

Immigration status of trafficked children

This fact sheet provides information for those working with trafficked children and young people. The fact sheet provides information on the immigration statuses and various forms of leave relevant to victims of trafficking.

If you have any questions about trafficking relating to a refugee or migrant child, young person or family, you can call our Migrant Children's Project advice line on 0207 636 8505 or by email to mcp@coramclc.org.uk.

What is the legal status of victims of trafficking?

Children with various types of immigration status can be victims of trafficking. For example, they may be British, European Economic Area nationals, in the United Kingdom on a visa, undocumented children born in the UK or visa over-stayers.

Being referred to the National Referral Mechanism ('NRM') or receiving a positive Conclusive Grounds Decision from the NRM will not necessarily determine a child's immigration status. The particular circumstances of each child's case will have an impact on whether leave is granted, or deemed to be needed.

The government published a Modern Day Slavery Strategy in November 2014 [1] and passed the Modern Slavery Act 2015. [2] The Modern Slavery Act 2015 makes some changes in relation to the law as affects victims of trafficking and/or modern slavery. For further information, please see our fact sheet on the National Referral Mechanism at www.coramchildrenslegalcentre.com/resources.

In all cases where immigration status is a live or potentially live issue, trafficked children should be referred to an immigration adviser as soon as possible.

Residence permits for trafficking victims

Article 14 of the Council of Europe Convention on Action against Trafficking in Human Beings recognises the need for member states to issue renewable residence permits to victims when required. [3]

The Convention identifies two situations where the issue of a residence permit would be appropriate:

- the competent authority considers that their stay is necessary owing to their personal situation;
- the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigations or criminal proceedings.

Article 14 further states that any residence permit for child victims should be issued in accordance with the best interests of the child and, where appropriate, renewed under the same conditions.

However, the non-renewal or withdrawal of a residence permit is subject to the conditions provided for by the UK government. The Home Office has provided detailed guidance for the Competent Authority on handling referrals to the NRM and granting residence permits. [4]

In the UK, when a child or young person receives a positive Conclusive Grounds Decision in the NRM, the Competent Authority should consider whether they require a residence permit. This would be a renewable residence permit, granted for a minimum of 12 months and up to 30 months (2 ½ years). However, they do have discretion to provide a permit for less than 12 months or more than 30 months should it be considered appropriate.

Residence permits can be granted to trafficked children in the UK in the following circumstances:

- they have particularly compelling personal circumstances which justify a grant of leave to allow them to remain in the UK (such as medical conditions, mental health issues, need for recovery);
- they need to stay in the UK to pursue a claim for compensation against their traffickers; or
- the victim needs to stay in the UK to assist with police enquiries (the victim needs to have agreed to cooperate with the enquiry, and the police must make a formal request for them to be granted leave on this basis).

In some cases the police may themselves request that a residence permit be granted, particularly if there is an ongoing investigation or prosecution.

However, in most cases the child will need legal assistance to collect the evidence to show why they require a residence permit. This should be submitted with legal representations to the Competent Authority before a Conclusive Grounds Decision is made.

Asylum

Professionals should be aware that there is often an interaction between child trafficking and the Refugee Convention (particularly where a child would be at risk of re-trafficking or exploitation on return). The UN High Commission for Refugees (UNHCR) has produced guidance on human trafficking and the Refugee Convention. [5]

The definition of a refugee is set out in the Refugee Convention, which states that someone is recognised as a refugee if that individual is:

Owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable

or, owing to such fear is unwilling to return to it [emphasis added].

In the case of *SB (PSG) Moldova [2008]*, the Tribunal found that in the case of former victims of trafficking for sexual exploitation, both “former victims of trafficking” and “former victims of trafficking for sexual exploitation” are capable of being considered a particular social group because of their shared common background or past experience of having been trafficked. [6]

In *AZ (Trafficked Women) Thailand [2010]* the tribunal found that although former victims of trafficking in Thailand constituted members of a particular social group, not all would be at risk on return. The risk would depend on the particular circumstances of the individual. The Tribunal considered that relevant factors would include:

- age;
- marital status;
- domestic background;
- education;
- availability of employment; and
- family or other support networks. [7]

Therefore, if someone is recognised as a victim of trafficking, and depending on their nationality, they may be able to show that, due to their particular circumstances, as well as the lack of protection or access to protection in their home country, that they are a refugee and entitled to refugee status in the UK.

Humanitarian Protection

Even if an individual does not meet the definition of a refugee, they may be entitled to ‘humanitarian protection’. Under Article 2(e) of the Qualification Directive:

A person eligible for subsidiary protection means a third country national or a stateless person who

does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country [emphasis added].

Therefore, even if a victim of trafficking cannot meet the definition of a refugee, they may be entitled to subsidiary protection if their circumstances merit such protection. For example, they could argue that returning to their home country would result in torture or inhuman or degrading treatment due to the country conditions and their personal circumstances.

Other human rights grounds

There can also be a connection between the needs and entitlements of trafficked children and the child's right to private life (including a durable solution and access to/continuity of rehabilitative support and education) as protected by Article 8 of the European Convention of Human Rights (ECHR).

In the case of *Rantsev v Cyprus and Russia*, the European Court of Human Rights found that victims of trafficking can rely directly on Article 4 of the ECHR (which prohibits slavery, servitude and forced or compulsory labour) when making a claim for protection on human rights grounds.

It was further found in *Rantsev* that countries must protect victims of trafficking and potential victims of trafficking, as well as having a duty to not return victims to a situation where they may again face exploitation or re-trafficking. [8]

Leave as an unaccompanied asylum-seeking children ('UASC leave')

Where the Home Office finds that a trafficked child is not a refugee and is not eligible for leave on any other basis, the Home Office may still grant a child a period

of limited leave under the immigration rules (called 'UASC leave') until the age of 17.5 years old, or for 2.5 years, whichever is shorter. This leave is granted to children in cases where there are no adequate reception arrangements in their country of origin.

Grants of leave on this basis should be very carefully scrutinised and legal advice sought, because this type of leave shows that the Home Office has refused to grant the child leave as a victim of trafficking. Grants of leave on this basis will also mean that the child's asylum claim has been refused. For further information on this type of leave, please see our fact sheet at:

www.coramchildrenslegalcentre.com/resources.

Appeals

If a child receives a negative conclusive grounds decision under the NRM, then their only right of appeal against this decision is to judicially review the negative decision. However, if the child has made an asylum claim, they will receive a right of appeal against the asylum decision to the First Tier Tribunal.

It has been held that the Tribunal should consider whether an individual claiming asylum is a victim of trafficking and that any arguments made should be heard and taken into account. This is relevant even if there has been a negative conclusive decision made by the Competent Authority. [9]

Legal aid

The legal aid situation has become increasingly complex, so if you are unsure as to whether a child is eligible, please consult with a solicitor. At present there is only mainstream legal aid available in certain areas of law relevant to child trafficking cases, including, for example:

- Trafficking, or modern slavery, cases, but only after the individual has received a positive Reasonable Grounds Decision;
- Asylum cases or cases raising Article 3 of the European Convention of Human Rights (prohibition on torture/inhuman and

degrading treatment);

- Judicial review; and
- Criminal defence.

There is no legal aid in England and Wales for immigration cases raising Article 8 of the ECHR (respect for private and family life) or European Union law or for trafficking cases before there is a positive Reasonable Grounds Decision (although funding for judicial review is available).

Where a trafficked child is seeking compensation for trafficking, or modern slavery, legal aid is available and there is also legal aid available for the preparation of an employment tribunal case involving exploitation. [10]

Exceptional case funding can also be applied for and the Public Law Project currently runs an Exceptional Funding Project. [11] A trafficked child may also be eligible to make a claim for compensation from the Criminal Injuries Compensation Authority. [12]

In areas where there is no legal aid, but legal advice is needed to ascertain or promote the best interests of the child and safeguard their welfare, then the local authority children's services department should fund legal advice as part of the child's support package.

As noted above, where appropriate and suitable (given the urgency of some legal issues) consider helping the trafficked child apply for Exceptional Case Funding, to obtain legal aid in an area where it is not usually available as a matter of course.

NOTES

- [1] Home Office, The United Kingdom's Modern Day Slavery Strategy, November 2014
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/383764/Modern_Slavery_Strategy_FINAL_DEC2015.pdf
- [2] Modern Slavery Act 2015
<http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>
- [3] Article 14, Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims

<http://eur-lex.europa.eu/legal-content/GA/TXT/?uri=celex:32011L0036>

[4] Home Office, Victims of Modern Slavery: Competent Authority guidance

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450842/Competent_authority_guidance_v2_0_ext.pdf

[5] UNHCR, Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked

<http://www.unhcr.org/443b626b2.html>

[6] *SB (PSG - Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002

<http://www.refworld.org/docid/47837c902.html>

[7] *AZ (Trafficked women) Thailand CG* [2010] UKUT 118 (IAC) <http://www.refworld.org/docid/4bd58d912.html>

[8] *AS (Afghanistan) v Secretary of State for the Home Department* [2013] EWCA Civ 1469

<http://www.bailii.org/ew/cases/EWCA/Civ/2013/1469.html>

[9] *Rantsev v. Cyprus and Russia*, Application no. 25965/04

https://www.coe.int/t/dghl/cooperation/economiccrime/corruption/Projects/CAR_Serbia/ECHR%20Judgements/English/RANTSEV%20v%20CYPRUS%20%20RUSSIA%20-%20ECHR%20Judgment%20_English_.pdf

[10] Schedule 1, Legal Aid, Sentencing and Punishment of Offenders Act 2012 & Section 47, Modern Slavery Act 2015

<http://www.legislation.gov.uk/ukpga/2012/10/schedule/1/enacted> and

<http://www.legislation.gov.uk/ukpga/2015/30/section/47/enacted>

[11] Public Law Project, Exceptional Funding Project homepage

<http://www.publiclawproject.org.uk/exceptional-funding-project>

[12] Criminal Injuries Compensation Authority homepage

<https://www.gov.uk/government/organisations/criminal-injuries-compensation-authority>

This fact sheet should not be used to give legal advice and is for information and guidance only. For advice on individual cases, assistance should be sought from an independent regulated legal adviser.

For further assistance contact our advice line. Call 0207 636 8505 or email mcp@coramclc.org.uk.