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Compounding vulnerability and concealing unfairness: decision-making processes in the UK's anti-trafficking framework

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Introduction

In recent years the UK government has advanced a now familiar rhetoric about its approach to addressing human trafficking, a key component of which has been the (self-)positing of the UK as a 'world leader in the fight against modern slavery'.[1] The notion of 'vulnerability' has been central to the way in which the government has framed victims.[2] For example, in May 2014 Theresa May, then Home Secretary, claimed that '[t]he men, women and children who are forced, tricked and coerced into servitude and abuse, are often the world's most vulnerable.'[3] This narrative of the 'vulnerable victim' has continued in Theresa May's discussions of the issue as Prime Minister.[4]

The concept of vulnerability is generally used in law to describe categories of people considered to be entitled to receive 'extra care and attention'.[5] In light of the prominence of vulnerability in the political discourse as a characteristic supposedly relevant to those trafficked, it might be reasonable to assume that the associated legal and policy framework, a component of which is the Modern Slavery Act 2015 (MSA), would encapsulate such a safeguarding spirit. In reality, as this article demonstrates, the processes responsible for determining victimhood in the context of the UK's modern slavery framework, such as the National Referral Mechanism (NRM), and those that regulate access to post-identification entitlements such as residence, are not working to advance the interests of vulnerable people and fail to deliver administrative justice.[6] Individuals who are suspected to be victims

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[1] Home Office, *Modern Slavery and Supply Chains: Government Response.* <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/448200/Consultation_Government_Response_final_2_pdf.pdf>(accessed 18 July 2018).

[2] There has been criticism of the emphasis on prosecution to the detriment of protection, see V. Brotherton, 'Is the UK a world leader in the fight against modern slavery?', *Open Democracy,* 26 October 2016. <https://www.opendemocracy.net/beyondslavery/vicky-brotherton/is-uk-world-leader-in-fight-against-modern-slavery> (accessed 18 July 2018).

[3] T. May, *A model that works: A government's role in combating human trafficking,* 9 April 2014. <https://www.gov.uk/government/speecnd hes/a-model-that-works-a-governments-role-in-combating-human-trafficking> (accessed 18 July 2018).

[4] T. May, *Defeating modern slavery* (article written for Daily Telegraph, 31 July 2016. <https://www.gov.uk/government/speeches/defeating-modern-slavery-theresa-may-article> (accessed 18 July 2018).

[5] A. Morawa, 'Vulnerability as a Concept of International Human Rights Law' (2003) 6(2) *Journal of International Relations and Development,* 139-155, 139.

[6] Thomas and Tomlinson describe the concept of administrative justice as concerning 'both the making of administrative decisions and the systems for challenging such decisions': R. Thomas and J. Tomlinson., 'Mapping current issues in administrative justice: austerity and the 'more bureaucratic rationality' approach' (2017) 39(3) *Journal of Social Welfare and Family Law,* 380-399, 380.

of one of the offences falling within the 'modern slavery' umbrella[7] do not have access to a fair and rigorous decision-making system.

This article begins with an overview of the UK's anti-trafficking framework which comprises the statutory MSA and the practical NRM. Drawing on Martha Fineman's theoretical work, it explains the use of the concept of vulnerability as an analytical framework for the current UK system. The following sections then explore the ineffectiveness of this system as a tool for safeguarding people so overtly described as vulnerable. By means of an analysis both of the limitations of the NRM mechanism and of the framework by which recognised trafficking victims can seek to secure a right to reside in the UK, subsequent sections demonstrate that current legal mechanisms are insufficiently accessible to the majority of victims. The real possibility that individuals are subjected to unfair treatment is embedded across the system, spanning the initial victim identification to subsequent decisions around the residence entitlement of trafficking victims taken by the Home Office which, in its capacity as 'gatekeeper' of leave to remain status, is reticent to exercise its discretion. Consequently, there is a reliance on judicial review to challenge Home Office decisions, though crucially this fails to address the fundamental issues undermining the system. Ultimately, current frameworks and decision-making procedures fail to effectively recognise and respond to vulnerability and, as such, do not provide trafficking victims with appropriate structures to build resilience in support of their recovery.

The UK's statutory anti-trafficking framework

The UK's legal response to trafficking is embedded within broader international and regional frameworks. In terms of international law, the UK is signatory to the Palermo Protocol[8] and the Council of Europe Convention on action against trafficking in human beings 2005 (ECAT).[9] The UK government also took the decision to opt-in to the 2011 European Union Directive on preventing and combating trafficking in human beings and protecting its victims (Directive 2011/36).[10] The Palermo Protocol contains the well-established definition of trafficking which both ECAT and the Directive use as a foundation. This tripartite definition focusses on the action, means and purpose of trafficking. The action translates as the *'recruitment, transportation, transfer, harbouring, or receipt of persons';* the means includes '*threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person';* and the purpose is for *exploitation.* That exploitation *'shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs'.*[11] The consent of a victim of trafficking to the intended exploitation is irrelevant where any of the means set out (i.e. coercion, abduction, fraud, deception, abuse of power) have been used.[12]

While the international regime exemplified by Palermo, ECAT and Directive 2011/36 utilizes the concept and process of trafficking, in the UK the anti-trafficking position has been presented principally under the broader banner of modern slavery.[13] This agenda was driven forward by current Prime

[7] The Modern Slavery Act 2015 includes within this human trafficking (s.1), slavery, servitude, and forced or compulsory labour (s.2).

[8] UN Doc A/55/383, 2 Nov, 2000, annex II. The Palermo Protocol supplements the UN Convention against transnational organized crime (the CTOC). A second protocol addresses the smuggling of migrants by land, sea and air: UN Doc A/55/383, 2 Nov 2000, annex III.

[9] Council of Europe Convention on Action against Trafficking in Human Beings 2005, Warsaw, 16.5.2005, CETS No. 197.

[10] Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims OJ [2011] L101/1.

[11] Article 3, Palermo Protocol.

[12] When children are involved, it is sufficient that only the action and purpose elements are satisfied.

[13] Of course, the UK is not the only jurisdiction within which trafficking and slavery are increasingly conflated. For analysis of this in the ECHR caselaw, see R. Vijeyarasa and J. Villarino, 'Modern Day Slavery A Judicial Catchall for Trafficking, Slavery and Labour Exploitation: A Critique of Tang and Rantsev' 8 (2012) *Journal of International Law and International Relations* 36-61. There are differing views on the appropriateness of the label 'slavery' within trafficking discourse. See C. Hoyle, M. Bosworth and M. Dempsey, 'Labelling the Victims of Sex Trafficking: Exploring the Borderland between Rhetoric and Reality' 20 (2011) *Social and Legal Studies,* 313-329.

Minister Theresa May during her tenure as Home Secretary from 2010-2016. The MSA reformed and consolidated the previously piecemeal law on human trafficking and related offences of slavery, forced or compulsory labour and servitude,[14] and put in place a unified legislative regime to address these issues.[15] In addition to providing detail on these offences,[16] the MSA sets out maximum sentences for those convicted (with an increased term of life imprisonment).[17] The MSA also makes provision for trafficking reparation orders to be made in order that victims receive compensation.[18] In terms of victim protection, the Act contains a defence for victims who have committed an offence attributable to their slavery or trafficking situation.[19]

Not all of the provisions of the MSA are immediately operational, with some of the victim protection-relevant provisions requiring further action to render them meaningful.[20] For example, there is a duty on the Secretary of State to make 'reasonable' arrangements, and to make regulations, so that specialist independent child trafficking advocates (ICTAs) are available to support and represent children when there are reasonable grounds to believe they may be victims of trafficking.[21]

Contextualizing vulnerability

The interaction of trafficking victims with decision-making processes is examined here through a vulnerability lens. The concept of vulnerability is embedded in debates about trafficking and modern slavery. Despite the high visibility of vulnerability as a term, its meaning and impact remain ill-defined and imprecise. As prominent vulnerability theorist Martha Fineman highlights, the concept is 'in common use, but also grossly under-theorized, and thus ambiguous.'[22] The United Nations has similarly recognized the 'loose' use of vulnerability in policy contexts:

Vulnerability stems from many sources and can be traced to multiple factors rooted in physical, environmental, socio-economic and political causes. In essence, vulnerability can be seen as a state of high exposure to certain risks and uncertainties, in combination with a reduced ability to protect or defend oneself against those risks and uncertainties and cope with their negative consequences. It exists at all levels and dimensions of society and forms an integral part of the human condition, affecting both individuals and society as [a] whole.[23]

This definition draws directly on Fineman's main thesis that vulnerability is the primal human condition,[24] but also details a number of particular factors which have the effect of enhancing vulnerability. In the trafficking context, such vulnerability-enhancing factors might be related to intrinsic elements, such as gender or age, or situational conditions, such as poverty or irregular immigration

[14] This article focusses on the UK as a whole, though there are differences in the Act's applicability across the devolved nations, with separate statutes applying to Northern Ireland and Scotland. See Anti-Trafficking Monitoring Group, *Class Acts? Examining modern slavery legislation across the UK* (October 2016).

[15] Modern Slavery Act 2015, Chapter 30. Previously the relevant legal provisions were scattered across: Gangmasters (Licensing) Act 2004, Asylum and Immigration (Treatment of Claimants etc) Act 2004, Coroners and Justice Act 2009, and Sexual Offences Act 2003.

[16] Sections 1 and 2.

[17] Sections 5 and 6.

[18] Sections 8-10.

[19] Section 45 and schedule 4. This represents an attempt to comply with the non-punishment principle in Article 26 of ECAT.

[20] Under section 49, statutory guidance should be produced on identifying and supporting victims.

[21] Section 48. The actual 'roll out' of ICTAs in England has been significantly stalled in practice. See House of Lords European Union Committee, *Children in crisis: unaccompanied migrant children in the EU,* HL Paper 34, 26 July 2016.

[22] M.A. Fineman, 'The vulnerable subject: anchoring equality in the human condition' (2008) 20(1) *Yale Journal of Law and Feminism,* 1-23 at 9.

[23] United Nations, *Report on the World Social Situation, 2003, Social Vulnerability: Sources and Challenges,* (UN: New York, 2003), 8.

[24] M. Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth-century Tragedies* (1995, Routledge: New York); M. Fineman, *The Autonomy Myth: A Theory of Dependency* (2004, The New Press, New York).

status.[25] While their existence can heighten the vulnerability of individuals to being trafficked, vulnerability can also manifest in the aftermath of trafficking. The anti-trafficking legal framework recognizes that vulnerability may be a precursor to the 'act' of trafficking. The definition of trafficking which cascades down from the Palermo Protocol to measures such as ECAT and Directive 2011/36, and to the domestic legislation in the form of the MSA, contains 'abuse of a position of vulnerability' as one of the potential means that might be used in order to traffic persons. According to Lima de Pérez, vulnerability tends to be conceptualised broadly for the purposes of a determination of the existence (or not) of such an abuse. The focus is on whether there is greater susceptibility to being trafficked as opposed to a stricter determination of whether exploitation of a specific vulnerability actually took place.[26] Vulnerability will, of course, likely continue to be experienced - and potentially intensify – following the action of trafficking as the process moves into the exploitation phase.[27]

By interrogating the interaction that potential victims of trafficking have with UK decision-making procedures, it is possible to assess, first, the extent to which the relevant legal and administrative structures are able to respond to vulnerability (for example by being sensitive to the concerns individuals might have about presenting to the authorities, or by providing free and accessible legal advice). Secondly, by combining this with examination of the impact of legal challenges to decisions brought by individuals through courts and tribunals, it is possible to gain an understanding of the suitability of such legal action for actually confronting such vulnerability.

Decision-making in the National Referral Mechanism: processes, outcomes and judicial reviews

Although the MSA now details the legal landscape of human trafficking and slavery in the UK, for those victims wishing to avail themselves of the protections it purports to grant them, the route to seeking support from the authorities is via navigation of the NRM. Established in 2009 as part of the government's national response to its obligations flowing from ECAT, the NRM is the process through which victims of trafficking are identified.[28]

Processes within the NRM

Under the standard NRM procedures, authorised first responders - which are either public authorities or NGOs and include the police force, the UK Border Force, the Salvation Army, Home Office UK Visas and Immigration, social services, and local authorities - refer individuals they believe may have been trafficked to a Competent Authority (CA). The CAs are the Modern Slavery Human Trafficking Unit (MSHTU), a component of the National Crime Agency,[29] and UK Visas and Immigration (UKVI), a division of the Home Office. In practice, MSHTU decides which CA will assess the individual's case. In cases involving UK, EU or EEA nationals, MSHTU makes the decision; in cases concerning non-EU/EEA nationals, or EU/EEA nationals that are subject to immigration control, UKVI makes the decision. The CAs initially make a determination, which should be completed within five days of referral, as to whether there are 'reasonable grounds' (RG) to believe that someone may have been trafficked.[30] A positive RG decision then initiates a 45 day 'reflection and recovery period' within which the individual is entitled to support and assistance (including, for example, provision in safe house accommodation and medical support). During this period, evidence is gathered and a 'conclusive grounds' (CG)

[25] J.L. de Pérez, 'A Criminological Reading of the Concept of Vulnerability: A Case Study of Brazilian Trafficking Victims' (2016) 25(1) *Social & Legal Studies,* 23-42, 25.
[26] J.L. de Pérez, 'A Criminological Reading of the Concept of Vulnerability: A Case Study of Brazilian Trafficking Victims' (2016) 25(1) *Social & Legal Studies,* 23-42, 25.
[27] See discussion below.
[28] Article 10 of ECAT.
[29] Formerly, UK Human Trafficking Centre (UKHTC).
[30] The threshold here is 'I suspect but cannot prove'.

decision should follow as to whether or not, on the balance of probabilities, the individual is considered to be a victim of trafficking.[31]

The 'rules' determining how the NRM operates are established on a non-statutory basis in a series of Home Office-issued guidance,[32] reflecting the executive-policy approach the UK has taken to satisfying its obligations under ECAT.[33] The operation of the NRM does intersect with statutory guidance on related issues. For example, there is statutory guidance for local authorities on unaccompanied migrant children and child victims of modern slavery.[34] This Department for Education-issued guidance actually refers to the creation of 'new statutory guidance due to be published by the Home Office in 2017 to provide extensive information for identifying and supporting all victims of modern slavery'.[35] Presumably this is referring to section 49 of the Modern Slavery Act which imposes a duty on the Secretary of State to issue guidance on identifying and supporting victims.[36] Such guidance has not yet transpired but there has been some momentum behind the call for its creation. Sarah Newton MP (former Home Office Minister) made a statement to parliament during a debate on modern slavery in October 2017.[37] This included a commitment to set up a consultation on the preparation of statutory guidance in order to fulfil the requirement of s.49 of the MSA. However, as yet, there is no timescale for this to occur. Interestingly, the approach of legislation in Scotland and Northern Ireland to this issue is different: both the Human Trafficking and Exploitation (Scotland) Act 2015 and Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 contain direct references to the obligations as to identification and protection of victims established in ECAT, it is only in England and Wales that such detail is omitted from the primary legislation and left within the remit of the Secretary of State.

The non-statutory basis of the current Home Office guidance has implications for the robustness of the process as a vehicle for transparent and fair decision-making. Indeed, a Home Office-funded review of the NRM in 2014 recognized that awareness of the decision-making processes was low.[38] The rules can also be amended on a fairly flexible basis and, moreover, such changes to the system can take place without there being a need for parliamentary scrutiny or oversight. The NRM system has been characterized by geographic variability and operational fluidity, especially following the 2014 review. While modified decision-making processes targeted at quick access to support have

[31] See further Home Office, *Interim review of the national referral mechanism for victims of trafficking,* 2 October 2014. <https://www.gov.uk/government/publications/interim-review-of-the-national-referral-mechanism-for-victims-of-human-trafficking> (accessed 18 July 2018). See also Home Office, *National referral mechanism guidance: adult (England and Wales),* published on 12 September 2016 at 16-18. <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> (accessed 18 July 2018).

[32] E.g. Home Office, *Victims of modern slavery – Competent authority guidance,* version 3.0, published 21 March 2016. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/521763/Victims_of_modern_slavery_-_Competent_Authority_guidance_v3_0.pdf> (accessed 18 July 2018). See also Home Office, *National referral mechanism guidance: adult (England and Wales),* 12 September 2016. <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 (accessed 18 July 2018).

[33] Acknowledged by Hickinbottom, LJ in *R (on the application of PK) v SSHD* [2018] EWCA Civ 98 (para. 15).

[34] Department for Education, *Care of unaccompanied minors and child victims of modern slavery,* published March 2017. <https://consult.education.gov.uk/children-in-care/care-of-unaccompanied-and-trafficked-children/supporting_documents/Revised%20UASC%20Stat%20guidance_final.pdf> (accessed 18 July 2018).

[35] Department for Education, *Care of unaccompanied minors and child victims of modern slavery,* published March 2017, p.4.

[36] There is the *option,* as opposed to obligation, for regulations to be enacted on identifying and supporting victims pursuant to section 50 of the MSA.

[37] Hansard, vol 630, column 512.

[38] Home Office, *Interim review of the national referral mechanism for victims of trafficking,* 2 October 2014., para. 2.1.5.

been trialled in some English regions, these have not been rolled out more widely.[39] Further change is likely following a meeting of the Prime Minister's Modern Slavery Taskforce in October 2017. The outcome of this was a commitment by the government to introduce measures to both improve decision-making within the NRM and support provided to victims, including the creation of 'a single, expert unit to be created in the Home Office to handle all cases referred from front line staff and to make decisions about whether somebody is a victim of modern slavery, this will replace the current case management units in the National Crime Agency and UK Visas and Immigration.'[40] While the abandonment of the two-stage system might be a welcome development,[41] the proposed further entrenched dominance of the Home Office raises cause for concern. There has not been clear articulation of how potential conflicts of interest as regards to an individual's status as a victim of trafficking with the Home Office's responsibility for enforcing immigration law will be managed.[42] Overall, the decision-making system has been reviewed, tinkered with and tweaked at incremental intervals, and in certain localities, but there has been a lack of urgency on the part of the government to follow-up on commitments made or policies partially initiated on a more certain and national scale.

NRM referrals and outcomes

Statistics published by the National Crime Agency demonstrate that in 2017 there were 5145 potential victims referred to the NRM (a 35 per cent increase on 2016 referrals).[43] The referrals were made in relation to 2454 women (47 per cent); 2688 men (52 per cent); and three transgender people (<1 per cent). There were 3027 referrals on behalf of adults (59 per cent) and 2118 on behalf of children (41 per cent). The statistics also show that 116 nationalities are represented within the NRM referrals, with Albanian, UK and Vietnamese the most commonly reported in 2017. Significantly, of the 5145 referred into the system in 2017, only 665 had received positive CG decisions (13 per cent) by 7th March 2018, the date the statistics were compiled. Of the 3804 referrals made in 2016, 1133 positive CG decisions had been issued by the 2018 compilation date (30 per cent). The proportion of those referred to the NRM who ultimately receive such positive decisions has been on a downward trajectory in recent years (36.8 per cent of those referred in 2015; 35.6 per cent of those referred in 2014 and 46.9 per cent of those referred in 2013).

The 2017 statistics show that 1049 of those individuals referred during 2017 (20 per cent) had received a negative final decision at the date of compilation in March 2018, but it is clear that the reality for many of those referred into the system is a long period of waiting before a CG decision is reached. As of 7th March 2018, decisions were still pending in 3273 (63.6 per cent) of 2017 NRM referrals. Moreover, decisions in 1168 (30 per cent) of 2016 referrals and 515 (16 per cent) of 2015 referrals

[39] See N. Ellis, C. Cooper and S. Roe, *An evaluation of the National Referral Mechanism pilot,* Research Report 94 (Home Office, October 2017). <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/653703/evaluation-national-referral-mechanism-pilot-horr94.pdf > (accessed 18 July 2018).

[40] Home Office, *Modern Slavery Taskforce agrees new measures to support victims,* 17 October 2017. Available at <https://www.gov.uk/government/news/modern-slavery-taskforce-agrees-new-measures-to-support-victims> (accessed 18 July 2018).

[41] The Independent Anti-Slavery Commissioner has been critical of the two-stage approach within the NRM, see Independent Anti-Slavery Commissioner, letter to Sarah Newton MP on the National Referral Mechanism. <www.antislaverycommissioner.co.uk/news-insights/letter-to-sarah-newton-mp-on-improved-national-referral-mechanism/> (accessed 18 July 2018).

[42] On the suspicion directed at illegal migrants by the UK Border Agency, see A. Balch and A. Geddes, 'Opportunity from Crisis? Organisational Responses to Human Trafficking in the UK' (2011) 13(1) *British Journal of Politics and International Relations,* 26-41 at 37. For a critique of the role of UKVI in NRM process see J. Elliott, 'The National Referral Mechanism: querying the response of 'first responders' and the competence of 'competent authorities' (2016) 30(1) *Journal of Immigration, Asylum and Nationality Law,* 9-30.

[43] National Crime Agency, *National Referral Mechanism Statistics – End of Year Summary 2017* (April 2018). <www.nationalcrimeagency.gov.uk/publications/national-referral-mechanism-statistics/2017-nrm-statistics/884-nrm-annual-report-2017/file > (accessed 25 July 2018).

remained outstanding.[44] It is apparent, then, that many NRM applications are left clogged in the system for a number of years.[45] Decision-makers within the CAs are expected to make the initial RG decisions within five days.[46] Yet, in the case of CG decisions, the guidance does not stipulate a specific timescale other than to state the decision 'will be made as soon as possible following day 45 of the recovery and reflection period'.[47] While it is true that expediency is not necessarily indicative of *quality* decision-making, it is also surely the case that a prolonged period of uncertainty around the outcome is far from desirable for the individuals concerned.

Those who do receive a positive CG decision are given a further 14 days to exit the safe house accommodation that is provided following the positive RG decision, although there is a commitment to extend this post-CG support to 45 days bringing the total to 90.[48] Those who receive a negative decision have only two days to leave such accommodation. Even for those that are found to be 'genuine' victims of trafficking, then, government sanctioned (and, crucially, funded) support post-CG decision is still short-lived, even taking into account the plan to extend the duration of post-identification support.[49] Consequently, given the fairly limited nature of the support provided to those who eventually receive a positive decision, the extended and drawn out decision-making process appears completely disproportionate to the substantive outcome. In reality, it is the RG, not the CG, decision that has potential to bring about most immediate and transformative impact for an individual in that it triggers the initial 45 day recovery period within which the individual is entitled to support. For many, the initial period of support will have expired by the time they receive a final decision.[50] In reality, the significance of a positive CG decision will likely be related to its potential to trigger entitlement for legal aid to fund legal advice on the issue of securing a right to remain in the UK.[51] In and of itself a positive CG decision remains rather inconsequential in what it delivers to the individual.

Judicial review as the mechanism to challenge negative NRM decisions

The sub-section above has drawn out some of the problems *within* the system and has also given a sense of the hollowness of the CG decision. Here, attention turns to the potential to challenge a negative decision, whether that be at the initial, RG, stage or the final, CG, stage. For those who

[44] The statistics also provide that negative CG decisions had been received by 1325 (35 per cent) of those referred in 2016; and 1341 (41 per cent) of those referred in 2015.

[45] The Immigration Law Practitioners' Association corroborates the prolonged nature of many NRM referral applications. See *ILPA submission to the review of the National Referral Mechanism,* available at < www.ilpa.org.uk/resources.php/29120/ilpa-submission-to-the-review-of-the-national-referral-mechanism-endorsed-by-the-anti-trafficking-le> (accessed 18 July 2018).

[46] Home Office, *Victims of modern slavery – Competent authority guidance,* version 3.0, published 21 March 2016, p.50.

[47] Home Office, *Victims of modern slavery – Competent authority guidance,* version 3.0, published 21 March 2016, p.64.

[48] The Home Office announcement can be accessed at < https://www.gov.uk/government/news/modern-slavery-victims-to-receive-longer-period-of-support > (accessed 19 July 2018).

[49] Significant academic and NGO research suggests current provision is inadequate: Human Trafficking Foundation, *Life Beyond the Safe House: Gaps and Options Review,* July 2015 <www.humantraffickingfoundation.org/sites/default/files/Life%20Beyond%20the%20Safe%20House_0.pdf>; FLEX, Fairwork and ADPARE, *Improving the Identification and Support for Victims of Trafficking for Labour Exploitation in the EU,* September 2016 <www.labourexploitation.org/sites/default/files/publications/PROACT%20Policy%20Paper.pdf> (accessed 18 July 2018). This is echoed in a Report of the Work and Pensions Select Committee: House of Commons Work and Pensions Committee, *Victims of Modern Slavery (Twelfth Report of Session 2016-17),* HC 803, 30 April 2017. The Modern Slavery (Victim Support) Bill, which would provide one year of support – including financial – is due to be considered by the House of Commons in November 2018.

[50] This brings into question the UK's compliance with its international obligations, in particular Articles 10 and 12 of ECAT. The combined effect of these provisions is arguably that following the RG decision the individual is in an extended recovery and reflection period (Art. 10(2)) and, as such, should be entitled to continue to access the relevant support (set out in Art. 12).

[51] Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, schedule 1, para 32. The UK government recently claimed it could restrict legal aid to trafficking victims but later conceded this point, see < www.atleu.org.uk/news/legalaidimmigrationadvice > (last accessed 19 July 2018) and the Consent Order in *R (on the application of LL) v the Lord Chancellor* CO/3581/2017.

receive a negative NRM decision, there are no formal avenues to lodge an appeal. Clearly, the non-statutory nature of the NRM is an influencing factor here as, inherently, there can be no statutory right of appeal under the present system. The Home Office guidance for CAs does state that the CA can be requested to reconsider their decision should new evidence emerge.[52] Consequently, there is an explicit suggestion that CAs will, through a process of informal reconsideration, be responsive to ongoing assessments and fresh insight, although the guidance is very clear to stress that judicial review provides the only official mechanism to *challenge* a negative NRM decision. The centrality of judicial review is starkly illustrated in *Secretary of State for the Home Department v MS (Pakistan).*[53] The case involved an overlapping NRM referral and asylum application in relation to a child from Pakistan, both of which had been refused. In contrast to the CA, the Upper Tribunal (Immigration and Asylum Chamber) (UTIAC) found that MS was a victim of trafficking.[54] Accordingly, the UTIAC went on to find that MS could not be lawfully removed from the UK as the correct trafficking determination would, in turn, have triggered police investigation and prosecution proceedings requiring his presence in the territory.[55] The Court of Appeal was very disapproving of this approach, finding the UTIAC had exceeded its jurisdiction by carrying out an 'indirect judicial review' of the negative RG decision. Trafficking decisions do not constitute 'immigration decisions' and, as such, fall outside the realm of the statutory appeals procedure in the Nationality, Immigration and Asylum Act 2002.[56] This decision clearly limits opportunities for negative NRM decisions to be reassessed under the Tribunal's jurisdiction, and firmly restates the principal role of judicial review in its oversight of this strand of Home Office decision-making.

There are limitations to the scope of judicial review, both from an access perspective and in terms of the nature of the examination the court can give to the original decision.[57] The application must be brought within three months and permission to proceed must be granted by the Administrative Court.[58] Cost is also likely to be a consideration for many of those who seek to challenge a negative NRM decision. Under the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, those in receipt of a negative reasonable or CG decision are entitled to legal aid to fund legal advice in relation to judicial review.[59] However, there is no entitlement to legal aid prior to the RG decision. This has the effect of denying individuals the ability to access funding to receive legal advice *before* they enter the NRM. Nevertheless, the availability of legal aid to help bring about a judicial review to challenge a negative NRM decision can no doubt be valuable. Of course, it also presupposes that the individual concerned is aware of the possibility of doing so. In practice, it is clear that NGO/charitable organisations and advocates working on a pro bono basis play an important role here,[60] and in raising awareness of available legal routes.[61]

A judicial review of a CA's NRM decision will effectively result in an examination of whether there has been an error of law in the making of that decision. The court does not have jurisdiction to re-examine the facts and cannot substitute its own decision when exercising this 'supervisory' function, as

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[52] Home Office, *Victims of modern slavery – Competent authority guidance,* version 3.0, published 21 March 2016, p.91.
[53] [2018] EWCA Civ 594.
[54] *MS v Secretary of State for the Home Department* [2016] UKUT 226 (IAC), para. 59.
[55] *MS v Secretary of State for the Home Department* [2016] UKUT 226 (IAC), para. 64.
[56] *Secretary of the State for the Home Department v MS* [2018] EWCA Civ 594, para 77 (per Flaux, LJ).
[57] For a recent discussion of judicial review in English public law see N. Duxbury, 'The outer limits of English judicial review' (2017) *Public Law,* 235-248.
[58] Judiciary for England and Wales, *The Administrative Court Judicial Review Guide 2017,* July 2017. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/647052/Admin_Court_JRG_2017_180917.pdf>
[59] Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012, schedule 1, para. 19.
[60] Such as 'Advice on Individual Rights in Europe' (AIRE Centre) <www.airecentre.org/index.php>
[61] The nature of NRM referrals means that frequently such challenges cross-cut with other immigration and asylum applications, appeals or judicial reviews of Home Office decisions in these areas. See R. Thomas, 'Mapping immigration judicial review litigation: an empirical legal analysis' (2015) *Public Law,* 652-678.

it is traditionally understood.[62] However, it can, in those instances when it finds that the relevant decision-making process has not been lawfully followed, make a quashing order against the original decision and grant other discretionary remedies. Thus far, there have been no judicial reviews brought against decisions of the MSHTU in its capacity as CA, but a notable number of UKVI NRM decisions have had judicial review proceedings lodged against them. This is illustrated by taking into account a number of distinct yet related datasets. First, the Ministry of Justice's statistics on judicial review show an increase in such claims lodged under the category of 'immigration – human trafficking' in recent years. For example, in 2013 only five cases were logged under this category; in 2016 this had risen to 81. Of course, this coincides with the general increase in numbers referred to the NRM.[63] Secondly, this also links in with the increasing rate of judicial reviews being brought against Home Office decisions in immigration and asylum matters more generally. Immigration-related matters account for over 80 per cent of all judicial review claims brought.[64] In 2013, UTIAC), by Practice Direction, gained jurisdiction to hear some judicial review cases in such matters in an attempt to alleviate pressure from the Administrative Court.[65] In 2016-17 13,372 judicial review claims were lodged against Home Office decisions in the UTIAC, of which 28 per cent ultimately found in favour of the claimant.[66] The NRM-related judicial reviews do not form part of the immigration and asylum case load which have been expressly transferred to the UTIAC,[67] and so such cases are largely captured in the Administrative Court figures which evidence a comparatively lower success rate for claimants. For example, in 2016, 1832 applications for judicial review were brought against the Home Office in the Administrative Court, across all areas, of which only 12 (1 per cent) ultimately found in favour of the claimant.[68]

The combined impact of this quantitative data would appear to be that judicial review is playing an increasing role in the supervision of UKVI decision-making in the NRM, which tallies with the amplified use of judicial review in response to Home Office decisions more generally. The statistics do not suggest this judicial supervision is having particularly pronounced impacts on individuals in terms of the eventual outcomes, especially for those challenging NRM outcomes. This data snapshot also cannot capture the particular details of scenarios in which individuals have been able to achieve 'success' in judicial review cases and when they have not, and therefore some consideration of the case law is also insightful.

Contrasting successful and unsuccessful judicial review cases highlights the limitations of judicial review of NRM decisions, which, intrinsically, is often an essentially process-focussed, formalistic assessment that is disconnected from the realities of the situation. In particular, the case law demonstrates how relying on judicial review to supervise decision-making under the NRM is effective in so far as it requires decision-makers to engage with existing guidance and protocols. Yet, it is not conducive to ensuring that individuals' vulnerability is taken into account beyond the letter of the Home Office-issued guidance. First, *AB v Secretary of State for the Home Department,*[69] provides an example of a successful judicial review challenge to an NRM decision. The Secretary of State's decision to refuse to recognize a claimant as a victim of trafficking was quashed where she had failed to engage

[62] See Lord Greene MR in *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 K.B. 223, esp at 228.

[63] Ministry of Justice statistical tables published at: <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2017>

[64] R. Thomas, 'Mapping immigration judicial review litigation: an empirical legal analysis' (2015) *Public Law* 652-678 at 652.

[65] Consolidated Direction given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005 and s. 18 of the Tribunals, Courts and Enforcement Act 2007 <https://www.judiciary.gov.uk/wp-content/uploads/2013/10/lcj-direction-jr-iac-21-08-2013-updated-2.pdf> (accessed 18 July 2018).

[66] Ministry of Justice statistical tables published at: https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2017 (accessed 18 July 2018).

[67] However, there are examples of NRM issues intertwining with immigration and/or asylum issues considered by the UTIAC in judicial review proceedings, *R (FT) v Secretary of State for the Home Department* [2017] UKUT 331 (IAC).

[68] Royal Courts of Justice Statistical Tables published at: <https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-january-to-march-2017> (accessed 18 July 2018).

[69] [2015] EWHC 1490 (Admin).

with the conclusions of medical and psychiatric and trafficking reports that supported the claim, and to explain why she had disagreed with them. The claimant was a Nigerian woman who had worked in domestic servitude since age six and had been trafficked to the UK by her employer. Heaton J, stressed the importance of taking expert reports into account, largely on the basis that the relevant guidance stipulated that they should form part of the decision-making process:

That report expresses the opinion that the Claimant is a trafficked person. Of course that opinion does not bind the decisionmaker. However, the decisionmaker here fails to grapple with that opinion at all, or explain why she disagrees with it. In my judgment given the importance of this material as identified by the SSHD's own policies the decisionmaker was under an obligation to recognise the conclusions of the report, engage with them and explain, however briefly, why she disagreed with them. In failing to do so in my judgment she again acted unlawfully in failing to have sufficient regard to her own policy and irrationally in that she did not take the opinion expressed in that report into account.[70]

This represents a positive outcome for the claimant in the sense that her challenge was successful. Moreover, her particular characteristics of vulnerability, represented in the reports, influenced the court's conclusion on the judicial review. However, this outcome was achieved only on the basis of an oversight by the decision-maker, who had not fully complied with the relevant NRM guidance. This rationale is similar to that seen in *FX v Secretary of State for the Home Department.*[71] This case concerned an Ethiopian woman who challenged a negative RG decision. This woman had travelled from Ethiopia, first to Italy and then to the 'Calais jungle' refugee and migrant camp in France, with the involvement of an agent and a number of men. She had been locked in a room and raped on multiple occasions. There is extensive evidence in the court report of the traumatised nature of the claimant as a consequence of her experiences. Dove J found the decision to have been inadequate and unlawful on the basis, first, that the decision-maker appeared not to have considered that being locked in a room, which was only unlocked when a man entered in order to rape her, was capable of constituting harbouring by coercive means for the purposes of sexual exploitation.[72] Secondly, the judge was critical of the failure to follow NRM guidance as regards how to follow up on individuals who have been referred to the system but are set to receive a negative CG decision (for example, the claimant or involved agencies had not been prompted to provide any further information to support the NRM claim).[73] Here, like in *AB,* an individual that clearly was vulnerable had her position supported by the court, but this was only possible under the remit of the Court's judicial review jurisdiction because there was an irregularity in the process which the decision-maker had followed on which to base such a finding. There was certainly no substantive findings about vulnerability or what, as a matter of law, this concept means.

Conversely, *BG v Secretary of State for the Home Department* illustrates the fine line that can divide positive and negative NRM decisions and their subsequent judicial review.[74] In particular it highlights that judicial review cannot as readily assist those who are unable to pinpoint a specific deficit within the decision-making process. Here, an Albanian woman had arrived in the UK in 2013. She had been in an abusive relationship in Albania and her boyfriend had demanded she work as a prostitute. Initially a St Pancras official and the Poppy Project charity had decided not to refer her, citing 'credibility' issues owing to her unwillingness to provide details of her boyfriend, the client or a contact who had assisted her travel. Eventually, a referral was made following the intervention of the claimant's solicitors, and a positive RG decision was issued. However, later, the CG decision found that on the balance of probabilities the claimant had not been trafficked but, rather, was a victim of severe

[70] Para. 41.
[71] [2016] EWHC 1908 (Admin).
[72] Para. 45.
[73] Para. 49.
[74] [2016] EWHC 786 (Admin).

domestic abuse.[75] In essence, this case illustrates how those identified as victims, in many instances, are not very different from those who are not. The decision, upheld by the High Court, may have been negative, but expert testimony had also been strongly in support of the opposite outcome.[76] *BG* might be distinguished from *AB* or *FX* on the basis of a lack of a failure of proper process on the part of the defendant, such as failing to follow the relevant guidelines during the process. In *AB*, it was emphasized by the court that the SSHD had failed to engage with the conclusions of medical reports. The implication was that she was thus unable to render a lawful decision on the basis of a flawed decision-making process. In *BG*, in contrast, there had apparently been a level of engagement with the medical evidence with which the government ultimately disagreed. From one perspective, this brings into focus how individuals who are equally as vulnerable as those who have experienced improper process in their NRM decision can be left without recourse to pursue redress. From another perspective, however, this does not mean that judicial review is without any virtue as a vehicle for the promotion of justice. It can provide an 'individual form of dispute resolution' and, according to Halliday, '[judicial review] can also be used to advance the direction of specific areas of public law or public policy, or as a way of raising political consciousness or political momentum.'[77]

Legal practitioners are also likely to be influenced to contribute to the raising of consciousness by bringing forward similar cases. This analysis is useful as a counter-balance to the critique that judicial review can only ever bring about individualized benefits without broader significance, or 'peripheral in the sense of being unimportant to all save those directly concerned'.[78] Indeed, research evidences the positive impacts that judicial review litigation can bring, both in terms of providing (sometimes vulnerable) people the opportunity to challenge decisions and with regards to the future behaviour of public bodies whose decisions are challenged.[79]

To anchor this more directly in the specifics of the topic under investigation, it is important to keep in mind the particular government department whose decisions individuals seek to challenge in this way. The Home Office is not only responsible for the decision-making under the NRM but, especially in the absence of statutory victim identification system, is largely able to set the parameters of the system and guidelines on its own terms. The judicial review process frequently involves an examination of the extent to which UKVI decision-makers have followed the guidance of the Secretary of State but it is difficult to go beyond the constraints of this structure and provide a more comprehensive analysis of the principles that underpin it. Even as the defendant, the Home Office maintains a dominant position due to the influence it has in setting the standard it is assessed against. This is reminiscent of Rawlings's argument about the 'backfire effect' of judicial review whereby its existence can serve as a 'legitimating device' for the expansion of government power,[80] albeit a more apt description in the current case might be the maintenance of government (Home Office) influence.

Acknowledgment of the Home Office's lingering control, even in those cases it is technically 'losing', is consistent with research on the behaviour of the Home Office in immigration and asylum challenges. Thomas has exposed the tendency of the Home Office to 'tactically concede' by reconsidering some challenges on an individual basis, rather than allowing the courts to decide upon the legal issues under consideration, which would carry with it the risk of certain policies being found unlawful.[81] In essence, the Home Office uses tactical concession to 'prevent the creation of precedent

[75] Para 39.
[76] Para 41.
[77] S. Halliday, 'The influence of judicial review on decision-making' (2000) *Public Law* 110-122, 122.
[78] R. Rawlings, 'Modelling Judicial Review' (2008) 61(1) *Current Legal Problems,* 95-123, 97.
[7979] L. Platt, M. Sunkin and K. Calvo*, Judicial Review Litigation as an Incentive to Change in Local Authority Public Services in England & Wales* (2009) Institute for Social and Economic Research, University of Essex, Working Paper 2009-05. Available at < https://www.iser.essex.ac.uk/files/iser_working_papers/2009-05.pdf> (accessed 19 July 2018).
[80] H.F. Rawlings, 'Judicial Review and the 'Control of Government' (1986) 64 *Public Administration* 135-145,136.
[81] R. Thomas, *Administrative Justice and Asylum Appeals* (Oxford: Hart Publishing, 2011); R. Thomas, 'Mapping immigration judicial review litigation: an empirical legal analysis' (2015) *Public Law* 652-678, 669-671.

unfavourable to its wider interests likely to benefit a number of individuals'.[82] In respect of the NRM procedure, the existence of the informal process of reconsideration currently referred to in the guidance has similar implications. This casual, 'off the record' challenge to decisions enables UKVI to amend any erroneous decisions without oversight or external scrutiny. The grasp that the Home Office has on the terms *and* operation of the NRM system is not conducive to ensuring that the process of identifying victims of trafficking is working to protect vulnerable people, or, that they encounter administrative justice should they seek to challenge a resulting decision.

Decision-making on entitlement to leave to remain for identified victims of trafficking

For those people that do receive a positive CG decision under the NRM, either initially or following a challenge, a second decision-making process that they may encounter concerns leave to remain in the UK. A right of leave to remain is not automatically extended to identified victims of trafficking. Article 14 of ECAT provides that residence permits should be issued in two circumstances: if a stay is considered necessary owing to the individual's personal circumstances; or their stay is necessary for the purpose of their co-operation with the CAs in investigation or criminal proceedings.[83] The position in the UK on the granting of leave to remain is in a state of flux at the time of writing. Up until February 2018, the guidance for CAs – which purported to comply with Article 14 of the Convention - emphasized that the Home Office would automatically consider whether a grant of discretionary leave was appropriate following a positive CG decision,[84] but went on to state that there must be 'compelling reasons based on their individual circumstances' to do so.[85] In the case of *PK (Ghana) v Secretary of the State for the Home Department,*[86] the Court of Appeal found that Article 14 merely requires consideration of personal circumstances which could only be assessed by reference to the primary objective of ECAT: the protection and assistance of victims.[87] Therefore, the requirement of *compelling circumstances* set too high a threshold.[88] Following this judgment, the Home Office produced interim guidance placing all refusals of discretionary leave to remain (DLR) to victims of trafficking on hold,[89] meaning that the system is at standstill with cases for consideration building up. It is unclear on what timescale new guidance will be issued but, assuming the Home Office complies with the ruling, it should specify that the test for such a grant of DLR is one of necessity in order to meet the objective of providing protection and assistance to victims.

Unsurprisingly, the 'compelling circumstances' test has coincided with very low numbers of grants for leave to remain being issued to identified victims. In 2015 only 123 (12 per cent) of those who received a positive CG decision were granted such a right to reside.[90] Furthermore, when such residence permits are granted, they tend to be of 12 months duration only.[91] This is perplexing when, undoubtedly, the protection of those who have been trafficked will often best be served by securing

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[82] R. Thomas, 'Mapping immigration judicial review litigation: an empirical legal analysis' (2015) *Public Law* 652-678, 669.

[83] Article 7 of Palermo Protocol also encourages states to provide victims with at least temporary residence permits. Directive 2011/36, which the UK has opted in to and implemented, is silent on the issue of residence permits and instead defers to Directive 2004/81 on the issue of a residence permit to victims of trafficking in human beings who are third-country nationals, which the UK has *not* opted in to, and Directive 2004/38 on the rights of the citizens of the Union and their family members to move and reside freely within the territory of the Member States.

[84] Home Office, *Victims of modern slavery – Competent authority guidance,* version 3.0, published 21 March 2016, 72.

[85] Home Office, *Victims of modern slavery – Competent authority guidance,* version 3.0, published 21 March 2016, 73.

[86] [2018] EWCA Civ 98

[87] Para. 50.

[88] Para. 56.

[89] Home Office, *Interim operational guidance: Discretionary leave for victims of modern slavery* (21 February 2018) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/683036/DL-modern-slavery-v1.0EXT.pdf >_

[90] Letter from Sarah Newton (Minister for Vulnerability, Safeguarding and Countering Extremism) to Chair of the Work and Pensions Select Committee, 17th February 2017.

[91] GRETA, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom* GRETA(2016)21 (Council of Europe), published 7 October 2016, 222-227.

leave to remain in the receiving country,[92] and accordingly gaining access to rights associated with lawful residence, including access to formalized support structures.[93] For the time being at least, EEA nationals will, on the whole, have a right to reside on the basis of EEA Treaty rights.[94] As a result, it is mostly those from outside of the EEA for whom an application for discretionary leave will have most resonance. There is also the possibility of an asylum application being an avenue to residence, but there are limited opportunities for non-EEA trafficking victims to secure a right to reside in the UK in the absence of an additional distinct claim.[95] The implication of a person not securing DLR is that the label of illegality is extended to them.[96] This renders them susceptible to the application of immigration enforcement, including detention and removal, in spite of their status as an identified victim. The Modern Slavery (Victim Support) Bill,[97] which originated in the House of Lords, is scheduled to be discussed in the House of Commons in November 2018. In its current form, the Bill proposes to provide identified victims with one year of support in the UK, to include one year DLR but it is unclear what reception it will receive from MPs.

PK was an appeal from the High Court decision in *R (on the application of K) v Secretary of State for the Home Department,* in which Picken J had (incorrectly) found the Home Office guidance compatible with ECAT. *PK* encapsulates how judicial review can be used to challenge policy itself, as opposed to application of policy by decision-makers to a particular set of circumstances.[98] Consequently, it demonstrates how judicial review can have broader justice implications; this challenge may have the future result of advancing the potential of (vulnerable) identified victims to be granted DLR. Given the centrality of ECAT to this outcome, this case is also illustrative of how judicial review has undergone adaptation and expansion, particularly as a result of the UK's membership of the Council of Europe (and EU), and the enhancement in human rights standards by public bodies this has necessitated.[99]

Judicial review of decisions refusing leave to remain to individual victims of trafficking

With regards to individual challenges to decisions refusing DLR, it is clear from the guidance that 'there is no automatic right of appeal if after a decision is made under the NRM, no limited leave is granted by the Home Office.'[100] Given the similarity between this approach on DLR and that relating to the ability to challenge NRM decisions, much of the earlier discussion about reliance on judicial review and the influence of the Home Office is relevant here also. There are, though, distinctive elements of the case law pertaining to DLR decision challenges that are worthy of exploration in their own right. In particular, there seems to be a connection between the Home Office making mistakes as to the NRM decision-making process and the willingness of the court to accept subsequent challenges about the determination of DLR.

While the post-*PK* policy on the granting of DLR may provide a somewhat more accessible threshold, it will, of course, remain the case that the Secretary of State retains the decision-making

[92] E Yoo and EH Boyle, 'National Human Trafficking Initiatives: Dimensions of Policy Diffusion' (2015) 40(3) *Law & Social Inquiry* 631-663, 635.

[93] Human Trafficking Foundation, *Day 46: Is there life after the Safe House for Survivors of Modern Slavery* (October 2016).

[94] However, EEA nationals also encounter problems when navigating the NRM: House of Commons Work and Pensions Committee, *Victims of Modern Slavery (Twelfth Report of Session 2016-17),* HC 803, 30 April 2017.

[95] Research also suggests that non-EEA nationals, who already have more insecure immigration status, are less likely to obtain a positive NRM decision and thus the status of a victim of trafficking than a UK or EEA national. See GRETA, *Report concerning the implementation of the ECAT by the UK* GRETA(2016)21, 7 October 2016, para 150.

[96] Notwithstanding the outcome of any applications for asylum or statelessness protection.

[97] Modern Slavery Victim Support Bill (HL) 2018 (211 57/1).

[98] J. Sumption, 'Judicial and Political Decision-making: The Uncertain Boundary' (2011) 16(4) *Judicial Review* 301-315, 303.

[99] For more detailed discussion on the transformation of judicial review, see R. Rawlings, 'Modelling Judicial Review' (2008) 61(1) *Current Legal Problems,* 95-123

[100] Home Office, *Victims of modern slavery – Competent authority guidance,* version 3.0, published 21 March 2016, 123.

power.[101] The Court of Appeal might have found that Picken J had erred on the compatibility of the compelling circumstances test issue in *K,* but Hickinbottom LJ was also clear that it was only this one, narrow ground of appeal which was implicated and no doubt was cast on other aspects of Picken J's judgment in the High Court. Thus, a distinction drawn by Picken J in *K* between the 'primary' decision of whether a person is a victim and the 'secondary' decision as whether a residence permit is to be granted, remains valid.[102] The effect of the demarcation between such primary and secondary concerns is stifling in that the status of 'trafficking victim' is rather futile in a real-life context in the absence of any attached right to stay in the UK. Yet the reluctance on the part of the courts to be seen to be encroaching on the jurisdiction of the SSHD to decide on the granting of leave for individuals in the immigration sphere is perhaps understandable in light of the politically contentious nature of the issue.[103]

There are, however, examples of the judiciary adopting a stronger position. The case of *R (Atamewan) v Secretary of State for the Home Department*[104] saw the High Court take steps to ensure the short-term residency of a trafficking victim in judicial review proceedings. The claimant's asylum claim had been refused and she had received a negative NRM (RG) decision in February 2011, despite recognition that she had been brought to the UK as a child and exploited by her aunt. She was detained in August 2011 and then was returned to Nigeria. The NRM decision, however, was then found to be unlawful on the basis that it, and the guidance at the time, failed to recognize historic trafficking as valid and misinterpreted ECAT. The subsequent removal of the claimant had been particularly unfortunate from the point of view of the claimant's wellbeing as she had been able to 'move on with her life' (a point acknowledged in the NRM decision itself) and establish friendships and a relationship in the UK.[105] The High Court considered that if the SSHD had correctly concluded that the claimant was a trafficking victim, she could not have been detained and removed at such an early stage. It then took the unusual step of granting a mandatory order that the SSHD should use her 'best endeavours to secure the return of the claimant to the UK from Nigeria' and 'grant the claimant 12 months and 1 day's DLR in the UK'.[106] This represents a positive outcome in the short-term for this particular victim of trafficking, although the Court was also keen to emphasize that there was no obligation to allow the claimant to stay indefinitely. Further, the claimant's willingness to take part in police investigations was cited as a key reason to allow her return to the UK for a year.[107] In other words, the right to reside was limited in its scope and was connected to the claimant's promise to cooperate with the authorities. This outcome was also tied to the particular circumstances of the case which concerned the failure to recognize historic trafficking claims, therefore it has limited broader significance.

Another such case is *R (FT) v Secretary of State for the Home Department.*[108] This claim was heard by the UTIAC under its judicial review jurisdiction, but it reflects similar principles to that of the High Court in *Atamewan*. Here, the UTIAC overturned decisions made by the SSHD relating to DLR for a victim of trafficking. This particular man had previously had an (incorrect) negative NRM decision, had been detained for four years and had a removal order issued. Essentially, there had been repeated errors with regards to his status. He had, eventually, been granted six months DLR but medical evidence concluded he required in-depth psychological treatment that could take up to two years to complete. The evidence also indicated that such treatment could not be effective unless he felt he was

[101] *R (Galdikas and others) v Secretary of State for the Home Department* [2016] EWHC 942 (Admin) does emphasize the importance of being able to *request* DLR.
[102] Para. 76.
[103] For an example of judicial reticence, see *R (on the application of Adesanya v Secretary of State for the Home Department* [2016] EWHC 1165 (Admin).
[104] [2013] EWHC 2727 (Admin).
[105] Para. 15.
[106] Para. 103.
[107] Para. 104.
[108] [2017] UKUT 331 (IAC).

in a stable position. The UTIAC took these factors into consideration and, after quashing the decision to give six months DLR, remitted the decision back to the SSHD, although it did stress there was no expectation that *indefinite* leave to remain would be granted.[109] The rationale of the judgment is encapsulated in the following:

The duration of leave is ultimately a matter for the respondent, but her decision must lawfully reflect the matters identified in this judgment including the protracted history of this litigation, the applicant's clear vulnerability, the unchallenged recommendations in the medical evidence and [the Secretary of State's] own conduct.[110]

Both of these cases concerned errors on the part of the SSHD and the court, subsequently, seeking to offer some recompense. For the individuals concerned, the judgments had significant, positive impacts. They also evidence what Richard Rawlings has termed 'the judges' "flexible friend": the expanded 'judicial tool-kit of remedies',[111] especially declaratory relief which afford the courts a fairly creative licence to direct the decision-makers. Nevertheless, the somewhat exceptional nature of cases like *Atamewan* and *FT* should not divert attention from the reality that for those identified victims refused DLR, there will be little opportunity to formally question and challenge the decision. The direct implication for the analysis here is that it is only following an error in the original NRM decision-making process that the court (or tribunal) has been willing to intervene during judicial review proceedings and make an order as to the subsequent determination of entitlement to leave. In the absence of any such error (as in *Adesanya*[112] in which the NRM decisions had not been through any challenge) there would appear to be very little scope for individuals to challenge refusal of DLR.

In general then, there remains potential for vulnerability to be compounded by the uncertainty of victims' residence status and poorly effected procedures with inconsistent outcomes. Even in the cases in which the claimants were 'successful', *Atamewan* and *FT,* the uncertainty, and indeed vulnerability, did not end with the conclusion of the court proceedings. Instead, the individuals were left in a state of limbo while the issue of their entitlement to reside was remitted back to the SSHD. Furthermore, the courts and tribunals are very careful to couch the orders to the Secretary of State in pacifying language, emphasizing that the grant of leave given need only be the bare minimum time required to enable the individual to access treatment. This overlooks the reality that a grant of DLR for one year will, in many cases, be insufficient to enable genuine long-term recovery. The following section considers how the vulnerability label, so readily attributed to victims, could have more valuable consequences.

The value of the vulnerability label

Vulnerability is a term that is employed frequently in policy documents, political statements and court judgments (such as *FT* above) to describe those who have been trafficked. Such demarcation should not be accepted uncritically. Scholars such as Vijeyerasa emphasize that this portrayal of trafficked victims, which presents traits such as naivety and vulnerability as intrinsic, disregard the possibility of individuals exercising any agency during the process of trafficking and subsumes experiences into a standardised narrative.[113] A key aspect of Fineman's theory is that the state (and, by implication, its law) fails to respond adequately to vulnerability due to its preoccupation with the 'liberal subject' and the consequent privileging of autonomy as s supreme quality. Fineman advocates for an alternative vision - the responsive state - which recognizes the universality of vulnerability and responds to it on the basis

[109] On indefinite leave to remain more generally, see *R(S) v SSHD* [2007] EWCA Civ. 546.
[110] Para. 98.
[111] R. Rawlings, 'Modelling Judicial Review' (2008) 61(1) *Current Legal Problems,* 95-123, 105.
[112] *R (on the application of Adesanya v Secretary of State for the Home Department* [2016] EWHC 1165 (Admin).
[113] R. Vijeyarasa, *Sex, Slavery and the Trafficked Woman: Myths and Misconceptions about Trafficking and its Victims* (2015, Routledge, New York).

of more collective values, such as connectedness and interdependence.[114] Under the current schema, however, vulnerability is a label with negative connotations that tends to be reserved for 'vulnerable populations'. The consequence of such labelling is stigmatisation as vulnerability is associated with inadequacy represented by a failure of autonomy.[115] This analysis can be applied to victims of trafficking: this group is deemed to be more vulnerable to harm on the basis, first, of the circumstances that contributed to them initially being trafficked (which might include poverty, age, and education-level) and, secondly, as a result of the exploitation that occurred through the process of trafficking. Fineman argues that such (stigmatising) designation as a vulnerable population may be motivated by protection (as with children or the elderly) or control (as with at-risk youth or single mothers).[116] Both of these elements are relevant to victims of trafficking when examined from the standpoint of a vulnerable population. On the surface, the decision-making processes may be presented as necessary for the protection of victims; yet the framework they encounter also encompasses elements of control. For example, the NRM records individuals' presence in certain safe houses and localities for set periods of time. This ties in strongly with the proposition that the extension of the vulnerability status to particular groups can lead to political and legal 'surveillance and regulation' and, ultimately, can have 'punitive and stigmatizing' consequences.[117] For victims of trafficking, the most extreme example of such consequences is surely their enveloping within punitive immigration policies as a result of the failure to grant many with leave to remain.

Thus far, the analysis through the prism of vulnerability is pessimistic and the label of vulnerability appears not to reap rewards for this group. However, there are ways in which the current framework could be altered to render the designation as vulnerable more meaningful. From Fineman's point of view, building resilience can provide a solution:

Although nothing can completely mitigate our vulnerability, resilience is what provides an individual with the means and ability to recover from harm, setbacks and the misfortunes that affect our lives.[118]

The decision-making procedures, and broader legal responses to trafficking in the UK, could go further than recognizing vulnerability and respond to it in a way that moves closer to enabling people to build resilience and recover from harm. Considering the pros and cons of alternatives is beyond the scope of this article but this discussion has already brought to the fore certain problematic aspects of the current approach. For example, one option could be to formalise the NRM on a statutory basis and to create a statutory right of appeal, potentially opening up and expanding the opportunities to challenge beyond the realm of judicial review. This would not be the 'easy option', especially in light of the possibility for pressures in the system to be intensified as a result of the right of appeal, but it could enhance transparency in decision-making and improve awareness of the system. There are also ways in which the legal framework could be amended to support the resilience of victims. An obvious example would be for the House of Commons to fully embrace the proposed Modern Slavery (Victim Support) Bill which proposes a statutory right to residence for a defined period of one year. It would be necessary to put in place safeguards to ensure that any automatic right to DLR that attached to a positive CG decision did not have a corresponding limiting impact on the number of those identified as victims under the NRM. The long-promised statutory guidance on identifying and supporting victims in section 49 of the MSA 2015 could also be issued by the Secretary of State.

[114] M.A. Fineman and A. Greer (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate: Farnham, 2013), 26.
[115] M. Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 *Oslo Law Review* 133-149, 147.
[116] M. Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 *Oslo Law Review* 133-149, 147.
[117] M.A. Fineman and A. Greer (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate: Farnham, 2013), 16.
[118] M. Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4 *Oslo Law Review* 133-149, p.146.

Overall, a key way to build resilience would be to make categorisation as 'vulnerable' deliver more meaningful impact to victims of trafficking. A stipulation in the statutory framework, for example, that an individual's vulnerability should be the overriding factor to be taken into account when decisions are taken by the Home Office regarding their status and entitlement to remain, or by courts and tribunals in their reviewing capacity, could start to inculcate an approach that encourages outcomes more suited to the development of resilience. This leads on (or back) to the elephant in the room in this discussion: a barrier to resilience-building for victims of trafficking is the close proximity between law purporting to protect victims and restrictive immigration rules. It is difficult to foresee how victims of trafficking could be genuinely incorporated into a system which recognizes and responds to vulnerability without them being completely removed from the reach of the competing objectives of the immigration system or, at least, there being recognition of the role that immigration status plays in inducing vulnerability. The UK Supreme Court recognized this to an extent in *Taiwo v Olaigbe and Onu v Akiwu,*[119] although it did not have a direct impact for the claimants in the particular case. Both claimants were Nigerian migrant domestic workers who had been exploited by their employers. Such treatment was not found to be contrary to the Equality Act 2010 as it had not occurred because of the claimants' race (the definition of which includes nationality); rather, it was their immigration status which made them vulnerable. The claimants had limited leave to enter the UK on overseas domestic workers' visas. These visas are renowned for exacerbating precarious immigration status as they make residence dependent on the specific employer to whom they are 'tied'.[120] Significantly, Lady Hale recognized that if the employers had employed non-British nationals *who had the right to live and work in the United Kingdom*, they would not have treated them so badly.[121] The claimants' ill-treatment was not therefore related to their nationality, and the claim for direct racial discrimination failed, leaving the women without redress.

The significance of this for the analysis here is that Lady Hale expressly acknowledges that insecure immigration status can be a precursor to vulnerability. It was not a personal characteristic, such as gender, age, or race; furthermore, it was not an external problem connected to the economic, social or political context in the country from which the individual had travelled. Instead, the driver for the vulnerable position the claimants found themselves in in *Taiwo* was directly linked to an element of the UK's immigration policy. The evidence presented throughout this article effectively builds on this observation by demonstrating that current decision-making procedures are also responsible for compounding the vulnerability of people. As such, while the political pronouncements around the MSA have emphasized vulnerability as a key characteristic of those trafficked, this belies the role that UK law and procedure is playing in reinforcing and extending such vulnerability.

Conclusion

Decision-making within the anti-trafficking framework in the UK is fraught with issues that weaken any claim that the system is operating in a just way that enshrines a commitment to protecting vulnerable people. It is the combination of parts of the procedures, the limitations on the potential to challenge and the subsequent implementation of the processes by the Home Office which conspire together to create this effect. A major influencing factor that shrouds the system in its entirety is the far-reaching influence of the Home Office. In some respects, its power is upfront, as when it is responsible for making direct decisions. Yet the Home Office also wields a softer and less blatant form of control. This comes about, first, due to the use of informal 'reconsideration' of decisions which allows it to remove from official public scrutiny decisions made in error. Secondly, even within the ambit of judicial review, the Home Office is able to shape the standards against which it is judged on individual decisions owing to the important role of its guidance in establishing the 'rules'. Judicial review has brought about positive

[119] [2016] UKSC 31.

[120] V. Mantouvalou, ''Am I Free Now? Overseas Domestic Workers in Slavery' (2015) 42(3) *Journal of Law and Society* 329-57.

[121] Para.26.

results for some claimants but the success of any individual claim will be influenced by a focus on proper process and outcomes will inevitably be unpredictable owing to the arbitrary nature of judicial review decisions.

Vulnerability is a concept which has been interwoven throughout the article. Despite its centrality to the political conceptualisation of trafficking as a form of modern slavery, there is no clear articulation within the corresponding legal framework of what actually constitutes vulnerability, including how it might intersect with immigration status of varying kinds, *or* of what would be an appropriate resilience-building response to vulnerable people to enable genuine recovery. This opaqueness around the concept masks the dichotomy between the sentiment of protection in the political rhetoric and the reality of how many people experience the system. It is the ultimate insult to those who persevere in their navigation of the system that even a CG decision yields limited entitlement to support and offers no security of residence. For many victims of trafficking, the current approach of the UK, at best, amounts only to an offering of tea and sympathy.