

The National Referral Mechanism for identifying victims of trafficking (NRM) and recovery entitlements.

Subsistence payments and legal aid for victims of trafficking. Accessing one entitlement to lose another

Subsistence payments and legal aid eligibility

People who are in the National Referral Mechanism for identifying victims of trafficking (NRM) are 'entitled' to legal aid. However legal aid is also means tested. This means not everyone in the NRM is able to access legal aid in practice. This poses a significant barrier to justice for people who are not eligible and denies them a key entitlement under article 12 of the Council of Europe Convention for Action Against Trafficking In Human Beings and recital 19 and Article 12 of the Anti- Trafficking Directive.

There is a capital test and an income test for legal aid.

The income test means that anyone, including survivors of trafficking, who has a monthly income of over £733 (after deductions eg for housing or dependents) is not eligible for legal aid, even if they are in the NRM.

This has implications for survivors who work. It means that for some people, accessing subsistence payments, could push them over the eligibility threshold for legal aid.

It also includes survivors who are in sex work who are not eligible for legal aid due to their earnings. Some survivors find themselves trapped in abusive relationships and sexual exploitation because they are unable to access advice even when they are in the NRM, due to the level of their earnings.

This seems unfair because subsistence payments are to aid recovery- they are additional income to help each survivor recover, for example to pay for travel to appointments. These payments should not serve to make them ineligible for legal aid, another entitlement key to recovery.

The capital test means that people who have over £8,000 in savings or assets are not eligible for legal aid. This causes problems if survivors have property overseas (eg migrant domestic workers whose family have a small patch of land which they cannot prove the value of) or they win a compensation claim which pushes them over the limit.

People with partners who are working may find themselves just over the income threshold, or where the partner owns a property or has some savings can also find themselves ineligible due to the capital test. Survivors may have partners who are not aware of their trafficking history and they feel unable to discuss it with them in order to access funds for legal advice. Survivors often find themselves in abusive and controlling relationships where partners may be unwilling to fund advice.

It is possible for lawyers to make exceptionality arguments eg if they can't get assets abroad valued, but this requires a detailed understanding of the rules and a commitment and risk from the legal firm.

Some benefits are 'passported'. This means that if you receive one of these benefits you are eligible for legal aid without needing to pass the income test and only have their assessment on capital. These benefits include Universal Credit, income support and JSA. People in receipt of section 4 or 95 asylum support are passported through both income and capital tests for immigration advice. However, many victims of trafficking do not get the benefit of being passported at an early stage for immigration advice, as they do not claim asylum and receive asylum support until after being identified as trafficked.

Case Study

In one case seen by ATLEU 'X' was referred into the NRM by police. She was supporting elderly frail parents and a severely disabled sibling, all of whom required care. She had significant debts and saw no alternative but to keep earning through sex work. This meant she was not eligible for legal aid and was unable to get any legal assistance to explain her trafficking case due to her earnings. She got a positive RG but then negative CG.

With assistance from NGOs she tried to seek a reconsideration for the next 17 months, but these requests were ignored. She was not eligible for legal aid as her income was too high from sex work, so the NRM's refusal to accept a reconsideration request could not be challenged as she could not afford legal proceedings.

She remained in sex work and couldn't be persuaded to leave as she had no alternative way to support her family. Her mental health declined and she attempted suicide twice. After the second attempt she was admitted to hospital for psychiatric treatment and ceased sex work. Only at this point, having stopped earning, did she become eligible for legal aid, 3 ½ years after being referred into the NRM.

With intensive legal support provided under legal aid she successfully challenged the negative CG decision, the failure to grant discretionary leave, the negative asylum decision, and the termination of her NRM support.

Recommendation

Being in the NRM should also passport you through the legal aid income and capital tests. This would mean that everyone in the NRM would be able to access legal aid (as per Article 12, ECAT).

This blanket rule, which should cover all legal aid categories of law, would mean that no one in the NRM would be barred from accessing their entitlement to free legal advice as a result of being ineligible for legal aid.

Being passported through the income test would remove a significant barrier to work for people in the NRM. Without this there is a risk that survivors may be dissuaded from seeking work, although it would be beneficial to their recovery.

This would also cut down significantly on bureaucracy for legal representatives, making victims of trafficking less financially complex and risky to open cases for. It would by no means solve all the issues with legal aid but could help facilitate access for people in the NRM and would make the system clearer and fairer.