

ATLEU's Submission to the Independent Review of Administrative Law

October 2020

About ATLEU

ATLEU secures safety and justice for survivors of trafficking and modern slavery through using and reforming the law. ATLEU seeks to clarify the law and improve protections for all victims of trafficking through a combination of legal casework, policy work and capacity building activities including delivering specialist legal capability training, second-tier advice and legal resources.

ATLEU is the only UK charity providing dedicated and holistic legal advice to survivors of trafficking. Our specialist multi-disciplinary legal team assists victims to resolve multiple and complex problems, providing advice and representation to help them escape, recover and rebuild: securing safe and appropriate housing, regularising immigration status, obtaining trafficking identification, subsistence and support, and recovering compensation. We assist over 200 victims a year with over 300 legal matters, nationally.

Our response to this Review is informed by our day to day experience of practising public law and advising victims of trafficking and modern slavery and those who assist them.

Introduction

Trafficking is a complex and emerging area of law. There is an absence of domestic legislation and this contributes to a lack of clarity around the UK systems which exist to protect and support victims of trafficking and modern slavery. The NRM (National Referral Mechanism) is the framework for identifying and supporting victims of human trafficking. It sits outside the other statutory frameworks for protecting and supporting vulnerable people, with the state's legal obligations primarily implemented through policy and guidance. As such, as well as being relatively new, they are also subject to far more frequent change.

Survivors typically rely heavily on others to advocate for them. They are especially dependent on those supporting and advising them to navigate the changing and complex systems through which they are identified and access support, to recover from their experiences. Where victims are not believed, where they are not identified and where they are unable to

access the support they need, we know they are less likely to come forward to cooperate with the authorities. This means traffickers are not held to account, they are not prosecuted by the police and they are not subject to criminal proceedings. They are left free to abuse, exploit and enslave others.

There are a series of decisions made about victims of trafficking, all of which have a bearing on whether they are able to escape permanently from situations of trafficking and exploitation. These include decisions taken by the Single Competent Authority relating to identification, support and leave to remain, and decisions on housing, subsistence and care which are taken by housing and social services departments within local authorities. There are also decisions taken by the police, local authorities and other first responders, who are responsible for notifying the Single Competent Authority, and referring those who are potentially victims of trafficking to be identified. This is a crucial role. Where it is not carried out, victims may be left in the hands of traffickers, crimes are not investigated and traffickers get off scot free, creating an environment for organised crime to thrive.

It is well understood that when victims of trafficking are left destitute, without accommodation, subsistence and support they are far more likely to be targeted and re-trafficked. For the system to function, to help survivors escape, recover and rebuild, it is essential that the different elements of support are in place. As the NRM is not integrated into other statutory frameworks this is especially important. The different mechanisms of the state must all work together, or else there is a real risk that significant resource will be invested by the Single Competent Authority, into identifying and supporting victims, only then to have a local authority fail to recognise their legal obligations and leave victims destitute once again, unable to engage with criminal proceedings against their traffickers and at the mercy of those who will exploit them. This not only has a human cost. When victims fall through the cracks in the system, it has a real cost for the state. We already see people being trafficked for a second time and re-entering the NRM. Getting all of these decisions right, first time, is essential.

Judicial review plays a critical role. There are almost no formal appeal or review mechanisms in place within the systems which identify and support victims of trafficking. With the exception of those making homelessness applications, for which there is a statutory review and appeals process, most other decisions affecting victims of trafficking lack due process. At the same time these decisions have profound consequences on both the individual victim's future prospects and on the ability of the state to effectively combat the crimes of modern slavery and trafficking.

Most of the decision-makers involved have a limited understanding of the relevant legal framework. Current recruitment for these decision makers requires just five GCSEs¹. In practice, errors are made, questioning the training, knowledge and supervision of the decision making. Victims are not always correctly identified nor do they receive the level and type of support needed to protect them and combat trafficking. Due to the lack of formal appeal or review mechanisms, judicial review is the only independent process available for resolving an

¹ Current advert for an Executive officer within the Single Competent Authority requires just 5 GCSEs (<https://www.civilservicejobs.service.gov.uk/csr/jobs.cgi?jcode=1691411>)

error. However, this is a constructive process that leads to the resolution of cases, normally without litigation. Most cases are resolved via the exchange of pre-action correspondence. Crucially, a pre-action letter leads to a decision being scrutinized by a second pair of eyes, someone with a deeper understanding of the relevant law and policy framework and how this should be applied. Where decision makers are not and cannot be expected to hold a detailed grasp of complex law and policy, a process to scrutinise the quality and lawfulness of these decisions is important. In the absence of an alternative mechanism, judicial review provides a flexible mechanism by which public bodies can have confidence that those they employ to exercise their public functions do so effectively and efficiently and that their legal obligations to survivors of trafficking are being met.

Question 1: Are there any comments you would like to make, in response to the questions asked in the above questionnaire for government departments and other public bodies?

We are concerned that the questionnaire is weighted towards gathering information on how judicial review may impede the proper and effective discharge of central or local government functions, rather than undertaking a balanced inquiry which looks at the operation of judicial review and seeks information from all the stakeholders involved. The questionnaire is addressed solely to government departments and information is not sought from public bodies more widely nor civil society as a whole. There is little acknowledgement of the positive role judicial review plays in improving decision-making and ensuring the effective rule of law, nor in the important role it plays in protecting individual rights. This approach risks undermining the legitimacy of any reforms to be born out of it.

Question 2: In light of the IRAL's terms of reference, are there any improvements to the law on judicial review that you can suggest making that are not covered in your response to question (1)?

Consideration should be given to making three positive reforms:

- (i) Amending the legal aid scheme to improve access to judicial review;
- (ii) Extending the time limit for bringing judicial review proceedings; and
- (iii) Strengthening disclosure duties.

Legal aid

Survivors of trafficking and modern slavery are entitled to free legal advice, under Article 12 of the Council of Europe Convention for Action Against Trafficking In Human Beings ('Anti Trafficking Convention') and this is meant to be given effect through our legal aid regime. However, victims of trafficking and modern slavery do not have an automatic entitlement to legal aid when they are being supported under the NRM as they are not 'passported', like other groups in receipt of certain mainstream benefits. In practice a significant number of

victims of trafficking and modern slavery cannot access legal advice when they need it. This includes those requiring advice in relation to a potential judicial review. The civil legal aid means test is set at a level that leads to some survivors of trafficking being ineligible for legal aid. The consequences of this are severe: survivors are left trapped in exploitative situations, in sex work and in abusive relationships, because they are unable to access advice. This is illustrated by an ATLEU client's situation, set out in the case study below.

Case study: Escaping sexual exploitation

In February 2015, our client was picked up in a police raid and referred into the NRM, and identified by the state as a potential victim of trafficking. She was supporting elderly frail parents and a severely disabled sibling, all of whom required care. She had significant debts and saw no alternative but to keep earning through sex work. This meant she was not eligible for legal aid and was unable to get any legal assistance to explain her trafficking case. She received a negative Conclusive Grounds trafficking decision. With assistance from NGOs she tried to seek a reconsideration of the decision. Over 17 months all of these requests were ignored. Her only remedy was judicial review, but she was not eligible for legal aid as her earnings took her over the means threshold. Despite the offer of pro bono assistance she was too scared to proceed to judicial review due to the risk of litigation costs, so she remained in sex work. She couldn't be persuaded to leave as she had no other way to support her family. Her mental health declined, she attempted suicide twice in 2018, and was eventually admitted to hospital for psychiatric treatment, which is when she stopped working. She finally became eligible for legal aid, three and a half years after being referred into the NRM. Only then did she receive the legal assistance she needed, which led to her receiving a positive Conclusive Grounds decision, accessing NRM support and leaving behind a life in sexual exploitation.

There is some provision within the legal aid scheme for legal aid providers to start urgent work on a judicial review case without first making an application for legal representation to the Legal Aid Agency. This is known as exercising delegated functions and is important as it ensures that in emergency homelessness judicial reviews vulnerable individuals are not left on the street due to a lack of access to legal aid². Unfortunately, many of the judicial review cases for survivors of trafficking and slavery are not covered by delegated functions. This means where survivors of trafficking are on the street or in situations of exploitation and in need of legal assistance to challenge a decision relating to their identification and/or support under the NRM the legal aid provider has to apply to the Legal Aid Agency. This process takes 48 hours and is sometimes subject to further delays and requires decisions on funding to be chased. During this time survivors are left at risk of harm and are especially vulnerable to being re-trafficked. We have had clients who were about to be on the street while waiting for a decision on an emergency legal aid application and only avoided this after a charity stepped in to provide a few nights' accommodation. Amending delegated functions for legal aid to include urgent judicial review challenges in respect of NRM decisions on identification, leave

² Since 2013, providers have not had the power to grant emergency representation using delegated functions for judicial reviews, with the exception of urgent homelessness matters. In 2019 this power was reinstated for certain cases, including those under Part VII Housing Act 1996, section 21 of the National Assistance Act 1948, section 20 of the Children Act 1989, section 47(5) National Health Service and Community Care Act 1990, section 19(3) of the Care Act 2014, and section 36 of the Social Services and Well-Being (Wales) Act 2014.

to remain, support and accommodation for victims and potential victims of modern slavery would improve access to judicial review and assist in safeguarding this group.

Time limits

We would recommend extending the time limit for issuing judicial review claims and/or enabling parties to agree to an extension to the time limit. Survivors of trafficking often struggle to access advice and this can contribute to delays in issuing proceedings. In practice, most can't access advice quickly after a decision is made and many don't get advice within the 3 month time limit. Survivors of trafficking and modern slavery will often suffer from post-traumatic stress disorder and other mental health conditions as a result of the abuse they have suffered. This can mean taking instructions is painful, slow and difficult. Many will not have access to documentary evidence and this may take time to collate. Often the relevant information is held by public authorities and this may require a subject access request to be made, which causes further delay. If parties could agree an extension to the time limit it may enable fuller disclosure at the pre-action stage which would increase the chances of settlement prior to issue.

Survivors of trafficking and modern slavery can experience considerable delays when seeking legal aid for judicial review proceedings. This is especially the case where challenges are in relation to legal obligations that are found in the Anti Trafficking Convention, which is most likely a reflection of the lack of domestic legislation in this field and that this is an emerging area of law. However, where there are delays this should provide good reason for an extension of time to issuing judicial review proceedings.

Disclosure duties

A public authority will typically have greater access, to relevant knowledge and information, than the claimant at the outset of judicial review proceedings. This inequality is particularly great with survivors of trafficking and modern slavery, as survivors frequently lack documentary evidence in support of their case, in addition to which they may be unable to set out a full account of their situation. Their memory may be affected by trauma. Many will not have had control over key aspects of their lives for the previous months or years and may be entirely unaware of documents submitted in their name. There may be bank accounts operated on their behalf and without their knowledge, or welfare benefits or immigration applications made without their understanding or consent.

Decisions made about survivors in the NRM will normally relate to their identification or an aspect of their support. In ATLEU's experience, survivors have not routinely received letters setting out a decision taken about their subsistence, accommodation or support. Where a letter is obtained in relation to such a decision full reasons for the decision are frequently not provided. This is unfortunate as a survivor will have little insight into why the decision has been made and this can create a sense of injustice.

Early disclosure is therefore particularly important in trafficking survivors' cases. In ATLEU's experience requests for a copy of a decision letter and relevant evidence at the pre-action stage are typically ignored. In our experience, the Single Competent Authority will not normally comply with their disclosure obligations under the pre-action-protocol, and insist that if this information is to be provided it should be through a subject access request. We have only once had pre action disclosure from the government in such a case. Our experience of subject access requests made to the Home Office has been that they can take up to six months, and in one case, over nine months, before the request was fulfilled, with a standard position (even pre Covid-19) regardless of what is set out in the request, that only computerised records will be provided in the first instance. This approach to pre action disclosure can cause significant delay as well as being an impediment to effectively advising survivors on the merits of their case. If disclosure of these documents were provided early, in compliance with the duty of candour, it would enable parties to better assess the prospects of a claim and help to deter those pursuing weaker claims. Early disclosure can actively promote the prospect of settlement prior to issue, which is in the interests of both parties.

In a recent case, where ATLEU successfully obtained relevant disclosure at an early stage we reviewed the case and advised the client not to pursue judicial review proceedings on the basis that the decision taken by the Single Competent Authority was a reasonable and lawful one in the circumstances. This information was crucial, both in preventing the issue of proceedings, and in enabling the individual to have confidence in the system and understand why they had been treated fairly.

Question 3: Is there a case for statutory intervention in the judicial review process? If so, would statute add certainty and clarity to judicial reviews? To what other ends could statute be used?

We do not consider that the codification of judicial review would result in greater certainty or clarity. Judicial review is a mechanism by which the law laid down by Parliament is enforced. It would be an enormous task to comprehensively codify the common law and would likely result in considerable litigation attempting to resolve new questions regarding the scope and meaning of such legislation. Judicial review is a flexible and effective mechanism which plays a vital role in improving the quality of public authority decision making, providing a check on the potential misuse of executive power and ensuring the accountability of public bodies. Judicial review enables individuals, including the most vulnerable and marginalised, to ensure that a public body acts lawfully. There will always be an imbalance of power between the individual and the state and judicial review plays an essential role in keeping that power in check. It is essential to the effective functioning of our democracy.

Question 4: Is it clear what decisions/powers are subject to Judicial Review and which are not? Should certain decision not be subject to judicial review? If so, which?

As practising lawyers acting for survivors of trafficking and slavery we consider the test for justiciability to be sufficiently clear. We do not see any merit in narrowing the scope of judicial review. It is essential that individuals, particularly the most vulnerable, have an effective mechanism by which to challenge a public body's decision. This is particularly true for survivors of trafficking and modern slavery, where poor or unlawful decision making can leave them in the hands of traffickers, unable to escape.

One of the reasons that judicial review is relied upon as a remedy for survivors of trafficking and modern slavery is the lack of an independent right of appeal in NRM decisions and/or the lack of a formal, independent review process for NRM decisions in respect of accommodation and support. Were this to be addressed survivors would rely less upon judicial review.

Question 5: Is the process of i) making a Judicial Review claim, ii) responding to a Judicial Review claim and/or iii) appealing a Judicial Review decision to the Court of Appeal/ Supreme Court clear?

As practising lawyers acting for survivors of trafficking and slavery in judicial review claims we have experience of making rather than responding to judicial review claims. The process of making a claim and appealing a decision is relatively straightforward and guidance on questions of procedure can be found in the Civil Procedure Rules.

Question 6: Do you think the current Judicial Review procedure strikes the right balance between enabling time for a claimant to lodge a claim, and ensuring effective government and good administration without too many delays?

The time frame for bringing a judicial review is short, considerably shorter than most other civil litigation time limits. For the reasons set out in answer to Question 2 we would recommend an increase in the time limit for issuing claims. If the limitation were to be curtailed further we fear it would result in less meritorious claims being pursued, less engagement between parties at the pre-action stage and less opportunity for parties to engage in meaningful settlement prior to issue.

Question 7: Are the rules regarding costs in judicial reviews too lenient on unsuccessful parties or applied too leniently in the Courts?

We have not seen any evidence of costs in judicial reviews being applied too leniently. Costs are subject to a rigorous process in which they are assessed by the court. Both sides are typically represented and costs which are considered unreasonable will be struck out. Scrutiny by the court provides a fair and rigorous process for the parties.

Question 8: Are the costs of Judicial Review claims proportionate? If not, how would proportionality best be achieved? Should standing be a consideration for the panel? How are unmeritorious claims currently treated? Should they be treated differently?

We do not consider that the costs of Judicial Review claims are disproportionate. We are aware that for survivors of trafficking and modern slavery legal aid plays an important role in their ability to access justice. Where it is unavailable to them for reasons such as those set out in our response to Question 2 above, they are likely to be deterred from bringing meritorious claims. Even where we see those with very strong cases most are so intimidated by the prospect of being liable for their opponent's costs, as this would be a debt that they could not conceive of being able to pay off, that they are unwilling to proceed.

The availability of recoverable costs also plays a role in maintaining access to advice for survivors of trafficking and modern slavery. Accessing public law advice is challenging for this group and subject to significant delays due to the scarcity of lawyers prepared to undertake the work. Reforms to the costs regime would potentially undermine further the sustainability of the legal advice for this client group.

Question 9: Are remedies granted as a result of a successful judicial review too inflexible? If so, does this inflexibility have additional undesirable consequences? Would alternative remedies be beneficial?

It is our experience that there is sufficient flexibility in judicial review remedies. Whilst a survivor of trafficking or modern slavery may be able to establish that a decision was unlawful, it does not follow that they will be entitled to any particular relief. The court has real discretion in this process which helps to ensure that remedies granted are appropriate to the individual case.

Question 10: What more can be done by the decision maker or the claimant to minimise the need to proceed with judicial review?

The complexity of the legal framework, the lack of domestic legislation and the frequently changing policy and guidance for survivors of trafficking and slavery creates a challenging context for the Single Competent Authority decision-makers to be operating in. Unfortunately, this does lead to poor quality and unlawful decisions, whether this is due to the misapplication of the relevant law or policy, inadequate funding of sufficient staff to process cases in detail, a failure to take into account the evidence provided, a failure to follow a fair process, or simply a failure to provide adequate reasoning for the decision reached. All of these issues underline the need for better quality training and funding of decision-makers.

**Question 11: Do you have any experience of settlement prior to trial?
Do you have experience of settlement 'at the door of court'? If so, how
often does this occur? If this happens often, why do you think this is
so?**

The vast majority of ATLEU's judicial review cases settle. Over the last year just 2% of cases have proceeded to hearing. The vast majority, 73% of cases, have settled at the pre-action stage, prior to the formal commencement of proceedings. 25% were issued but then settled either before or after permission stage.

The two case studies below provide examples of cases that resolved disagreement over points of law without requiring a full hearing. However, in both cases parties required the assistance of counsel and evidence to reach a settlement agreement.

Case study: Helping survivors to claim compensation

Parliament included a clause in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) to ensure that victims of trafficking could bring compensation claims against their traffickers. This was repeated and expanded upon in the Modern Slavery Act 2015. However, the way in which this was implemented through the legal aid contract, meant that few victims of trafficking and modern slavery were able to access legal advice on a potential claim against their trafficker. From 2013 each legal aid provider was able to use five matter starts from another category of law, such as housing or immigration, to do 'miscellaneous' cases. Trafficking compensation claims were included in the work that could be undertaken on these miscellaneous matter starts. The Lord Chancellor contended that there was therefore adequate legal aid provision for victims of trafficking. However, ATLEU's evidence demonstrated that significantly fewer victims of trafficking were able to hold their traffickers to account in the civil courts, than before LASPO came into force. Unfortunately, criminal prosecutions of traffickers are still rare, so a compensation claim is often their only way of seeking recompense for acts of trafficking and exploitation and for deterring them from perpetrating future crimes. Evidence from support agencies showed that many victims were unable to access advice because of the limited number of providers able to deal with compensation claims and the limited number of such claims each one could handle. It was not possible to resolve the matter through ADR at an early stage, although discussions were held prior to the commencement of proceedings. ATLEU issued judicial review proceedings and permission was granted. The court found that it was arguable that the arrangements amounted to a breach of the government's duty to make legal aid available to victims of trafficking and granted ATLEU permission to pursue the judicial review. Attempts to resolve the matter through ADR were resumed prior to the full hearing. The settlement terms included the Ministry of Justice and Legal Aid Agency agreeing to undertake a review of the provision of legal aid for trafficking compensation claims and a commitment to ensure the wider availability of matter starts. As a result the government carried out their review and made significant changes to the way legal aid was provided for survivors of trafficking and modern slavery, enabling a provider to assist up to 100 survivors a year under the 2018 Civil Contract.

Case study: (R (LL) v Lord Chancellor CO/3581/2017) Guaranteeing access to justice

LL's parents died when she was a child and a family member brought her to the UK. They forced her into prostitution when she was just 13 years old. After three years she escaped but she was completely dependent on others for survival. The Home Office identified her as a potential victim of trafficking, but despite this, she was unable to access legal advice about her trafficking and immigration case. This placed her in danger of being re-trafficked. The Legal Aid Agency's position was that "there was no entitlement to legal aid for immigration advice for victims of trafficking seeking discretionary leave on the basis of their trafficking experiences". This was in direct contrast to the Home Office position which was that potential victims of trafficking are entitled to legal aid. Following the Legal Aid Agency's refusal to grant LL legal aid (under the Exceptional Case Funding regime), LL issued commenced judicial review proceedings. Shortly before the hearing the case was settled. The Lord Chancellor conceded that potential victims of trafficking do have the right to legal aid for immigration advice and for help with identification while they go through the NRM. These proceedings were important as they enabled parties to reach agreement on a point of law. All advisers and survivors of trafficking and slavery now have greater clarity about the legal entitlement to free advice. As part of the settlement the Lord Chancellor agreed to publish a document which clarify this entitlement. ATLEU continues to receive enquiries from professionals working with victims of modern slavery who are unsure about what survivors are entitled to free legal advice on. The document published as a result of these proceedings continues to be one we refer to, helping to ensure there is a greater clarity on this point of law.

**Question 12: Do you think that there should be more of a role for Alternative Dispute Resolution (ADR) in Judicial Review proceedings?
If so, what type of ADR would be best to be used?**

Most judicial review proceedings involving survivors of trafficking and modern slavery do not provide ample opportunity for ADR. Many of the cases involve matters of real urgency with survivors facing situations where they are at immediate risk and judicial review is the only mechanism by which to protect them.

Given the emerging nature of this area of law we and other practitioners in the field frequently encounter questions of legal principle. Whilst these may be resolved prior to hearing this is usually only possible after disclosure and the exchange of fully reasoned legal argument. ADR can lead to meaningful settlement negotiations in these cases but typically at a later stage, nearer to hearing. There are also those cases where the point of law is one which the court must determine. This plays a significant role in developing the law and providing all parties with clarity around their legal rights and obligations.

The time limit for judicial review also prohibits parties from engaging in meaningful ADR prior to the formal commencement of proceedings. In practice, there is insufficient time for parties to engage in this process.

Question 13: Do you have experience of litigation where issues of standing have arisen? If so, do you think the rules of public interest standing are treated too leniently by the courts?

The vast majority of cases for survivors of trafficking and modern slavery are brought by individuals. We are aware of just one judicial review brought of public interest standing. This is set out above in response to Question 12.