

Survivors of trafficking

and the Criminal Injuries
Compensation Scheme

November 2020

ATLEU

ANTI TRAFFICKING AND
LABOUR EXPLOITATION UNIT

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Recommendations

- Human trafficking and modern slavery should be defined within the scheme rules as crimes of violence and the tariff amended to include compensation for trafficking per se.
- A report to the Single Competent Authority should be treated as a report to the police. In practice, this should mean that victims of trafficking and slavery with a positive Conclusive Grounds decision will automatically meet this requirement.
- Adequate enquiries should be conducted by CICA for applicants who are survivors of trafficking, which should include a request for information from the Single Competent Authority and the police.
- Where there is apparent non-cooperation with a criminal investigation, CICA should actively consider the reasonableness of the survivors' actions.
- Unspent convictions should not automatically disqualify survivors of trafficking from recovering compensation under the CICS. Where a survivor of trafficking has an unspent conviction, there should be discretion to consider mitigating circumstances.
- CICA should publish guidance dealing specifically with how the scheme rules should be interpreted for survivors of trafficking or slavery, in light of the additional legal obligations to this group and their particular vulnerabilities.
- CICA should publish a timescale for determining applications relating to human trafficking and slavery, so survivors have some indication as to when a claim might be determined.
- CICA should seek to record the true number of survivors accessing the CICS by amending the application form to remove the question as to whether the applicant is a victim of trafficking with a Conclusive Grounds decision from the residency section. Issues with the CICS for survivors of trafficking apply to both British nationals and those who are not ordinarily resident in the UK.
- Legal aid should be automatically available to survivors of trafficking and slavery for advice on the CICS. CICA matters should be brought back into scope for trafficking survivors. The ECF scheme as it is operated is not one that can be genuinely accessed by an unrepresented survivor.

Introduction

This report aims to set out the barriers faced by survivors of trafficking and slavery trying to obtain compensation from the Criminal Injuries Compensation Scheme (CICS).

This is a statutory scheme that exists to compensate victims of violent crime in England, Scotland and Wales. The CICS is administered by the Criminal Injuries Compensation Authority (CICA), which was established in 1996.¹

In 2012, the CICS was amended to explicitly include survivors of trafficking. This report examines the extent to which survivors of trafficking and slavery are able to access compensation under the scheme.

Applications to CICA are generally made by survivors who are unable to identify their trafficker, where the trafficker has no significant assets, or where the survivor is unable or unwilling due to their vulnerability to face their trafficker in court.

Compensation is vital for survivors of trafficking. Poverty is one of the root causes of trafficking, leaving already vulnerable individuals more susceptible to exploitation. Compensation can give survivors a genuine opportunity to rebuild their lives and help protect them from further exploitation.

CICA does not have a clear understanding of how the scheme is operating for survivors of trafficking. Parliamentary questions asked in 2014 revealed that the government was unable to provide any indication of the number of survivors applying for or obtaining an award under the CICS.

Since 2015, CICA has started to collect information relating to survivors of trafficking. But it only records those survivors who, at the outset of the application process, state they have no immigration status in the UK and are

awaiting a Conclusive Grounds decision. This means that survivors who have been granted leave to remain in the UK, or those who are UK/EU nationals, will not be counted.

Similarly, survivors who refer to their trafficking status in the body of the CICS application will also not be captured in Freedom of Information (FOI) statistics. As a result, to understand the effectiveness of the scheme, and if it is resulting in survivors receiving compensation for their treatment, FOI data is unreliable.

Methodology

The findings of this report are based on 30 cases conducted by ATLEU between April 2013 and November 2018 and a survey of professionals.

In July 2019, this survey was sent to solicitors and support workers working with survivors of trafficking and slavery who had experience of making CICS claims. Its purpose was to see if the experiences of others were similar to those of survivors represented by ATLEU, and to identify any significant barriers to compensation being awarded to survivors of trafficking more generally.

There were 35 respondents to the survey. This may seem a small number, but it is inevitably the case as there are so few practitioners helping survivors to claim compensation² under the CICS and even fewer support workers with the capacity and expertise to prepare even the initial CICS application for survivors.

1. Originally the Criminal Injuries Compensation Board established in 1964. There have been various revisions to the scheme rules. The 2012 rules are currently in force.

2. Of 250 legal aid providers contacted, only 27 confirmed that they could advise and assist with a trafficking or modern slavery compensation claim: <https://athub.org.uk/knowledge-base/accessing-legal-aid/>

Legislative background

Both the Council of Europe Convention (ECAT) and Directive 2011/36/EU (the Directive) contain provisions aimed at providing compensation to survivors of trafficking.

Article 15(4) ECAT states that:

'Each party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims which could be funded by the assets resulting from the application of measures provided in Article 23.'

Article 17 of the Directive states that:

'Member States shall ensure that victims of trafficking in human beings have access to existing schemes of compensation to victims of violent crimes of intent.'

ECAT and the Directive set out the minimum provisions required for victims of trafficking in respect of accessing state compensation. The wording of both ECAT and the Directive requires Member States to include human trafficking as a violent crime of intent within their domestic schemes for compensating victims of violent crimes. Currently, it cannot be said that most victims of trafficking are able to access compensation via the legislative framework the UK has in place to facilitate this, which is the 2012 CICS.

CICA has produced a leaflet³ advising that survivors of trafficking can make applications under the CICS and has amended the scheme's eligibility criteria so that those who have been conclusively identified as victims of trafficking can access the scheme, irrespective of their residence. However, beyond this, no steps have been taken to ensure that survivors have genuine and effective access to the scheme.

How the CICS works for survivors of trafficking and slavery

An application is made online to CICA. The application requires the applicant to set out the dates on which the criminal injury occurred, the injury suffered and the treatment obtained.

CICA will then obtain documentation from the police and any medical practitioner that the applicant has visited in order to establish whether they have suffered injury within the meaning of the scheme and where, within the tariff of awards, the applicant should be placed.

Having reviewed the documentation, CICA will either make an award of compensation or refuse the application, setting out its grounds for doing so.

Where an application is refused, applicants can request an internal review and, subsequently, an appeal to the First-tier Tribunal (Social Entitlement) (CICA). Any further appeal is by way of application for judicial review to the Upper Tribunal.

On the face of it, an applicant need only complete the online form and, if the criteria are met, an award will be made. However, CICA has little experience of dealing with survivors of human trafficking and slavery, so additional representations will usually be required, setting out why the survivor comes within the scheme rules. Without these, it is more likely that the application will be refused and a review or appeal needed.

3. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/351337/human-trafficking-leaflet.pdf

Legal aid

Legal advice and assistance

There is no legal aid available for survivors of trafficking wishing to submit an application to CICA. Legal aid for CICA applications for survivors is expressly excluded by Schedule 1 part 2 paragraph 16 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

The Exceptional Case Funding (ECF) regime is in place to provide legal aid to those who would otherwise suffer a breach of a Convention or EU right. However, the Legal Aid Agency (LAA) does not accept that an application to CICA involves the determination of Convention or EU rights and so routinely refuses applications, asserting that the right to a fair trial as enshrined by Article 6 of the European Convention on Human Rights (ECHR) is not engaged. In fact, the Court of Appeal has confirmed that an application to CICA will engage Article 6.⁴

Without legal aid, if the survivor does not speak English, the cost of an interpreter will not be covered. The same holds true for costs related to subject access requests or specialist medical legal reports.

ECF funding to prepare an application to CICA

Our survey results demonstrate that 93% of applications made to the LAA for ECF to prepare and submit an application to CICA were refused. Common grounds for refusal were:

- The application process is no more than 'form filling' and so legal advice and assistance are not required
- The survivor has received advice in relation to another legal matter and so could simply send the documents generated to CICA
- The survivor has a support worker who could be asked to prepare and submit an application
- There are specialist victim support organisations that the survivor could approach for assistance.

Where the LAA refuses an application for ECF, it is possible to seek a review of the decision. In practice, the review is generally carried out by the original decision maker, who is often reluctant to reverse a previous decision. More often than not, no analysis is carried out of the review grounds and the earlier grounds of refusal are simply repeated.

4. *JT v First-tier Tribunal* [2018] EWCA Civ 1735



Inez

Inez was trafficked to the UK for the purpose of domestic servitude. Over a period of five years, she was regularly beaten and subjected to threats and verbal abuse. Inez was eventually able to escape her trafficking situation when a member of her church became aware of her circumstances.

Inez's trafficker attended the same church and so, following her escape, she could no longer attend. Inez was moved to safe accommodation in another part of the country and due to fear of her trafficker she did not contact any church members. Inez was diagnosed at this time as suffering from psychiatric injury.

An application for ECF was refused on the basis that Inez could seek help from someone at the church to prepare and submit an application to CICA.

A review was sought of the LAA's decision, reiterating that Inez was not in contact with any church members and so had no one to assist her. Again funding was refused. As a result, it was necessary to take steps to bring judicial review proceedings before funding was granted.

Inez initially sought legal aid in July 2016 and obtained a grant of funding in May 2019. Inez is now waiting for CICA to determine her application.

Miguel

Miguel was trafficked to the UK as a minor. Miguel was told that he was travelling to the UK to further his education. Instead, he was put to work in a takeaway restaurant for long hours with no payment.

Miguel was subjected to physical and verbal abuse but he eventually escaped his traffickers. Miguel then spent several years in a series of exploitative employment relationships before coming to the attention of the police and being entered into the National Referral Mechanism (NRM).

An application for legal aid was made on Miguel's behalf to prepare an out of time CICA application. The application confirmed that legal submissions would be required and that Miguel had no one who could make these submissions.

The LAA refused funding on the basis that Miguel could apply to CICA by himself or contact Victim Support. This was despite Victim Support expressly stating that it cannot advise or make legal submissions.

The LAA was notified that Miguel was preparing to issue judicial review proceedings against it, following which it withdrew its negative funding decision and agreed to make a new decision. Unfortunately, the LAA again refused funding, this time concluding that it was not obliged to fund an application to CICA as it did not engage a Convention or EU obligation owed to survivors of trafficking.

Although this is incorrect and the LAA's decision was susceptible to legal challenge, after 12 months of attempting to obtain legal aid Miguel opted not to bring a case against the LAA and gave up on seeking compensation.



Although the LAA publishes target dates for processing an ECF application, there are no published dates for undertaking a review. It is therefore common for review decisions not to be made for several months, which can be particularly distressing for survivors who are already extremely vulnerable.

In ATLEU's experience, delay can be significant. In 50% of ATLEU'S CICS cases, a review decision was communicated only after formal complaint and threat of judicial review.

Respondents to the survey confirmed that 85% of ECF review applications made between 2017 and 2019 were refused by the LAA and the vast majority did little to address points raised on the survivor's behalf. Only two respondents to the survey had been granted ECF following a review by the LAA.

As a result of the delay and minimal prospect of a decision being reversed, many respondents to the survey said that if a detailed ECF application is refused by the LAA, they did not submit a request for a review. They either concluded that they could not assist the survivor at all, or that their time would be better spent trying to assist on a pro bono basis.

One respondent explained that such were the difficulties with obtaining ECF, they would only prepare CICA applications if the survivor had already been represented by them previously, i.e. in relation to an immigration matter and in the course of that matter sufficient documentation had been generated to satisfy the CICS rules. This enabled them to act pro bono, but meant they could make no more than one or two claims a year.

Judicial review

Once the LAA makes a negative decision in respect of an ECF review, the only way of challenge is by judicial review. The LAA's approach has been to respond to judicial review pre-action correspondence by withdrawing its negative review decision and making a new negative decision (on different grounds). When further pre-action correspondence is sent, the LAA will again typically withdraw its negative decision.

While it is possible to issue judicial review proceedings on the basis that the LAA's internal review will not genuinely resolve the matter, in practice legal aid will not be granted to issue the judicial review as the LAA's position is that internal resolution remains available. The survivor is therefore faced with some liability for the LAA's legal costs in the event it decides to issue judicial review proceedings against them. This is a position that many survivors fear to be in.

Only one provider had been forced to go as far as issuing judicial review proceedings on behalf of a survivor following the LAA's refusal of funding. On this occasion, the LAA settled the proceedings and agreed to grant ECF for advice on their CICA matter.

The vast majority of legal practitioners who assist survivors with CICA applications said that the difficulties in obtaining legal aid funding meant that it was not feasible for them to advise survivors on these matters.

The lack of legal aid funding for advice and representation on CICA matters means large numbers of trafficking survivors are unable to access compensation. Without pro bono assistance or a support provider with sufficient capacity and expertise to help, most are unable to make an application or request a review of a CICA decision. CICA can take an extremely long time to process an application, and many survivors have left services before a decision is made. This often results in CICA abandoning the claim due to lack of response.

Support for survivors

Voluntary sector support

Government guidance suggests that organisations such as Victim Support will assist survivors to make applications to CICA. Victim Support has confirmed that it can do no more than direct a survivor to the online or telephone application.

'None of our staff are legally trained and we do not have legal insurance to give advice so we would not be able to assist with that. We would be able to inform them about any general information regarding CICA and help them physically fill out the forms if they were unable.'

Victim Support cannot obtain documents or make representations to CICA as to how the CICS rules ought to be interpreted and applied to a survivor's circumstances and in light of the legal framework on trafficking.

In 2018, a claim was successfully brought against Victim Support Scotland for failure to advise a CICA applicant of the right to claim loss of earnings. As a result, many within the voluntary sector decline to assist with CICA applications, concluding that survivors are best served by obtaining formal legal advice and representation. While the decision is one of the Scottish Courts, undoubtedly it has raised concerns within the voluntary sector across the UK.⁵

Where a survivor has suffered sexual assault, services have some experience of helping applicants to navigate the CICA process. However, organisations, such as Solace Women's Aid, are often limited to assisting survivors within a specific geographic location. Again, there is limited knowledge of the issues arising and the

nature of representations needed when the survivor has also suffered trafficking or slavery.

While victim support organisations provide an invaluable service, they are generally limited to providing practical assistance to help survivors access the scheme, as opposed to providing legal advice and assistance.

Trafficking support providers

Only a small number of the support providers surveyed were regularly assisting survivors to submit applications to CICA and this support extended to no more than help with the application form. The increasing pressures on providers' time and resources mean that preparing additional representations to accompany the application is just not possible.

Of respondents to the survey:

54%

advised that they did not help survivors with CICA claims as they did not have the capacity

67%

advised that they did not help survivors with CICA claims as they did not have the requisite knowledge or experience.

It is notable that the support providers most likely to submit applications are those with a legal officer on staff with a background in personal injury claims and who has fostered a culture of seeking ad hoc legal advice to enable them to make some representations alongside an application.

5. <http://thirdforcenews.org.uk/tfn-news/victim-support-scotland-sued-by-abuse-victim>
<http://www.scottishlegal.com/2018/01/22/man-sues-victims-charity-failure-inform-remedy>

The criteria for CICS

There are a number of criteria that a survivor must meet to successfully obtain an award of compensation under the CICS. For the purpose of this report, we have focused on those criteria that present the most difficulty to survivors of human trafficking and modern slavery.

Time limits

An application to CICA must be made within two years of the criminal injury suffered. Many survivors will make an application outside the two-year time limit. This is most commonly due to trauma, a lack of knowledge about the scheme or the lack of assistance available to help submit an application.

CICA has the discretion to extend the time limit but will only do so if the application is submitted with all the evidence necessary to determine the application. This places a significant burden on the survivor to produce documentation in support of their application. Typically, this would be evidence held by the Single Competent Authority, such as a witness statement, medical records or an expert report.

CICA itself will not carry out enquiries beyond contacting the police, on the basis that anything more amounts to an '*extensive enquiry*', which under the CICS rules it is not obliged to do.

Amalfi

Amalfi was trafficked to the UK for the purpose of sexual exploitation. Amalfi was helped to escape her traffickers, but due to fear did not enter into the NRM or agree to report to the police until 18 months after her escape.

Following a period of reflection, Amalfi was advised of her right to compensation and sought ECF under the legal aid scheme so she could obtain legal assistance to make an application to CICA.

The application for legal aid funding was refused because, although the application to CICA was made outside the two-year time limit, the LAA argued that Amalfi could comply with the requirements of paragraph 87 of the CICS rules by providing a copy of the decision that she had been found to be a victim of trafficking on a Conclusive Grounds basis.

However, the NRM decision does not address why an application to CICA should be extended; it only considers identification, so the claim was, of course, refused.

Amalfi did eventually obtain ECF and instructed a solicitor to prepare representations as to how the CICS should be interpreted in light of her status as a victim of trafficking. CICA is now actively considering the sum to be awarded to Amalfi in respect of compensation.

65%

of respondents to the survey had experience of CICA applications being refused because the application had been made out of time.

Many respondents indicated that they were unaware of what representations and documents would be needed to support an out of time application. Commonly, respondents were not aware that a survivor's lack of knowledge of the right to compensation, or their lack of knowledge of the existence of the CICS, was not grounds on which time could be extended.

While there is some awareness of a trafficking survivor's entitlement to compensation, little has been done to ensure that victim services and support providers, particularly those providing services under the Victim Care Contract, are aware of the CICS and how it can be accessed.

- All non-lawyer respondents to the survey (62%) reported that they were unable to secure legal advice for trafficking survivors for assistance with an application to CICA (due to the lack of legal aid), causing more survivors to miss the two-year time limit. Where the CICA application was out of time, support providers said this made it harder still to secure legal assistance for survivors.

Crime of violence

The scheme rules state that a survivor has to demonstrate that they have sustained a criminal injury that is directly attributable to their being a direct victim of a crime of violence. The definition of a 'crime of violence' is limited to one of the following:

- A physical attack
- Any other act or omission of a violent nature which causes physical injury to a person
- A threat against a person, causing fear of immediate violence in circumstances which would cause a person of reasonable firmness to be put in such fear
- A sexual assault to which a person did not in fact consent
- Arson or fire.

The rules mean that a survivor of trafficking is not entitled to compensation unless they have suffered physical violence, have been threatened with violence or believed that they might be subjected to violence.

Many survivors of trafficking are unable to demonstrate that they meet this requirement, with those trafficked for the purpose of forced labour and domestic servitude often facing the greatest difficulty. Those trafficked into sexual exploitation do not typically experience the same difficulty in demonstrating that they have suffered a crime of violence.

Piotr

Piotr was trafficked to the UK for the purpose of labour exploitation. He was required to carry out building work and was also forced to shoplift. Piotr was told that if he did not get certain items and provide them to his traffickers at the end of the day, he would be beaten. Piotr was refused compensation on the basis that his fear of harm was not immediate.

Sheena

Sheena was required to work lengthy hours in a tailoring business for which she received no payment. Sheena was subjected to threats of arrest and deportation if she objected to the poor treatment she suffered. Sheena was eventually helped by the police and gave evidence at trial leading to the conviction of her trafficker.

Sheena was diagnosed as suffering from a mental injury directly attributable to her experiences. However, as Sheena had never feared that she would be subjected to physical harm, she was refused an award of compensation.

There is also a requirement that the fear of harm be 'immediate'. So if the fear of harm arises because of a threat to harm at a later date then the survivor will not be eligible for an award of compensation.



It is also common for CICA to consider that the survivor has not suffered a crime of violence if the trafficker has not been identified by the police, or when there is no successful prosecution of the trafficker. This is despite the fact that there is no requirement within the CICS rules for the trafficker to have been arrested and prosecuted before an award can be made.

BA v CICA Cl021/18/00019

In August 2018, an appeal was considered by the First-tier Tribunal (FTT) in relation to a survivor trafficked for domestic servitude and subjected to sexual assault. The survivor had reported her treatment to the police who interviewed the trafficker but concluded that there was insufficient evidence to bring criminal charges.

CICA concluded that the lack of prosecution meant that there was no evidence that the survivor had suffered a crime of violence. That she had provided medical and witness evidence was not given weight. The FTT found that CICA had applied an incorrect test when determining whether the survivor had suffered a crime of violence and remitted the application back to CICA.

TA v CICA Cl021/17/00346

In November 2018, the FTT heard an appeal in respect of a survivor trafficked for sexual exploitation. The FTT concluded that the survivor had been subjected to physical and sexual abuse and so had suffered a crime of violence. The FTT went further and noted that the act of trafficking the victim and forcing her into sex work could amount to an act of a violent nature. This appears to be the first acknowledgement that trafficking could amount to a crime of violence.

The case of TA strongly suggests that CICA should be taking a more considered approach as to what treatment and actions amount to a crime of violence within the scheme rules in a trafficking context. In this case, no real enquiry was carried out until the matter came before the FTT.

Most survivors do not have the support to prepare and submit grounds of appeal to challenge a CICA decision, which in practice means they face a complete bar to obtaining a compensation award. As a result, many trafficking survivors are not receiving the compensation that they are entitled to. There is a clear need for the CICS to be updated to better reflect the crimes suffered by victims of trafficking and slavery.

Trafficking as a crime of violence

Trafficking and slavery are not interpreted as crimes of violence per se under the CICS. Where a survivor does not suffer physical harm or fear physical harm (or are unable to evidence this), they will not receive any compensation. This is incompatible with ECAT and the Directive, which provide for compensation for trafficking, recognising it as a wrong in and of itself and deserving of compensation with no associated requirement of physical or mental injury.

60%

of respondents to the survey had experience of survivors being refused compensation on the basis that they had not suffered a crime of violence.

R (oao) RD v CICA & The Lord Chancellor and Secretary of State for Justice

In this case, the survivor was trafficked for forced labour. While he was subjected to exploitation and mistreatment, he did not suffer physical or mental injury. The applicant issued judicial review proceedings on the basis that CICS, as currently drafted, does not recognise trafficking as a crime of violence and so served to breach his legal right as a victim of trafficking to compensation. The application for permission is currently before the Administrative Court.

Human trafficking and slavery are heinous crimes which involve a fundamental violation of human dignity and freedom. They are crimes which attack an individual's autonomy and integrity and, as such, are inherently crimes of violence and crimes of the most serious order.

The importance of compensation for this group of victims is heightened given the role it plays in preventing re-trafficking and in recognising that in addition to the abuse an individual has suffered they have also been robbed of their labour, sometimes for many years.

The criminal nature of human trafficking and modern slavery is recognised in UK legislation, including in the Modern Slavery Act 2015 – Statutory Guidance for England and Wales version 1.01 at p.5, para 1.1, which states:

'Modern slavery is a serious crime that violates human rights. Victims are forced, threatened or deceived into situations of subjugation, degradation and control which undermine their personal identity and sense of self.'

There is no distinction drawn, in either ECAT or the Directive, between different types of victim, nor is it suggested that some are entitled to compensation where others are not, depending on how they might meet the trafficking definition. It clearly intends each Member State to guarantee victims of trafficking access to a state scheme of compensation. The UK currently does not.

Reporting to the police

Under the scheme rules, a survivor is required to have reported to the police as soon as reasonably practicable and within a period of two years. All potential victims of trafficking who are referred into the NRM will report the crime to the authorities. This means that victims of trafficking must report twice: at the point they are referred into the NRM and then to the police.

The framework in place for identifying and supporting victims and ensuring information is shared with different law enforcement bodies should be taken into account under the CICS. Given CICA's requirement that trafficking survivors have a Conclusive Grounds decision and the investigative ability of the Single Competent Authority, it is unclear why CICS requires a further and express report to the police.

The recovery and reflection period for survivors, given effect through the NRM, recognises that they are vulnerable and often traumatised so time is needed for rehabilitation. Many survivors do not self-identify. Identification is an important function of the NRM. This should be reflected in the CICS with greater flexibility for survivors of trafficking and slavery to make applications outside the two-year time limit. Without this provision, many survivors of trafficking will continue to be shut out from securing compensation under the scheme.

LT v CICA C1018/15/0009

The survivor had been trafficked for forced labour. After running away from his traffickers, he spent 10 days sleeping rough. The survivor eventually went to a police station for help. As the survivor spoke no English and an interpreter was not obtained, he was sent away as they thought he wanted help with housing. The survivor continued to sleep rough until a homelessness shelter offered help and spoke to him with an interpreter.

The survivor was referred into the NRM during which a detailed account of his treatment was taken. The survivor also provided an intelligence report to the police via his support provider. However, compensation was refused on the basis that he had failed to report to the police as soon as possible. On appeal, it was suggested that the 10 days spent sleeping rough would have been the appropriate time to report to the police. Following an adjournment, CICA withdrew its decision and concluded that the survivor had in fact reported to the police.

60%

of respondents to the survey had experienced applications being refused on the basis that the survivor had not reported to the police as soon as reasonably practicable.

Cooperating with criminal investigations

Under paragraph 23 of the scheme, CICA is able to withhold awards of compensation where an applicant has *failed to cooperate so far as is reasonably practicable in bringing the assailant to justice*. There is nothing contained within ECAT or the Directive which makes compensation dependent on the willingness of the survivor to cooperate with a criminal investigation.

Despite the requirement to look at the individual applicant's circumstances and how far they are able to cooperate with an investigation, CICA routinely refuses compensation on the grounds of non-cooperation, without any consideration of the applicant's reasons or circumstances.

C v CICA C1011/15/00026

On 5 July 2018, the FTT heard an appeal in relation to a survivor trafficked to the UK for the purpose of domestic servitude. After many years of exploitation, C was able to escape and report her treatment to the police. C's family members abroad were threatened by her traffickers and so C concluded that continued cooperation with the police would endanger them.

CICA refused C an award of compensation on the basis that she had failed to cooperate with a criminal investigation. The FTT concluded that to apply paragraph 23 in the manner that CICA had was an interference with obligations set out in the trafficking directive.

***CICA v First-tier Tribunal, Interested Party C
JR/1309/2016***

CICA applied to the Upper Tribunal for a judicial review of the decision in C. Permission was refused. The Upper Tribunal concluded that an appeal would not succeed. On a plain reading of the scheme rules, CICA was required to consider whether, within the specific circumstances, the applicant had cooperated as far as reasonably practicable.

65%

of respondents to the survey had experienced applications being refused on the basis that the survivor had failed to cooperate with the police.

Convictions

Under the scheme rules, an unspent conviction will result in an award being withheld. There is no discretion for CICA to look at the circumstances of the conviction, for example whether the conviction was as a result of acts the survivor was compelled to do in the course of their exploitation.

(A & B) v Criminal Injuries Compensation Scheme & Anor C1/2017/246

The Appellants in A & B had been convicted in 2010 of burglary and theft and received custodial sentences in Lithuania. In 2013, they were trafficked to the UK for the purpose of labour exploitation. A & B escaped their traffickers, who were eventually prosecuted for trafficking offences. A & B made applications to CICA to be compensated for their treatment. Their applications were refused.

At the Court of Appeal, it was argued on behalf of A & B that the bar on those with unspent convictions was incompatible with international obligations to ensure access to compensation for survivors of trafficking. However, the Court found that A & B's criminality was not linked to their trafficking as the criminal offences were carried out and sentences given well before the Appellants were ever trafficked.

Moreover, those survivors whose criminal behaviour was directly linked to their trafficking would be able to rely on the non-punishment provisions within the Modern Slavery Act and would be able to have convictions set aside.

The Supreme Court will determine in November 2020 whether the mandatory bar on criminal convictions amounts to unjustified discrimination against survivors of trafficking. The Court of Appeal assumed that survivors who had been coerced into criminal activity by their traffickers would have the conviction set aside, but of course this is not always the case. Not all survivors are advised that there is a defence where criminal activity is linked to trafficking so many survivors have criminal records abroad that cannot easily be set aside.

48%

of respondents to the survey had experience of applications being rejected on the basis of an unspent conviction.

Injury outside the UK

CICA can only compensate survivors for injuries suffered in the UK. Some survivors have suffered a significant period of exploitation abroad before they are transferred or recruited to the UK, where their exploitation continues.

If injury has been suffered in an EU country, CICA's EU Assistance Team can advise survivors as to how to make their applications in the relevant EU countries.

Where the survivor has suffered injury outside the UK/EU and if that country operates a scheme of criminal injury compensation, then an application can be made. The Foreign and Commonwealth Office is able to advise about these schemes.

Because of the difficulty in obtaining funding, none of the solicitors responding to the survey had experience of a survivor now based in the UK obtaining compensation for injury outside the UK.

Timescales

CICA does not publish timescales for dealing with an application.

No respondent to the survey had experience of an application being determined within three months

5% of respondents had experience of an application being determined and compensation awarded within six months

11% of respondents had experience of an application being determined and compensation awarded within nine months

5% of respondents had experience of an application being determined and compensation awarded within 12 months

5% of respondents had experience of an application being determined and compensation awarded within 18 months

17% of respondents had experience of an application being determined and compensation awarded within 24 months

47% of respondents had experience of an application being determined and compensation awarded within three years

5% of respondents had experience of an application taking four years or more to determine and award compensation.

The length of time from application to award of compensation can therefore be lengthy for survivors and require extensive correspondence and submissions being made. The lack of readily available legal assistance can mean that survivors become disillusioned and disengage from the process.

88%

of respondents to the survey had experience of survivors disengaging due to the length of time taken to deal with their application.

One respondent to the survey stated that they had been waiting over five years for an application to be determined. The survivor was an English national with pro bono legal representation, so there were no delays that could be attributed to lack of legal assistance or delays due to language barriers.

Another respondent similarly advised that an application made for an English national was still to be determined two years after application.

This confirms that the CICA application process is regularly a slow process with the lack of assistance or legal representation likely to further increase the time taken for an application to be determined and an award made.

Dead clients

Sadly, the length of time needed to obtain funding and an initial decision from CICA has seen survivors die before the conclusion of their application.

Esio

Esio had been controlled by a gang who used his ID to obtain credit and items such as mobile phones that were then sold for profit. Esio eventually escaped his traffickers and reported to the police. Esio was refused compensation by CICA on the basis that there was no evidence that he had suffered a crime of violence.

While Esio had confirmed that he had not been beaten by his traffickers, he stated that he had been in fear that they would harm him and so his treatment did come within the definition of a crime of violence.

Sadly, Esio died four days before his appeal was to be heard by the FTT. The hearing was adjourned while steps were taken to locate his next of kin, who are not in the UK.

Jurek

Jurek was awarded £35,000 in compensation, having suffered physical and mental injury. Jurek had been required to carry out building work for little or no salary. Jurek was beaten, verbally abused and only fed sporadically.

Once Jurek was able to escape his traffickers, he was able to obtain medical care for the first time in five years. He was then diagnosed with a lung condition from which he subsequently died.

Jurek had not signed his acceptance of the CICA award prior to his death. It was therefore withdrawn with the advice that Jurek's next of kin could submit a new application.

However, Jurek's family members, who were not in the UK, found the prospect of gathering the documents necessary to establish they had a right to submit an application too onerous and opted not to do so.

Children and young people

Accessing and navigating the CICS is particularly difficult for children and young people who are survivors of trafficking.

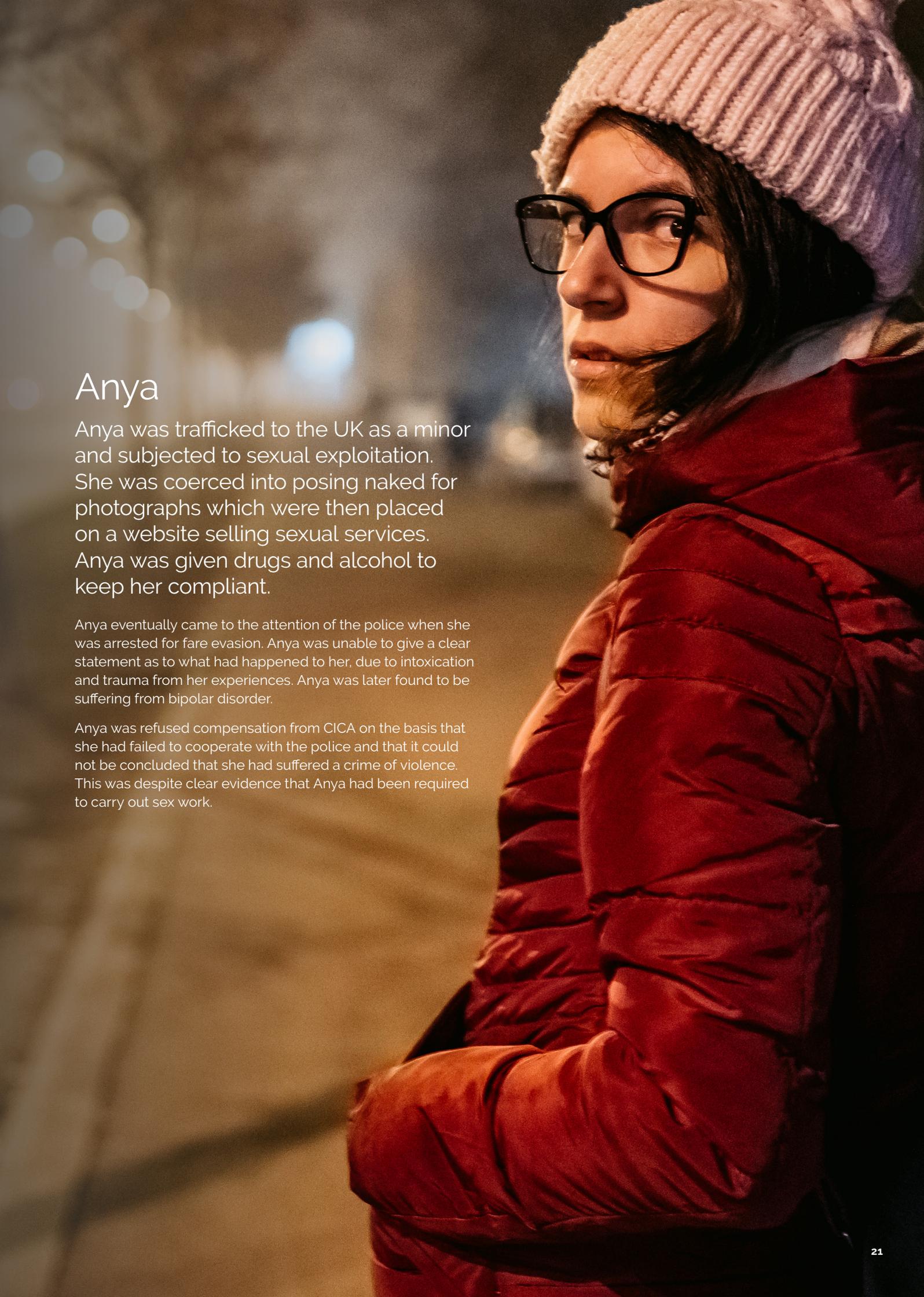
The lack of guidance around trafficking, and how it presents, means that a child is more likely to fall foul of the view that they have failed to cooperate with the police, or have failed to take the steps necessary to bring their assailant to justice.

Many of the respondents working with children and young people were concerned that the experience of making a CICA application would cause further trauma. Following a lengthy wait for a decision, there is a real possibility that a review or appeal will be needed, leaving the child or young person with uncertainty and in some cases deep distress at the decision made by CICA.

One organisation working with survivors reported that it had taken a cautious view to making applications for children and young

people because of the 'misguided and damaging' approach taken. It felt that a failure to understand that a survivor cannot consent to their exploitation had led to survivors not being granted awards and being left to feel that they were to blame for their treatment.

Another organisation working exclusively with children and young people also expressed concern that the CICA scheme was not sufficient but, having attended a training session, was willing to help with making an application. However, it stated that it would only do this in relation to survivors who were unlikely to be severely distressed by waiting a lengthy period for a decision or receiving an initial negative decision. This meant that those most vulnerable and in need of compensation to rebuild their lives were least likely to receive compensation.



Anya

Anya was trafficked to the UK as a minor and subjected to sexual exploitation. She was coerced into posing naked for photographs which were then placed on a website selling sexual services. Anya was given drugs and alcohol to keep her compliant.

Anya eventually came to the attention of the police when she was arrested for fare evasion. Anya was unable to give a clear statement as to what had happened to her, due to intoxication and trauma from her experiences. Anya was later found to be suffering from bipolar disorder.

Anya was refused compensation from CICA on the basis that she had failed to cooperate with the police and that it could not be concluded that she had suffered a crime of violence. This was despite clear evidence that Anya had been required to carry out sex work.

Loss of earnings

Under rule 43 of the CICS, there is a requirement to provide evidence of physical and mental injury for an award to be made. This is usually demonstrated by the provision of medical records. It is also possible to obtain compensation for loss of earnings.

However, evidence must be produced to show that the survivor was in paid work at the time of the 'incident' or three years prior, or that they had good reason not to be in paid work either at the time of the incident or three years prior.

The requirements of rule 43 mean that submissions are required about the survivor's status as a victim of trafficking and how an earlier period of vulnerability or exploitation should be construed.

CICA states: '*We are not prescriptive about the evidence we require and we will consider each case on its merits.*' However, this can lead to inconsistency in outcomes where the survivor is not legally represented. If no submission is made, a loss of earnings award is unlikely to be made.

First-tier Tribunal

The FTT considers appeals of negative CICA review decisions. A presenting officer will attend the appeal to set out CICA's position as to why an award was lawfully refused. In fact, it is often only in preparation for an appeal that a CICA legal officer looks at the issues engaged or, following a direction from the FTT, seeks relevant documentation.

For some survivors, CICA will, prior to the hearing, seek to concede the appeal, having concluded that the scheme rules are satisfied and an award of compensation should be made.

The process of engaging with the survivor's status, trafficking legislation and the scheme rules should be occurring at the beginning of the application process and not on appeal. The FTT has been placed in a position of remedying errors that arise solely from the lack of guidance for CICA decision makers specifically on trafficking and slavery.

This is both a woefully poor use of public resources as well as a real barrier to survivors of trafficking obtaining desperately needed awards of compensation under the scheme.

L v CICA C1005/19/00007

L had been trafficked to the UK for the purpose of labour and sexual exploitation. L was refused compensation on the basis that he had not provided documentary evidence that he had been recognised as a victim of trafficking and that there was no evidence that he had suffered a crime of violence.

CICA had been advised that L did not speak English and was attempting to obtain legal aid. CICA was asked if it could exercise its powers to seek disclosure from third parties and obtain L's file from the Competent Authority. CICA declined to do so on the basis that this would amount to an extensive enquiry. A Case Management Conference was held and CICA was ordered to obtain documents from the Competent Authority. Having obtained the file, CICA concluded that L had been recognised as a victim of trafficking and had suffered a crime of violence. While this was a positive outcome, it took three years for L to reach the FTT.

Conclusions

At present, the CICA scheme is not fit for purpose. It is not genuinely accessible and the vast majority of survivors are refused compensation in circumstances where it ought to be granted.

Beyond amending the residence criteria, no other amendment has been made to the CICA scheme. As a result, it does not account for the phenomena of trafficking and slavery, which frequently leads to negative decisions for survivors and the denial of compensation.

It is galling that despite recognising that trafficking and slavery are serious criminal acts, which amount to an assault on an individual's being and autonomy, the CICS does not recognise or include compensation for trafficking per se.

There is no guidance or training for CICA decision makers on the UK's international obligations to survivors of trafficking and how this should be given effect through the CICS, resulting in delay and inconsistent outcomes.

The CICS is a scheme of 'last resort' so for many survivors it is the only route by which they might be compensated for their treatment. A financially secure and independent survivor is more likely to recover from their experiences and rebuild their life.⁶

The barriers to a survivor being granted compensation by CICA are further exacerbated by the lack of access to free legal advice, meaning that survivors are left to deal with complex legal issues unaided.

The UK Government has restated its commitment to protect those enslaved and exploited and '*those whose lives are shattered by this devastating crime*'.⁷ If this commitment is to be more than empty rhetoric, then a simple starting point would be to ensure genuine access to the CICA scheme for survivors.

6. Anti-Slavery International: *Opportunities and Obstacles: Ensuring Access to Compensation for Trafficked Persons in the UK* (2009)

7. Rt Hon Priti Patel MP, Home Secretary, *UK Annual Report on Modern Slavery* (2019)

ATLEU

ANTI TRAFFICKING AND
LABOUR EXPLOITATION UNIT

ATLEU is an award-winning charity that works to secure safety and justice for survivors of trafficking and slavery by using and reforming the law. We are the only UK charity that provides dedicated and holistic legal advice to survivors of trafficking. We are committed to improving the lives of all survivors by working with them to help them bring their traffickers to justice; by pushing to extend the legal protections available to them; by challenging government policy; and by sharing our knowledge with other professionals in the field.

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