

INADEQUACY OF REMEDIES IN CASES OF HUMAN TRAFFICKING AND MODERN SLAVERY

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In the last five years, the UK Supreme Court has heard appeals in several claims brought by migrant domestic workers, a form of employment notorious for exploitation by unscrupulous employers.² The law in this country recognises the problem in several ways: depending on the form mistreatment takes, it may amount to a breach of an employment contract or statutory employment rights, a tort, an offence under the Modern Slavery Act 2015 or under the general criminal law, and it may entitle the victim to a slavery and trafficking reparation order under section 8 of that Act. However, in *Taiwo v Olaigbe* we held that mistreatment stemming from the worker's vulnerable immigration status did not amount to race discrimination. This led to the closing remarks in our judgment on the inadequacies of the present remedies for modern slavery:

It follows that these appeals must fail. This is not because these appellants do not deserve a remedy for all the grievous harms they have suffered. It is because the present law, although it can redress some of those harms, cannot redress them all. Parliament may well wish to address its mind to whether the remedy provided by section 8 of the Modern Slavery Act 2015 is too restrictive in its scope and whether an employment tribunal should have jurisdiction to grant some recompense for the ill-treatment meted out to workers such as these, along with the other remedies which it does have power to grant.³

Among the problems which some of these workers have faced is that their immigration status means that they have no right to work and therefore any contract of employment might be invalid. However, the Supreme Court has established that any illegality entailed in the migrant's working in the UK is no more than the context for the alleged misconduct and these employment claims should not be barred by public policy.⁴ We have also held that diplomatic immunity would cease to protect an employer from such claims when the diplomatic posting ended.⁵ We left open whether an employer's participation in trafficking might fall within the scope of 'commercial activities', which are excepted from immunity under article 31 of the Vienna Convention on Diplomatic Relations.⁶ So there are some respects in which claims by victims of trafficking have become easier. But are they enough?

The UK is obliged by the Council of Europe Convention on Action against Trafficking in Human Beings⁷ to ensure that victims have access to compensation and legal redress. Article 15.3 states that 'Each party shall provide, in its internal law, for the right of victims to compensation from the perpetrators'. Article 15.4 provides that 'Each Party shall adopt

¹ I am deeply indebted to my Judicial Assistant, Penelope Gorman, for her help with this paper.

² *Hounga v Allen and another* [2014] UKSC 47, [2014] 1 WLR 2889; *Taiwo v Olaigbe and another* [2016] UKSC 31, [2016] 1 WLR 2653; *Reyes v Al-Malki* [2017] UKSC 61, [2017] 3 WLR 923.

³ *Taiwo v Olaigbe and another* [2016] UKSC 31, [2016] 1 WLR 2653 at paragraph 34.

⁴ *Hounga* (n 2), confirmed in *Patel v Mirza* [2016] UKSC 42, [2017] AC 467.

⁵ *Reyes* (n 2).

⁶ Vienna Convention on Diplomatic Relations (adopted 18 April 1961, entered into force 24 April 1964) 500 UNTS 95.

⁷ Council of Europe Convention on Action against Trafficking in Human Beings (adopted 16 May 2005, entered into force 01 February 2008) CETS 197.

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’.

There are four broad avenues in the UK for a victim to obtain compensation. These are (1) a claim in the Employment Tribunal for breaches of employment rights or discrimination on the ground of a protected characteristic such as race or sex; (2) a claim under the Criminal Injuries Compensation Scheme if the victim has suffered personal injury from a crime of violence; (3) a civil claim in tort or contract; and (4) either a reparation order or a compensation order made by the criminal courts against a trafficker who has been convicted of an offence.⁸

Recognition as a victim is achieved through the National Referral Mechanism (NRM). This was introduced in 2009 as part of the UK’s compliance with the duty to investigate and prosecute potential cases of human trafficking, slavery or forced labour under article 4 of the European Convention on Human Rights.⁹ It involves a two-stage process. When potential victims are referred to it, the first determination is whether there are ‘reasonable grounds’ to believe that a person is a victim of human trafficking or modern slavery. If there are, the potential victim is granted a 45-day reflection and recovery period. She or he is provided with accommodation or support by the Salvation Army, which should include advice on immigration and possible avenues for compensation.¹⁰ During this time, further investigation takes place in order to reach a ‘conclusive’ decision as to whether she or he is a victim of trafficking. Other public authorities, such as the police and the Home Office have a duty to carry out a prompt and effective investigation of credible claims, whether or not the complaint was made by the victim.

Even if she or he is found to be a victim, immigration status may still be a problem. Where they do not qualify for asylum or humanitarian protection or leave to remain on other grounds, the Home Office requires ‘compelling reasons based on their individual circumstances’. However, the Home Office may grant discretionary leave to remain here in three situations:

- Where the police formally request that a victim is granted leave because the victim is cooperating with an ongoing police investigation and his or her presence is necessary. Discretionary leave is generally for 12 months and a day, which can be extended.

⁸ Article 16 of Council Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57 requires member states to (1) ensure that in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender, within a reasonable time, except where national law provides for such a decision to be made in other legal proceedings, and (2) to promote measure to encourage offenders to provide adequate compensation to victims.

⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR),

¹⁰ The standards of care and support for victims during this process have recently been amended and augmented by the *Slavery and Trafficking Survivor Care Standards 2018*, published by the Human Trafficking Foundation (the UK-based charity which grew out of the work of the All-Party Parliamentary Group on Human Trafficking). See Kate Roberts (ed), ‘The Slavery and Trafficking Survivor Care Standards 2018’ (Human Trafficking Foundation 2018) <<https://www.antislaverycommissioner.co.uk/media/1235/slavery-and-trafficking-survivor-care-standards.pdf>> accessed 26 August 2019.

- The victim is pursuing a compensation claim against the trafficker, leave would help them secure justice and it would be unreasonable for them to pursue the claim from outside the UK.
- The personal circumstances of the victim are so compelling that leave of between 12 and 30 months is appropriate, for example to complete a course of medical treatment.¹¹

The fact that the victim has been trafficked will not be a ground in itself for refugee status; but an individual might qualify as a member of a social group that would be at risk of persecution on their return, such as female victims of trafficking for sexual exploitation, who face risks of reprisals, discrimination, and of re-trafficking.

What claims might a victim who has obtained leave to remain here make? First, section 8 of the Modern Slavery Act 2015 empowers the criminal courts to make a ‘slavery and trafficking reparation order’, but only where a person has been convicted of one of the offences created by the Act and a confiscation order has been made against that person in respect of that offence. The court must give consideration to making a reparation order in every case in which it has power to do so – regardless of whether it was requested by the prosecution – and to give reasons if it decides not to make one.¹² The amount of the order should be ‘such amount as the court considers appropriate having regard to any evidence and to any representations made by or on behalf of the person or the prosecutor’, but it cannot exceed the amount required to be paid under the confiscation order.¹³ The court has no power to make a Section 8 order as well as a compensation order under s 130 of the Powers of Criminal Court (Sentencing) Act 2000,¹⁴ the general discretionary power to make awards to victims of crime.

The limitations of this relief are immediately obvious. The person responsible for exploiting the victim must first be convicted of a trafficking offence and second have sufficient means to permit a confiscation order to be made. Lack of evidence sufficient to meet the criminal standard of proof beyond reasonable doubt will often be a problem. The 2018 UK Annual Report on Modern Slavery¹⁵ discloses that in 2017 only 205 defendants were prosecuted for either pre-Modern Slavery Act offences or the offences under that Act and there were only 59 convictions. Small wonder then that between the coming into force of the Act and December 2017, no reparation orders at all were made.¹⁶

In July 2018, the Home Secretary announced an independent review of the Act. This is being undertaken by two members of the House of Commons, Frank Field and Maria

¹¹ Home Office, ‘Asylum Policy Instruction Discretionary Leave’ (Home Office, 18 August 2015 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/658372/discretionary-leave-v7.0ext.pdf> accessed 26 August 2019, at [3.5] and [5.4].

¹² Modern Slavery Act 2015, Section 8(7).

¹³ *ibid*, Section 9.

¹⁴ *ibid*, Section 10.

¹⁵ HM Government, Department of Justice Northern Ireland, The Scottish Government, Welsh Government, ‘2018 UK Annual Report on Modern Slavery’ (Home Office, October 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/749346/2018_UK_Annual_Report_on_Modern_Slavery.pdf?_ga=2.217464542.9199193.1566833396-470876949.1566833396> accessed 26 August 2019.

¹⁶ Frank Field, Maria Miller and Baroness Butler-Sloss, *Independent Review of the Modern Slavery Act: Fourth interim report: Legal Application of the Modern Slavery Act* (Home Office, 21 March 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/788253/Independent_MSA_Review_Report_4_-_Legal_Application_2_.pdf?_ga=2.250295886.9199193.1566833396-470876949.1566833396> accessed 26 August 2019. It reports anecdotal evidence of two cases since the cut off period at [3.1.2].

Miller, and Baroness Butler-Sloss, the former President of the Family Division. An interim report relating to aspects of the legal application of the Act has recently been published.¹⁷ It identifies three reasons for the absence of reparation orders: first, the narrow circumstances in which an order may be made; second, a lack of awareness of them among participants in the criminal justice system and confusion about the differences between reparation orders and the compensation orders which may be made when a conviction has been secured under other legislation; and third, the police and Crown Prosecution Service are increasingly seeking to pursue ‘victimless’ prosecutions where the victims are not called as witnesses; this is designed to protect them from further trauma, but it may mean that the police lose contact with them. Further difficulties are caused by the failure to identify and secure assets and proceeds of crime swiftly and thoroughly at the outset, despite the array of powers in the Act to facilitate this. No-one suggested to the review panel that criminal compensation orders might be the solution, although they are a little easier to obtain. In any event, not surprisingly they too are extremely rare.¹⁸

It is difficult to see on this evidence what the 2015 Act has added by way of compensation for victims of slavery and trafficking. The Independent Review did invite views on whether the reparation order remedy was too restrictive. During the passage of the Bill, amendments had been put forward to introduce a general civil remedy for trafficking, but the government resisted these on the ground that the existing civil remedies were sufficient. The Review found ‘mixed views’ on whether there should be a specific civil penalty for modern slavery, which would allow the victims to bring claims in the County Court to seek compensation directly from the alleged trafficker in cases where a criminal prosecution had not been possible. The interim report did not recommend that the Government pursue this now, but that it should keep the matter under review and look at it again if their recommendations to address the low level of reparation orders did not improve matters.

The Government did recognise the need for legal aid for compensation claims made by victims of trafficking. Section 47 of the Modern Slavery Act therefore amended the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) to extend civil legal aid services to victims of slavery, servitude or forced or compulsory labour. Initially, such cases were not covered by standard contracts between the Legal Aid Agency and solicitors’ firms. But the contracting arrangements have now improved and the Independent Review was told that there are now almost 300 solicitors who could potentially provide legal assistance.

Another flaw was identified through the case of *LL*, a young woman who was brought to the UK and sexually exploited as a child. She wanted to apply for discretionary leave to remain here. Discretionary leave to remain should be available to victims while they pursue the remedies to which they are entitled. But access to a lawyer is often needed to secure this. *LL* was told that, even though it was accepted that there were reasonable grounds to believe that she was a victim of slavery, and the inquiry into this was therefore continuing, she was not entitled to legal aid for immigration advice unless a case for the discretionary award of Exceptional Case Funding could be made out. *LL* took proceedings against the Lord Chancellor. Her judicial review application was settled the day before the hearing, and

¹⁷ *ibid.*

¹⁸ There were only 8 compensation orders made following 211 convictions for the pre-MSA crimes of human trafficking over the 11 year period from 2004 to 2014 (see Focus on Labour Exploitation, ‘Access to Compensation for Victims of Human Trafficking’ (FLEX, July 2016) <<https://www.labourexploitation.org/publications/flex-working-paper-access-compensation-victims-human-trafficking>> accessed 26 August 2019).

the government expressly confirmed in the consent order that legal aid is indeed available for victims in LL's position.¹⁹

The second potential route for redress for victims of trafficking is an application to the Criminal Injuries Compensation Authority. This is a publicly funded scheme that provides victims with compensation for physical or psychological injuries occasioned by a physical attack or threats of violence. For many victims of trafficking the scheme offers the only prospect of obtaining compensation, because the trafficker cannot be identified, has left the country or has no assets. But the scheme is only available to victims of crimes of violence.²⁰ Many features of modern slavery fall outside this definition - coercion may be exercised through deception and debt and threats to report people working illegally to the police; and neither human trafficking nor forced labour are specifically listed as 'crimes of violence' under the scheme. Further requirements are that the victim must have cooperated sufficiently with the police and must have reported the offence to the authorities within two years of the crime (or of their becoming 18) unless there are exceptional circumstances. It is also required that 'the evidence presented in support of the application means it can be determined without further extensive enquiries by a claims officer'.²¹ The victim must have been conclusively identified as a victim by a competent authority under the NRM or have applied for and been granted 'temporary protection, asylum or humanitarian protection'.²² Legal aid is not available for applicants. The Authority provides guidance to help victims submit claims themselves, and there is no fee for applications, but securing the necessary evidence to support it may well require expenditure and there are often significant language barriers. Awards can cover loss of earnings but not unpaid wages, so these claims still have to be pursued elsewhere.

In practice, this scheme creates some significant hurdles for an applicant. Awards may be withheld or reduced if the trafficking offence was not reported to the police as soon as reasonably practicable; where a victim is deemed to have failed to cooperate fully with the police or the Criminal Injuries Compensation Authority; where the victim's conduct has made an award inappropriate or where a victim has previous convictions.²³ The Independent Review reported that some stakeholders had suggested that this scheme could yet be a good route for victims of modern slavery, but that there needs to be greater flexibility to take account of the particular circumstances of such victims. This will no doubt feature in the consultation exercise in relation to the Government's review of the scheme that is due to take place this summer.

The next possibility is a claim in the Employment Tribunal. Employment-related abuses are commonplace for victims of trafficking. Ms Taiwo, for example, entered the UK from Nigeria with a migrant domestic worker's visa obtained for her by her employers. She was not given a contract of employment and on arrival they confiscated her passport. She was

¹⁹ Order dated 18 April 2018 (copy at <https://drive.google.com/file/d/1oPaX-mQpv4YB9ybTUAClfO4qdK-jf0Wd/view>).

²⁰ Article 17 of the EU Trafficking Directive (2011/36/EU) requires member states to 'ensure that victims of trafficking in human beings have access to existing schemes of compensation to victims of violent crimes of intent'. See Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101/1.

²¹ Ministry of Justice, 'Criminal Injuries Compensation Scheme 2012' (HM Courts & Tribunals Service, 27 November 2012)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/808343/criminal-injuries-compensation-scheme-2012.pdf?_ga=2.214121823.9199193.1566833396-470876949.1566833396> accessed 26 August 2019, at [88]-[89].

²² *ibid* at [15].

²³ *ibid* at [22]-[27].

expected to be on duty during most of her waking hours and was not given the rest periods required by the Working Time Regulations 1998. She was not paid the minimum wage to which she was entitled under the National Minimum Wage Act 1998. Her employers paid her the £200 a month she had been promised but after a few months she was forced to hand back £800 to the employers – an unlawful deduction from wages under section 13 of the Employment Rights Act 1996. She was not given enough to eat and suffered physical and mental abuse. Ms Houniga, who had entered under a visitors' visa and was not supposed to be working at all, was maltreated in a very similar fashion and not paid anything at all. After 18 months she was shut out of her employers' home with nothing and nowhere to go.

Claims can be made in the Employment Tribunal for such things as the failure to provide an employment contract, or to pay the correct amount of wages, or to provide rest breaks and holidays, and for unfair dismissal. The remedies aim to put the worker back into the position she or he would have been but for the unlawful conduct of the employer. Compensation for the distress occasioned by mistreatment is only available in a minority of claims, most notably discrimination. There are relatively strict time limits to observe and another limitation for all claimants, including victims of trafficking, is that since July 2014, the Deduction from Wages (Limitation) Regulations 2014 prevent them from claiming more than two years of wages owed to them.²⁴ Trafficking victims are particularly likely to have been exploited for many years before their escape and pursuit of a remedy, so this may significantly reduce the compensation they can be awarded.

On the other hand, Employment Tribunal claims have advantages over civil claims in the ordinary courts. There are (at present) no fees for making a claim, following the Supreme Court's decision in the *UNISON* case.²⁵ Even if the claimant loses, it is unusual for her or him to be ordered to pay the other side's costs. And the usual exclusion of legal aid for employment tribunal claims does not apply to victims of modern slavery who have been referred to the NRM, so in this respect there is more assistance to enable this vulnerable group to pursue employment-related claims than for others with similar complaints.

Finally, there is the option of a civil claim, for which legal aid is also potentially available thanks to the Modern Slavery Act. Claims in tort may lead to compensation for physical injury, psychiatric harm, and loss of earnings. There is the possibility of aggravated damages in some claims, in recognition of the defendant's objectionable conduct. Such claims also have much longer limitation periods, with the potential for extension. However, the requirements for each of the possible causes of action may not always be appropriate to capture the complex elements of trafficking, still less the subtler forms of coercion and control which are often present. The problems common to all civil claims apply – the need to identify and then to find a defendant in the jurisdiction, with assets against which an award can be enforced, the cost and the length of time proceedings will take – but these are even more acute for trafficking victims who may face language barriers, difficulties accessing legal advice and finding evidence, and the limited period of discretionary leave to remain in which to pursue the claims.

But I can report one successful case, brought by six Lithuanian men who were trafficked to the UK, in which corporate liability was established. In *AG and others v DJ Houghton Catching*

²⁴ There is the possibility of HMRC enforcing the national minimum wage requirements after this period on behalf of the victim.

²⁵ *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409.

Services Ltd,²⁶ Supperstone J granted summary judgment on the men's claims that the employer had breached the Agricultural Wages (England and Wales) Order 2010 by failing to pay the rates prescribed, and the Gangmasters (Licensing Conditions) Rules 2009 by charging the men fees for finding them work and (very poor) accommodation. He also refused to strike out their personal injury claims. The employer supplied labour to chicken farms and the employees were tasked with catching chickens at various locations at night. They were paid according to how many birds were caught, and they suffered injuries at work due to the employer's negligence. They complained of a lack of facilities to wash, rest, eat and drink. It was reported that the assessment of damages was subsequently settled for a substantial sum.²⁷

The picture of remedies available to victims of trafficking is therefore extremely complex. What is still missing is access to a single tribunal with jurisdiction to offer appropriate relief for all the types of harm that such victims have suffered in one claim. There will be financial loss caused by the terms on which they have been forced to work, but importantly the psychological impact of this particular form of exploitation requires expression in a freestanding award of compensation, comparable to the award for injury to feelings that can be made in discrimination claims. We should obviously retain the power of the criminal court to make reparation orders, and thus save the victim the trouble of initiating a civil claim if we can, but we must recognise that this will only be possible in a small minority of cases. It cannot satisfy our obligations to make adequate remedies available for the victims of the scourge of trafficking and modern slavery.

²⁶ [2016] EWHC 1376 (QB), [2016] IRLR 859.

²⁷ 'Modern Slavery & Human Trafficking' (Leigh Day) <<https://www.leighday.co.uk/International/Corporate-accountability/Modern-slavery-human-trafficking>> accessed 26 August 2019.