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# ***WORKING IN THE CROSSFIRE:*** **LEGAL REPRESENTATION OF** **PEOPLE WITH LIVED EXPERIENCE** **OF HUMAN TRAFFICKING**

A STUDY OF IMMIGRATION  
LEGAL AID LAWYERS IN THE  
UNITED KINGDOM

**RESEARCH REPORT**

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*WITH A FOREWORD BY*  
**DAME SARA THORNTON**

## FOREWORD

**BY DAME SARA THORNTON DBE QPM**

*PROFESSOR OF PRACTICE IN MODERN SLAVERY POLICY AT THE UNIVERSITY OF NOTTINGHAM RIGHTS LAB (UK) AND FORMER UNITED KINGDOM INDEPENDENT ANTI-SLAVERY COMMISSIONER (2019-2022)*

As the UK's Independent Anti-Slavery Commissioner from 2019 to 2022 I was concerned about the small number of survivors who actually received compensation. While Article 15 of the European Convention Against Trafficking in Human Beings states that: "Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims", the UK reality was very different.

In theory there are many options – a compensation or reparation order following criminal proceedings, a claim through the Criminal Injuries Compensation Scheme, a claim to an Employment Tribunal, a civil damages claim against a trafficker or a claim against the state for its failure to protect a victim.

But in practice there are significant barriers to accessing these options – not least the difficulty in obtaining legal advice and representation. While survivors of trafficking may be entitled to legal aid in reality there are severe capacity issues in the system. Fees have not been increased since 2011 and so it may come as no surprise that Ministry of Justice data showed that in immigration and asylum legal aid 'over 30% of the providers given contracts in September 2018 had stopped doing legal work by March 2023'. The lack of capacity impacts not just on access to compensation and remedy but also on immigration issues, access to housing and benefits and support as a victim of trafficking.

This research builds on earlier studies which have laid bare the lack of capacity in the system. Legal practitioners were interviewed to understand why there is such a paucity of legal support and identified three significant factors - the perilous state of the legal aid market, the regressive turn in immigration and asylum law reform, and the consistent negative portrayal of immigration lawyers as activists who set out to frustrate Government policies.

The findings are of great concern and profoundly undermine our ability to put survivors at the heart of the response. Vulnerable people are therefore rendered more vulnerable. The issues raised in this research demand a response – clearly the system needs investment but the operating context could be improved considerably if the rhetoric was just dialled down.

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## ABOUT THIS REPORT

This report is authored by Dr Samantha Currie, Associate Professor of Law at Monash University, Australia.

The research was funded by the British Academy Mid-Career Fellowship during a time Samantha was based at the University of Liverpool, in the United Kingdom. The interviews with legal practitioners took place during 2022 and 2023.

## ACKNOWLEDGMENTS

I am extremely grateful to all of the legal practitioners who gave up their time to share their valuable insights and experiences of working in the anti-trafficking space.

I am also indebted to valued colleagues, in practice and academia, for their willingness to discuss and review the research. Particular thanks are owed to Dr Jess Mant, Dr Jo Wilding and Jo Bezzano.

## ACRONYMS

**CG:** Conclusive Grounds decision under the National Referral Mechanism. This is the second-stage of the two-part decision-making process to determine if an individual referred to the NRM is a victim of modern slavery.

**ECAT:** Council of Europe Convention on Action against Trafficking in Human Beings 2005.

**ECF:** Exceptional Case Funding, a mechanism introduced by s.10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 which enables an application to be made for legal aid when it would not otherwise be available, so long as the applicant would financially qualify for legal aid in the usual way (i.e. through the means test).

**FR:** First Responder under the NRM framework. FRs include the police, local authorities, the Home Office and certain non-governmental organisations.

**GRETA:** Group of Experts on Action against Trafficking in Human Beings.

**IECA:** Immigration Enforcement Competent Authority. One of two competent authorities in the Home Office responsible for making NRM decisions. The IECA make decisions in respect of those in immigration detention and foreign national offenders who are subject to deportation.

**IMA:** Illegal Migration Act 2023.

**LASPO:** Legal Aid, Sentencing and Punishment of Offenders Act 2012.

**MSA:** Modern Slavery Act 2015.

**NBA:** Nationality and Borders Act 2022.

**NRM:** National Referral Mechanism, the decision-making framework for identifying victims of modern slavery.

**RG:** Reasonable Grounds decision under the National Referral Mechanism. This is the first-stage of the two-part decision-making process. A positive decision prompts a 'rest and recovery' period and the individual will then await a CG decision.

**SCA:** Single Competent Authority. One of two competent authorities in the Home Office responsible for making NRM decisions.



## SUMMARY

This socio-legal project focussed on the role of lawyers who advise and represent people who have experienced trafficking. It particularly explored the role played by immigration legal aid lawyers who navigate legal frameworks on behalf of clients in order that they: (1) be formally identified as a 'victim of modern slavery' under the UK's victim identification framework, the NRM; and/or (2) secure immigration status in the UK so as to be able to lawfully reside and avoid being subject to immigration enforcement processes, including immigration detention and removal.

The project involved 20 semi-structured interviews with legal practitioners and a desk-based review of relevant law and policy, literature and research.

A particular objective of the research was to present a qualitative analysis of how lawyers experience working in the anti-trafficking space. Research in this area has previously highlighted the central importance of access to legal advice for those with lived experience of trafficking and modern slavery (Currie and Young 2021; Gauci, Maguglini and Trajer 2023). Yet, other work has demonstrated the highly perilous nature of the legal aid market which renders it difficult in reality to secure legally aided immigration representation (Wilding 2019, 2022, 2023). This report particularly complements Jo Wilding's research which has exposed the significant problems of capacity in the immigration legal sector. It aims to 'get behind the numbers' and shed light on impacts and consequences of working in this environment for the practitioners and, by corollary, for their clients' access to justice.

## Key findings

Legal practice in the anti-trafficking space is being shaped by three vectors of Government policy: the perilous state of the legal aid market; the restrictive direction of immigration and asylum law and policy, encapsulated by the Nationality and Borders Act (NBA) 2022 and Illegal Migration Act (IMA) 2023; and consistent use of anti-lawyer rhetoric by politicians which has accompanied the legislative reforms.

Working in the crossfire of these vectors means that lawyers who represent clients who have experienced trafficking are:

- **Working in a highly pressurised environment characterised by legal aid cuts, insufficient time for complex trafficking casework, low pay and problems of capacity;**
- **Navigating a changed and regressive legal framework with reduced options for their clients to access support services and secure their immigration status in the UK;**
- **Carrying out their legal practice against a backdrop of derisory public commentary which posits their independent legal representation of clients as a deliberate affront to Government policy in the immigration sphere.**

Implications for legal practitioners and for people with lived experience of human trafficking:

- **Working in the anti-trafficking space can have a negative impact on the wellbeing of legal practitioners;**
- **There is a risk of already entrenched capacity problems in the immigration legal aid sector being compounded due to legal practitioners viewing the work as unsustainable long-term;**
- **The potential for people who have experienced trafficking to access justice and remedies for the harms they have suffered is being undermined by the current legal practice environment.**

## INTRODUCTION: ACCESS TO JUSTICE AND EFFECTIVE REMEDIES FOR PEOPLE WHO HAVE BEEN TRAFFICKED

Access to justice and effective remedies have been recognised as essential for the rehabilitation and reinstatement of rights for people who have been identified as victims of trafficking (GRETA 2021, 6). This reflects a victim-centred and human rights-based approach to addressing modern slavery, as is crystallised in the Council of Europe's Convention on action Against Trafficking in Human Beings (ECAT).<sup>1</sup> The Convention places a set of obligations on states that relate to the identification of victims of trafficking and subsequent support provided to them. A key component of how the UK gives effect to its obligations is the National Referral Mechanism (NRM), the system for identifying 'victims of modern slavery'.<sup>2</sup>

The Council of Europe Group of Experts on action Against Trafficking, the body responsible for monitoring compliance with the Convention (GRETA 2021, 21), emphasises the need for a number of preconditions to be fulfilled in order for access to justice and effective remedies to be realised. These include 'prompt and accurate identification of victims of trafficking, the provision of a recovery and reflection period, the availability of material, psychological, medical and legal assistance, access to translation and interpretation, when appropriate, regularisation of the victim's stay, the right to seek and enjoy asylum, and full respect for the principle of non-refoulement'.<sup>3</sup>

This report builds on previous research in the UK context that has demonstrated the importance of access to legal advice for people who have experienced trafficking owing to the usually multiple and overlapping legal issues faced (e.g. Currie and Young 2021, ATLEU 2022). Facing a myriad of legal problems demands engagement with a number of different frameworks. This can encompass, not exclusively: decision-making in the NRM; different facets of the asylum and immigration system; criminal justice; employment; housing; welfare and family law. It is clear that navigating such processes is difficult in the absence of legally aided representation (Currie and Bezzano 2021). This can be the case even in respect of processes such as the NRM, which are not explicitly set up to operate on an adversarial basis whereby two opposing parties present their arguments before an impartial adjudicator, but are supposed to be accessible to those seeking to engage with them. In fact, resolving the legal problems of people who have been trafficked frequently requires legal advice and representation to inform of the working of the system and to challenging an aspect of Government decision-making. This typically, but not exclusively, relates to decisions made within the Home Office, such as the competent authorities under the NRM.

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<sup>1</sup> CETS No. 197. ECAT was adopted in 2005 and entered into force in 2008. It has been ratified by 48 states/entities, including the UK and the European Union. < <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=197> >

<sup>2</sup> The detail of the NRM process is set out in Home Office Guidance: *National referral mechanism guidance: adult (England and Wales)* (1 July 2023) < <https://www.gov.uk/government/publications/human-trafficking-victims-referral-and-assessment-forms/guidance-on-the-national-referral-mechanism-for-potential-adult-victims-of-modern-slavery-england-and-wales> >. Statutory guidance has been adopted under s.49 of the Modern Slavery Act 2015: *Modern Slavery: Statutory Guidance for England and Wales (under s49 of the Modern Slavery Act 2015)* and *Non-Statutory Guidance for Scotland and Northern Ireland*, v.3.3 < [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1169046/Modern\\_Slavery\\_Statutory\\_Guidance\\_v3.3.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1169046/Modern_Slavery_Statutory_Guidance_v3.3.pdf) >

<sup>3</sup> The principle of non-refoulement stems from Article 33 of the Refugee Convention 1951. It embodies the principle that refugees cannot be returned to a place they may be persecuted, face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm.

## AIMS OF THE STUDY AND FOCUS OF THE REPORT

This socio-legal project focussed on the role of lawyers who advise and represent people who have experienced trafficking. It particularly explored the role played by immigration legal aid lawyers who navigate legal frameworks on behalf of clients in order that they: be formally identified as a 'victim of modern slavery' under the UK's victim identification framework, the NRM; and/or secure immigration status in the UK so as to be able to lawfully reside and avoid being subject to immigration enforcement processes, including immigration detention and removal.

The project involved 20 semi-structured interviews with legal practitioners and a desk-based review of relevant law and policy, literature and research.

A particular objective of the research was to present a qualitative analysis of how lawyers experience working in the anti-trafficking space. Research in this area has previously highlighted the central importance of access to legal advice for those with lived experience of trafficking and modern slavery (Currie and Young 2021; Gauci, Maguglini and Trajer 2023). Yet, other work has demonstrated the highly perilous nature of the legal aid market which renders it difficult in reality to secure legally aided immigration representation (Wilding 2019, 2022, 2023). This report particularly complements Jo Wilding's research which has exposed the significant problems of capacity in the immigration legal sector. It aims to 'get behind the numbers' and shed light on impacts and consequences of working in this environment for the practitioners and, by corollary, for their clients' access to justice

## METHODOLOGY

This report draws on interviews conducted in the UK throughout 2022 and 2023 with legal practitioners who represent people who have experienced trafficking. The project was funded by a British Academy Mid-Career Fellowship and explored the role played by lawyers in navigating legal frameworks on behalf of clients who had experienced trafficking. The 20 semi-structured interviews covered: the nature of the legal issues encountered by people who have been trafficked and the requisite case work carried out by the lawyers; accessibility of legal aid lawyers to this client group; individual practitioners' pathways to working in this area of law; as well as lawyers' general experiences of representing the client group. Interview transcripts were coded electronically in QSR NVivo 12. A thematic analysis of the interview transcripts was carried out. The coding and analysis followed the approach identified by Braun and Clarke (2006) for thematic analysis: becoming familiar with the data; producing an initial coding framework and coding the data; searching for themes; reviewing and defining themes; and then writing up the analysis. This approach accommodated a combination of inductive ('bottom up') coding and deductive (or theoretical) coding based on the focus of the research.

All of the legal practitioners had experience of advising and representing clients who had been trafficked. The vast majority interviewed identified their primary legal specialism(s) as immigration and/or public law, with housing and criminal justice lawyers included in smaller numbers. The majority of lawyers that participated were solicitors (16) and the remainder were barristers (4). In terms of location, all of the lawyers were based in English cities: 12 in London; the remainder in either Liverpool, Manchester or Sheffield. The majority of the case work the solicitors did was funded by legal aid, with some limited exceptions.<sup>4</sup> As a consequence of the relatively small size of the cohort of legal practitioners in the UK with specialist expertise in the area of trafficking and modern slavery, in comparison to immigration and public law more broadly, this report takes a cautious approach to anonymisation, including to the level of potentially identifying information presented.

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<sup>4</sup> Two of the lawyers referred to a small amount of private client work for clients who had been ineligible for legal aid.



The findings presented here are not generalisable but, instead, offer authentic and rich insights into the views and experiences of lawyers who represent clients who have been trafficked. The qualitative insight is particularly valuable in this context as a complement to large-scale and quantitative-led research carried out by others. Most notably, it builds upon the work of Wilding (2019, 2022) and ATLEU (2022) which has already exposed the extent of capacity problems in the immigration legal aid provision and the specific effects of this on those who have been trafficked, respectively.

## TERMINOLOGY

Terminology around trafficking and modern slavery is contested. There is a delicate balance to be struck between recognising the agency of individuals and their capacity for resilience, while still acknowledging their vulnerability and often traumatic lived experiences. While ‘victim’ can be criticised for its paternal connotations, it can also hold particular legal meaning (especially in the criminal justice context). Within this report, the term victim is used only in the context of referring to the formal status of ‘victim of trafficking or modern slavery’ that is secured following a conclusive grounds (CG) decision under the NRM. Some researchers prefer to use the term ‘survivor’, a term I have also used in previous work, to represent the transition away from victimhood and to capture a sense of empowerment absent from the victim label. However, recent research by Asquith et al (2022) found that this is not widely understood and can cause alienation amongst people who have experienced trafficking. This report tends to use the phrases lived experience of human trafficking, trafficked person or people/clients/individuals who have experienced trafficking, in an attempt to move away from the more loaded victim and survivor concepts.

## ACCESS TO LEGAL ADVICE AND EFFECTIVE REMEDIES: KEY LEGAL PROVISIONS

### International law

*UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime ('The Palermo Protocol')*

Article 6(3)(b) provides that victims should receive: 'Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand.'

*ILO Protocol of 2014 to the Forced Labour Convention, 1930*

Article 3: Each Member shall take effective measures for the identification, release,

protection, recovery and rehabilitation of all victims of forced or compulsory labour, as well as the provision of other forms of assistance and support.

Article 4: 1. Each Member shall ensure that all victims of forced or compulsory labour, irrespective of their presence or legal status in the national territory, have access to appropriate and effective remedies, such as compensation.

### Council of Europe and European Union law

*Council of Europe Convention on Action against Trafficking in Human Beings (ECAT)*

Article 12(1)(d): 'Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least: ... (d) counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;'

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.

*Directive 2011/36/EU: Trafficking Directive*

Article 12(2): 'Member States shall ensure that victims of trafficking in human beings have access without delay to legal counselling, and, in accordance with the role of victims in the relevant justice system, to legal representation, including for the purpose of claiming compensation. Legal counselling and legal representation shall be free of charge where the victim does not have sufficient financial resources

### Domestic law

*Modern Slavery Act 2015*

Section 47 extended the availability of civil legal services under schedule 1, part 1, paragraph 32 of the Legal Aid Punishment of Offenders Act 2012 (LASPO) to all victims of slavery, servitude or forced or compulsory labour, subject to satisfaction of the standard legal aid eligibility criteria, including the means test.

## WHEN ARE TRAFFICKED PERSONS ENTITLED TO LEGAL AID?

Under the **Legal Aid Punishment of Offenders Act 2012 (LASPO)** (Schedule 1, para. 32) people who have experienced trafficking are entitled to legal aid for immigration advice after receiving a positive reasonable grounds (RG) or conclusive grounds (CG) decision under the NRM.

This should be available to support an application for limited leave to remain or another immigration application. This legal advice can also cover the NRM victim identification process, although the client concerned would already have received a positive determination, at least at the RG stage. Therefore, such advice will necessarily relate to issues such as the potential of a positive CG decision and a future application for permission to stay on the basis of being recognised as such. It will come at too late a point to cover the nature of the NRM referral itself.

The **Nationality and Borders Act 2022 (s.66)** allows for legal aid for advice *prior* to referral into the NRM where an individual is already accessing advice in scope of certain immigration matters or advice about judicial review (e.g. advice that falls within Part 1 Schedule 1 of LASPO). This means there is entitlement to legal aid for advice solely about the NRM victim identification process prior to being referred to the NRM for a limited cohort of people.

Legal aid is also available in a formal sense in relation to judicial review of a negative NRM decision or refusal of leave to remain following a positive CG NRM decision.

Some clients who have experienced trafficking will access a legal aid lawyer not as a potential victim of trafficking or modern slavery under the NRM, but as part of a claim for refugee status. However, not all clients who have been trafficked will make asylum claims due to the different focus of the assessments for protection claims for refugee status or humanitarian protection, which ostensibly recognise future risk as opposed to previous harm.

LASPO 2012 also purportedly makes legal aid available for 'trafficking and modern slavery compensation claims', which are claims under employment law in the Employment Tribunal or claims for damages in the High Court. Compensation claims for victims of trafficking do not fall within a specific legal aid contract but instead fall within the 'miscellaneous' category and can, technically, be carried out by any provider holding a civil legal aid contract. Evidence shows that the demand for legally aided advice on this issue is greater than the available supply of legal providers.<sup>5</sup>

There is no entitlement to legal aid for confirmed victims of modern slavery to access advice on recovering compensation from the Criminal Injuries Compensation Authority.

**Exceptional Case Funding (ECF)**, introduced by s.10 of LASPO 2012, provides a potential avenue for those who would not otherwise be entitled to legal aid to access it, so long as they would financially qualify for legal aid in the usual way (i.e. through the means test). This might include advice relating to such an application to the Criminal Injuries Compensation Authority, or in respect of pre-NRM advice for someone not in receipt of legally aided advice following a positive NRM decision. The premise of ECF is to ensure the UK satisfies its obligations under the European Convention on Human Rights (and previously European Union law) despite the more restrictive nature of legal aid following LASPO. ECF can only be obtained by application to the Legal Aid

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<sup>5</sup> E.g. Submissions to the call for evidence of the Justice Select Committee of the House of Commons' Inquiry into the Future of Legal Aid (2020) highlighted the limited access to legal aid in order to bring such compensation claims. See the evidence available at <https://committees.parliament.uk/work/531/the-future-of-legal-aid/publications/>

Agency and the test is whether an individual can present their case effectively and fairly without legal aid. ATLEU (2018) have highlighted the slowness of Legal Aid Agency decision-making in respect of ECF applications and pointed to a high refusal rate (93%) in respect of funding requests to make claims for criminal injuries compensation.

### IDENTIFYING VICTIMS UNDER THE NRM FRAMEWORK

The NRM model relies on First Responders making a referral in respect of individuals they think may have been a victim of trafficking or modern slavery. FRs include the police, local authorities, the Home Office and certain non-governmental organisations. Adults are required to provide consent to such a referral being made, a condition which does not apply in respect of children. One of two competent authorities within the Home Office, either the Single Competent Authority (SCA) or the Immigration Enforcement Competent Authority (IECA), are responsible for making the RG and, if necessary, the CG decisions. A positive RG should trigger a 30-day period of support, including accommodation.

The IECA was introduced in November 2021 to make decisions in respect of those in immigration detention and foreign national offenders who are subject to deportation.

The SCA makes decisions in respect of all other individuals, including children.

## FINDINGS

Legal practitioners' experiences of advising and representing people who have been trafficked are being shaped by three vectors of Government policy: (1) the perilous state of the legal aid market; (2) the restrictive direction of immigration and asylum law and policy, encapsulated by the Nationality and Borders Act (NBA) 2022 and Illegal Migration Act (IMA) 2023; and (3) consistent use of anti-lawyer rhetoric by politicians which has accompanied the legal reform in (2). The influence of these factors on the context in which practitioners work was apparent from the analysis of law and policy, the desk-based review of relevant research and literature and in the interviews carried out with practitioners.

### **(1) Perilous state of the immigration legal aid market**

The legal aid landscape has been characterised by budget cuts and reductions in scope since the financial crisis of 2008 and the period of austerity politics that followed (Sigafoos and Organ 2021). This trend is epitomised by the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 which removed most immigration matters from the scope of legal aid with some limited exceptions, such as asylum claims and applications for immigration bail (see further York 2013).

Research carried out for the 2021 Legal Aid Census found that working conditions for legal aid practitioners are increasingly challenging (Denvir et al 2021, Denvir et al 2023). Increased costs of living are contributing to a worsening of working conditions, with legal aid practice only providing practitioners with low levels of remuneration, a point underlined by the fact that many civil legal aid fees have not increased since 2011 and all have fallen significantly in real terms (ILPA/PLP 2023).

#### *Capacity problems in immigration legal aid impact particularly on trafficking case work*

Despite people who have experienced trafficking being entitled to legal aid on paper (see above), in reality access to legal aid lawyers is frustrated by widespread and well-documented capacity issues. These problems of limited capacity apply across the board to the immigration and asylum legal aid market in England and Wales, which is characterised by a deficit of legal advisors. Jo Wilding's (2019) work has been particularly instructive in highlighting the significant capacity problems in the immigration sector amongst legal aid providers, with many areas dependent on only one individual or a small number of advisors. The cuts to legal aid funding have clearly contributed to the diminished supply of legal aid practitioners in this area, with some providers closing altogether and others reducing the number of advisors in the post-LASPO environment (Amnesty International 2016). Wilding (2023a) recently probed this further through freedom of information requests submitted to the Ministry of Justice. The resulting data showed that in immigration and asylum legal aid 'over 30% of the providers given contracts in September 2018 had stopped doing legal work by March 2023'. Wilding (2023b, 224) also found that 'at least 45 per cent of the main applicants who claimed asylum in the year to June 2022 did not have a legal aid representative'.

Problems of capacity amongst legal aid lawyers have particular resonance in the context of case work for clients who have experienced trafficking. Such cases often demand a specialist level of knowledge due to the client's case having a complex immigration and/or asylum element and additional layers of complexity pertaining to the trafficking element of the case. The below extract from an interview with a solicitor captures the sentiment expressed across the sample as a whole about the multiple nature of legal issues faced by people who have been trafficked.



*“My trafficked clients are the ones who have the most files open. For my trafficked clients, it's not uncommon for me to have opened maybe nine or ten legal help and legal aid files. I think it's because they are let down at so many different stages. From the NRM referral, the RG and then the CG, sometimes we would challenge delays and sometimes negative decisions. But also sometimes things like the accommodation isn't suitable and so that leads to a focus on other things like protection and support... This is all alongside running other legal claims, such as to try and get refugee status, of course.” (LR25)*

### **Standard fixed fees fall short**

The practitioners in this study corroborated Wilding's (2019, 2022) findings that legal aid payment structures compound problems of capacity amongst immigration providers and highlighted the particular difficulties this created for them when representing clients who had been trafficked. It was resoundingly reported by participants that the standard fixed fees payable to immigration legal aid lawyers are too low as to facilitate the complex and long-running, often delayed, legal work necessary on cases involving trafficking to a sufficiently high quality.<sup>6</sup> The legal practitioners considered the time factored in to the standard fixed fees as insufficient to adequately pursue the legal avenues open to their clients.<sup>7</sup>

*“I think in many firms the caseworkers are under pressure to just kind of get through cases, but you can't really do that with a victim of trafficking. You've really got to take the time to take a detailed statement and often that will take a long time. You've got to know the right questions to ask, they've got to trust you, to disclose that information. Clients usually don't have straightforward asylum claims, often they've been trafficked multiple times, there is usually a delay in claiming asylum, maybe because they were victims of trafficking, and they may not have been referred [to the NRM]. It can take such a long time to unpick it all.” (LR28)*

### **Meeting the escape threshold not perceived as a viable route for all**

It is possible to charge for the time spent on case work and bill for hourly rates (avoiding the fixed fee) if the work carried out meets the escape fee threshold. This threshold is met if, should the work be paid at the appropriate hourly rate, it would exceed at least two times the value of the standard fixed fee.<sup>8</sup>

The following extract from an interview with a solicitor captures the two options available to legal aid lawyers: to take on a high number of cases and deal with them in an expeditious fashion claiming standard fixed fees; or to take on fewer cases but to dedicate more time to them, with scope to pursue the clients' legal issues in a fuller way, by meeting the escape fee threshold:

*“It does feel like you have to choose one or the other, either having very high case loads and not doing much work on them and churning through them, which I think a lot of firms do on asylum cases, or you*

<sup>6</sup> The Legal Aid Census also highlights the difficulties caused by fixed fees across the legal aid sector as a whole. See Denvir et al (2021).

<sup>7</sup> The fees for civil legal aid purposes are set out in the Civil Legal Aid Remuneration Regulations 2013 SI 2013/422 (as established by the Lord Chancellor). In 2022, following a Ministry of Justice consultation on immigration legal aid fees, a further 'bolt-on' fee was introduced (currently set at £150, after the originally proposed figure of £75 attracted criticism) for advice on referral into the NRM. This coincided with the introduction in the NBA (s.66) of some access to pre-NRM advice for those already accessing advice for certain immigration matters or judicial review.

<sup>8</sup> The threshold was lowered from triple the fixed fee to double during the course of the research following the Ministry of Justice (2022) consultation on immigration legal aid fees.

*try and have fewer cases and do lots of work and go the escape fee route, but then you need to have an alternative source of cash flow in the meantime.” (LR14)*

There was a divergence of opinion amongst the sample as to whether meeting the escape fee was an appropriate and feasible strategy to fund case work in relation to clients who had experienced trafficking. Some firms, either with a particular specialism in trafficking or with a diverse range of legal areas and related income streams, encouraged practitioners to work to escape fees and incorporated this approach into their overall model of funding. Practitioners working in such an environment viewed this approach as a way to pursue a client's legal issues in a rounded way. In contrast, other practitioners interviewed explained that this particular model would not be suitable for their firm, some citing the demand for legal advice within the particular region they operated in as a reason to try to take on as many clients as possible even if it meant only being able to give their cases a restricted level of attention. For some, relying on meeting the escape fee was simply deemed too risky due to the uncertainty as to whether the threshold would, in fact, be met. A practitioner may spend a considerable period of time working on a case but still fall short of meeting the threshold required to unlock the escape fee and only be paid the fixed fee. This risk involved in turning the file escape can create a pressure to remain within the fixed fee, resulting in the case work being restricted (see Wilding 2019).

The escape threshold was lowered from triple the fixed fee to double during the course of the research, following the Ministry of Justice (2022) consultation on immigration legal aid fees. It is important to recognise that the majority of the comments made by legal practitioners about the escape threshold (including that above) was based on the previously higher level of three times the fixed fee. It was only possible to gather views on whether the reduction of the threshold to two times the fixed fee would make a difference to the working models of practitioners and firms who currently deemed it too risky to go escape in four interviews that took place in the later stages of the project. These particular participants did not expect the change to have a significant impact. They cited the precarious financial position of many firms and risk-averse behaviour this encouraged. Nevertheless, the lower threshold may provide further scope for legal practitioners to bill for hourly rates for the case work carried out on trafficking cases.

### **Concerns about funding trafficking case work puts practitioners under considerable pressure**

Another way in which the practitioners interviewed responded to the limiting impact of fixed fees was to carry out work on their files on an unpaid basis. It was commonplace for the lawyers interviewed to talk about how they often worked outside of scheduled work hours as a way to deliver the quality of service they felt their clients deserved. The quotation below encapsulates a view communicated across the sample: that they carried out extra work on a consistent basis, although they questioned the personal sustainability of this in the longer-term:

*“I do hours and hours of unpaid work. The Legal Aid Agency doesn't pay me for the work that I do... I think if I was to estimate, I probably do about a day a week, which is pretty breath-taking. I think there may come a point that I may run out of steam, but we will keep going while we can.” (LR29)*

Amongst the sample, practitioners experienced personal stress as a consequence of the pressure involved in running trafficking cases with limited legal aid funding, for example:

*“I guess some people are better at switching off than others and maintaining that professional distance. I'm finding it personally, incredibly hard. Again, this particular cohort, they are so misunderstood and neglected and they've been ignored for so long... I think there is a lot of burnout for that reason because you feel that you do your best but there just isn't enough resources.” (LR22)*

It was clear from the interviews that the lawyers linked the personal stress experienced to the issue of legal aid funding. For example:

*“The stress that you feel about basically being the only person that this individual contacts. Very often you're the only person that they are talking to and the only support they've got, there's no other network, and they're in crisis. Then you can't get the funding and so you're left with this impossible choice: do I just help this person as far as I can, as is humanly possible, because what's going to befall them is so much worse and they're at such risk, or do I have to make the decision to keep on hammering the Legal Aid Agency trying to get funding in place. And they'll tell you they're coming back to you tomorrow. That's no good. Where does that person sleep tonight? So that's what kills you. It's the same with the compensation side of work. I mean, they're so obstructive. Every case is complicated so dramatically by the level of bureaucracy, the ongoing no, no, no, that culture of refusal that exists, that gets in your way of doing your job.” (LR27)*

This lawyer explained the difficulty of deciding whether they should seek to represent their clients in the fullest way possible within the confines of the fixed fee, or instead attempt to engage with the Legal Aid Agency to secure additional funding. The LAA was perceived by the majority of the practitioners interviewed as uncooperative to the granting of funding beyond the standard fixed fee.

**Lawyers representing clients who have experienced trafficking are working in a highly pressurised environment characterised by legal aid cuts, insufficient time for complex trafficking casework, low pay and problems of capacity.**

## **(2) Regressive trajectory of immigration and asylum law and policy: directly impacting on people who have experienced trafficking or modern slavery**

During the course of the research there was a shift in the approach of the UK towards people who have experienced trafficking (and other forms of exploitation deemed to fall under the umbrella of ‘modern slavery’). This is intertwined with the Government’s preoccupation with addressing ‘illegal’ migration, particularly by those who arrive in the UK on small boats. The legislative response through the NBA 2022 and IMA 2023 directly impacts on the system put in place to support victims of trafficking and modern slavery.

### ***Interplay of changes made by NBA 2022 and IMA 2023 rows back on protections for trafficked persons***

The NBA 2022 introduced a public order exemption to bar victims identified under the NRM from support if they have been given a prison sentence of 12 months or more, or if they have claimed to be a victim in ‘bad faith’ (NBA s.63). The legislation also removed the right to ‘further assistance’ if an exploited person has already been through the NRM and stipulates that a person’s credibility is undermined as a consequence of ‘late disclosure’ of the exploitation they have experienced (NBA s.62 and s.59).

The IMA 2023 entrenches the conflation of the debates on ‘illegal’ immigration and modern slavery further. A key component of the IMA is the creation of a duty on the Secretary of State for the Home Department to remove from the UK anyone who has entered ‘unlawfully’ and does not have a lawful right to enter or remain where they have travelled through a safe third country on the way to the UK (IMA s.2).<sup>9</sup> Under the NBA people who had received a positive RG decision under the NRM – and so have been identified as potential victim of modern slavery and are awaiting the CG decision – could not be removed (NBA ss61-62). The IMA disapplies the prohibition on removing those who have a positive RG but who have entered the UK unlawfully so that the duty to remove still applies (IMA s.22(2)), as well as any entitlement to leave to remain that has been granted relating to their status as victim of trafficking or modern slavery (under NBA s.65). The IMA also provides for access to assistance and support services pursuant to the s.50A of the Modern Slavery Act 2015 to be removed from individuals who have been granted an RG but who entered the UK unlawfully (IMA s.23(2)).

The IMA also contains a strengthened public order disqualification. Section 29 of the IMA amends NBA s.63(1) with the effect that a competent authority now *must* determine that a recipient who has a reasonable or conclusive grounds decision under the NRM, whether issued *before or after the Act came into force*, is disqualified from protection if satisfied the person is a threat to public order or has claimed to be a victim of trafficking in bad faith. The competent authority can apply an exception if there are ‘compelling reasons’ not to disqualify a person from protection (IMA s.29(3)). There is also an extension of the meaning of constituting a threat to public order. The IMA (s.29(4)) specifies that this includes people with a conviction who have been sentenced to a period of imprisonment, and anyone who is ‘liable to deportation’ from the UK.

### ***Lawyers express concern about the direction of law and policy***

The lawyers interviewed for the study were keenly aware of the shifting nature of the law and policy framework in this area. They expressed concern about this from two perspectives. First, they were apprehensive about the impact of the regressive policies for individual clients. The lawyers interviewed for the study expressed a high-level of commitment to their clients who had experienced trafficking, pointing to the number of challenges they have to overcome and their strength in doing so. Due to the length of time over which the case work tends to run relating to both trafficking-elements and broader asylum and immigration-elements of a client’s case the practitioners found they were able to build up a rapport with clients. For example:

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<sup>9</sup> This duty is not yet in force.

*"I really like working with the client group because they are so inspiring. I feel that every time you do a trafficking case, you learn so much." (LR25)*

*"It can already take two, three years before you've got discretionary leave and then refugee status, and by that time it's sad to say goodbye to them because you've seen them grow as people." (LR19)*

Building on this, it was common for the practitioners to express concern about the way in which the more restrictive nature of the rights in the aftermath of the NBA 2022 and IMA 2023 would impact on particular clients. There was a clear awareness that there has been a reduction of protection, for example:

*"I just feel like the whole hostile environment is now everywhere... I think victims of trafficking almost used to be a slightly separate group but I feel like now they're being lumped in with all migrants and targeted by the Home Office. That's what it feels like, to me." (LR28)*

Clients with previous criminal convictions obtained as a result of being compelled to commit offences by those who had exploited them were cited as a particular group who were likely to be denied access to protection as a consequence of the reforms. The recent legislative developments clearly reflect the idea espoused by some members of the Government, without supporting evidence, that the system for protecting victims of trafficking is being abused by criminals (Home Office 2021). Such claims do not take into account evidence which suggests to the contrary that victims of trafficking continue to be criminalised and prosecuted for crimes they committed directly as a consequence of exploitation and abuse (Hestia 2019, Burland 2019). This is in spite of the existence of a statutory defence for victims of modern slavery who are compelled to commit criminal offences, introduced by s.45 of the Modern Slavery Act 2015 to give effect to the policy of non-punishment of victims enshrined in Article 26 of ECAT. The lawyers in the study corroborated research findings (e.g. by Burland 2019) that the defence is not widely used and is very rarely having any significant practical effects for clients.

This is significant given the potential for the public order disqualification to apply and for individuals to be denied access to protection on the basis of the definition in s.29(4) of the IMA 2023. It is also usual practice for deportation orders to be issued under Part 13 of the Immigration Rules to 'foreign offenders' when it is considered 'conducive to the public good'. Receiving a prison sentence of 12 months or more is an indicator that this proviso is satisfied. There is no mechanism at this post-conviction point to probe whether a deportation order issued is actually a consequence of a crime a person was compelled to commit, or, to have it quashed on this basis.

Secondly, the practitioners interviewed shared a collective regret about the general direction of the Government's policies on tackling trafficking and modern slavery. For example:

*"It's extremely concerning, because there are a number of elements that have a huge impact on victims of trafficking. It's going to completely undermine the Modern Slavery Act. The purpose of the Modern Slavery Act was to create extra momentum to help the identification of victims. I think that's going to be more difficult and it's going to exclude a significant number of victims of trafficking ... It's contradictory to what we, as the country, should be doing and what we thought we would be doing when the Modern Slavery Act came into play." (LR23)*

Many of those interviewed talked about how the Modern Slavery Act 2015 and the general commitment to protect victims of trafficking and modern slavery was being undermined by the NBA 2022 and IMA 2023.

The effect of the recent legislation in the UK is to render it more difficult to access rights, such as those enshrined in ECAT, not only for those with a criminal record but more generally for those who have been trafficked and are



*without a lawful immigration status.* This is poignant in light of previous research which found that it was already difficult for those who have experienced trafficking to secure their immigration status (Currie and Young 2021, Currie 2019). There remains no automatic entitlement to be granted any form of leave to remain following identification as a victim of modern slavery, and discretionary grants of permission to stay have remained low since the introduction of the Modern Slavery Act 2015. While outside the scope of this report, it is noteworthy that there are clear concerns that the UK's approach to disqualify individuals from protection based on the way they arrived in the territory is in conflict with its international legal commitments, including under the European Convention on Human Rights and ECAT (Office of the High Commissioner for Human Rights 2023).

Lawyers representing clients who have experienced trafficking are navigating a changed and regressive legal framework with reduced options for their clients to i) access support services and ii) secure their immigration status in the UK.

### (3) Increase in anti-lawyer rhetoric

Another contextual factor which is shaping the climate within which these legal practitioners are working is the tendency of high-profile politicians to publicly criticise lawyers. This is particularly apparent in the case of those working in the immigration and asylum sphere. For example, during Priti Patel's tenure as Home Secretary (July 2019-September 2022) the official Twitter account of the Home Office published an animated video of deportation flights leaving the UK with the accompanying text stating that activist lawyers were 'delaying and disrupting' returns of those without a right to remain. This was posted on the Home Office Twitter account on 26 August 2020. It was removed from Twitter the following day with the Home Office's Permanent Secretary stating that such a tweet should not have been posted on an official government channel. The Bar Council and Law Society were amongst those that responded to condemn the use of the activist language (see Pinto 2020, Bulman 2020). That same year, at Conservative Party Conference, Patel (2020) denounced the 'lefty lawyers' whom she grouped with 'the traffickers, the do-gooders and the Labour Party'.

#### *Claims about 'activist lawyers' accompanied new legislation*

Such anti-lawyer rhetoric has since been consistently drawn upon by a number of senior Government politicians, including Prime Minister Rishi Sunak and former Home Secretary Suella Braverman. It has been especially prominent during the passage of both the NBA 2022 and IMA 2023 and in the aftermath as part of the Government's public relations efforts around its policy to 'stop the boats' (Cameron-Chileshe et al 2023). Legal challenges brought against the Government's Rwanda plan – a partnership agreed with the Rwandan Government which would see asylum seekers whose claims are deemed inadmissible in the UK sent to Rwanda – have also prompted commentary from politicians, and parts of the media, that have criticised lawyers using the 'activist' and 'lefty' terminology (Siddique 2022).<sup>10</sup> In November 2023 the Supreme Court agreed with the Court of Appeal's that the 'Rwanda Plan' is unlawful.<sup>11</sup> The unanimous decision was reached on the basis of evidence that Rwanda does not qualify for designation as a safe third country. It could not be guaranteed that the *non-refoulement* principle - which embodies the idea refugees cannot be returned to a place they may be persecuted, face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm - would be respected by the Rwandan authorities. It is significant that the Supreme Court's judgment emphasises the legal nature of the decision and how the Court is not concerned with the political debate surrounding the policy.

Underpinning the reliance on the activist lawyer label by politicians is the idea that lawyers, and their clients, seek to 'abuse' the system. This is an accusation levelled at those who are referred to the NRM as potential victims of trafficking or modern slavery (Home Office 2021). The understanding that underlies the claim of system abuse is that some people, who do not have legal status in the UK, falsely claim to have been trafficked so as to gain protection under the modern slavery framework. As was discussed in section 2 above, this has shaped the reforms implemented in the recent legislation. The anti-lawyer rhetoric has been part of how the Government has explained and justified the need for the introduction of the NBA 2022 and IMA 2023.

#### *The lawyers interviewed expressed dissatisfaction with the language used by Government and saw it to be disingenuous based on their knowledge of other lawyers who worked in the sector*

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<sup>10</sup> At first instance, in December 2022, the High Court held that the partnership with Rwanda was lawful, but this decision was overturned by the Court of Appeal, in June 2023: *AAA and Others v Secretary of State for the Home Department* [2023] EWCA Civ 745.

<sup>11</sup> *R (on the application of AAA (Syria) and others) v Secretary of State for the Home Department* [2023] UKSC 42.

The legal practitioners perceived this rhetoric as part of the package of regressive law and policy reform in the asylum and immigration sphere. For example, the following extract represents a common view articulated in the interviews:

*"If you look at who's using that term ['activist'], they're using it to disparage us. I don't like it and I don't think it's due anyway... everybody's not necessarily an activist, they're not necessarily left even, they might not believe in human rights. On the Rwanda policy, a lot of people have surprised me by coming up to say 'oh, I think that's a terrible policy', and they're not leftie, they're not people that I would have expected to think that, actually. It's trying to shift the blame onto lawyers, and ultimately the courts." (LR26)*

There was also a clear sense from a majority of those interviewed for this study that the nature of the legal work they did on behalf of clients who had been trafficked was being mischaracterised as 'activist'. The below extract captures a common view from the sample about how politicians and the media exaggerated the power of practitioners to influence outcomes:

*"Despite what the Daily Mail tries to say, we don't have the power to stop removals, we don't have the power to make the Home Office do anything, or the courts, and in doing this job you're not taking on the role of an NGO or a campaigner." (LR22)*

The following practitioner saw the work they did as being very bureaucratic in nature as it often involved close examination of legal documentation and pointing out errors made previously in respect of a client's legal position to Home Office decision-makers:

*"It [activism] is never a badge I've adopted because I think if I'm a lawyer I'm an officer of the court and I'm upholding the rights that are enshrined in English law, and sometimes I'm trying to push those, because I think that's the right approach, but a lot of the time I'm actually unpicking an almighty mess that the Home Office has got itself into and in the end that's always agreed. That's not activist. If anything, that's kind of bureaucratic. It's attention to detail and it's actually reading the papers." (LR16)*

These points underline how the anti-lawyer rhetoric used by politicians is diverting discussion away from considering the *lawfulness* of Government decision-making and policy more broadly.

**Lawyers representing clients who have experienced trafficking are carrying out their legal practice against a backdrop of derisory public commentary which posits their independent legal representation of clients as a deliberate affront to Government policy in the immigration sphere.**

## IMPLICATIONS FOR LEGAL PRACTICE AND ACCESS TO JUSTICE

The research findings from this study demonstrate that the effect of working in the crossfire of these three vectors is having a significant impact on practitioners who represent people who have been trafficked. The perilous state of the legal aid market and the constraining impact of fixed fees on trafficking case work makes the day-to-day work challenging. This is combining with the regressive turn in immigration and asylum law reform, which has direct impacts on people who have experienced trafficking, *and* with the consistent negative portrayal of immigration lawyers as activists who set out to frustrate Government policies. Overall, this has negative implications for the wellbeing of the lawyers running the cases and for the potential of clients who have experienced trafficking to resolve their legal issues.

### Implications for legal practitioners

This research findings underline the negative impact that working in the anti-trafficking space can have on the wellbeing of practitioners. The nature of the legal aid sector, the regressive nature of the recent law and policy reform and the Government's public condemnation of immigration lawyers all contribute to the working environment being challenging and highly pressurised.

The legal practitioners interviewed were highly committed to their clients and were working additional hours on an unpaid basis in order to bolster their clients' opportunity to access rights and challenge negative decisions. This was placing considerable burdens on them personally and they recognised this would not be sustainable in the longer-term.

The legal aid sector as a whole is in a perilous state. This research particularly exposes the vulnerability of trafficking case work to problems of capacity, stemming from the complex and overlapping nature of the legal issues involved and the therefore specialist nature of the work.

The findings raise serious concerns about the potential for the capacity problems that are already entrenched in the legal aid sector to be compounded. Carrying out additional *pro bono* work on one's own case files is unsustainable in the longer-term. Moreover, the disparaging remarks made by politicians over such a sustained period of time impact negatively further still on morale, raising questions about whether legal aid practitioners will remain in the sector in the longer-term.

At a time when Government is rowing back on protections for people who have been trafficked, often justified by arguments which conflate trafficking with 'illegal' migration, the loss of experienced and expert legal practitioners from the anti-trafficking space is likely to be particularly harmful for the ability of trafficked persons to access justice.

### Implications for people who have experienced trafficking

The research findings raise pressing concerns about the potential for people who have experienced trafficking to access justice.

Access to good quality legal advice and representation is hugely important for trafficked persons because of the complex range of legal issues they face, encompassing a range of different decision-making systems. Without such access, for example, they are unlikely to be able to secure immigration status, through temporary trafficking-specific leave or a claim for refugee status, or challenge negative NRM decisions.

In the current and short-term, clients who have experienced trafficking are impacted in the first instance by the limited capacity of immigration legal aid lawyers in general, which is particularly acute in certain regions. This can lead to them, if they are able, having to travel significant distances to access legally aided advice. They are also impacted in a second instance in the sense that legal aid practitioners who do take on their cases may not have the necessary expertise and/or capacity to pursue the *trafficking-specific* elements of their case, even if they can represent them in the case of an immigration or asylum claim, e.g. a claim for refugee status.

This leads to legal issues not being pursued, and therefore left unresolved and at risk of escalation. It also means that unlawful actions and decisions of the Government, particularly the Home Office, go unchallenged.

In the medium to long-term, there remain serious repercussions for trafficked persons' access to justice and effective remedies stemming from the likelihood that the capacity problems in the legal aid sector will remain and potentially worsen. The joint effect of this and the reduction of protection for those who have experienced trafficking as a result of changes brought in by the NBA 2022 and IMA 2023 is to place the group in an increasingly vulnerable position completely removed from a victim-centred and human rights-based approach.

## A NOTE ON RESEARCH SCOPE

While a wide range of legal aid immigration solicitors were initially invited to participate, those who accepted tended to be actively engaged in representing clients who had been trafficked and to have knowledge of the relevant law. Therefore, the sample of legal practitioners who participated is self-selecting in that they shared a commitment to representing people who had been trafficked and had a higher level of expertise in the anti-trafficking legal framework than is usual amongst legal practitioners, even those in immigration. They were present and active in the anti-trafficking legal space. As a consequence, it is important to acknowledge the qualitative data collected does not capture the perspectives of lawyers who represent clients who have experienced trafficking but who *do not* have either a detailed awareness of the anti-trafficking and modern slavery frameworks. It also does not encompass lawyers without a particular interest in and/or commitment to the legal rights of people who have been trafficked. The data needs to be interpreted with this in mind: the participants' views are clearly filtered through their own interest in and personal commitment to this cause.

Notwithstanding these limitations, the findings shed light on the experiences of lawyers working in the anti-trafficking space and the repercussions for their clients. They provide a springboard for understanding the coalescence of legal aid structures, immigration and asylum law and policy, and concerted use of anti-lawyer rhetoric by those in positions of political power. for those who practice and those who seek



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