking for forced labour.⁸⁴

4.2.3 Gangmasters (Licensing) Act 2004

Overview

The Gangmasters (Licensing) Act came into force on 1 October 2006 and requires that all labour providers operating in the agricultural and shellfish industries and the food

80 Child Exploitation and Online Protection Centre (CEOP), *A Scoping Project on Child Trafficking in the UK*, June 2007, p. 55, available at <http://www.homeoffice.gov.uk/documents/ceop-child-traffick-report-0607?view=Binary>.

81 UK Borders Act 2007, s. 31(2).

82 S. 31(1).

83 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, s. 4(5).

84 Convictions for Human Trafficking. <http://www.southyorks.police.uk/foi/disclosurelog/20090598>

processing and packaging sectors be licensed. The purpose of the law is to combat worker exploitation and illegal labour provider activity in response to the February 2004 drowning deaths of 21 Chinese cockle-pickers at Morecambe Bay, Lancashire. The Act establishes the Gangmasters Licensing Authority to run a register of gangmasters and enforce a licensing scheme. The Act and the associated Gangmasters (Licensing Authority) Regulations 2005 apply to work done anywhere in the UK, along the shoreline and in UK coastal waters.

The Act establishes four offences:

1. It is an offence to operate without a licence.⁸⁵
2. It is an offence to obtain or possess a false licence or false documentation with the intent of deceiving another into believing that he or another person is a licensed gangmaster when neither of them are.⁸⁶
3. It is unlawful to use an unlicensed gangmaster unless the person can show that he made a reasonable due diligence investigation and had no reasonable grounds for believing that the gangmaster was unlicensed.⁸⁷
4. It is an offence to intentionally obstruct an enforcement or compliance officer from carrying out his duties under the Act or to give false material information to an officer.⁸⁸

Who is Covered by the Act?

As stated above, the Act covers gangmasters involved in the agricultural and shellfish industries and the food processing and packaging sectors. Significantly, the Act at present does not apply to the construction, care and hospitality industries, all sectors which attract a significant number of migrant workers but are largely left unregulated.⁸⁹

Penalty

The Act creates penalties of up to ten years' imprisonment and a fine for gangmasters who are convicted of operating without a licence or obtaining or possessing false documentation with the intent of causing another person to believe that a person acting as a gangmaster is licensed. The lesser offences of using an unlicensed

⁸⁵ Gangmasters (Licensing) Act 2004, ss. 6, 12(2).

⁸⁶ *Ibid.*, s. 12(2).

⁸⁷ *Ibid.*, ss. 13(1) and (2).

⁸⁸ *Ibid.*, ss. 18(1) and (2).

⁸⁹ BBC, *Clampdown Move on Rogue Employers*, 5 August 2008, available at <http://news.bbc.co.uk/1/hi/business/7541696.stm>.

gangmaster and obstructing the activities of an enforcement officer are punishable on summary conviction by imprisonment for up to 51 weeks, a fine or both.

As of July 2008, 61 licences have been revoked by the Gangmasters Licensing Authority for worker abuse and exploitation and failing to abide by the regulatory standards.⁹⁰ The first person to be convicted under the Act received 18 months probation and 140 hours of community service for operating without a gangmasters licence.⁹¹

4.2.4 Immigration, Asylum and Nationality Act 2006

Overview

The Immigration, Asylum and Nationality Act 2006 represents the government's latest effort to strengthen the legislation on the employment of illegal migrant workers. Under the Act, an employer who exploits illegal migrant workers or subjects them to abusive conditions for personal gain is subject to prosecution under the Act. Section 21 of the Act replaces section 8 of the Asylum and Immigration Act 1996 and criminalises a person's knowing employment of an illegal migrant worker over the age of 16.⁹² The Act also imposes a continuing responsibility for employers to ensure that any migrant workers they employ have an ongoing right to work in the UK.⁹³

Penalty

The Act introduces an increased penalty of two years' imprisonment and an unlimited fine on those convicted of knowingly employing illegal migrant workers.⁹⁴ Additionally, the Act introduces a system of civil penalties for employers of illegal migrant workers, setting forth a maximum penalty of £2,000 per illegal migrant worker.⁹⁵

90 Gangmasters Licensing Authority, *Scottish Business is Shut Down by GLA*, 10 July 2008, Note 7, available at http://www.gla.gov.uk/embedded_object.asp?id=1013382.

91 Gangmasters Licensing Authority, *Probation and Community Service for First Prosecuted Gangmaster*, 30 May 2008, available at http://www.gla.gov.uk/embedded_object.asp?id=1013361.

92 Immigration, Asylum and Nationality Act 2006, ss. 21(1) and 25(a).

93 *Ibid.*, s. 15(7).

94 *Ibid.*, s. 21.

95 *Ibid.*, s. 15.

4.2.5 Proceeds of Crime Act 2002

The Proceeds of Crime Act 2002 (POCA) provides the Crown Court with broad confiscation powers to recover financial assets that an offender has obtained from criminal conduct. The Act made the Crown Court the main venue for confiscation and related proceedings for offences committed on or after 24 March 2003. POCA is an important mechanism, but the Act does not provide a trafficked person with an additional means beyond the criminal compensation order of obtaining compensation for injuries. Indeed, where assets are recovered under the civil recovery scheme, they are not distributed to the victim of the unlawful conduct. Rather, the Act simply establishes the priority in which unlawful seized assets should be distributed where a court has made a confiscation order upon the defendant's conviction.

Overview

POCA allows for several different types of asset forfeiture: (1) confiscation proceedings, which may follow a criminal conviction, (2) civil recovery proceedings, which are brought by the Assets Recovery Agency (ARA), and (3) cash forfeiture proceedings, which take place in the Magistrates Court. Cash proceedings and civil recovery proceedings do not require a prior criminal conviction.⁹⁶

In April 2008, ARA's function with respect to civil recovery and tax investigations was transferred to the Serious Organised Crime Agency (SOCA) after the planned merger of the two bodies. The UK Serious Organised Crime Control Strategy, developed by SOCA on behalf of UK Law Enforcement, has four programmes of activity related to organised immigration crime, including a programme on "Trafficking of people," in particular women and children.⁹⁷

Under Operation Pentameter, approximately £250,000 was confiscated from traffickers in 2006.⁹⁸ Significantly, all receipts from recovered assets were transferred to the Treasury

96 This section of the Guide only discusses confiscation proceedings. For more information on disposal of assets, civil recovery proceedings and cash forfeiture proceedings, see Thomas, D. A., *Proceeds of Crime Act 2002: A Current Law Statute Guide*, London: Sweet & Maxwell, 2003.

97 House of Commons Hansard Written Answers for 01 October 2006, available at <http://www.publications.parliament.uk/pa/cm200607/cmhansrd/cm071001/text/71001w0006.htm>.

98 Joint Committee on Human Rights, Twenty-first Report of Session 2006–7, available at <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/179/17908.htm>.

and none of the assets were paid out to trafficked persons. Half of the amount was channelled to prosecution and law enforcement bodies while the other half was given to the Home Office to fund its “commitments on asset recovery,” which includes crime reduction projects.⁹⁹

Confiscation Proceedings

In order to make a confiscation order, two requirements must be met:

1. First, the defendant must either have been convicted of an offence before the Crown Court, have been committed to the Crown Court for sentence in respect of an offence under sections 3, 4, or 6 of the Powers of Criminal Courts (Sentencing) Act 2000, or have been committed to the Crown Court under section 70 of the Act.¹⁰⁰
2. Second, the prosecutor or the Director of the Assets Recovery Agency must request the confiscation order, or the court must believe it to be appropriate.¹⁰¹

The Act lays out a sequence of determinations the Court must make before it may make a confiscation order for seizure of the defendant’s criminal assets. First, the Court must first decide whether the defendant has a “criminal lifestyle.”¹⁰² Then, the Court must decide whether the defendant has benefited from his “general criminal conduct.” In making this decision, the Court must make certain assumptions for the purpose of deciding whether he has benefited from his general criminal conduct, and deciding his benefit from the conduct, unless the assumption is “shown to be incorrect” or there would be a “serious risk of injustice” if the assumption were made.¹⁰³

Once the Court has decided that the defendant does have a criminal lifestyle and has benefited from his general criminal conduct, it determines the recoverable amount by taking the benefit from the general criminal conduct as the starting point for calculation.¹⁰⁴

99 *Ibid.*

100 Proceeds of Crime Act 2002, s. 6(2).

101 *Ibid.*, s. 6(3).

102 *Ibid.*, s. 6(4)(a).

103 *Ibid.*, ss. 10(1)–(6).

104 *Ibid.*, ss. 7(1), (2).

The Court decides any question arising in connection with whether the defendant has a criminal lifestyle or whether he has benefited from his general criminal conduct on a “balance of probabilities.”¹⁰⁵

Effect of Civil Proceedings and Compensation Orders

The Court need not make a confiscation order if it believes that the victim of the crime has initiated, or intends to initiate, civil proceedings against the defendant.¹⁰⁶ However, if the Court makes both a confiscation order and compensation order under section 130 of the Sentencing Act against the same person in the same proceedings, and the Court believes he will not have sufficient means to satisfy both orders, then it must direct the defendant to pay a specified amount of compensation out of any sums recovered under the confiscation order.¹⁰⁷ The amount the Court specifies must be the amount it believes will not be recoverable because of the insufficiency of the person’s means.¹⁰⁸

4.2.6 Other Laws

In an effort to reduce demand for trafficked women, the Home Office announced in November 2008 its intention to criminalise those who pay for sex with prostitutes who are “controlled for another person’s gain.”¹⁰⁹ Anyone who knowingly pays illegally trafficked women for sex could face rape charges. This is a *strict liability* offence, which means that sex buyers may be subject to prosecution, even if they had no knowledge that the prostitute was controlled by a pimp or had been trafficked. Sex buyers who commit the new offence will get a criminal record and up to a £1,000 fine.

The Sexual Offences Act 1985 introduced two distinct offences which can be used to prosecute those who buy sex:

- kerb crawling (where someone solicits from a motor vehicle, or within the vicinity of a motor vehicle), for the purposes of prostitution, persistently or in a manner that is likely to cause annoyance to people in the neighbourhood.

105 *Ibid.*, s. 6(7).

106 *Ibid.*, s. 6(6).

107 *Ibid.*, s. 13(5).

108 *Ibid.*, s. 13(6).

109 Home Office, *Tackling the Demand for Prostitution: A Review*, November 2008, p.3, available at <http://www.homeoffice.gov.uk/documents/tackling-demand?view=Binary>.

- persistent soliciting for the purposes of prostitution (effectively kerb crawling but without a vehicle).

The “persistence” requirement has now been removed from both offences, and in the case of kerb-crawling, the alternative requirement of “in a manner that is likely to cause annoyance to people in the neighbourhood” has also been removed. These changes are intended to facilitate the prosecution of kerb crawlers in the first instance, increasing the deterrent to those who consider paying for sex on the street or in a public place.

Children Act 1989

Several provisions in the Children Act 1989 are relevant to the prohibition of trafficking, and the investigation, prosecution and punishment of traffickers. For instance, a local authority has a duty to investigate if it has a reasonable cause to believe that a child, who lives or is found in their area, is suffering from harm.¹¹⁰ Additionally, the Act establishes an offence of knowingly and without lawful authority abducting children.¹¹¹ In relation to private fostering, a local authority has authority to inspect premises used for private fostering and has the power to prohibit private fostering under certain circumstances.¹¹²

¹¹⁰ Children Act 1989 (c. 41), s. 47.

¹¹¹ *Ibid.*, s. 49.

¹¹² *Ibid.*, ss. 67 and 69.

5 MECHANISMS TO OBTAIN COMPENSATION IN THE UK

Under the UK legal system, a trafficked person may pursue compensation through several different alternatives. Under civil law, the individual may bring a lawsuit in the civil courts or a claim to an employment tribunal. Under criminal law, he or she could ask the prosecution to apply for a compensation order upon the conviction of an offender. Finally, if eligible, the individual could apply for compensation through the state compensation fund run by the Criminal Injuries Compensation Authority (CICA).

This chapter discusses the alternatives available within the law and their application. In the practical annexes you will find examples and advice of practitioners who used some of these remedies to obtain compensation for trafficked persons in the UK.

5.1 Civil Lawsuit

The option of a civil lawsuit is available to a trafficked person seeking compensation. Civil litigation enables a wronged party to hold the transgressor personally accountable for his/her wrongdoing. While there have been recent successes where trafficked persons have been able to claim significant compensation under the Criminal Injuries Compensation Scheme, it is unlikely that the scheme will obviate the need to pursue civil litigation altogether. Only a tiny fraction of trafficked persons have received such compensation and none of the individuals were trafficked persons for forced labour. Consequently, civil litigation may very well play an important role in enabling trafficked persons access to justice.

This section reviews several important legal issues that may arise under English law in the course of initiating civil proceedings on behalf of a trafficked person.

5.1.1 Facilitating Access to Legal Representation

Trafficked persons are often deterred from participating in legal proceedings because simple, accessible and timely legal advice is not available to them. In the UK, for example, they are not routinely provided with legal representation throughout the criminal proceedings of the trafficker. Moreover, it is not realistic for trafficked persons to pursue compensation claims on their own behalf, as many are unaware of their legal rights and may have limited proficiency in English.

Over the past several years, NGOs which support trafficked persons have developed closer ties with a number of solicitors and barristers associated with the private and voluntary sectors, a partnership which has helped facilitate the protection of victims and their rights. Currently, the legal representation of trafficked persons focuses almost exclusively on helping the individual obtain immigration relief rather than evaluating potential legal remedies such as compensation. Thus, most trafficked persons are unaware of the legal remedies available to them, especially those available through civil law.

5.1.2 Funding Options for a Civil Case

Identifying appropriate funding for a civil lawsuit remains a formidable barrier to trafficked persons and legal practitioners who wish to pursue compensation claims against traffickers. Whilst it is possible for a trafficked person to retain a lawyer throughout the criminal proceedings, it is highly unlikely that the individual would have the financial means to pay the legal fees. At present, the Government provides only limited legal assistance to trafficked persons to cover an initial asylum or Human Rights Act claim and merits-based help for any subsequent appeals against the Home Office refusals.¹¹³ It is not clear to what extent this has been extended to cover compensation claims. The first compensation claims brought on behalf of trafficked persons were funded privately and relied on the extensive pro bono assistance of a London law firm.

Additionally, publicly funded legal assistance can be withdrawn from trafficked persons pursuant to the NIAA 2002 and section 9 of the AIA 2004 under certain circumstances.¹¹⁴ The latter act introduced further restrictive measures, including fewer opportunities to appeal against asylum refusal decisions, more restrictive timescales for submitting appeals, and introduction of retrospective funding arrangements for higher appeals.¹¹⁵

Solicitors have a professional duty to advise clients on the options for funding litigation. A solicitor must give his or her client the best information possible about the likely legal

113 Joint Committee on Human Rights, *Written Evidence: Memorandum from the Solicitors' International Human Rights Group*, Paras. 132, 133, available at <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/245/245we26.htm>.

114 *Ibid.*

115 *Asylum Aid, Response from Asylum Aid to the Department for Constitutional Affairs Discussion Paper on Asylum Legal Aid Reforms*, April 2004, p.3, available at http://www.asylumaid.org.uk/data/files/publications/53/Response_to_consultation_on_2004_legal_aid_reforms.pdf

costs and must discuss how, when, and by whom any costs are to be met.¹¹⁶ Options that should be explored include the possibilities of:

1. Conditional fee agreement (CFA);
2. Community Legal Service;
3. Trade union funding;
4. Pro bono funding;
5. Private funding; or
6. Legal expenses insurance.¹¹⁷

Conditional fee agreements

A conditional fee agreement (CFA), also known as “No Win, No Fee” agreements, is an agreement whereby a lawyer and a client can agree to share the risk of the litigation by coming to a financial arrangement on the fees payable based on the outcome of the litigation. If the client loses the case, he or she will not be liable to pay his own legal fees, but will likely be liable for the opponent’s legal costs. On the other hand, if the client wins, he or she is liable for the legal costs, including a “success fee,” which is calculated as a percentage of the basic costs; the costs, however, would be paid almost in full by the losing party. The existence of the CFA must be disclosed to the other party at the outset of the litigation. Additionally, the risk assessment, which evaluates the merits of the case, must be disclosed to the court and, if necessary, to the other party when costs are assessed. The claimant must purchase an insurance policy to protect against potential cost exposure if (s)he loses the case.

There are several advantages of a CFA. First, costs are linked to the outcome of the case with the possibility that no costs or reduced costs are payable by the client if the case is unsuccessful. Second, disclosure of a CFA to the other party may encourage earlier settlement because the other party’s cost exposure will increase in line with the level of

116 Solicitors Regulation Authority, *Solicitors’ Code of Conduct 2007*, Rule 2.03, available at <http://www.sra.org.uk/solicitors/code-of-conduct/195.article>.

117 It is unlikely that a trafficking victim would have the benefit of legal expenses insurance, which is purchased before an accident happens and usually attached to other insurance policies such as household, travel or motor insurance, for a small annual fee. Sometimes insurance is attached to credit card agreements, or as a benefit attached to bank accounts. Similar to legal aid, this policy covers costs in the event of a case losing but it does not cover all the costs of the claim if the case is successful. Section 29 of the Access to Justice Act 1999, however, allows a successful party to claim the premium paid for ATE cover from the other side as part of the costs of the proceedings. Where relevant, the solicitor and client should discuss the possibility that the client may already have insurance.

the success fee. Third, the success fee will, in most cases, be payable by the losing party, and any damages awarded to the client will not be reduced by the success fee.

Public funding

Public funding, previously known as legal aid, is available to those of limited financial means whose cases have a high likelihood of success.¹¹⁸ It is not available for personal injury litigation.¹¹⁹ A certificate of public funding provides funding for legal expenses along the way and acts as an insurance policy if the claimant loses the case. The Legal Services Commission (LSC) must authorise all work undertaken under the scheme, and the client may be required to pay a monthly amount on account of the work done on his/her behalf, although this is repaid when the case finishes.

Several different types of legal aid are relevant to the representation of trafficked persons in civil matters. These include:

- *Legal help*: the provision of initial advice and assistance with any legal problem;
- *Help at court*: involves the solicitor or legal adviser speaking on behalf of the trafficked person at certain court hearings, without formally acting on the individual's behalf in the entire proceeding; and
- *Legal representation*: enables the person to be represented in court if he is taking or defending court proceedings; available either as investigative help, where the funding is limited to investigating the strength of a claim, or full representation, where funding is provided to represent the individual in the actual legal proceedings.

A lawyer or law firm that is franchised by the Legal Services Commission can take on a case on behalf of a trafficked person if the client is eligible for public funding and if there is no alternative suitable form of funding available.

The general criteria for public funding from the LSC are the following:¹²⁰

- (a) It must be a matter of English law;
- (b) It must not be a service excluded under the Access to Justice Act 1999, sch. 2, and not brought back into scope by direction or order;

118 Eligibility for public funding can be determined through the assistance of a legal aid calculator, which is available at the Community Legal Service website, available at <http://www.communitylegaladvice.org.uk/en/legalaid/calculator.jsp>.

119 Access to Justice Act 1999, sch. 2.

120 Legal Services Commission Funding Code, part 1, section 4.

- (c) The applicant must be an individual, not a company or partnership;
- (d) Public funding must be provided via a recognised supplier;
- (e) If the work is to be carried out under the terms of a contract, it must comply with those contract terms;
- (f) Funding Code procedures must be followed;
- (g) The financial eligibility criteria must be satisfied; and
- (h) Public funding may be refused if it appears reasonable to do so having regard to the conduct of the applicant.

Legal practitioners have reported several challenges in obtaining public funding in the representation of trafficked persons in immigration and other civil proceedings. In October 2007, the LSC introduced a fixed fee system for funding immigration and asylum advice, replacing the hourly rate system for new cases. Under the new system, a fixed fee for representation is set for a case regardless of the type of case, amount of work involved or the complexity of it. The graduated fee scheme means that the fixed fee may rise depending on which stage the case reaches.

For exceptional cases, the legal adviser is paid at the hourly rate rather than the fixed fee.¹²¹ The exceptionality assessment, however, is made at the end of the case, thus requiring solicitors to bear the risk that the threshold is not met, in which case their additional work is unpaid. It is estimated that only a minority of trafficking cases will fall into the exceptional case category despite the level of work involved in the preparation of trafficking cases. Indeed, in some of the most complex trafficking cases to date profit costs have just fallen short of the exceptionality threshold (2.7 times more than the new fixed fee), resulting in lawyers only being paid the fixed fee.¹²² As noted by some practitioners, the problem of setting the fixed fee very low, yet establishing a very high threshold to be exempted only makes it more difficult to secure quality legal representation.¹²³ Additionally, legal aid only covers three hours of travel for lawyers

121 Exceptional cases are those to which the fixed fees would normally apply, but where the legal adviser has been required to spend so much time on the case that, if paid at the hourly rate, the adviser would be paid more than three times the total fixed fee level.

122 ILPA, *Against Identification?* PowerPoint Presentation, Garden Court Chambers Trafficking Conference, 7 March 2008.

123 ILPA, *Information Sheet: Legal Aid 4 – Future of Legal Aid*, 11 December 2007, p.2, available at <http://www.ilpa.org.uk/infoservice/Info%20sheet%20Legal%20Aid4%20Future%20of%20Legal%20Aid.pdf>.

visiting prisons and places of detention – regardless of how isolated the prison and even where there are no suitable lawyers within three hours travelling distance.¹²⁴

Many lawyers feel that casework involving the representation of trafficked persons exceeds the fixed fee level set and have reported that the introduction of the fixed fee system has not only reduced the amount of time they spend on a client's case but also made them less likely to take on trafficking cases, which are legally and evidentially complex.¹²⁵ This poses a particular problem for trafficking cases where specialist casework is often necessary and the level of experience and expertise among legal practitioners varies. In some parts of the country there may be too little or no expertise available even though there are legal advisers doing legal aid work.

Given these challenges with public funding, it may be wise to pursue multiple funding opportunities where available and to consider joint representation of the client with co-counsel.

● *Trade union funding*

Some trade unions have a legal advice and assistance scheme which allows an individual to obtain advice from an approved solicitor. If a person is a member of a trade union, he or she will probably be entitled to a free initial interview to decide whether the case is likely to succeed. The union, which may have an arrangement with a firm of specialist lawyers, may then fund the entire case, thus eliminating the risk that the claimant will have to pay the costs.

Sometimes the union will act as insurance if the case is not successful. Usually, this method of funding means that the claimant receives all of the compensation at the end of the case and has no risks of paying the legal costs.

● *Pro bono support*

While a number of large UK law firms offer pro bono representation for disadvantaged communities and individuals, legal representation for trafficked persons has been limited thus far. The provision of Government funding to existing pro bono providers

¹²⁴ *Ibid.*

¹²⁵ Anti-Trafficking Legal Project (ATLeP), *Written Evidence to the Home Affairs Committee Inquiry into Human Trafficking*, p.8, available at http://www.ein.org.uk/resources/ATLeP_Submission_to_the_Home_Affairs_Committee.doc.

such as Bar Pro Bono and various law firms for legal training would assist lawyers in bringing test cases on behalf of trafficking victims, and thus develop jurisprudence, and enable lawyers to represent a greater number of victims.

● *Private funding*

Unless external funding sources have been identified, private funding is not a realistic option for a trafficking victim's compensation claim, as it requires the client to pay a substantial amount of money up front to fund the expenses of the claim and bear all the risk of loss. If the client wins the case, the lawyer will try to recover the costs from the defendants. However, if the client loses the case, he or she is also responsible for paying the costs of the defendants.

5.1.3 Factors to Consider

Bringing a Civil Case

Whereas the ultimate penalty imposed upon a person who is adjudged guilty of an offence in a criminal prosecution is imprisonment, the penalty in civil litigation for an individual found liable of civil grievances is financial rather than custodial. The procedure for bringing a case against a human trafficker is more clearly established for criminal prosecutions than for civil actions, as there is little, if any, case law on civil remedies for victims of trafficking. The UK has no specific statute that enables a trafficked person to bring a civil suit against the trafficker for damages. Tort and contract law, however, may provide trafficked persons with the possibility of recovering damages for injuries and financial losses.

Lawyers representing trafficked persons have a responsibility to educate their clients about the different aspects, implications and consequences of bringing a civil lawsuit against the trafficker. When considering whether to initiate a civil lawsuit on behalf of a trafficked person, the following factors should first be considered:¹²⁶

- Has the client been awarded and received any money through a compensation order awarded upon the conviction of the defendant at the close of the criminal trial or through the Criminal Injuries Compensation Scheme?
- Have the police seized any of the traffickers' assets in the UK?

126 See Kim, K. and Werner, D., *Civil Litigation on Behalf of Trafficking Victims*, 2004, available at <http://www.oas.org/atip/Reports/Civil%20Litigation%20on%20behalf%20of%20TIP%20victims.pdf>

- Are there potential defendants who have the resources to satisfy a judgement?
- Are the potential defendants located in the UK?
- Is the client informed about the disclosure process?
- Is the client willing to endure years of litigation, including potential enforcement proceedings?
- Are there safety concerns for the client and his/her family?
- Are there other potential plaintiffs?
- Will civil litigation impact the criminal case?
- Do you have resources to represent the client in the civil case? If not, are there other lawyers who would be willing to co-counsel?
- Will the client's immigration status impact his/her ability to bring a civil case?

Additionally, it is important to provide the client with an overview of the civil court system and procedure to maximise informed decision-making. Useful topics to cover, for example, include:

- Client's rights and responsibilities
- Solicitor's role in representing client
- Trafficker's rights as a defendant in a civil lawsuit
- Adversarial nature of civil litigation, including nature of disclosure and fact-gathering procedures in civil proceedings
- Possibility that defendant may raise counterclaims against claimant
- Nature of the litigation and legal advice privilege
- Length of time required in civil proceedings
- Potential outcomes of civil lawsuit (i.e. money judgement rather than custody and/or penalty)
- Standard of proof in civil case of "balance of probabilities" that needs to be established.

Without a doubt, the legal representation of a trafficked person is a time-intensive and lengthy undertaking that requires a great deal of "handholding." However, the better informed the client, the better positioned he or she will be to make choices about their future.

Because many trafficked persons are non-native English speakers, procuring a competent and qualified interpreter will also likely be necessary to meet the

individual's needs. Interpreters should specifically be trained to high standards of professionalism, both in the quality of their interpretation and in appropriate interactions with the victims. If the case is publicly funded, Community Legal Service funding may be available. However, if the case is privately funded parties must supply their own interpreters.

Criminal Conviction of Trafficker

Under the doctrine of estoppel, a party's criminal conviction is admissible in subsequent civil proceedings as evidence that the person in question committed the offence recorded in it.¹²⁷ The clearest use of the estoppel principle is where the crime and the subsequent civil action are based on the very same facts.¹²⁸ This will be the case where a claimant seeks damages for injuries suffered as a result of the trafficker's actions against her (e.g. claims of assault, false imprisonment and battery). A party's conviction, however, is not conclusive proof that the person committed the crime concerned but only prima facie evidence in the case of civil proceedings (unless in the case of defamation proceedings).¹²⁹ It merely reverses the burden of proof on the issue and requires the convicted person to prove that his conviction was wrong.

If the claimant wishes to introduce as evidence the defendant's conviction, he must assert in the statement of case the full particulars of it and the issue to which it is said to be relevant.¹³⁰ In response to the allegation, the other party may:

1. Deny the conviction itself (say that it does not in fact relate to them)
2. Allege that the conviction was erroneous (e.g., say that he pleaded guilty in ignorance of some fact which would have constituted a defence, or was otherwise wrongly convicted); or
3. Deny that the conviction is relevant to any issue.

127 Section 11(1) of the Civil Evidence Act 1968 states that "in any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom or by a court-martial there or elsewhere shall...be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section."

128 Osborne, C., *Civil Litigation 2007–2008*, Oxford University Press, 2007, pp. 68–71.

129 *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321.

130 PD 16, para. 8.1, 8.2.

The criminal conviction is only admissible against the guilty party at the time of the criminal proceeding.

Recourse to Public Benefits

Many persons trafficked to the UK for sexual exploitation or forced labour are nationals of non-EU or the new EU Accession countries such as Lithuania and Romania, and thus may have limited rights and benefits available to them. For example, the UK has implemented transitional measures for the new EU Accession countries, restricting access to labour markets and benefits for A8 and A2 nationals and requiring them to register prior to or upon starting employment.¹³¹ Although A8 and A2 nationals may exercise their treaty rights to seek employment in the UK, in practice many victims are not able to exercise such rights to legitimate employment if they do not speak English or have no previous work experience. It remains to be seen whether residence permits granted to EU nationals as per the CoE Convention will count as time spent exercising their treaty rights in the UK. Thus, financial compensation may be particularly important to trafficked persons from non-EU and the new EU countries because of their limited entitlement to social security benefits.

Commission of Immigration or Other Offences

It is possible that a trafficked person may be prosecuted for immigration offences committed as a consequence of their trafficking situation. The most common immigration offences they may be likely to commit whilst under the coercion of another are:

- Using a false instrument under section 3 of the Forgery and Counterfeiting Act 1981;
- Possession of a forged passport or documents under section 5 of the Forgery and Counterfeiting Act 1981;
- Possession of a false identity document under section 25 of the Identity Cards Act 2006;
- Failure to have a travel document at a leave or asylum interview under section 2 of the Asylum and Immigration (Treatment of Claimants) Act 2004.¹³²

131 The A8 states are the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Slovakia, Slovenia and Poland, which joined the EU on 1 May 2004. The A2 states are Bulgaria and Romania, which joined the EU on 1 January 2007. During this transitional period, these individuals are not entitled to the full rights of EEA nationals.

132 Crown Prosecution Service, *Legal Guidance: Immigration Offences and Protocol*, last updated 1 October 2008, available at http://www.cps.gov.uk/legal/h_to_k/immigration_offences_and_protocol/#_Trafficking_and_Smuggling.

Article 26 of the CoE Convention provides for non-punishment of a trafficked person's involvement in unlawful activities, where they were compelled to do so as a part of their trafficking.

Unfortunately, trafficked persons continue to be prosecuted for immigration offences. In one recent case, the Court of Appeal, Criminal Division allowed an individual to appeal her conviction for possessing a false identity card with the intention of using it as her own.¹³³ The appellate court found that the individual's lawyers in the Crown Court should have raised at least the apprehension that the appellant had been trafficked to the UK for the purposes of prostitution and the Crown should have appreciated that the appellant might have been a very young person. However, both the prosecution and the defence appeared to have ignored the possibility that the individual might have been trafficked. The defence took no steps to investigate her history or consider whether she might have a defence of duress and the prosecution gave no consideration to its possible duty to protect her as a young victim.

Children trafficked to the UK for forced labour in cannabis production have also been subject to criminal prosecution for activities undertaken as part of their trafficking situation. In one case, the Crown Prosecution Service prosecuted a Vietnamese minor who had been trafficked into the UK for forced labour and was found cultivating the crop in a cannabis factory.¹³⁴ Additionally, in 2007, at Basildon Crown Court, Judge Christopher Mitchell took the view that two young Vietnamese men charged with cannabis production were likely victims of trafficking.¹³⁵

Research by the POPPY Project uncovered similarly disturbing trends with respect to trafficked persons who are held in immigration detention or police custody, or convicted of custodial offences, prior to being referred to support services.¹³⁶ Out of a review of 55

133 *R v O*, Court of Appeal, Criminal Division, 2 September 2008.

134 House of Common Hansard Debates for 8 July 2008, Comment of Paul Holmes, available at <http://www.parliament.the-stationery-office.com/pa/cm200708/cmhansrd/cm080708/halltext/80708h0007.htm>.

135 *Children Trafficked from Asia to UK to Work in Cannabis Factories*, Independent, 23 September 2007, available at <http://www.independent.co.uk/news/uk/crime/children-trafficked-from-asia-to-uk-to-work-in-cannabis-factories-403251.html>.

136 Stephen-Smith, S., *Prisoners With No Crime: Detention of Trafficked Women in the UK*, 2008, POPPY Project, p.4, available at http://www.eaves4women.co.uk/POPPY_Project/Documents/Recent_Reports/Detained.pdf

cases of women who were supported by the project, 44 women were illegally in the UK at the time they were detained.¹³⁷ Although the Home Office held information which suggested that the detainees were trafficked persons in 19 of these cases, this knowledge led to the immediate release of the women in only four of these cases. In ten of these cases, the POPPY Project provided evidence that the women had spent time in a trafficking situation. This led to the women's rapid release in only three cases. Information was also provided by the detainees themselves in three further cases and by legal representatives in five cases. This did not lead to release.

5.1.4 Overview of Potential Claims

The abuses that trafficked persons endure at the hands of their traffickers potentially give rise to a number of different claims arising under tort and contract law. This section provides a brief overview of the claims most relevant to trafficking cases.

Claim	Statute of Limitations
Harassment	6 years
False imprisonment	6 years
Assault	6 years
Battery	6 years
Deceit	6 years
Negligent misrepresentation	6 years
Conversion	6 years
Trespass to chattel	6 years
Conspiracy	6 years
Breach of contract	6 years
Personal injury	3 years
Human Rights Act 1998	1 year

● *Protection from Harassment Act 1997*

Section 3 of the Protection from Harassment Act creates a civil tort of harassment, which can cover a wide range of conduct, as the definition of harassment appears to have been left deliberately vague.¹³⁸ Harassment includes causing alarm or distress to another

¹³⁷ *Ibid.*

¹³⁸ Protection from Harassment Act 1997 (c.40), s. 3.

person.¹³⁹ Whether harassment has occurred is determined by an objective standard that considers whether a reasonable person would think that a person's actions amounted to harassment. An individual who is, or may become, the victim of harassment may seek redress in a county court in the form of an injunction or compensation where harassment is apprehended. Two elements must be met to bring a successful claim: (1) the claimant must establish a course of conduct, which would require showing at least two incidents representing harassment; and (2) the person carrying out the harassment must know or ought to know that his conduct would amount to harassment.¹⁴⁰

If a victim initiates proceedings in the civil court, and criminal proceedings result from the same course of conduct alleged, then the criminal proceedings will usually take priority. For a civil claim, damages may be awarded for any anxiety caused by the harassment and any financial loss resulting from the harassment.¹⁴¹ A court may also grant an injunction to restrain the defendant from harassing the claimant. If the terms of the injunction are broken, the claimant may seek a warrant for the arrest of the defendant.¹⁴²

● *False Imprisonment*

False imprisonment is the complete restriction of a person's freedom of movement without lawful excuse or justification.¹⁴³ The restriction of a person need not take the form of confinement in a room. Moreover, imprisonment does not have to involve seizure of the claimant; touching and informing the individual that he is under arrest are sufficient (this is particularly relevant in domestic servitude cases).

● *Assault*

Assault and battery are related common law torts. An assault is an intentional act that threatens violence or one that produces in the claimant a reasonable expectation of immediate, unlawful force.¹⁴⁴ An assault can be committed by words alone.¹⁴⁵

139 *Ibid.*, s. 7(2).

140 *Ibid.*, s. 1(1).

141 *Ibid.*, s. 3(2).

142 *Ibid.*, s. 3(3).

143 Deakin, S., Johnston, A. and Markesinis, B., *Markesinis and Deakin's Tort Law*, 6th ed., p. 462, Clarendon Press: Oxford, 2008.

144 *Ibid.*, p. 453.

145 *R v Ireland* [1997] 4 All ER 225.

● *Battery*

Battery is defined as the intentional and direct application of force to another person.¹⁴⁶

● *Deceit*

The tort of deceit requires that the following elements are satisfied: the defendant must make (1) a false statement (2) of existing fact (3) with knowledge of its falsity and with the intention that the claimant should act on it (4) with the result that the claimant acts on it to his detriment.¹⁴⁷ While most cases concern financial or pure economic loss, the tort can also extend to cover personal injuries and damage to property.

In many cases trafficked persons are deceived by their traffickers and promised legitimate jobs and reasonable pay upon their arrival in the UK, when in reality they are subject to forced prostitution or forced labour for little or no pay. Thus, a deceit claim would be highly relevant to a trafficked person bringing a civil lawsuit.

● *Breach of contract*

Trafficked persons may have contract claims for breach of oral or written contracts. Where a contractual term has been broken (e.g. failure to pay wages, failure to observe employee's time off, changing contract without employee's agreement) the injured party will have a claim for damages for breach.

● *Personal injury*

A person who is injured in the workplace or suffers ill health as a result of his or her working environment may sue the employer for damages. For personal injury claims, specialised legal help is required and public funding is not available.

● *Human Rights Act 1998*

The Human Rights Act 1998 (HRA) incorporates into English law the fundamental rights and freedoms protected in the European Convention on Human Rights (ECHR or Convention).¹⁴⁸ The Act makes it unlawful for a public body, including central government, local authorities, police, immigration officers and courts, to act incompatibly with the Convention rights and allows a case to be brought in a UK court

¹⁴⁶ Deakin, S. et. al., *Tort Law*, p. 454.

¹⁴⁷ *Ibid.*, p. 565.

¹⁴⁸ Human Rights Act 1998 (c. 42) [hereinafter HRA 1998].

or tribunal against the authority if it does so.¹⁴⁹ Breach of the Convention rights by an individual is not actionable under the HRA.

An individual who alleges an infringement of the Convention can still apply to the European Court of Human Rights (ECHR) in Strasbourg notwithstanding the right to rely on the Convention in the domestic courts, but only after exhausting all domestic remedies, including court and appeal hearings. Among the rights protected are the right to be free from inhuman or degrading treatment,¹⁵⁰ the right to be free from slavery and forced labour¹⁵¹ and the right to private and family life.¹⁵² The HRA requires a court or tribunal considering the complaint to take into account Strasbourg case law and interpret laws, wherever possible, in a manner that is consistent with the rights protected by the Convention.¹⁵³

Making a Claim

A person whose Convention rights have been breached by a public authority can bring proceedings against that authority in an appropriate court or tribunal, depending on the subject matter of the complaint.¹⁵⁴ A person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act (i.e. if he has been directly affected by the act or decision which is the subject of the complaint).¹⁵⁵

A court or tribunal that finds a violation of an individual's rights under the Act may grant any remedy which is within its powers and just and appropriate. The remedies include an award of damages, quashing an unlawful decision, releasing a defendant on a criminal charge or quashing a conviction, or ordering a public authority not to take action which, if taken, would be unlawful. The HRA extends the power to award damages for a breach of the Convention Rights under the Act to any court that has the power to order payment of damages or compensation in a civil case. However, when

149 *Ibid.*, s. 7.

150 Art. 3 of ECHR.

151 Art. 4 of ECHR.

152 Art. 8 of ECHR.

153 Department for Constitutional Affairs, *A Guide to the Human Rights Act 1998: Third Edition*, October 2006, p. 7, available at <http://www.dca.gov.uk/peoples-rights/human-rights/pdf/act-studyguide.pdf>.

154 HRA, Art. 7(1).

155 *Ibid.*, Art. 7(7).

considering whether to award damages under the HRA, as well as the appropriate amount, the courts must again have regard for the principles applied by the European Court of Human Rights.

Generally, the claim must be brought within one year from the date on which the act complained of took place, although a court may extend the time limit if it considers it equitable to do so.¹⁵⁶

● *Effect of Siliadin v France and Rantsev v Cyprus and Russia*

Although there is very little case law from the ECHR addressing the Article 4 prohibition of slavery in the context of human trafficking, the Court has, in recent years, pronounced its judgement that states have positive obligations to protect their citizens from slavery, servitude and forced labour.

In *Siliadin v. France*,¹⁵⁷ the applicant, a Togolese child, was held as an unpaid domestic servant in France for more than four years by her employers, Mr. and Mrs. B, who forced her to work 15 hours a day with no days off. In addition to making her sleep on the floor, they also confiscated her passport. Criminal proceedings were initiated against Mr. and Mrs. B for wrongfully obtaining unpaid or insufficiently paid services from a vulnerable or dependent person and for subjecting the applicant to working or living conditions incompatible with human dignity. The defendants were found guilty of the first offence, but were acquitted of the second offence. They were ordered to pay civil damages. However, the defendants' conviction and the civil damages award were overturned on appeal. The case was again appealed but the appeal was only successful with respect to the civil damages.

In her case before the European Court of Human Rights, the applicant complained that the state did not fulfil its positive obligations under Article 4, by implementing criminal law that prevented, prosecuted and penalised private actors who engaged in the exploitation of others.

The Court determined that the applicant had been subjected to forced labour and servitude within the meaning of Article 4 of the Convention. The applicant had been forced to provide her services and was particularly vulnerable as a minor with no

¹⁵⁶ HRA 1998, s. 7(5)(a).

¹⁵⁷ *Siliadin v France*, App. No. 73316/01, 26 July 2005.

financial resources and irregular immigration status. The Court held that states must provide effective protection to the victims, especially through criminal prosecution of domestic slavery. Additionally, it concluded that the legislation in force at the relevant time did not afford the necessary protection and that France therefore failed to fulfill its obligations under Article 4. French law was deficient both in its application and its wording, as the defendants had been acquitted of subjecting the applicant to forced labour and the criminal provisions in effect at the time were open to different interpretations. The Court also found decisive that neither slavery nor servitude was classified as offences under French criminal law. The Court did not award the applicant any damages, as she made no claim for them.

In *Rantsev v Cyprus and Russia*, Nikolay Rantsev, the father of Oxana Ranseva,¹⁵⁸ brought a case against Cyprus for failure to adequately investigate her death and also claimed that she was inadequately protected from exposing her to sexual exploitation.

EHRC found that Cyprus failed to protect Ms Rantseva from being trafficked, from being unlawfully detained before her death and also failed to investigate her death properly. Russia, her country of origin, was also found to have failed to properly investigate how she was trafficked from its border.

Cyprus was ordered to pay her father €40,000 EURO in damages and ordered Russia to pay €2,000 EURO.

In this case, the Court clarified the obligations of states at any stages of trafficking (origin, transit, destination) to combat trafficking and protect the victims.

Type of claim

Several other types of claims under the HRA appear to be particularly relevant to trafficking victims.¹⁵⁹ The following case studies provide some examples:

158 Oxana Ranseva was trafficked from Russia to Cyprus for the purposes of sexual exploitation and was found dead in March 2001 below the balcony of an apartment belonging to an employee of the cabaret, having been taken there from a police station by the cabaret's owner. The police found a bedspread tied to the railing of the balcony on the upper floor of the apartment. An inquest in Cyprus found she had died as a result of injuries sustained when she jumped from the balcony.

159 For further information see Weiss, A., *Damages for Victims of Trafficking Under the Human Rights Act 1998: Siliadin and Beyond*, available at <http://www.ein.org.uk/resources/printfriendly2.shtml?x=233524>.

● *Return of a trafficked person to his or her country of origin*

It is possible to bring a claim that returning a trafficked person to his or her country of origin (e.g. denying the victim asylum or humanitarian protection) would be a violation of Article 2 (right to life), Article 3 (right to be free from torture, inhuman or degrading treatment or punishment), Article 4 (right to be free from slavery, servitude and forced labour) and Article 8 (right to privacy or family life) under the Convention.

In *M v UK*,¹⁶⁰ an individual who was trafficked as a minor both within Uganda and to the UK for sexual exploitation brought a complaint against the UK before the ECHR. The applicant, whose application for asylum and request for an extension of discretionary leave to remain were refused, complained that she would suffer a severe deterioration in her mental health and run a real risk of further sexual exploitation and trafficking if she were returned to Uganda, in violation of her rights under Articles 3, 4 and 8.¹⁶¹ The ECHR communicated the complaint to the UK Government in June 2008. In December 2009 the case was stricken from the Court's docket as a "friendly settlement" had been reached, in the form of a grant of three years' Discretionary Leave.¹⁶²

● *Failure to investigate and prosecute offenders*

Trafficking, like any other crime, should be investigated by the law enforcement authorities in a thorough, effective and efficient manner. If an individual suffers a real and immediate risk to his/her life from known persons, the police or other state agents are obligated to take positive steps to protect them.¹⁶³ Where authorities have failed to properly investigate and prosecute the crime, a claim may arise under Article 2 (right to life) (see *Osman v UK*).

● *Failure to protect and identify trafficked persons*

Where authorities have failed to protect and identify a trafficked person, the individual may have a claim for violation of his/her Convention rights under Articles 2 and 3. A claim under Article 6 (right to a fair trial) may also arise, as suggested in the case of *R v O*,

160 Application No. 16081/08, available at <http://www.bailii.org/eu/cases/ECHR/2008/522.rtf>.

161 The ECtHR has ordered a stay on M's removal from the UK in the absence of removal directions and communicated the complaint to the UK Government in June 2008. A decision on admissibility and merits will be reached sometime in the future.

162 Personal correspondence. Letter from ECtHR to POPPY Project National Coordinator, Abigail Stepnitz, dated January 2010.

163 *Osman v UK* (1998) 29 EHRR 245.

if the victim is charged with a criminal offence without adequate investigation into the individual's personal circumstances and the availability of any potential defences.

In *R v O*,¹⁶⁴ the Court of Appeal allowed the appellant to appeal against her conviction for possessing a false identity card with the intention of using it as her own. In this case, the Court found that both the prosecutor and defence lawyers had been remiss in their duties. There was evidence that the appellant had been trafficked to the UK for sexual exploitation, but her lawyer failed to consider this possibility, investigate her history or consider whether she might have a defence of duress. The Crown also failed to consider that the appellant might be very young or that the state had a duty to protect her as a minor.

The Court found that Article 10 of the Convention on Action against Trafficking in Human Beings required state parties to identify and protect trafficked persons and stated that: "As a signatory to that Convention, the United Kingdom was obliged by article 18 of the Vienna Convention on the Law of Treaties to refrain from acts which would defeat the purpose of the Trafficking Convention."¹⁶⁵ Prosecutors must be aware of the protocols in relation to trafficked persons enshrined in the Code for Crown Prosecutors and thus refrain from charging such potential victims with immigration offences. Additionally, defence lawyers must make inquiries if presented credible material indicating that their client may have been trafficked, especially if the client was young.

The Court also held that the common law and Article 6 of the European Convention on Human Rights alike required far higher standards of procedural protection than were given here.

● *Disappearance of children in local authority care*

The state has a positive obligation to protect children from treatment contrary to Article 3.¹⁶⁶ Instances where trafficked children have gone missing after being placed in local authority care – of which there are many known cases in the UK – appear to be a violation of the duty of care that a local authority owes to children of whom it is aware

164 [2008] EWCA Crim 2835.

165 The Times, *No Fair Trial for Victim of People Trafficking*, 2 October 2008, available at <http://business.timesonline.co.uk/tol/business/law/reports/article4863830.ece>.

166 *Z v UK* (2002) 34 EHRR 97.

may be subject to inhuman and degrading treatment.¹⁶⁷ In *Z v UK*, the Court held that the local authority failed to take adequate measures to protect children from the severe neglect and abuse that they were known to be suffering due to their ill treatment by their parents.¹⁶⁸ The local authority's failure to protect the children from neglect and abuse amounted to inhuman and degrading treatment in violation of Article 3. The Court further found a violation of Article 13 as the children were not afforded suitable means of obtaining a determination of such allegations, or the possibility of obtaining an enforceable award of compensation for the damage suffered.

● *Mistreatment in detention*

A State has a duty to ensure that detainees are held in conditions compatible with respect for human dignity.¹⁶⁹ Inappropriate treatment or detention of trafficked persons may constitute a violation of Article 3 or Article 8. To be considered inhuman and degrading under Article 3, the treatment must attain a minimum level of severity, which is assessed on the basis of all the circumstances of the case, including the sex, age and health of the individual.¹⁷⁰ Inhuman and degrading treatment may result from harsh or inadequate prison conditions¹⁷¹ or inadequate medical treatment in detention necessary to secure an individual's well-being.¹⁷² For example, if an individual suffers from illness during detention but prison authorities fail to take appropriate steps to treat the prisoner's condition and relieve their suffering, and fail to act sufficiently quickly to prevent the worsening of his or her condition, this could give rise to an Article 3 violation.¹⁷³ Such a scenario is particularly relevant as many trafficked persons may have already suffered extensive physical and psychological abuse at the hands of their traffickers prior to coming to the attention of law enforcement authorities.

Even if the mistreatment during detention falls short of the standard of inhuman and degrading treatment under Article 3, it may nevertheless violate the individual's right to

167 Weiss, A., *Damages for Victims of Trafficking Under the Human Rights Act 1998: Siliadin and Beyond*.

168 *Ibid.*

169 *McGlinchey v UK* (2003) 37 EHRR 41; *Kudla v Poland*, App. No. 30210/96, judgment of 26 October 2000, para. 94.

170 *Ireland v UK* (1978) 2 EHRR 25.

171 *Kalashnikov v Russia*; *Peers v Greece* 28524/95.

172 *McGlinchey v UK*; *McFeeley v UK* (1981) 3 EHRR 161.

173 *Ibid.*

physical and moral integrity under Article 8 if he or she suffered sufficiently adverse effects.¹⁷⁴ In *Bensaid v UK*, the Court stated that “mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity.”¹⁷⁵ The right to privacy and family life under Article 8 “protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world.”¹⁷⁶

● ***Violation of right to fair hearing and no effective remedy (Art. 6 and 13)***

It may be possible to argue that there is a breach of article 6(1) of the European Convention on Human Rights if public funding is not available.¹⁷⁷ The question of whether legal aid is necessary to guarantee a fair hearing “must be determined on the particular facts and circumstances of each case and will depend, inter alia, upon the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the applicant’s capacity to represent himself effectively.”¹⁷⁸ In *Airey v Ireland*, the applicant, who wished to petition for a judicial separation from her husband, lacked the financial means to retain a solicitor and legal aid for civil proceedings were not available.¹⁷⁹ The European Court of Human Rights held that the State’s failure to provide effective access to court to obtain a judicial remedy violated the applicant’s rights under Article 6 (right to a fair hearing in the determination of civil rights) and Article 8 (right to respect for private and family life) of the Convention.

It may also be a breach of an individual’s article 6(1) rights if a claimant’s public funding is withdrawn before trial on the basis that the defendants do not appear to have sufficient assets to satisfy any judgement against them. This was the case in *R (Alliss) v Legal Services Commission* where the LSC’s decision was found to deny the claimant any effective access to justice and be disproportionate and unfair.¹⁸⁰

174 *Bensaid v UK* (2001) 33 EHRR 10; see Weiss, A., *Damages for Victims of Trafficking Under the Human Rights Act 1998: Siliadin and Beyond*.

175 *Ibid.*, para. 47.

176 *Ibid.*

177 Article 6 safeguards an individual’s right to a fair hearing and requires a court to take into account a party’s inability to pay where that would result in a party being unable to proceed with a claim. It does not, however, confer an absolute right to legal aid.

178 *Steel and Morris v UK* App No 68416/01, 15 May 2005; (2005) 41 EHRR 22.

179 (1979) 2 EHRR 305.

180 [2002] EWHC 2079 (Admin), LTL 26/9/2002).

5.1.5 Limitations Period

If a claim is not brought within the limitation period, it will be time-barred and the expiry of the period provides a defendant with a complete defence to a claim. Most limitations periods are set forth in the Limitation Act 1980 (LA 1980). Tort and contract claims, which are relevant to trafficking victims, have a six-year limitation period.¹⁸¹ For general claims in tort, the important date is the date the damage was sustained and not the date on which the claimant discovered the damage.

Previously, cases of deliberate assault (e.g., sexual abuse cases) were not characterised as an action for “negligence, nuisance or breach of duty” under section 11(1) of the Limitation Act and therefore were subject to a non-extendable six-year limitation period from the date of the assault.¹⁸² The result was that victims of deliberate abuse were time-barred from bringing an action for compensation for deliberate assault if it was brought more than six years after the incident. This caused substantial difficulties where the victim was a child, or was particularly vulnerable.

Recently, however, in *A v Hoare*¹⁸³ the House of Lords reversed its decision in *Stubbings v Webb* and extended the meaning of claims under “negligence, nuisance or breach of duty” to include deliberate assault. The Lords ruled that the usual time limit for such claims was three years, and not six years, and that the exception under section 33 could now apply, thus giving the court discretion, where a claim would otherwise fail under section 11, to extend the limitation period if it determines it is equitable to do so.

As a result of the *Hoare* decision, a claimant can now bring a case for compensation as a result of sexual and physical abuse many years after the incident provided that a court considers that a fair trial is still possible.

Damages for Tort Claims

Damages are the predominant remedy for civil litigants to compensate for the harms suffered. The fundamental principle applied to the assessment of an award of damages is that the claimant should be fully compensated for the loss suffered caused by the

¹⁸¹ Limitation Act 1980, s. 2, s. 5.

¹⁸² *Stubbings v Webb*, [1993] AC 498.

¹⁸³ [2008] UKHL 6.

defendant's wrongdoing and, to the extent possible, restored to the position that he or she would have been in, had the tort not been committed.

● *Compensatory Damages (General and Special Damages)*

General damages are those that are presumed to flow from torts which are actionable per se, and so need not be specifically pleaded. General damages include emotional distress, pain and suffering and loss of future earnings.

Special, or pecuniary, damages refer to those that the claimant must plead and prove as part of his cause of action in tort. These are generally losses that are capable of being calculated with reasonable accuracy and include accrued expenses such as damaged property (e.g. clothing), medical expenses and loss of earnings to the date of trial.

● *Aggravated Damages*

Aggravated damages are the additional damages which the court may award as "compensation for the defendant's objectionable behaviour."¹⁸⁴ A claim for aggravated damages must be made separately in the particulars of the claim.¹⁸⁵ In some cases, aggravated damages may be awarded for injury to the claimant's feelings of dignity and pride. Factors that a court considers in making such an award include the defendant's behaviour, his intentions and motives, and his "high-handed, malicious or oppressive manner." Aggravated damages have been awarded in false imprisonment,¹⁸⁶ assault and battery,¹⁸⁷ and deceit¹⁸⁸ cases. More recently, aggravated damages have been awarded in cases of sexual and racial discrimination, where the sum can amount to several thousand pounds.¹⁸⁹

● *Exemplary Damages*

Exemplary damages are punitive in nature and are defined as "damages which go beyond compensating for actual loss and are awarded to show the court's disapproval of the defendant's behaviour."¹⁹⁰ In *Rookes v Barnard* [1964] AC 1129, the House of Lords

184 Civil Procedure Rules Glossary.

185 Civil Procedure Rules 1998, r. 16.4(1)(c).

186 *Thompson v Commissioner of Police for the Metropolis* [1998] QB 498.

187 *Appleton v Barren* [1996] PIQR P1.

188 *Archer v Brown* [1985] QB 401.

189 Deakin, S. et. al., *Tort Law*, p. 942-43.

190 Civil Procedure Rules Glossary.

held that exemplary damages should be awarded only in three categories of case:

- (a) Oppressive, arbitrary or unconstitutional action by servants of the government;
- (b) Where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable; and/or
- (c) Where an award of exemplary damages is expressly authorised by statute.

In the limited number of cases where exemplary damages actually are awarded, the amounts have generally been very modest – approximately £1,000.¹⁹¹

Damages for Contract Claims

In a breach of contract action, damages are meant to compensate the injured party for any consequences of the breach and to restore the injured party, as near as possible, to the financial position he would have been in had the promise been fulfilled. As such, contract remedies are generally limited to compensatory damages.

Restitution

Claims for restitution, which are based on the principle of unjust enrichment, can be made at law and in equity. The claim is for repayment of the benefit received by the defendant and not the loss suffered by the claimant. The claim will be particularly important where the claimant's damages are less than the benefit received by the defendant and where the claimant may have difficulty proving his damages. A claim in restitution may be made in some tortious actions, particularly those involving interference with proprietary rights.

5.1.6 Commencing Civil Proceedings

● *Gathering Evidence*

The civil standard of proof requires the facts of a case to be judged on the balance of probabilities (i.e. that an allegation is more probable than not). The necessity of gathering evidence to support a civil suit against a trafficker presents several challenges. First, it is important to balance sensitivity to the client's experiences and trauma with the need to obtain accurate and reliable evidence. The client will likely already have endured lengthy questioning by law enforcement and immigration officials about his or her trafficking experience and may be loath to recount the experiences again for the

¹⁹¹ Deakin, S. *et. al.*, *Tort Law*, p. 950.

purpose of evidence gathering. Thus, to the extent possible, the lawyer should take steps to minimise the burden on the individual when interviewing him or her to collect evidence for the civil case. For example, this may mean interviewing the client in several stages or ensuring that the client has friends or relatives who can accompany them to legal meetings. The client's testimony may clearly be critical to the success of the case, but testimony from witnesses, friends, family members and social service providers can also support and corroborate the client's case. This will be particularly useful if the defendant has manipulated or destroyed evidence.

Second, maintaining client contact through a relationship built on trust is a key component to gathering all possible evidence to support the case. In several cases, support workers in the UK have reported losing contact with trafficked persons once they have returned to their home countries. Additionally, the individual may lose interest in the process given the numerous procedural requirements necessary in litigation. The greater the trust between the lawyer and client and the better informed the client, the greater the likelihood that he or she will maintain regular contact.

It will be necessary to coordinate with police, immigration officials, case workers and other NGOs who have had contact with the client to gather all information relevant to the trafficked person's claim for monetary damages, including compensation, restitution and recovery. Relevant evidence may include any immigration documents, letters, notes, personal diaries or accounts kept by traffickers or the victim, photographs, receipts and, where available, an employment contract. Newspaper articles, medical records documenting physical and psychological injuries and police reports are other evidential sources that may be necessary to build the case.

Because the police are not directly involved in civil proceedings, they may have little interest and incentive in participating or cooperating in the case. Therefore, it is important to maintain collaborative and cooperative relationships as much as possible with other stakeholders to ensure that the claimant's case has the best possible chance of success.

● *Claim form*

Civil proceedings are commenced when the court issues a claim form, prepared for or by the claimant, which sets out the essential details of the claim, including a concise

statement of the nature of the cause of action and a statement of the remedy sought.¹⁹² Every claim form must be verified by a statement of truth.¹⁹³ A person who intentionally makes a false statement in a document verified by a statement of truth is guilty of contempt of court.

The claim form must contain a statement of value if the claimant is making a monetary claim, which will be true of virtually all civil suits brought against traffickers.¹⁹⁴ The claimant must state either:

1. The amount of money which he or she is claiming;
2. That he or she expects to recover either (a) less than £5,000, (b) between £5,000 and £15,000 or (c) more than £15,000; or
3. That he or she does not know how much they expect to recover.¹⁹⁵

This statement enables the court to allocate the case to the appropriate court and track, although it does not limit the power of the court to give judgement of the amount to which it considers the claimant is entitled.

● *Service and Jurisdiction*

Generally, proceedings have to be served within the jurisdiction. In trafficking cases, it is likely that some of the defendants will be difficult to serve, for example if they have left the country. Service out of the jurisdiction may be made with the permission of the court if a claim is made against someone on whom the claim has been served and there is a “real issue” between the parties and the other person is a “necessary or proper party to that claim”.¹⁹⁶ Additionally, if the claim is made in tort where damage was suffered in England or the tortious act was committed in England, service out of the jurisdiction is permitted.¹⁹⁷ It is not possible to bring a claim for an act that has taken place outside the jurisdiction. Thus, where the torts have been committed abroad (e.g. assault, false imprisonment), it is generally considered that a cause of action will not arise within the jurisdiction.

¹⁹² Civil Procedure Rules, r 7.2(1).

¹⁹³ PD 7.1.

¹⁹⁴ CPR, r. 16.2(1)(c).

¹⁹⁵ CPR, r. 16.3(2).

¹⁹⁶ PD 6b, para. 3.1(3)

¹⁹⁷ PD 6b, para. 3.1(9). In *Booth v Phillips* [2004] 1 WLR 3292, the court interpreted “damage” to mean physical or economic harm suffered by the claimant.

Before initiating civil proceedings, it is important to identify the court that has jurisdiction over the matter or, in other words, is competent to deal with the case. This involves considering whether England is the forum in which the case could most suitably be tried for the interest of all the parties and for the ends of justice. Where the defendant is domiciled in the EU, the general rule is that he/she must be sued in the country where he or she is domiciled.¹⁹⁸ It will not be difficult to establish that a trafficker is domiciled in the UK, as they need only be resident in the UK or have a substantial connection with the UK, which is established after being resident in the country for three months.¹⁹⁹ If jurisdiction can be established against an EU defendant (e.g. under article 5 or 6 of the Jurisdiction Regulation),²⁰⁰ the claimant can choose whether to sue in England or in the defendant's country of domicile and English proceedings may be served without permission. If jurisdiction can be established against a defendant who is outside the EU, proceedings can be served outside the jurisdiction only with the permission of the court. The times for responding to claims outside the jurisdiction are extended.²⁰¹

If the defendant outside the jurisdiction does not respond to the claim, judgement in default can be entered in the usual way if permission to serve outside the jurisdiction was obtained because the defendant is outside the EU. However, permission to enter judgement in default must be sought if the defendant was served without permission under the Jurisdiction Regulation.

Once England is determined to be the proper forum in which to bring the case, the nature and complexity of the case will determine the competent court. Personal injury claims for less than £50,000 and money claims for less than £15,000 must be started in the county courts. Claims for less than £5,000 can be considered in the county courts in the small claims track, which provides a simple and informal way of resolving disputes, often without the need for a lawyer. Any claim over £15,000 can be issued in either the High Court or the county courts. Within the High Court, the Queen's Bench Division would generally be the most appropriate division to hear the case, as it deals with a wide range of civil matters, including actions for damages arising from breaches of contract and tort.

198 Brussels Convention, Art. 2.

199 Civil Jurisdiction and Judgments Act 1982 (c.27), s. 41(2)(3).

200 Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 16 September 1988.

201 CPR, r. 6.35(3), (4).

● *Evidential Issues/Disclosure*

Disclosure is the process by which parties exchange copies of the documents in their control that are material to the issues in the claim. The disclosure of documents is intended to provide the parties with the relevant documentary material before a trial so as to assist them in appraising the strength or weakness of their respective cases and thus to provide for the fair disposal of proceedings before or at the trial. Standard disclosure requires a party to disclose only:

1. The documents on which he or she relies; and
2. The documents which adversely affect his or her own case, adversely affect another party's case, or support another party's case; and
3. Other documents required by a relevant practice direction²⁰²

Certain categories of documents are regarded as privileged and need not be disclosed.²⁰³ The party asserting a privilege must do so in writing and state the grounds on which it is claimed. *Litigation privilege* protects any document which was prepared primarily for contemplated or actual litigation, such as communication between the claimant and a third party. *Legal advice privilege* protects communications to or from the lawyer and his or her client in his professional capacity, provided those communications are for the purpose of obtaining or giving legal advice. Additionally, documents that fall under the category of "*without prejudice*" communications may also be exempt from disclosure. Documents exchanged between parties during the course of negotiations when attempting to settle the disputed matters, whether or not labelled "*without prejudice*," may be privileged from disclosure during subsequent proceedings. The underlying policy is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything said in the course of negotiations may be used to their prejudice in any subsequent legal proceedings. Additionally, there is a privilege against disclosing documents which would incriminate the party making it.

Documents will not be entitled to privilege merely because they are considered confidential. Thus, documents held by an NGO, such as a human rights organisation or support services organisation, and containing personal information about the claimant,

²⁰² CPR, r. 31.6.

²⁰³ CPR, r. 31.3(1)(b).

are not necessarily privileged simply because they are confidential and the organisation does not wish to become involved in legal proceedings. However, a court may protect confidential communications up to a point, balancing the public interest in the preservation of confidences and the private interest of the parties in maintaining the confidentiality of their communications against the administration of justice.²⁰⁴

A lawyer is under a professional duty to advise his or her clients on their disclosure obligations and must ensure that all original documents are preserved and made available at the disclosure stage. The client is similarly obligated to make full disclosure of material documents. This involves conducting a reasonable search for disclosable documents and personally signing a disclosure statement certifying that he understands the duty to disclose documents and that he has carried out this duty to the best of his knowledge.²⁰⁵

● *Freezing Assets*

Even if a trafficker has the resources to satisfy any civil judgement made against him or her, it is possible that the trafficker may transfer ill-gotten assets out of the UK or take other steps to conceal them from those who may have a rightful claim to them.²⁰⁶ Prosecutors and police have repeatedly encountered difficulties in seizing such criminal assets, as traffickers have transferred assets back to their home country or held money in bank accounts under false identities. To prevent this possibility and safeguard the defendant's proceeds of crime, it is possible to apply to a High Court for a freezing injunction. The application is normally made without notice to the defendant, but the applicant is under a duty of full and frank disclosure.

The requirements for granting a freezing injunction are that:

1. The claimant has a good arguable case against the defendant;
2. There is a real risk that the defendant will either remove assets from the jurisdiction or dissipate them so as to frustrate the judgement; and
3. It would be just and convenient in the circumstances to grant the order sought.²⁰⁷

204 See *Three Rivers District Council & Ors v The Governor and Company of the Bank of England* [2004] UKHL 48.

205 CPR, r. 31.5(6).

206 Supreme Court Act 1981, s. 37(1); Civil Procedure Rules 1998, Rule 25.1(f).

207 *Ninemia Maritime Corp v Trave Schiffahrtsgesellschaft mbH & Co KG* [1984] 1 All ER 398.

The application can be made at any stage in proceedings, even before a claim form has been issued, or after judgement to assist in its enforcement and should be supported with evidence in the form of an affidavit.

Although freezing injunctions do not generally extend to assets outside the UK, in an exceptional case a court may grant a worldwide freezing injunction. However, the order must contain an express provision that it will not affect third parties outside the jurisdiction until it has been declared enforceable, or is enforced, by a foreign court.²⁰⁸

● *Witness protection*

Witness security may still be an issue of primary concern to a trafficked individual involved in a civil lawsuit. Fortunately, witnesses in civil proceedings are entitled to protection under some circumstances. If the claimant has been subject to intentional harassment by the defendant or anyone else, it is possible to obtain a restraining order against the offender.²⁰⁹ The Protection from Harassment Act also makes it possible to obtain a civil remedy, which enables a victim to seek an injunction from a county or high court against a person who is harassing them or may be likely to do so.

The Domestic Violence (Crime and Victims) Act 2004 extends the circumstances in which a restraining order can be made under the Protection from Harassment Act 1997 following criminal proceedings.²¹⁰ Courts now have the power to make a restraining order on conviction for any offence, rather than only on conviction for offences under the 1997 Act.

Further protection is available to witnesses under the Criminal Justice and Police Act 2001 for more serious threats to their safety and well-being. Sections 39, 40 and 41 of the Act create two offences intended to increase protection for witnesses in non-criminal proceedings, for which the penalty is up to five years in prison. The offences are:

1. Intimidating another person where the offender knows or believes that the victim is or may be a witness in any relevant proceedings, with the intention of perverting, obstructing or interfering with the course of justice; and²¹¹

208 *Babanaft International Co SA v Bassatne* [1989] 1 All ER 433.

209 Section 7 of the Protection from Harassment Act 1997 defines harassment as alarming or causing a person distress through the defendant's conduct on at least two occasions. The conduct can involve speech.

210 Domestic Violence, Crimes and Victim Act 2004, S. 12(1).

211 Criminal Justice and Police Act 2001 (c.16), s. 39.

2. Harming or threatening harm to another person knowing or believing that he has been a witness in relevant proceedings.²¹²

In very serious cases where the risk to witnesses is so great that they need to relocate to another part of the UK and even change their identity, enhanced witness protection is available in both criminal and civil proceedings. Witness Protection, as described within the Serious and Organised Crime and Police Act 2005 (SOCPA), is generally directed to those persons who have provided crucial evidence and against whom there is a substantial threat.²¹³ The term “witness” includes those in both civil and criminal proceedings and covers those whose testimony may not be admissible in court but could provide the basis for cross-examination during the proceedings, or corroborates or confirms evidence submitted to the proceedings.²¹⁴

Under Section 82 of the SOCPA, in order to be eligible for protection, the protection provider must believe that the individual’s safety is at risk.²¹⁵ This would normally be established by means of a threat assessment. The factors that should be considered in deciding whether to provide protected status or to vary or cancel a person’s protected status include:

- The nature and extent of the risk to the person’s safety;
- The cost of the arrangements;
- The likelihood that the person and family will be able to adjust to any change in circumstances as a result of the arrangement; and
- If the person is or might be a witness in legal proceedings, the nature of the proceedings and the importance of their testimony.²¹⁶

212 *Ibid.*, s. 40.

213 Persons who are eligible for protection under these provisions include witnesses, jurors and other people involved in the legal system, informants, and persons who have or have had a significant connection with a person falling within any of those categories, such as family members. SOCPA, Schedule 5.

214 *Ibid.*, s. 94(6).

215 Under section 82(5) of the Serious Organised Crime and Police Act 2005 (SOCPA), a protection provider can be Chief Officers and Chief Constables of police, the Director General of SOCA, the Director of the Scottish Drug Enforcement Agency and Revenue and Customs Commissioners. These officers are also permitted to delegate the function of protection provider to someone within their organisation with the appropriate operational status.

216 SOCPA, s. 82(4).

The provisions only apply to those who are ordinarily resident in the United Kingdom.

Law enforcement agencies are not obliged to use the powers under section 82 and may continue to provide lesser levels of protection, such as security locks or panic alarms.²¹⁷ Additionally, persons who are not protection providers will still be able to provide protection to witnesses and others under their existing powers.²¹⁸

5.1.7 Enforcement of judgements

Obtaining a successful judgement does not bring the litigation to a satisfactory conclusion if the losing party refuses to comply with the judgements and orders of the court.

● *Assets in the UK*

If the claimant prevails in the lawsuit and is awarded monetary damages by the court, several methods of enforcement are available to collect the judgement if the defendant has assets in the UK.

The claimant can ask the court for any of the following:

- *A warrant of execution*: having a Court Officer attend at the defendant's home or premises and seize the defendant's goods to sell them and pay the proceeds (after costs) to the claimant;
- *An attachment of earnings order*: stopping the money from the defendant's wages;
- *A third party debt order*: freezing the defendant's money held, for example, in a bank account and directing the money to pay the claimant instead; or
- *A charging order*: obtaining a charge on certain of the defendant's assets (e.g. property, stocks and shares) and then obtaining an order that those assets be sold and the proceeds paid to reduce the judgement debt.

● *No Assets in the UK*

If a defendant has no assets within the UK, it may be a long road to enforcing the judgement in another country. The UK, however, is a signatory to a number of treaties

217 *Explanatory Notes to Serious Organised Crime and Police Act 2005*, para. 189, available at <http://www.opsi.gov.uk/Acts/acts2005/en/05en15-c.htm>

218 SOCPA, s. 82(7).

providing for mutual recognition and enforcement of judgements. These include the Brussels Regulation 2001²¹⁹ and Lugano Convention 1988,²²⁰ which provide for the recognition and enforcement of judgements obtained from the courts of other member states.²²¹ Judgements obtained in one member state are generally easily recognised and enforced in other member states. Thus, for example, if a claimant obtains a judgement in England against a defendant who has assets in the Czech Republic, it should be as easy to enforce that judgement in the Czech Republic as it would be if it were a Czech judgement. However, it is mainly only EU states which are parties to those Conventions.

The UK also has bilateral conventions with many former and current Commonwealth countries, which are given effect by the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933 (FJREA). Enforcement of a UK judgement, however, may be subject to a wide range of defences. For example, if a court concludes that a foreign judgement was obtained by fraud or duress, that the foreign court acted contrary to natural justice, or that enforcement would be contrary to public policy, it will not enforce the foreign judgement.

In the absence of a treaty where there are no reciprocal rights of enforcement of foreign judgements (e.g., United States, China, Japan), it will be necessary to research the law of each country where enforcement is sought, and in particular how each such country deals with the recognition and enforcement of judgements in general, and judgements issued by a UK court in particular.

219 The Brussels Convention of 1968, which regulates jurisdictional issues across the EU and also facilitates the recognition and enforcement of judgements between member states, has largely been superseded by the Brussels Regulation (Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters), which came into force on 1 March 2002. The Regulation automatically applies to all EU countries with the exception of the UK, Ireland or Denmark, but the UK opted into the Regulation. Articles 38 to 42 pertain to the enforcement of foreign judgements in member states.

220 The Lugano Convention regulates jurisdiction and enforcement issues between member states of the EU and member countries of the European Free Trade Association (EFTA) (Switzerland and Iceland).

221 The Civil Jurisdiction and Judgements Act 1982, as amended by the Civil Jurisdiction and Judgements Order 2001 (SI 2001 No. 3929) incorporates into English law the treaties under which judgements of the signatory States of the relevant conventions will be enforced.

Advantages of a Civil Suit

One of the primary advantages of civil litigation is the potentially significant financial recovery it affords the plaintiff. Additionally, where the trafficker is not subject to criminal prosecution and the trafficked person has been denied a financial award under the Criminal Injuries Compensation Scheme, civil litigation offers another alternative avenue for obtaining compensation.

Another important advantage of civil litigation is that it enables the trafficked person to hold the traffickers personally accountable for his or her injuries by naming them as the defendants. Moreover, the trafficked person, as the plaintiff in the lawsuit, has the ability to control the direction of the case, in direct contrast to her role in a criminal prosecution. The trafficked person as plaintiff is thus not dependent on law enforcement and prosecuting authorities to initiate or carry out investigations. For some victims, such participation in a lawsuit may provide a fuller sense of recovery and justice.²²²

Disadvantages of a Civil Suit

Pursuing a civil lawsuit requires a significant investment of time, money and legal resources. As the vast majority of trafficked persons have little or no financial resources of their own, civil litigation would only be a realistic option if legal aid is readily available. A lawsuit may also take several years to resolve, even if it does eventually end in settlement by the parties, as most lawsuits do, rather than trial. Routine delays may also affect the quality and availability of evidence – witnesses may disappear and physical evidence may be lost or destroyed.

Another considerable disadvantage of pursuing a civil suit is the psychological strain and emotional stress it may place on the trafficked person. Fact-gathering procedures may leave the plaintiff feeling exposed and vulnerable, while also potentially causing them to relive traumatic experiences associated with the trafficker. As such, it is critical to ensure that the individual is surrounded by appropriate support and encouragement throughout the legal process.

Even if the claimant is successful, he or she may face difficulties in enforcing the judgement, as many traffickers often send money back to family members in their home

²²² Kim, K. and Werner, D., *Civil Litigation on Behalf of Victims of Human Trafficking*, 2004, available at <http://www.oas.org/atip/Reports/Civil%20Litigation%20on%20behalf%20of%20TIP%20victims.pdf>

countries. Thus, a judgement from a civil case may only be partially satisfied by the trafficker's assets in the UK.

Finally, the availability of legal aid for civil cases brought by trafficked persons is limited. There may be no provision of funds for the services of an interpreter and legal aid is only available for certain types of civil cases. In most cases, legal aid is not available in personal injury cases; thus, a trafficked person seeking compensation for personal injuries may need to enter into a "conditional fee" or "no win, no fee" agreement with a solicitor in order to pursue her or his claims.

Effectiveness as a Remedy for Trafficked Persons

Civil litigation in the UK on behalf of trafficked persons is largely uncharted territory whose effectiveness as a remedy remains to be seen. Few individual cases have been filed, and some of them succeeded such as *AT, NT, ML, AK v Dulghieru and Dulghieru* (2008). For more, see Practical Annexes.

A civil suit by a trafficked person could potentially precipitate a criminal investigation and prosecution. This may be an effective strategy particularly for victims of forced labour, as there have been very few forced labour trafficking convictions in the UK to date.

5.2 Employment Tribunals

Overview

In many cases, trafficked persons, specifically those who have been exploited for forced labour, are subject to unsafe and abusive working conditions. They may be severely underpaid, forced to work excessive hours, verbally or physically abused, and subject to significant unauthorised deductions for food and accommodation. Additionally, an employer often may not make appropriate national insurance and tax deductions on the worker's behalf as required by law. Indeed, recent HSE research has revealed that migrant workers, some who are likely to have been trafficked for forced labour, face appalling working conditions and widespread disregard for their employment rights.²²³

223 Trades Union Congress, *Safety & Migrant Workers*, June 2007, p. 4, available at <http://www.tuc.org.uk/extras/safetymw.pdf>.

For a number of reasons, including lack of knowledge about employment rights, irregular immigration status, fear of the employer, language and cultural barriers, the individual may feel powerless to change his/her situation, as (s)he may have little or no bargaining power with the employer.

Employment tribunals can provide a wronged worker with the means of obtaining redress against their employer through administrative proceedings. For an individual legally employed in the UK, recourse to employment law is an additional means of seeking unpaid wages and compensation from abusive employers. The worker may seek to have his/her employment claims resolved before an employment tribunal. Thus, an individual who enters and works in the UK legally as a domestic worker, for example, and is subsequently subjected to exploitative work conditions or denied pay could pursue a number of employment-related grievances before an employment tribunal. On the other hand, an individual who works in breach of immigration rules is deemed to have an illegal employment contract. Consequently, he or she is largely excluded from the protection of employment law and barred from enforcing statutory or contractual employment rights.

Types of Workers

An individual's employment status affects his or her rights. Most workers can be divided into three main categories: (1) an "employee" who provides services under a contract; (2) a "worker," which is a broader category than "employee" but normally excludes those who are self-employed; and (3) a "self-employed" person who is an independent contractor engaged under a contract for services. For a person to be classified as an employee, the employer must exercise some day-to-day control over the worker and there must be an obligation on the employer to provide the work and a corresponding obligation on the employee to perform it.

A worker is any individual who works for an employer, whether under a contract of employment, or any other contract where an individual undertakes to do or perform any work or services. Workers are entitled to core employment rights and protections. Most agency workers, short-term casual workers and some freelancers are likely to be workers but not employees.

Generally "employees" have more rights than "self-employed" workers. For example, only employees have the right to claim unfair dismissal and statutory redundancy payments.

● *Agency Workers*

Agency workers are workers provided to a third party by an agency to work on agreed tasks. They are usually considered to be “workers” rather than “employees.”

Agency workers are covered by the National Minimum Wage, working time legislation and health and safety and social security provisions. Both agency workers and employers have flexibility in setting working arrangements. Agency workers may take up and leave jobs at short notice, whilst employers also have the flexibility to end temporary work without being liable for unfair dismissal or redundancy pay. An agency worker’s contract is with the agency, which must pay the worker even if it is not paid by the hiring company.

Many agency workers are also migrant workers and may be vulnerable to exploitation and abuse.²²⁴ Additionally they may earn a very low wage – often below the legal national minimum wage or barely enough to serve as a living wage – and receive few of the benefits to which they are entitled (e.g. maternity pay, child benefit). Researchers have documented a number of abuses and irregularities surrounding the working conditions of agency workers, particularly in the care and hospitality industries.²²⁵ In these sectors, for example, in-house workers had better pay and conditions than agency staff provided by subcontracted service providers.²²⁶

Types of Claims Available

Whilst employment tribunals may hear a wide range of claims, this section focuses on the employment-related claims most relevant to trafficked and exploited persons.

Relevant claims include: (1) breach of contract (i.e. wrongful dismissal) claims; (2) unfair dismissal claims; and (3) discrimination claims; (4) national minimum wage; (5) dismissal for health and safety reasons; (6) breach of working time regulations; and (7) unauthorised deductions.

224 Trades Union Congress, *Migrant Agency Workers in the UK*, November 2007, p. 3, available at <http://www.tuc.org.uk/international/tuc-14040-f0.pdf>.

225 Evans, Y. et al., *Making the City Work: Low Paid Employment in London*, November 2005, available at <http://www.geog.qmul.ac.uk/globalcities/Report2.pdf>.

226 *Ibid.*, p. 30.

Type of claim	Appropriate forum for bringing claim
Wrongful dismissal/breach of contract	Employment tribunal AND civil courts
Unfair dismissal <ul style="list-style-type: none"> • Assertion of statutory rights • Family-related reasons • Union membership and activities • Health and safety 	Employment tribunal
Discrimination <ul style="list-style-type: none"> • Sex • Race • Disability • Sexual orientation • Equal pay 	Employment tribunal
National minimum wage	Employment tribunal
Health and safety cases	Employment tribunal AND civil courts
Working Time Regulation cases	Employment tribunal
Unauthorised deductions from wages	Employment tribunal

● *Wrongful dismissal/breach of contract*

A breach of contract claim can be made for outstanding contractual payments such as arrears of salary, pension payments, holiday pay, maternity pay, sick pay and any other contractual sums due to an employee on the termination of employment. A wrongful dismissal claim arises when an employer breaches the employment contract with the employee. The most common example of a wrongful dismissal claim is dismissal of an employee without proper notice (i.e. period of notice expressly agreed between the parties). Other examples of wrongful dismissal include failure to give statutory notice,

Types of damages available	Amount of damages available	Remedy available to irregular worker
Compensatory damages	£25,000	No
Basic award Minimum basic award (special cases) Compensatory award	£63,000 limit for compensatory award	No, unless contract was lawful when made
Financial loss Injury to feelings	No limit	In some cases (e.g. if discrimination is extrinsic to contract)
Compensatory damages		No
Compensatory damages	No limit	Yes
Compensatory damages	No limit	No
		No

dismissal in violation of various restrictions on the right to terminate, dismissal in breach of disciplinary procedures, repudiation and breach of a fundamental contractual term.

Wrongful dismissal and breach of contract are common law claims and are treated differently from statutory claims for unfair dismissal or discrimination. The distinctions are important, as the type of claim determines the forum in which the claim may be brought and the amount of damages that may be sought. Breach of contract or wrongful dismissal claims may be heard in either an Employment Tribunal or an ordinary

civil court (e.g. county court or High Court) depending on the value of the claim. As employment tribunals are limited by the amount of compensation they can award, wrongful dismissal claims are more commonly brought in the courts. If the wrongful dismissal claim also involves issues relating to restrictive covenants or personal injury, the claim must be brought in a court, even if the amount of compensation claimed is within the power of the Employment Tribunal to award.

If the wrongful dismissal claim is brought in a court a six-year time limit would normally apply. By contrast, if the claim is brought in the Employment Tribunal, an employee has only three months from the effective date of termination of employment to bring a contractual claim.

Damages are intended to compensate the injured party and place them in the same position they would have been in if the contract had been performed. This normally includes the correct amount of money for the correct notice period and can also include any wages or salary that have not been paid. Compensation is not intended to enable the employee to make a profit out of the employer's breach; as such, an employee must give credit for payments received since dismissal such as earnings from a new job or social security benefits. In general, no damages are awarded for distress and vexation associated with a wrongful dismissal.

● *Unfair dismissal*

An employee has the right not to be unfairly dismissed by his or her employer.²²⁷ The employee must have worked at the job for at least one year unless he or she has been dismissed for a reason that is deemed automatically unfair under the Employment Relations Act 1996 (ERA).²²⁸ Under the ERA, the definition of "employee" is limited to someone working under a contract of employment.²²⁹ Self-employed workers are excluded from the protections under the ERA.

227 Employment Rights Act 1996 (c.18), s. 94.

228 Reasons deemed automatically unfair under sections 99 to 105 of the Employment Relations Act 1996 include dismissal for: family-related affairs, assertion of statutory rights, reasons related to the transfer of an undertaking in some circumstances, union-related membership or activities, health and safety reasons and the employer's failure to comply with the statutory disputes resolution procedure set out in the Employment Act 2002.

229 ERA, s. 230.

A claim for unfair dismissal arises if an employee is dismissed because he or she:

1. Is a member of a trade union or has taken part in trade union activities;
2. Sought to enforce his or her employment rights;
3. Took action on health and safety grounds;
4. Has disclosed certain kinds of wrongdoing in the workplace; or
5. Sought to enforce a right under the Working Time Regulations 1998.

Because the ability to bring a claim for unfair dismissal depends upon the existence of an enforceable contract, an employment tribunal will refuse to hear a claim where the contract is expressly or impliedly prohibited by statute or entered into for an illegal purpose. In *Tomlinson v Dick Evans*, a case concerning a claim for unfair dismissal and redundancy, the EAT stated:

“It is true that the rights with which we are concerned are creatures of statute, superimposed upon the contractual rights of employees and employers which they enjoy under the common law. But the prerequisite to the existence of these rights is that the person who seeks to enforce them has been employed under a contract. The rights, though creatures of statute, in our judgment depend on, or arise from the contract just as do the common law rights which arise from the contract itself.”²³⁰

On the other hand, an unfair dismissal claim may survive where a contract was lawful when made but subsequently illegally performed (e.g. employer did not deduct PAYE or National Insurance from employee’s wages) if a party was reasonably unaware of matters that made the performance of the contract illegal.²³¹ Thus, in *Wheeler v Quality Deep Ltd*, an employee who did not speak English and was unaware that her employer illegally failed to deduct PAYE and national insurance contributions from her wages was nevertheless allowed to pursue her unfair dismissal claim even though the employment contract was “tainted with illegality.”

Unfair dismissal claims are the exclusive jurisdiction of Employment Tribunals. The claimant must bring an unfair dismissal claim within three months from the date of his or her dismissal.

230 [1978] ICR 639, 642.

231 *Wheeler v Quality Deep Ltd* [2004] EWCA Civ 1085.

The award for unfair dismissal compensation is usually limited to a basic award and a compensatory award. The basic award is normally calculated by reference to a fixed statutory formula that takes into account the employee's age and the length of service at the effective date of termination. The compensatory award, on the other hand, is not based on a statutory formula, but is intended to compensate employees for loss caused to them as result of their dismissal. Thus, the award is not punitive in nature. Losses that count in calculating the compensatory award are loss of earnings and, increasingly, future loss of earnings. Loss of earnings include notice, holiday pay or any outstanding final pay and has a maximum limit of £63,000 (although the maximum is rarely awarded).²³²

An Employment Tribunal may also make an order for reinstatement or re-engagement.²³³ Where it does so and the employer fails to comply with these orders, the Tribunal has the power to make an additional award. No compensation is awarded for hurt feelings and claimants are expected to minimise any financial loss by looking for new work. In rare cases, compensation for injured feelings may be awarded where the manner of dismissal is so distressing that it seriously undermines the employee's capacity to look for work. In 2006-7, the average award for an unfair dismissal claim was £7,974.²³⁴

● *Discrimination*

Discrimination claims cover a wide range of claims and fall under several different statutory torts found in the table below. A person who has been treated in an unlawful manner or discriminated against on account of their sex, race, colour, nationality, ethnic or national origins, marital status, religion, sexual orientation, age or because they have undergone gender reassignment (transsexuals) may present a complaint to an Employment Tribunal. The discrimination may be direct or indirect or may involve harassment or victimisation.

Employees working under illegal employment contracts (e.g. where an individual works in breach of immigration rules) may still be able to bring a claim for sex or racial discrimination. Indeed, discrimination claims are unique among employment law

232 Employment Tribunals, Directgov, available at http://www.direct.gov.uk/en/Employment/Employees/ResolvingWorkplaceDisputes/DG_10028122.

233 ERA 1996, ss. 113, 114.

234 Employment Tribunals Service, *Annual Statistics, 2006–2007*, available at http://www.employmenttribunals.gov.uk/publications/documents/annual_reports/ETSAS06-07.pdf.

Grounds for discrimination claim	Statutory Provision
Equal pay	Equal Pay Act 1970
Sex	Sex Discrimination Act 1975
Race, colour, nationality, ethnic or national origin	Race Relations Act 1976
Disability	Disability Discrimination Act 1995
Part-time worker	Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000
Fixed-term employee	Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002
Sexual orientation	Employment Equality (Sexual Orientation) Regulations 2003
Religion	Employment Equality (Religion or Belief) Regulations 2003

because they do not depend on having a legal contract of employment. For more information see *Hall v Woolston Hall Leisure Ltd* and *Vakante v Governing Body of Addey and Stanhope School*.²³⁵

As with unfair dismissal claims, discrimination claims are the exclusive jurisdiction of employment tribunals and claims should be brought within three months of the incident giving rise to the complaint.

There is no statutory cap on compensation awards in unlawful discrimination cases. Compensation may be recovered for financial losses sustained as a result of unlawful discrimination and may take the form either of (a) loss of financial benefits (principally loss of earnings) of which he is or may be deprived because of an unlawful act and/or (b) out of pocket expenses. The most striking difference between damages for unfair or wrongful dismissal claims and discrimination claims is that damages may be recovered for injury to feelings in discrimination cases. Aggravated damages are also available where the employer has behaved in a malicious or oppressive manner in committing the act of discrimination.

235 [2004] EWCA Civ 1065.

With discrimination cases, the Tribunal's power is not limited to ordering the payment of damages. A Tribunal may also make additional orders, such as an order declaring the rights of the parties in relation to the act that gave rise to the complaint or an order recommending that the employer take action to correct the situation or limit the damage done to the applicant.

● *National Minimum Wage*

The National Minimum Wage Act 1998 is relatively new legislation that came into force on 1 April 1999. The legislation applies to the worker, which is defined in section 54(3) of the Act as an individual "working under a contract of employment" and one who has ceased to be of compulsory school age.²³⁶ Certain workers are excluded from protection of the Act, such as share fishermen, voluntary workers, prisoners working under prison rules, and certain religious communities. The rate of national minimum wage is set and revised by the Secretary of State by means of regulation. In 2006/07, there were 806 minimum wage applications registered by Employment Tribunals.²³⁷

An undocumented worker does not have the right to receive the national minimum wage for work already performed. (*Blue Chip Trading Ltd v Helbawi*).²³⁸

Enforcement

A claim for failure to pay the national minimum wage can be brought as a breach of contract claim at common law or as an unlawful deductions claim under section 13 of the Employment Rights Act 1996 if the individual qualifies as a worker within the meaning of the ERA.²³⁹ As with most Tribunal claims, a breach of contract claim must be brought within three months from the last deduction or series of deductions. Pursuant to the Employment Tribunals (Extension of Jurisdiction) Order 1994, the individual is entitled to seek the difference between the payment he actually receives and the amount he should have received under section 2 of the NMWA.²⁴⁰ An unlawful deductions claim, on the other hand, covers underpayments in the last six years, as long

236 National Minimum Wage Act 1998 (c. 39) [hereinafter NMWA], s. 1(2).

237 Employment Tribunals Service, *Annual Statistics 2006/07*, available at <http://www.employmenttribunals.gov.uk/Documents/Publications/AnnualStatistics0607.pdf>.

238 2008 UK EAT0397.

239 *Blackford Farms Ltd v Mr C Mulqueeny*, UKEATS/0030/06/MT; ERA 1996, s. 27(1)(a); Korn, A. and Sethi, M., *Employment Tribunal Compensation*, 3rd Ed., Oxford University Press, 2005.

240 NMWA 1998, s. 17(1), (2).

as the claim is made within three months of the ending of employment. Under section 27 of the ERA, national minimum wage is to be regarded as an entitlement under those statutory provisions, and the statutory definition of wages covers any sums payable in connection with employment whether payable under contract or otherwise.²⁴¹

Enforcement of national minimum wage can also be accomplished through the Inland Revenue. A team of compliance officers within Her Majesty's Revenue and Customs (HMRC) investigate cases where it is alleged that workers are being paid less than the minimum wage. Where a complaint is made to HMRC and arrears are subsequently identified and remain unpaid, an HMRC compliance officer may serve an enforcement notice on an employer specifying the amount owed to workers and the time the employer has to pay or appeal the enforcement notice.²⁴² Employers who do not comply with an enforcement notice in full may be served with a penalty notice, which levies a financial penalty calculated by a statutory formula. Penalties are paid centrally to the Government and held in the Consolidated Fund. The Department for Environment, Food and Rural Affairs (DEFRA) enforces the National Minimum Wage in agriculture in England and Wales and bears the same enforcement policies.

In support of this work the National Minimum Wage Helpline gives confidential help and advice on this matter and provides a mechanism through which complaints can be raised and investigated. There is also a separate helpline for those working in the agricultural sector whose pay rates are set by the Agricultural Wages Board.²⁴³

● *Health and Safety Act*

The Health and Safety at Work etc. Act 1974 (HSWA) is the primary piece of legislation covering occupational health and safety in the United Kingdom. Sections 2 through 7 of the Act cover the general duties of employers. The employer is required to provide free of charge to his or her employees a safe working environment and appropriate job safety training and protective equipment at work when necessary (e.g. clothing, shoes

241 ERA 1996, s. 27(1)(a); Korn, A. and Sethi, M., *Employment Tribunal Compensation*, 3rd Ed., Oxford University Press, 2005.

242 NMWA, s. 19.

243 *The Government Reply to the Twenty-Sixth Report from the Joint Committee on Human Rights, Session 2005-06: Human Trafficking*, December 2006, available at <http://www.official-documents.gov.uk/document/cm69/6996/6996.pdf>.

or boots, eye and ear protection, gloves, masks etc).²⁴⁴ The employer must also maintain a current safety policy and ensure that all employees are aware of the policy and any revision.²⁴⁵ Employees must be provided with health checks if there is a danger of ill health because of the work.

Migrant workers are entitled to the same protections under the health and safety legislation as other workers regardless of whether or not they are legally authorised to work in the UK. The responsibility for the health and safety of temporary and migrant workers depends on the relationship between the labour provider and user and the circumstances under which the work is being carried out.

Enforcement

The Health and Safety Executive is responsible for enforcing the Act and is empowered to issue notices to the employer where safety inspectors believe that legal requirements are being breached. An employer's breach of its general duties do not expose it to civil liability; rather, the appropriate sanction is criminal prosecution.²⁴⁶ Until 2003, a breach of the duty imposed by the 1999 Health and Safety Regulations could not confer a right of action in any civil proceedings. However, a 2003 amendment to the Regulations now permits civil claims to be brought against employers and employees who are in breach of duties imposed on them by the 1999 Regulations. Third parties, however, are excluded from bringing such civil claims against employers or employees.²⁴⁷

● *Working Time Regulations*

The Working Time Regulations 1998 create a number of specific rights which are enforceable by all workers, including the majority of agency workers and freelancers. A worker is defined as someone who has a contract of employment, or someone who is paid a regular salary or wage and works for an organisation, business or individual. Only individuals legally working in the UK are entitled to enforce the right to working time protection.

244 HSWA, s. 2(a), (b), (c).

245 *Ibid.*, s. 3.

246 *Ibid.*, s. 33(1)(a)

247 Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003 (S.I. 2003/2457) and Management of Health and Safety at Work (Amendment) Regulations 2006 (S.I. 2006/438).

In 2003, the Regulations were extended to cover workers in the following sectors: air, rail and road transport; non-mobile workers in sea fishing, sea transport, inland waterways and lake transport; and other work at sea, (e.g. offshore work in the oil and gas industry). The basic rights and protections that the Regulations provide are:

- A limit of an average of 48 hours a week which a worker can be required to work (though workers can choose to work more if they want to).²⁴⁸
- A limit of an average of eight hours' work in 24 which nightworkers can be required to work.²⁴⁹
- A right for night workers to receive free health assessments.²⁵⁰
- A right to 11 hours' rest a day.²⁵¹
- A right to a day off each week.²⁵²
- A right to an in-work rest break if the working day is longer than six hours.²⁵³
- A right to four weeks' paid leave per year.²⁵⁴

A worker who is denied rest periods, breaks or the paid annual leave entitlements may complain to an Employment Tribunal. Those classified as employees may bring a claim for unfair dismissal to an employment tribunal, regardless of their length of service, if they are dismissed for exercising rights under these regulations. Workers who are not employees may complain that they have suffered a detriment if their contracts are terminated for this reason. Both employees and workers are also protected from other detrimental action or deliberate inaction by their employer.

Enforcement is also carried out by different authorities. The limits and health assessments (if a night worker), are enforced by the Health and Safety Executive, local authority environmental health departments, the Civil Aviation Authority (CAA), the Vehicle and Operator Services Agency (VOSA) and Office of Rail Regulation (ORR).

248 Reg. 4.

249 Reg. 6.

250 Reg. 7.

251 Reg. 10.

252 Reg. 11.

253 Reg. 12.

254 Regs. 13, 14.

● *Unauthorised Deductions*

An employee may bring a claim against his or her employer for making unauthorised deductions from his wages. The claim must be brought before an employment tribunal within three months of the last deduction.

Employers are prohibited from making deductions from wages under the Employment Rights Act 1996 unless:

1. The deduction is required or authorised to be made by virtue of a statutory provision (e.g. PAYE tax or national insurance) or a relevant provision of the worker's contract, or
2. The worker has previously signified in writing his/her agreement or consent to the making of the deduction.²⁵⁵

This does not prevent deductions to reimburse employers for an overpayment of wages or expenses. Where an Employment Tribunal determines that an employer made an unlawful deduction from wages it can order the employer to pay the amount of the deduction to the employee.²⁵⁶

An Employment Tribunal will not hear a claim for unauthorised deductions from wages made by an undocumented worker, as it is a statutory right that is dependent upon the existence of an enforceable contract.

Making a Claim

Before an individual may bring a claim to an employment tribunal, she or he must first attempt to resolve any grievances with the employer through meetings and through the employer's dismissal and grievance procedure. This requires that the employee put the issue in writing and allow a period of 28 days to pass. The employer is then obligated to meet with the employee to discuss the grievance. An individual who is dissatisfied with the employer's decision must appeal it in a further meeting. After these procedures have been followed and the grievance still remains unresolved, the employee may then submit the claim to a tribunal.

A claim must be submitted on an approved form provided by the Employment Tribunals Service and may be submitted online or by post. Generally, the tribunal must receive an employment claim within three months from the date employment ended or from the date of the incident that gave rise to the claim. Disappointed parties may appeal to the

²⁵⁵ Employment Rights Act 1996, s. 13.

²⁵⁶ *Ibid.*, s. 24.

Employment Appeal Tribunal within 42 days after the Employment Tribunal issued its judgement, decision, direction or order.

Legal aid is not available for representation in Employment Tribunals in England, Wales and Northern Ireland, although legal advice may be available to assist in the preparation of a case before a tribunal according to the claimant's financial circumstances.

An Employment Tribunal has the power to award sanctions against the claimant, especially if it is considered that the claim had little merit or possibility of success.

Role of Trade Unions

Trade unions are increasingly playing an important role in enabling trafficked and exploited persons to pursue compensation against their employers. Trade unions are well-positioned to effect industry-wide improvements rather than change that is limited to a specific civil or criminal case. For example, unions are obtaining unpaid wages on behalf of exploited and trafficked migrants under collective agreements and seeking damages against companies for breaching the agreements. In Sweden, a Forestry and Wood Union assisted exploited migrant forestry workers who were held in debt bondage by their employer in obtaining unpaid wages.²⁵⁷

Trade unions also continue to play their important traditional role of negotiating collective bargaining agreements, disseminating information to workers and the public about workers' rights, providing legal services to union members, and campaigning for improved protection for workers. In the UK, the Transport & General Workers' Union helped bring about the implementation of the Gangmasters Licensing Act and the Trades Union Congress has produced leaflets on migrant workers' rights in at least ten different languages.

Advantages of an Employment Tribunal

Bringing a claim before an Employment Tribunal entails relatively little cost, especially as compared to litigation costs in a civil court. There is no fee associated with submitting a claim to tribunal, although in most cases, each party subsequently bears its own costs related to the hearing. Parties, witnesses and volunteer representatives may be entitled to claim travel and other expenses associated with attending a tribunal hearing.

²⁵⁷ See e.g., *Building and Wood Workers' International*, 'Swedish union steps in for tree planters from Romania', available at <http://www.bwint.org/default.asp?Index=1931&Language=EN>.

An additional advantage of the tribunal is its informal setting, which may be less intimidating than formal court proceedings. Civil procedure rules do not apply and decisions may be rendered by the tribunal on the same day of the hearing. Several resources are also available to assist or advise a party in bringing a complaint. The Citizens Advice Bureau, for example, can offer assistance in preparing an employment claim. If the complaint involves failure to receive national minimum wage, the individual can seek advice from the National Minimum Wage hotline. In England and Wales, free legal services for employment claims can also be obtained from the Free Representation Unit and the Bar Pro Bono Unit.

Disadvantages of an Employment Tribunal

Whilst employment tribunals are a less formal forum for resolving disputes, a number of barriers to access still remain. Indeed, the TUC Commission on Vulnerable Employment found that the ability to seek redress and access to rights is very difficult for vulnerable workers in general, regardless of whether they are British or migrant workers.²⁵⁸

The lack of funding for Employment Tribunal cases may bar many potential claimants. Legal aid funding is only available if the case is referred to the Employment Appeal Tribunal. Only in exceptional circumstances will the prevailing party be able to recover legal expenses from the opposing party. Legal assistance, however, is especially necessary for individuals with limited legal knowledge or command of English, particularly given the extensive procedural rules of tribunals. For example, specific grievance procedures must first be followed before claims can be brought before a tribunal and claims must be made within three months from the date the grievance arose.

Another disadvantage of Employment Tribunals is the exclusion of remedies to irregular workers. Enforcement of tribunal awards also poses another hurdle to successful claimants, as employment tribunals lack authority to enforce their own judgements where an employer fails to pay the award. Rather, the worker must seek enforcement of the payment through civil proceedings in England and Wales or through the assistance of a Sheriff Officer in Scotland.

258 Trades Union Congress, Commission on Vulnerable Employment, *Hard Work, Hidden Lives*, June 2008, available at http://www.vulnerableworkers.org.uk/files/CoVE_full_report.pdf.

Effectiveness as a Remedy for Trafficked Persons

The extent to which employment legislation has afforded trafficked persons access to justice is difficult to gauge at this time. There were a number of successful cases taken on behalf of workers subject to domestic servitude. However, these seem to be rare examples that were tested only in the London area. Employment tribunals do not offer an effective remedy for undocumented workers.

Vulnerable and migrant workers who have been trafficked or exploited still face difficulties in accessing the legal help they need. However, as NGOs and trade unions forge and strengthen partnerships to assist these workers, Employment Tribunals will likely play a more visible role in remedying some of the injustices faced by trafficked individuals.

5.3 Criminal Injuries Compensation Scheme

Overview

The Criminal Injuries Compensation Scheme (CICS) is a government-funded scheme that pays compensation awards to innocent victims of violent crime who have sustained injuries in England, Scotland or Wales.²⁵⁹ The scheme pays out two types of compensation: personal injury awards to victims of crime and fatal injury awards to immediate family members of a victim who has died as a result of a violent crime.²⁶⁰ In certain circumstances, a victim may be able to claim compensation for past or future lost earnings or special expenses caused by such a crime.²⁶¹

259 The official website of the Criminal Injuries Compensation Authority, which administers the scheme, is found at www.cica.gov.uk. Northern Ireland has its own compensation scheme (Northern Ireland Criminal Injuries Compensation Scheme) for victims of violent crimes. The 2001 Compensation Scheme applies to all applications received after 1 April 2001 and before 3 November 2008. The current 2008 Scheme was introduced on 3 November 2008 and applies to any applications made on or after then. The changes implemented in the 2008 Scheme streamline some administrative procedures, clarify the scheme rules in areas of doubt, and update the tariff of injuries to reflect current views on the relative seriousness of certain injuries. The Appeals Panel is now incorporated into a new tribunals system.

260 Criminal Injuries Compensation Authority, *Compensation for Victims of Violent Crime: A Short Guide*, available at https://www.cica.gov.uk/pls/portal/docs/PAGE/INFORMATION_PAGES/INFO_BOTTOMBOX_HWPC/BKL1%20COMPENSATION%20MINI%20GUIDE%20MAR05_0.PDF.

261 *Ibid.*

Eligibility

In order to be eligible for compensation under the scheme, the claimant must have sustained physical or mental injuries as a result of a violent crime and must have been blameless.²⁶² A victim who is claiming mental injury without physical injury must demonstrate that he was put in reasonable fear of immediate physical harm to his own person.²⁶³

The value of awards is determined by a tariff system of 25 levels that assigns each specific injury a fixed amount of compensation.²⁶⁴ Awards under the tariff range from £1,000 to £250,000. In serious cases, where victims may also be compensated for lost earnings or special expenses such as medical costs, the highest award that CICA can make, including both the tariff payment and these additional elements, is £500,000.²⁶⁵

A claimant will only receive compensation for lost earnings if the period of lost earning capacity is greater than 28 weeks; no compensation will be paid for the first 28 weeks of loss.²⁶⁶

A UK resident who was injured in a violent crime on or after 1 July 2005 in another EU country, while not eligible to apply for compensation under the CICS, is entitled to apply for compensation from that country.²⁶⁷ In accordance with EU Council Directive 2004/80/EC, the Glasgow-based EU Compensation Assistance Team can help individuals apply for criminal injuries compensation from the EU country where the crime occurred.²⁶⁸ The Directive requires member states to establish compensation schemes that guarantee fair and appropriate compensation to victims of violent crime, as well as appoint an 'assisting authority' to help people apply for compensation from other member states.

²⁶² *Ibid.*

²⁶³ The Criminal Injuries Compensation Scheme 2001, para. 9(a), available at http://www.cicap.gov.uk/publications/documents/crim_inj_comp2001.pdf.

²⁶⁴ Para. 26.

²⁶⁵ Para. 24.

²⁶⁶ Para. 30.

²⁶⁷ Official Journal of the European Union, *Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims*, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:261:0015:0015:EN:PDF>.

²⁶⁸ CICA, *Applying for Criminal Injuries Compensation in Other European Union Countries*, 2008, available at <http://www.cica.gov.uk/Documents/publications/Guide%20-%20Applying%20in%20other%20EU%20countries.pdf?epslanguage=en>.

Time Limit

The claimant must apply within two years of the crime which caused the injuries.²⁶⁹ The Criminal Injuries Compensation Authority (CICA), the body which decides the claims, will only consider applications received outside the time limit if it determines there is a legitimate reason for the delay in seeking compensation and that it is in the interests of justice to do so.²⁷⁰

● Mechanics

Complaint submitted to	Decision appealed to	Further appeal to	Time for appeal
Claims officer	Senior member of staff	Criminal Injuries Compensation Appeal Panel	90 days from lower decision

In order to apply for compensation under the CICS, the applicant must complete an application form, providing as much information as possible about the crime and related injuries, as well as police and hospital reference numbers. Applications may be obtained directly from the CICA, a local police station or a Victim Support branch. Applicants can also obtain assistance from Victim Support in completing an application. Legal aid may be available for initial advice and assistance in preparing an application to the Authority.

The CICA collects information about the applicant's injury (e.g. the source, extent and any potential contributing factors) through police reports and hospital records concerning the incident-related injuries. In determining the extent of the award, the claims officer also considers whether the applicant took reasonable and timely steps to inform police of the crime and resulting injuries and whether the applicant cooperated with the police in attempting to bring the assailant to justice.²⁷¹

It usually takes six months to collect the required information and an applicant can generally expect to receive a decision a year or more after applying for an award depending on the complexity of the case.²⁷² Applicants may not seek double recovery

269 Para. 18.

270 *Ibid.*

271 Para. 13(a) and (b).

272 Criminal Injuries Compensation Authority (CICA), *How We Decide Compensation*, available at https://www.cica.gov.uk/portal/page?_pageid=736,226134&_dad=portal&_schema=PORTAL.

for their injuries. Therefore, where an applicant has already received an award for a money judgement from a civil court, a compensation order from a criminal court or a financial settlement concerning a claim for damages and/or compensation with respect to the same injuries, any award that the applicant receives under the CICS will be reduced by the full value of the first award.²⁷³

Applicants who receive an unfavourable decision from a claims officer may seek review of the decision from a more senior member of staff within 90 days of the decision.²⁷⁴ An applicant dissatisfied with the decision of the review may further appeal the decision to the Criminal Injuries Compensation Appeals Panel within 90 days of the date of the review decision.²⁷⁵

● *Advantages*

The CICS offers a number of advantages to a trafficked person seeking compensation. First, unlike litigation, the applicant is not subject to a public and adversarial forum involving interaction with the offender. The trafficker would not be informed of the applicant's efforts to seek compensation, thus minimising any fears of reprisal from the trafficker. Second, the process of applying for and potentially receiving compensation under the scheme is shorter than litigation, which can often take several years to resolve. Third, unlike the compensation order issued by criminal courts, receiving an award from CICA does not require the conviction of the offender who caused the victim's injuries.²⁷⁶ Fourth, payment of an award to the applicant does not require collection of funds from the offender first, as payment is made by a public body. Fifth, the scheme provides the possibility of a high financial recovery for the victim's injuries as well as an appeals process for a disappointed applicant. Finally, although legal aid and free legal assistance is limited, both police and at least a couple of solicitors' firms have offered assistance to trafficked persons who have pursued applications to the CICA.

● *Disadvantages*

A recent House of Commons report suggests that public awareness of the CICS is

273 Paragraph 48.

274 Paragraph 59

275 Paragraph 61.

276 Each of the successful test cases brought on behalf of trafficked persons, however, has involved offenders who have been convicted of human trafficking offences.

limited: in 2006, 64% of victims of violent crime were unaware of the Criminal Injuries Compensation Scheme and only five per cent applied.²⁷⁷

One of the disadvantages of applying for compensation under the scheme is that the applicant's injuries must be deemed sufficiently serious by the panel to receive at least the minimum compensation award of £1,000. Although many trafficked persons may likely be able to establish the minimum threshold of injuries, individuals must be as thorough as possible in describing their injuries in their applications.

Depending on the trafficked person's objectives, another disadvantage of the scheme may be that the compensation award comes from a public fund, rather than directly from the offender. Thus, the source of the compensation may not provide the sense of justice that the trafficked person seeks.

Despite the early success of the CICS as a remedy for trafficked persons, a number of uncertainties exist regarding the components of a successful application. For example, at least two applications on behalf of trafficked persons have been rejected by the CICA even though both individuals testified at the trial of the defendants and two of the three offenders were subsequently convicted of human trafficking offences.²⁷⁸ In some cases, the applicant's illegal entry into the UK has contributed to a failed application, while in other cases, illegal entry has not barred a successful application.²⁷⁹

Additionally, preparation of an application to the CICA is a time- and resource-intensive undertaking. The few cases that have been successful thus far have involved the continuous support of dedicated case workers, solicitors, police officers and interpreters, with the entire process lasting from 18 months to two years from the moment the application was initiated to the time a decision was received from the Authority. Because the length and complexity of the cases far exceeds the availability of legal aid and pro bono legal assistance, the CICA is not likely to be a widely available remedy to the vast majority of trafficked persons.

277 House of Commons, Committee of Public Accounts, *Compensating Victims of Violent Crime*, November 2008, p. 5, available at <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmpubacc/251/251.pdf>.

278 Information from Deirdre O'Leary, Lovells, Assistant Pro Bono Manager, 13 June 2008.

279 *Ibid.*

Effectiveness of the CICS as a Remedy for Trafficked Persons

In July 2007, the first successful compensation awards were made to two young Romanian women who were trafficked for sexual exploitation.²⁸⁰ The individuals, who had been trafficked to the UK and forced into prostitution, also suffered physical and mental abuse over the period of several years before escaping from their traffickers and finding refuge at the POPPY Project.

The first woman, who was trafficked into the country in 2002 at the age of 16, received £62,000, which included £22,000 for sexual abuse and £40,000 for lost earnings and opportunity.²⁸¹ The second claimant, who was 13 at the time she was trafficked into the UK in 2004, received £36,500, which included £16,500 for sexual abuse and £20,000 for lost opportunity. The lower award accounted for the shorter length of time the woman was held under the control of the trafficker and her lower earning potential due to her age. Both women stood as prosecution witnesses at the trial of their trafficker, who was subsequently convicted of rape and controlling prostitution and sentenced to 21 years in prison.

Three additional applications have since resulted in successful outcomes for several other women trafficked for sexual exploitation with awards of £30,547 and two for £16,500.²⁸² At least four more applications are awaiting decision and in one of these cases, the applicant was awarded an interim payment of £22,000.²⁸³ The payments appear to herald increasing recognition and sensitivity to the injuries sustained by trafficked persons. The Authority's acceptance of the applicants' false imprisonment and forced prostitution as a basis of compensable injury solidifies the ability of trafficked persons to claim under the scheme. An offender's conviction for human trafficking offences, however, is not sufficient to guarantee the success of an application, as there have been at least two cases where applications were rejected on other grounds, even where the individuals testified at the defendants' trials.²⁸⁴

280 Information from barrister Parosha Chandran.

281 *Ibid.*

282 *Groundbreaking scheme pursuing Criminal Injuries Compensation for female victims of trafficking*, Changemakers, available at <http://www.changemakers.net/node/8451>; Information from Deirdre O'Leary, Lovells, Assistant Pro Bono Manager, 13 June 2008.

283 Information from Deirdre O'Leary, Lovells, Assistant Pro Bono Manager, 13 June 2008.

284 *Ibid.*

The CICS may also offer a potential remedy for persons trafficked to the UK for forced labour who meet the scheme's eligibility criteria, though test cases have not yet been brought.

5.4 Compensation Order

Overview

The compensation order in criminal court functions as both a punitive measure for the offender and a restorative measure for the victim, as the victim is compensated directly from the offender's assets. Although the monetary award is not intended to make the victim whole, in some cases it may obviate the need for the victim to seek legal redress against his or her trafficker through a civil suit.²⁸⁵ Once a defendant has been convicted of a criminal offence, section 130 of the Power of Criminal Courts (Sentencing) Act 2000 ["Sentencing Act"] gives the magistrate and Crown Court the discretion to order the defendant to pay compensation to the victim for any personal injury, loss or damage resulting from the offence.²⁸⁶ A court may impose a compensation order alongside a separate sentence or as a penalty in its own right.²⁸⁷

A victim of crime may be compensated for personal injury; losses through property damage or fraud; loss of earnings while off work; medical and travelling expenses; and pain and suffering.²⁸⁸ The victim cannot apply for a compensation order, but rather must inform the police that he or she wishes to claim compensation. The police provide the victim with a MG19 compensation claim form on which to record her losses, as well as any supporting documentary evidence where available, such as estimates and bills.²⁸⁹ Where compensation for personal injury is sought, information concerning medical visits to a doctor or dentist is also required. The form is also intended to provide the prosecutor with relevant details to make an application for compensation on the victim's behalf in court.

285 Her Majesty's Court Service, *Compensation*, <http://www.hmcourtsservice.gov.uk/infoabout/attend/witness/compensation.htm>.

286 Power of Criminal Courts (Sentencing) Act 2000 (c.6) [hereinafter PCCSA], s. 130(1).

287 *Ibid.*

288 Criminal Justice System, *Compensation for Victims of Crime*, available at <http://www.cjsonline.gov.uk/victim/compensation>.

289 A copy of the MG19 form can be found in Section 3 of the Prosecution Team Manual of Guidance (2004 Edition), which is available at <http://police.homeoffice.gov.uk/publications/operational-policing/prosecution-manual-section3?view=Binary>.

The Prosecution Team Manual of Guidance provides guidance notes to police to assist them in the completion of the MG19 form. For example, the notes state that “Where possible the MG19 should be completed at the same time as the statement of the complainant. The victim should be given a form MG19 as soon as possible after the defendant has been charged or the offence has been listed as TIC [taken into consideration].”²⁹⁰ Police have a duty to provide assistance to victims who may have difficulty completing the form, and the victim should be provided with an explanatory leaflet entitled “Victim of Crime.”²⁹¹ The police pass the completed form and a copy of relevant receipts, bills and estimates to the Crown Prosecution Service (CPS) to make an application in court for a compensation order against the offender.

If the court does make a compensation order, it must take into account the defendant’s financial means, as well as any evidence on behalf of the defendant or prosecutor, including the victim’s personal statement.²⁹² The offender must pay the specified amount to the court, which the court then passes on to the victim. A victim will only receive the compensation after the offender has paid the money into court.

If the offender has sufficient assets the compensation payment will normally be made in one lump sum. Usually, however, the offender is allowed time to pay the order, and to pay it in instalments. Where the court issues other financial penalties against the offender, such as a fine or costs order, the compensation order has priority.²⁹³ If a court chooses not to award compensation, it must state the reasons for its decision.²⁹⁴

The magistrates’ court is limited to awarding a compensation order of £5,000 for each offence, while the Crown Court may order an unlimited sum.²⁹⁵ Compensation paid to the victim reduces the amount of damages recoverable by the victim in civil proceedings in order to prevent double recovery by the victim.²⁹⁶

290 Prosecution Team Manual of Guidance (2004 Edition), p. 175, available at <http://police.homeoffice.gov.uk/news-and-publications/publication/operational-policing/prosecution-manual-section3?view=Binary>.

291 *Ibid.*

292 PCCSA, s. 130(11).

293 PCCSA, s. 130(12).

294 PCCSA, s. 130(3).

295 PCCSA, s. 131(1).

296 PCCSA, s. 134.

● *Enforcement of the Compensation Order*

In the event that the defendant fails to pay the compensation order to the victim, the court may seek to enforce the order, taking into account all the circumstances of the case. A court may pursue one of several options for enforcement. First, it can order that deductions be taken from an employed person's earnings or, if the offender is unemployed, from certain state benefits. Second, the court can issue a warrant of distress, which instructs bailiffs to seize and sell goods belonging to the offender up to the value of the compensation order and any related costs. Third, the court may order the clamping of an offender's vehicle and the inclusion of the unpaid compensation order on a register of fines and judgements that is open to public inspection, which may have a bearing on the offender's ability to get credit, housing and other services. Finally, as an ultimate sanction, the court may order that the offender be held in custody for non-payment.

● *Advantages of the Compensation Order*

Compensation orders offer several advantages to a trafficked person. First, it may require less time and effort by the individual than seeking compensation under the Criminal Injuries Compensation Scheme or in civil litigation. A crime victim need only inform the prosecutor and police that he or she is interested in seeking a compensation order from the court and provide the relevant details about the injuries, loss or damage suffered.

The minimal burden on the victim is particularly important for a trafficked person who may be highly traumatised and unable or unwilling to pursue the latter options. Second, a compensation order fills a void where the victim's injuries may not be deemed serious enough to warrant the minimum award of £1,000 under the Criminal Injuries Compensation Scheme. Thus, a compensation order, if made, would save the victim the expense of having to pursue further small claims litigation in civil court.

Third, a victim need not meet certain eligibility criteria in order to receive a compensation order, as is required under the CICS. Thus, the individual need not have been a victim of violent crime or be subject to a character evaluation. Rather, a court is under a duty to consider compensation to a crime victim in every case where loss, damage or injury has resulted from the offence.

● *Disadvantages of the Compensation Order*

While seemingly a straightforward process, the low percentage of compensation orders

actually made suggests otherwise. The compensation order is most effective as a remedy where the offender has readily identifiable assets which have been confiscated by the police and where the victim has suffered a readily quantifiable injury.

Among human trafficking cases, however, the experiences of judges, prosecutors and police indicate that such a scenario is elusive.²⁹⁷ Anecdotal evidence from prosecutors suggests that compensation orders are most commonly used in simple assault cases (e.g., where one sustained injuries in a bar fight) or property crimes. Statistical evidence demonstrates that compensation is made in only 1.5% of eligible sexual offences cases.²⁹⁸

Police have consistently stated that traffickers often lack significant assets and, even where available, assets are difficult to confiscate. There is also no guarantee that a crime victim will receive a compensation order upon conviction of the offender, as an offender may default in payment of the order or may pay in irregular instalments.

Even where a trafficked person is eligible for a compensation order, the nature and trauma of the injuries suffered by the individual, a general lack of definitive guidance about compensating such injuries and the low priority of the issue continue to render compensation orders ineffective for trafficked persons. A common concern among police with respect to discussing the possibility of compensation with trafficked persons has been the fear of defence counsel portraying the issue as one of inducement to the individual to testify at trial against the defendant. Thus, many police have adopted the practice of discussing compensation only well after the completion of any criminal trial, at which point the issue may often be forgotten or of little priority to the trafficked person, particularly if he or she has returned to his or her home country.

297 See Lam, J. and Skrivankova, K., *Opportunities and Obstacles: Ensuring Access to Compensation for Trafficked Persons in the UK*, Anti-Slavery International, 2009.

298 Ministry of Justice, *Criminal Statistics 2006: England and Wales*, Table S2.8(A), November 2007, available at <http://www.justice.gov.uk/publications/criminalannual.htm>. Forty-four compensation orders were made out of 2890 individuals convicted of a crime under the category of "Sexual Offence." Offences under this category include: (1) Buggery, (2) Sexual Assault on a Male, (3) Rape of a Female, (4) Rape of a Male, (5) Sexual Assault on a Female, (5) Sexual Activity With a Child Under 13, (6) Sexual Activity With a Child Under 16, (7) Familial Sexual Offences (Incest), (8) Exploitation of Prostitution, (9) Bigamy, (10) Sexual Activity With a Person With a Mental Disorder, (11) Abuse of Children Through Prostitution and Pornography, (12) Trafficking for Sexual Exploitation, (13) Abuse of Trust – Sexual Offences, (14) Gross Indecency with Children, (15) Miscellaneous Sexual Offences.

6 CONCLUSION

Although there have been very few awards of compensation made to trafficked persons in the UK, the issue should be one of great concern to legal and social service providers. The current reality is that the criminal justice system delivers little justice and reparation to the victim. Trafficked persons are often forgotten once criminal proceedings of the trafficker draw to a close. Additionally, the current *ad hoc* policy of granting a reflection period and residence permits to trafficked persons does not realistically permit them to access legal options which would enable them to recover compensation. Trafficked persons should not be vulnerable to re-trafficking when they return to their country of origin, as is currently too often the case.

Whilst the implementation of the Council of Europe Convention ushers in new opportunities to protect and restore victims, compensation must still be mainstreamed into the Government's anti-trafficking policy. Lawyers, in particular, have a unique role to play in advancing the issue of legal remedies for trafficking victims. The limited case law regarding compensation for trafficked persons should not be a deterrent to representing them in the pursuit of remedies. Indeed, through creative advocacy both in the UK courts and the European Court of Human Rights – such as the advancement of novel arguments under existing legislation and campaigning for better legislation – new and favourable precedent and opportunities may open more doors for trafficked persons to have their day in court.

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TABLE OF CASES

The following cases provide guidelines on sentencing and reflect the degree of coercion, force and violence used in the exploitation of their victims:

- **Attorney General's Reference No 6 of 2004 (R v Plakici) [2005] Cr App R(S) 19**

This case dealt with a series of individual offences that amounted to an extremely serious case of trafficking. The offender had arranged for the illegal entry of women and young girls into this country in circumstances that involved both deception and coercion and forced them to work as prostitutes. Counts of illegal entry attracted sentences of five years, of living on immoral earning five years, of kidnapping ten years, and of incitement to rape eight years. A total sentence of 23 years was imposed.

- **Blackford Farms Ltd v Mr C Mulqueoney, UKEATS/0030/06/MT**

- **R v Maka [2006] 2 Cr App R(S) 14**

Sentences totalling 18 years were upheld, on a guilty plea, in the case of a man who trafficked a 15-year-old girl into this country and repeatedly sold her to others for the purposes of prostitution. The court endorsed the comment of the sentencing judge that human trafficking was a degrading activity producing untold misery around the world and that the case had echoes of slavery with the girl being sold from one procurer to another. It added that the offence was intended to embrace a wide variety of different forms of conduct, identified as trafficking for sexual exploitation.

- **R v Roci and another [2006] 2 Cr App R(S) 15**

In this case the appellants were concerned in the importation and the control in this country of prostitutes from Lithuania. While the women came to this country willingly, they were then coerced to work in unpleasant circumstances and ways contrary to their wishes and to pay over most of their earnings. The sentence on the appellant who was concerned in all these matters was reduced from eleven years to nine years' imprisonment.

- *Hall v Woolston Hall Leisure Ltd* [2000] IRLR 578

- *Blue Chip Trading Ltd v Helbawi*

- *Vakante v Governing Body of Addey and Stanhope School*

- *A v Hoare*

- *Z v UK*

- *M v UK*

- *R v O*

Rights and Recourse

- *Osman v UK*
- *R (Alliss) v Legal Services Commission*
- *Siliadin v France*
- *Airey v Ireland*
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- *Three Rivers District Council & Ors v The Governor and Company of the Bank of England* [2004] UKHL 48
- *Wheeler v Quality Deep Ltd* [2004] EWCA Civ 1085
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http://www.jsboard.co.uk/civil_law/cbb/index1.htm

Legal Practitioners

- AIRE Centre
<http://www.airecentre.org>
- ATLeP
<http://www.ein.org.uk/resources/printfriendly2.shtml?x=227892>
- Community Legal Service Direct
<http://www.communitylegaladvice.org.uk>
- Garden Court Chambers
<http://www.gardencourtchambers.co.uk>
- ILPA
<http://www.ilpa.org.uk>
- Interights
<http://www.interights.org>
- Lovells Law Firm
<http://www.lovells.com/Lovells/Worldwide/UnitedKingdom/UK.htm>
- North Kensington Law Centre
<http://www.nklc.co.uk>
- Northern Ireland Law Centre
<http://www.lawcentreni.org>
- Refugee Migrant Justice
<http://www.refugee-legal-centre.org.uk>
- Thompson Solicitors
<http://www.thompsons.law.co.uk>
- 1 Pump Court
<http://www.1pumpcourt.co.uk>

NGOs and Charities

- Anti-Slavery International
www.antislavery.org
- Citizens Advice Bureau
<http://www.citizensadvice.org.uk>
- Kalayaan
<http://www.kalayaan.org.uk>
- Medaille Trust
<http://www.medaille.co.uk>
- Migrant Helpline
<http://www.migranthepline.org.uk>
- Poppy Project
http://www.eaves4women.co.uk/POPPY_Project/POPPY_Project.php
- Salvation Army
http://www2.salvationarmy.org.uk/uki/www_uki.nsf
- Victim Support
<http://www.victimsupport.org.uk>

Government Agencies

- Advisory, Conciliation and Arbitration Service (ACAS)
<http://www.acas.org.uk>
- Criminal Injuries Compensation Authority
<http://www.cica.gov.uk>
- Employment Agency Standards Inspectorate
<http://www.berr.gov.uk/whatwedo/employment/employment-agencies/index.html>
- Employment Tribunal Service Enquiry Line
<http://www.employmenttribunals.gov.uk>
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