

# Trafficked into detention:

How victims of trafficking are missed in detention

DETENTION ACTION

November 2017

## 1. Executive Summary

Despite the strong words and good intentions of successive Home Secretaries to protect victims of modern slavery, the UK continues to fail trafficking victims who are held in immigration detention. The Government has both the legal obligations and the political will to protect victims of trafficking, but they come into conflict with its tough line on controlling migration.

Many victims of trafficking are detained for removal after being encountered during raids on brothels, nail bars and cannabis farms. Often, they are wrongly convicted of criminal offences relating to their exploitation. They are primarily referred to the protection system for victims of trafficking, the National Referral Mechanism (NRM), by the Home Office, the same body responsible for their detention. Detention makes it difficult for people who have been trafficked to disclose their experiences; to access specialist, independent trafficking advice and representation; or to be correctly identified as victims and given specialist support in the community.

Evidence collected by Detention Action between December 2016 and June 2017 indicates that these factors appear to be denying the protection of the NRM to victims of trafficking in detention. Of a sample group of 16 Vietnamese men encountered in immigration detention with indicators of trafficking, only nine had been referred into the NRM and only two of those had received a positive reasonable grounds decision. This is despite the fact that, overall, the great majority of people referred into the NRM are given positive reasonable grounds decisions. Many of these men continued to be detained, in one case for 15 months, despite having Rule 35(3) reports from detention centre doctors providing evidence of trauma experienced at the hands of their traffickers, as well as severe physical and mental health problems.

There are structural reasons why the system for protecting victims of trafficking fails people in detention.

- **The Home Office faces a conflict of interest** between its responsibility to identify and protect victims of trafficking and its role in detaining and removing undocumented migrants. The prioritisation of these enforcement responsibilities leads potential victims of trafficking to be detained without careful assessment of their situations. Once in detention, the Home Office is primarily responsible for making NRM referrals and reasonable grounds decisions. The Home Office makes poor quality referrals to the NRM, which are refused, allowing it to continue to detain the person for removal.
- The risk of failure to identify victims of trafficking in detention is **exacerbated by the lack of effective procedural safeguards**. Neither the NRM nor the Home Office's Guidance on Adults at Risk in Immigration Detention provides a clear and effective safeguard to ensure that potential victims of trafficking are identified and released from detention.

- **Indefinite detention causes harm and prevents effective access to the NRM** by denying victims of trafficking a safe space where they can disclose their experiences and access independent advice. Detention impacts on physical and mental health and contributes to isolation and mistrust of authorities. Locked up in prison-like conditions, detained victims of trafficking lack access to independent specialist advice, support and representation.
- As a result, **the NRM is failing to protect victims of trafficking in detention**. The Home Office's conflict of interest leads to poor quality NRM referrals and decision-making, and there are few effective safeguards for victims of trafficking who cannot access adequate advice or space to disclose their experiences.

## 2. Summary of recommendations

- More effective screening should ensure that potential victims of trafficking are not detained, and instead are given support and advice;
- Specialised and independent case management should support people to stabilise in the community and engage with the NRM and immigration processes, managing any risks of absconding or re-trafficking;
- A referral to the NRM should trigger release from detention, since it is only made when there are indicators of trafficking;
- NRM referrals for migrants in detention should be made by an independent first responder, since the Home Office is responsible for decisions to detain. Likewise, reasonable grounds decisions should be made by an independent, multi-disciplinary panel;
- Specialist, independent, face-to-face advice and support should be available to potential victims of trafficking in detention prior to an NRM referral being made;
- Training should be provided to IRC and healthcare staff to identify and support potential victims of trafficking.

### 3. Introduction

The UK government has made a clear commitment to identifying and protecting people who have been trafficked into exploitation and modern slavery, reflecting its obligations under regional and international law. In April 2017, Home Secretary Amber Rudd expressed her regret at the ‘thousands of poor souls being exploited and abused’ in brothels, nail bars and car washes across the country, and voiced her government’s commitment to ‘getting immediate support to victims when they are at their most vulnerable’.<sup>1</sup> Her predecessor (and now Prime Minister) Theresa May has described human trafficking and modern slavery as ‘the great human rights issue of our time’.<sup>2</sup>

In the context of detention reform, growing concerns about the welfare of people at risk of harm in immigration detention – including potential victims of trafficking – led the government to commission an independent Review into the Welfare in Detention of Vulnerable Persons, conducted by Stephen Shaw. Citing concerns about the ‘consequences [of detention] for welfare and vulnerability’, Shaw called for the government to reduce its use of immigration detention ‘boldly and without delay’.<sup>3</sup> In response, the Home Office released new Guidance on Adults at Risk in Immigration Detention, which recognised that victims of trafficking were ‘particularly vulnerable to harm in detention’ and sought to achieve ‘a reduction in the number of vulnerable people detained’.<sup>4</sup>

However, this political concern is not translating into protection for people who are detained before they can be identified as victims of trafficking. Around 30,000 men and women are detained by the Home Office in prisons and immigration removal centres (IRCs) across the UK each year. In a significant minority of cases, there are indicators that they have been trafficked to or within the UK for the purposes of exploitation.

Detention makes it very difficult for victims of trafficking to access specialist trafficking support and advice; develop the trust necessary to disclose their experiences of trafficking or cooperate with police investigations into offences committed by their traffickers; or receive a fair assessment of the likelihood that they have been trafficked. They become trapped in a vicious cycle of isolation, trauma, confusion and doubt.

It appears that the cumulative impact of these factors leads to unfairness in the operation of the National Referral Mechanism (NRM) for people in detention. Of a sample group of 16 Vietnamese men with indicators of trafficking in immigration detention this year, only nine had been referred into the NRM and only two of those had received a positive reasonable grounds decision, an acceptance rate that falls well below the national average of between

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<sup>1</sup> Amber Rudd, ‘Home Secretary commits more support to victims of slavery’ (12 April 2017), <https://www.gov.uk/government/news/home-secretary-commits-more-support-to-victims-of-slavery>

<sup>2</sup> Theresa May, ‘Defeating modern slavery’ (31 July 2016), <https://www.gov.uk/government/speeches/defeating-modern-slavery-theresa-may-article>

<sup>3</sup> Stephen Shaw, ‘Review into the welfare in detention of vulnerable persons: A report to the Home Office’ (January 2016), p.9, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/490782/52532\\_Shaw\\_Review\\_Accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/490782/52532_Shaw_Review_Accessible.pdf)

<sup>4</sup> Home Office, ‘Immigration Act 2016: Guidance on Adults at Risk in Immigration Detention’ (August 2016), paras.1, 11, <https://www.gov.uk/government/publications/adults-at-risk-in-immigration-detention>

74 and 90%.<sup>5</sup> Case studies throughout this briefing provide further illustration of the ways in which the decision to detain exacerbates the vulnerability and marginalisation of those whom the Home Secretary and Prime Minister are otherwise at pains to protect.

As the body responsible for making the decision to recognise someone as a victim of trafficking *and* the decision to detain them pending removal from the country, the Home Office is torn between two aims: identifying and supporting those who have been trafficked, and removing migrants with no leave to remain. The much greater political priority given to enforcing removals means that people with clear indicators of trafficking are being seen primarily as irregular migrants suitable for detention rather than as potential victims of exploitation. As a consequence, vulnerable victims of trafficking are unable to access a fair identification and decision-making process, and stay in detention without the support they need.

#### **CASE STUDY: HIEN**

Hien interpreted for many other Vietnamese people in detention, who often talked about their experiences of being trafficked, abused and exploited.<sup>6</sup> After a few months, Hien felt comfortable disclosing to us his own experiences of trafficking. He had been brought to the UK via China and Russia as a teenager, along with other children as young as 12. On arrival in the UK, he was forced to grow cannabis plants and was eventually arrested and convicted of cannabis cultivation. He did not feel able to talk about being trafficked with Home Office officials. Hien told us that he 'Never felt I was asked properly, never had the opportunity to discuss it. The Home Office ask very closed questions, they never trusted me so I never felt comfortable talking to them about it. They didn't believe my age when I arrived.' Hien was also afraid that the traffickers would harm his wife and son if he talked about them. Only when he met a legal aid solicitor in the centre, 14 months after he was convicted and sent to prison, did Hien finally receive specialist legal advice about trafficking. An NRM referral was made but it wasn't until two months later that Hien was released to live with his family, after almost a year in detention.

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<sup>5</sup> In 2013 and 2014. Home Office, 'Review of the National Referral Mechanism for victims of human trafficking' (November 2014), p.25.

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/467434/Review\\_of\\_the\\_National\\_Referral\\_Mechanism\\_for\\_victims\\_of\\_human\\_trafficking.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/467434/Review_of_the_National_Referral_Mechanism_for_victims_of_human_trafficking.pdf)

<sup>6</sup> Some details have been changed to protect the identity of individuals.

## 4. Human trafficking and the National Referral Mechanism

Briefly, human trafficking involves three main elements. Someone who has been trafficked will have been (a) deceived, forced or coerced into being (b) recruited or moved within a country or across an international border for the purposes of (c) exploitation.

### Human trafficking in international law

Trafficking is defined under international law as 'the recruitment, transport, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or 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, for the purpose of exploitation', where this exploitation might involve forced labour, domestic servitude, sexual exploitation or organ harvesting.<sup>7</sup>

Unlike those who have paid a smuggler to arrange transport for them, a person who has been trafficked will not be free to decide what to do once they are moved to or within the UK. They will be expected to provide labour or services that they have not freely agreed to, often to pay back the substantial debts that they are said to have incurred. They are often subject to serious physical, sexual or psychological violence, including threats to the safety of themselves or their loved ones if they fail to pay off their debts. They may have little opportunity to learn the language, laws or customs of the place they are trafficked to. All of these factors mean that it can be very difficult for people who have been trafficked to explain their situation clearly, even where they do come into contact with the relevant authorities.

The government estimates that there are up to 13,000 potential victims of modern slavery in the UK,<sup>8</sup> but only a fraction of these are referred into the government's trafficking decision-making process, the NRM.<sup>9</sup> The NRM was established in 2009 to comply with the UK's obligations under international law,<sup>10</sup> and involves a two-stage decision making process designed to identify and support those who have been subject to trafficking or modern slavery. The first reasonable grounds (RG) decision acts as an initial filter before a final conclusive grounds (CG) decision is made.

<sup>7</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, GA Res 55/25 (15 November 2000), Article 3(a),

<http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>; Council of Europe Convention on Action against Trafficking in Human Beings, Council of Europe Treaty Series No.197 (16 May 2005), Article 4(a), <https://rm.coe.int/168008371d>

<sup>8</sup> House of Commons Work and Pensions Committee, 'Victims of modern slavery', Twelfth Report of Session 2016-2017, HC 803 (30 April 2017), p.3

<https://www.publications.parliament.uk/pa/cm201617/cmselect/cmworpen/803/803.pdf>

<sup>9</sup> Home Office, note 5 above, p.15.

<sup>10</sup> Council of Europe Convention, note 7 above, Article 10.

**National Referral Mechanism process**

**'First responder:** An organisation designated a 'first responder' must refer the potential victim to one of the UK's Competent Authorities (CA). The list of first responders includes: the Police Force, UK Border Force, Medaille Trust, Barnardo's and others. First responders complete a referral form, which goes to the Modern Slavery Human Trafficking Unit (MSHTU), part of the National Crime Agency. The MSHTU decides which CA will deal with the referral.

**'Competent Authority:** The UK's two Competent Authorities are: the MSHTU, which deals with referrals from the police, local authorities, and NGOs; and The Home Office Visas and Immigration (UKVI), which deals with referrals identified as part of the immigration process.

**'Reasonable Grounds:** Within five working days a decision maker in the relevant CA will decide whether there are 'reasonable grounds' (RG) to believe the individual is a potential victim of modern slavery. If a victim is given a positive RG decision then they are, if they need it, allocated a place within a government funded safe house and granted a reflection and recovery period of at least 45 calendar days.

**'Conclusive Grounds:** During the reflection and recovery period the CA gathers further information. The threshold for a Conclusive Grounds decision (CG) is that on the balance of probability, 'it is more likely than not' that the individual is a victim of human trafficking or modern slavery. A positive CG decision means that the State has conclusively determined that they are a victim of modern slavery.'

House of Commons Work and Pensions Committee, 'Victims of Modern Slavery' (30 April 2017)<sup>11</sup>

The number of individuals seeking help is increasing each year. 3,805 referrals were made through the NRM in 2016,<sup>12</sup> up from 1,186 in 2012.<sup>13</sup> Those referred came from over 100 different countries, with Albania, Vietnam and the UK the top three countries of origin.

People detained under immigration powers who receive a positive reasonable grounds decision are generally released into supported accommodation (although, in some cases, release only occurs after an application for bail or judicial review is made). However, issues in the initial referral and reasonable grounds decision-making process mean that many detained migrants are refused a positive reasonable grounds decision.

On 16 October 2017, the Government announced new measures to improve the identification and support for victims of modern slavery, through reform of the NRM. The first measures to be announced included '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

<sup>11</sup> House of Commons Work and Pensions Committee, note 8 above, p.7.

<sup>12</sup> National Crime Agency, 'NRM statistics: End of year summary 2016' (7 April 2017), <http://www.nationalcrimeagency.gov.uk/publications/national-referral-mechanism-statistics/2016-nrm-statistics/788-national-referral-mechanism-statistics-end-of-year-summary-2016/file>

<sup>13</sup> Home Office, note 5 above, p.15.

somebody is a victim of modern slavery [and] an independent panel of experts to review all negative decisions, adding significantly to the scrutiny such cases currently receive'. However, it is too early to say whether these measures will start to address the particular issues facing victims of trafficking in detention.

#### **CASE STUDY: DUONG**

Duong came to the UK in search of his wife and two children, who had been trafficked here. After arriving in the UK, he was picked up off the street by people who forced him to work in a cannabis farm, where he was severely beaten. Arrested and charged with cannabis cultivation, he was advised to plead guilty so that he would be given a shorter sentence. He agreed, thinking that he would be able to continue searching for his family sooner. Instead, he was detained following his prison sentence. When we met Duong, he had never been asked about trafficking or referred into the NRM. He had been found unfit to fly because of a recent operation, but continued to be held in detention. He had never managed to make contact with his family and had often thought of killing himself while in prison and detention.

## **5. Evidence of policy failure: Vietnamese men in detention**

There has been little study or analysis of the ways in which the use of detention undermines the good intentions of UK trafficking policy. This briefing looks at a particular group of people who are affected by both trafficking and immigration detention. Evidence drawn from Detention Action's work with Vietnamese men detained in Harmondsworth, Colnbrook and The Verne IRCs reveals flaws in the implementation of trafficking policy and decision-making processes for people channelled into the detention system.

Vietnamese men detained from nail bars or cannabis farms are well-recognised as potential victims of trafficking, and are therefore likely to represent a best case scenario in terms of victim identification and support. They make up one of the largest groups of people referred into the NRM, often on the basis of forced labour in cannabis farms, factories, brothels and nail bars. They also make up a sizeable proportion of the detention estate: 101 Vietnamese nationals were in detention on 31 December 2016, 4% of the detained population, compared with 98 from Iraq and 100 from Afghanistan.<sup>14</sup> They tend to be particularly isolated in detention, often speaking no English and having little formal education.

Over the six months from December 2016 to June 2017, Detention Action met 16 Vietnamese men detained in Colnbrook, Harmondsworth and The Verne IRCs with clear indicators of trafficking, out of a total of 19 Vietnamese men encountered during this time.<sup>15</sup> Seven had been convicted of cannabis cultivation, while others had been picked up by immigration officers while working in a cannabis farm or nail bar. Many described being physically or sexually assaulted by traffickers who brought them to the UK through Russia, China and France, or being forced to work long hours in poor conditions to pay off the debts they owed to their traffickers. Seven men (44%) had Rule 35(3) reports documenting

<sup>14</sup> Home Office Immigration Statistics, April to June 2017, <https://www.gov.uk/government/publications/immigration-statistics-april-to-june-2017/how-many-people-are-detained-or-retained#data-tables>

<sup>15</sup> The period covers 7 December 2016 to 14 June 2016.

evidence of the trauma experienced at the hands of their traffickers and had been recognised as ‘adults at risk’ under Home Office policy.<sup>16</sup>

In addition to these indicators of trafficking, many of the men were marginalised or vulnerable for other reasons. 15 (94%) spoke little or no English, and 11 (69%) disclosed serious physical and mental health problems, including cancer, seizures, type 1 diabetes, tuberculosis, PTSD, anxiety, depression and suicidal ideation.

During this six month period, none of the men were removed to Vietnam, despite seven (44%) being detained for six months or more and two (13%) for more than a year. Ten (63%) were released on bail or temporary admission. Aside from their rights as potential victims of trafficking, these figures beg the question of the purpose of detaining these men, particularly given that many were unwell and had been recognised as adults at risk by the Home Office.

Nine of the 16 men who described indicators of trafficking had to our knowledge been referred into the NRM. It is unclear why almost half were not referred into the NRM, despite clear indicators of trafficking and the widespread recognition of the exploitation of Vietnamese men. While victims of trafficking are entitled to make an informed decision not to be referred, many told us that they had never heard of ‘trafficking’ or the NRM before coming into contact with Detention Action. There is evidence more generally that appropriate NRM referrals are not always made for people in detention. The 2013 HM Inspector of Prisons’ inspection of Yarls Wood IRC found that ‘detainees who had clear trafficking indicators ... had not been referred to the national trafficking referral mechanism as required’.<sup>17</sup>

Of the nine NRM referrals made, only two were given an initial positive reasonable grounds decision, an acceptance rate of just 22%.<sup>18</sup> This figure is low compared to the 74-90% of NRM referrals that receive a positive reasonable grounds decision overall.<sup>19</sup> Being detained therefore appears to be associated with a much lower acceptance rate at the reasonable grounds stage.

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<sup>16</sup> Adults at Risk, above note 4; Home Office, ‘Detention Services Order (DSO) 08/2016: Management of adults at risk in immigration detention’ (February 2017), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/594770/DSO\\_Adults\\_at\\_risk.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/594770/DSO_Adults_at_risk.pdf)

<sup>17</sup> Her Majesty’s Inspector of Prisons, ‘Report on an unannounced inspection of Yarls Wood IRC’ (2013), p.6, <http://www.justice.gov.uk/downloads/%20publications/inspectorate-reports/hmipris/immigration-removal-centre-inspections/yarls-wood/Yarls-Wood-2013.pdf>

<sup>18</sup> This figure compares with 40% of Vietnamese referrals who have received a positive reasonable grounds decision from 2009-2016. This low overall figure may reflect the fact that the majority of Vietnamese potential victims of trafficking are detained. Independent Anti-Slavery Commissioner, ‘Combating modern slavery experienced by Vietnamese nationals en route to, and within, the UK’ (2017), p.15, <http://www.antislaverycommissioner.co.uk/media/1159/iasc-report-combating-modern-slavery-experience-by-vietname-nationals-en-route-to-and-within-the-uk.pdf>

<sup>19</sup> In 2013 and 2014. Home Office, note 5 above, p.25. Detention Action submitted several FOI requests to the Home Office for statistics about NRM referrals and reasonable grounds decisions for those detained under immigration powers, but these were refused on the basis that this would require a manual check of individual records.



Solicitors and specialist NGOs working with people who have been trafficked describe the reasonable grounds decision as a ‘very low threshold’,<sup>20</sup> a description that is echoed in the Home Office’s own guidance to decision-makers.<sup>21</sup> The test that should be applied is that ‘I suspect but cannot prove’ that the person has been trafficked.<sup>22</sup> However, it appears that people in detention are being assessed differently, with the result that they do not access the support of the NRM, including the mandated period of reflection and recovery.

All of the nine referrals were made by the Home Office, rather than a specialist NGO or other first responder. In detention, the Home Office also makes both the reasonable grounds decision and decisions on detention and immigration status, a potentially problematic conflict of interest.

## 6. Analysis

The NRM therefore appears to be operating differently for people in detention. Although the sample is small, the fact that only two out of nine NRM referrals resulted in a positive reasonable grounds decision suggests that the same low threshold is not being applied for people in detention as for people in the community. Several other men in this sample with indicators of trafficking had not been referred into the NRM at all. While many victims of trafficking also go unidentified in the community, the fact that the Home Office is detaining them and examining their cases makes it harder to explain how indicators can be missed.

This raises questions about the intersection of the government’s detention and trafficking policies. The detention of potential victims of trafficking undermines the Home Secretary’s aim of ‘getting immediate support’ to victims of trafficking so that they can recover from their experience, tell their story clearly and cooperate with authorities to ensure the prosecution of their traffickers.<sup>23</sup> It also undermines the aim of ensuring that people at risk of being harmed by detention are not detained. People in detention who have been trafficked are doubly disadvantaged: they are subject to the harmful impacts of detention and will also find it more difficult to get access to the support and recognition they need.

There are several stages at which the Home Office’s policies and practices fail potential victims of trafficking who are detained. One relates to the decision to detain; another involves the lack of effective safeguards against the decision to maintain detention; a third arises because of the difficulty in accessing specialist trafficking advice and support in detention.

### 6a. A Home Office conflict of interest

The Home Office’s dual responsibilities – to identify and support victims of trafficking, and to detain and remove irregular migrants – are in tension with one another. Factors that might be considered indicators of trafficking are typically framed as ‘immigration control factors’ and seen as indicators of poor character and risk of future offending or absconding.

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<sup>20</sup> House of Commons Work and Pensions Committee, note 8 above, p.8.

<sup>21</sup> Home Office, ‘Victims of modern slavery: Competent Authority guidance’ (21 March 2016), p.20, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/521763/Victims\\_of\\_modern\\_slavery\\_-\\_Competent\\_Authority\\_guidance\\_v3\\_0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/521763/Victims_of_modern_slavery_-_Competent_Authority_guidance_v3_0.pdf)

<sup>22</sup> Home Office, note 21 above, pp.50-51.

<sup>23</sup> Rudd, note 1 above.

*'You are likely to abscond if given temporary admission or release. You have failed to observe UK immigration laws by entering by clandestine means; You have not produced satisfactory evidence of your identity, nationality or lawful basis to remain in the UK; You do not have enough close ties to make it likely that you will stay in one place; You have shown a lack of respect for UK law as evidenced by your conviction for a serious crime; You have been assessed as posing a serious risk of harm to the public because you have committed the following offence – producing a Class B controlled drug (cannabis); There is a significant risk that you will reoffend.'* **Home Office monthly progress report given to victim of trafficking, January 2017**

All of the 16 Vietnamese men with indicators of trafficking supported by Detention Action were detained because of one or more of these immigration control factors, despite recognition that these factors are also potentially associated with a history of trafficking.<sup>24</sup> They had often entered the UK using false documents arranged for them by their traffickers. The majority had been arrested in a police or immigration raid on a nail bar or cannabis farm, where they had been forced to work in exploitative conditions. Seven had been prosecuted for cannabis cultivation, and in some cases advised to plead guilty by duty solicitors, despite widespread recognition of the link between cannabis farms and trafficking networks.<sup>25</sup> Apparent absconding may in fact have been the result of re-trafficking.

Where someone is detained for reasons of immigration control, an NRM referral will most likely to be made by the Home Office – the body also responsible for making the decision to detain, as well as for making the reasonable grounds decision itself – rather than by an independent First Responder. The Council of Europe's Group of Experts on Action against Trafficking in Human Beings (GRETA) has observed that, 'as [the Home Office] is a designated First Responder – as well as being a Competent Authority – there are many cases in which no other agency is involved in the identification process, the whole decision making being in the hands of the same UKBA official' without any independent input.<sup>26</sup> This creates a conflict of interest with unhelpful consequences for potential victims of trafficking in detention.

There is growing recognition of this conflict of interest, including criticism of the Home Office's 'overemphasis on immigration status' for victims of trafficking from outside Europe by the University of the West of England and Unseen.<sup>27</sup> According to a recent report by Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services, this emphasis on immigration status also affects police decision-making, with 'Some officers primarily treat[ing] potential victims of modern slavery and human trafficking as immigration

<sup>24</sup> UN Office on Drugs and Crime, 'Evidential issues in trafficking in persons cases' (2017), [https://www.unodc.org/documents/human-trafficking/2017/Case\\_Digest\\_Evidential\\_Issues\\_in\\_Trafficking.pdf](https://www.unodc.org/documents/human-trafficking/2017/Case_Digest_Evidential_Issues_in_Trafficking.pdf)

<sup>25</sup> Independent Anti-Slavery Commissioner, 'Annual report 2015-2016', p.22, <http://www.antislaverycommissioner.co.uk/media/1097/annual-report-2016.pdf>; Group of Experts on Action against Trafficking in Human Beings (GRETA), 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom' (2012), para.228, <https://rm.coe.int/168067a080>

<sup>26</sup> GRETA, note 25 above, para.219.

<sup>27</sup> University of the West of England and Unseen, 'The National Referral Mechanism pilots: A review of the training' (2016), p.19, <http://www.unseenuk.org/uploads/20160609115454807.pdf>

offenders'.<sup>28</sup> However, there has been little analysis of the adverse consequences that follow.

First, given the political emphasis on removing irregular migrants from the UK, there is a perverse incentive for the Home Office to overlook indicators of trafficking for migrants in detention who could otherwise be removed. Echoing the findings of the HMIP report on Yarl's Wood IRC, the Poppy Project has encountered a number of cases in detention where 'despite clear indicators during a screening interview, no referral has been made into the NRM and detention has been maintained'.<sup>29</sup> This is borne out by our sample, in which seven Vietnamese men with indicators of trafficking had not been referred into the NRM.

Second, where an NRM referral is made, there is a risk that Home Office case owners treat this as a tick-box exercise rather than a genuine assessment of an individual's history of exploitation. In his review of vulnerability in detention, Stephen Shaw observed that NRM referrals made on behalf of those in detention 'were said to have been made without consent, and could be incomplete'.<sup>30</sup> Similarly, the Independent Chief Inspector of Borders and Immigration has criticised the Home Office for failing to keep sufficiently detailed and accurate records of NRM referrals made in short term holding facilities.<sup>31</sup> Detention Action has seen evidence supporting this conclusion, including an NRM referral made by the Home Office in which none of the indicators had been ticked and the only information included was one sentence explaining that the person had sought asylum and claimed to be a victim of torture.

#### CASE STUDY: CHI

Chi was trafficked from Vietnam as a teenager. He was beaten by his traffickers in France before being smuggled across to the UK in a lorry. On arrival, he was locked in a house with another boy where they were forced to grow cannabis. Chi was arrested from this house and given a 16 month sentence for cannabis cultivation, aged 16. Around this time, he was referred into the NRM and received a negative reasonable grounds decision. After spending 8 months in prison, he was detained for almost a year. Despite having a solicitor who arranged for a new NRM referral to be made and lodged a judicial review of his second negative reasonable grounds decision, Chi continued to be detained. Chi said he had been refused bail because 'they say if I go out, I will make cannabis again. Every judge say this.' A few weeks later, Chi was released into supported accommodation by the Home Office, after 11 months in detention.

<sup>28</sup> Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services, 'Stolen freedom: The policing response to modern slavery and human trafficking' (2017), p.82, <https://www.justiceinspectors.gov.uk/hmicfrs/wp-content/uploads/stolen-freedom-the-policing-response-to-modern-slavery-and-human-trafficking.pdf>

<sup>29</sup> Poppy Project submission to the Shaw Review. Shaw, note 3 above, para.4.47.

<sup>30</sup> A finding echoed by Shaw, note 3 above, para.1.22.

<sup>31</sup> Independent Chief Inspector of Borders and Immigration, 'An inspection of Border Force's identification and treatment of potential victims of modern slavery: July to October 2016', recommendation 4.1, available at <http://icinspector.independent.gov.uk/wp-content/uploads/2017/02/Potential-Victims-of-Modern-Slavery-Inspection-report.pdf>

## 6b. Lack of effective procedural safeguards

Once a decision has been made to detain someone, Home Office policies are designed to ensure that people at risk of harm in detention are identified and released. However, the process for identifying someone as being at risk of harm because of a history of trafficking remains uncertain. Home Office guidance offers little clarity. The 2016 Guidance on Adults at Risk in Immigration Detention was intended to strengthen the presumption against detention of victims of trafficking. It defines as an ‘adult at risk’ anyone who has been identified (by themselves or someone else) as having been trafficked. As a result, ‘the presumption will be that the individual will not be detained’.<sup>32</sup> This policy appears to indicate a presumption of release of anyone who self-identifies as a victim of trafficking or consents to being referred into the NRM.<sup>33</sup> An NRM referral, after all, is only made where there are indicators of trafficking.

However, long-standing Home Office guidance to NRM decision-makers explains that an individual is ‘usually released from immigration detention if they receive a positive reasonable grounds decision... unless, in the particular circumstances, their detention can be justified on grounds of public order’.<sup>34</sup> This indicates that it is the positive reasonable grounds decision (rather than self-identification or an NRM referral) that triggers release. In practice, people do indeed tend to be released only after a positive reasonable grounds decision, if at all; in some cases, release only occurs after a subsequent application for bail or judicial review is made. It seems that the apparently stronger protection offered by the new Adults at Risk policy is not translating into any change in practice.

The positive reasonable grounds stage of the NRM therefore acts as the primary safeguard against the detention of people who have been trafficked. However, our evidence suggests that potential victims of trafficking in detention are much less likely to be given a positive reasonable grounds decision. They may also have to wait for weeks for a reasonable grounds decision to be made or a negative decision to be reconsidered.<sup>35</sup> Even where someone is given a positive reasonable grounds decision or a Rule 35(3) report documenting experiences of trauma at the hands of their traffickers, this evidence of vulnerability may be outweighed by their perceived risk of absconding or reoffending under Home Office policy.<sup>36</sup>

## 6c. The impact of detention on individual wellbeing and access to the NRM

Detention is not an appropriate place for victims of trafficking. People who are detained must cope with the uncertainty, isolation and possible re-traumatisation of detention, in addition to the difficulty of managing any pre-existing physical or psychological conditions. Evidence suggests that any period of detention longer than a month has a significant impact on mental health and that that impact is compounded because of the lack of a time limit on immigration detention in the UK.<sup>37</sup> There is a growing body of evidence documenting the

<sup>32</sup> Adults at Risk, above note 4, para.8.

<sup>33</sup> Compare Shaw, note 3 above, p.224.

<sup>34</sup> Home Office, note 21 above, pp.57-58.

<sup>35</sup> A recent High Court decision found that ongoing detention arising from a delay in making a reasonable grounds decision was unlawful. *XYL, R (on the application of) v SSHD* [2017] EWHC 773 (Admin) (11 April 2017), [http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2017/773.html&query=\(xyl\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Admin/2017/773.html&query=(xyl))

<sup>36</sup> Home Office, note 21 above, pp.57-58.

<sup>37</sup> All Party Parliamentary Group (APPG) on Refugees and All Party Parliamentary Group (APPG) on Migration, ‘The report of the inquiry into the use of immigration detention in the UK’ (2015), p.33, <https://detentioninquiry.files.wordpress.com/2015/03/immigration-detention-inquiry-report.pdf>

harmful effects of indefinite detention on mental and physical wellbeing, often with severe, long-lasting consequences.<sup>38</sup>

It is also widely recognised that detention has a detrimental impact on people who have experienced trafficking and exploitation, particularly where ‘experiences of detention are reminiscent of a trafficking situation’.<sup>39</sup> Home Office policy recognises that a history of trafficking or modern slavery will make someone ‘particularly vulnerable to harm in detention’,<sup>40</sup> a position reinforced by Stephen Shaw in his 2016 review of vulnerability in detention.<sup>41</sup> The UNHCR Detention Guidelines and Vulnerability Screening Tool recommends that alternatives to detention be considered for people who may have been trafficked,<sup>42</sup> and GRETA was ‘concerned by reports from NGOs regarding the high number of potential victims of trafficking who are detained’ in the UK,<sup>43</sup> as was the UN Committee Against Torture.<sup>44</sup>

Nor is the detention environment conducive to building up a relationship of trust and understanding that would facilitate cooperation with the authorities and the disclosure of experiences of trafficking. The Poppy Project, a First Responder, has argued that ‘[t]here are compelling reasons why victims of trafficking should be given time to disclose what has happened to them ... without being in detention’.<sup>45</sup> Similar concerns have been raised by the Independent Chief Inspector of Borders and Immigration, who recognises that features associated with detention – including officers having to ‘stand guard’ and carry handcuffs and batons – will ‘further reduc[e] any chance of building trust’.<sup>46</sup> In addition to potentially undermining their health, wellbeing and immigration case, detaining people who have been trafficked therefore also has the ‘concerning consequence’ of undermining the government’s aim to increase prosecutions of traffickers.<sup>47</sup>

Victims of trafficking in immigration detention also have limited access to specialist trafficking advice, support and representation. They are only entitled to immigration representation from one of a handful of firms contracted by the Legal Aid Agency to work in each centre, and some of these advisors have limited experience in working with people who have been trafficked. People in detention do not face such restrictions on representation from solicitors working in other areas of law (including criminal, public and family law), but they often do not know this, and cannot attend offices to ask to be represented.

Despite the fact that ‘[m]uch depends upon the access a person has to legal advice and representation to be able to put forward the evidence that he/she has been trafficked and is

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<sup>38</sup> For a recent summary, see the reviews conducted by Mary Bosworth and Jeremy Johnson at the request of Stephen Shaw. Shaw, note 3 above, Appendices 4 and 5.

<sup>39</sup> Poppy Project submission to the Shaw Review. Shaw, note 3 above, para.4.48.

<sup>40</sup> Adults at Risk, above note 4, para.11.

<sup>41</sup> Shaw, note 3 above.

<sup>42</sup> UNHCR, ‘Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention’ (2012), para.62, <http://www.refworld.org/docid/503489533b8.html>; UNHCR, ‘Vulnerability screening tool’ (2016), para.7.4.1, <http://www.refworld.org/pdfid/57f21f6b4.pdf>

<sup>43</sup> GRETA, note 25 above, para.333.

<sup>44</sup> UN Committee Against Torture, ‘Concluding observations on the fifth periodic report of the United Kingdom’ (May 2013), para.30, <http://www.crae.org.uk/media/63835/cat-concluding-observations-may-2013.pdf>

<sup>45</sup> Poppy Project submission to the Shaw Review. Shaw, note 3 above, para.4.49.

<sup>46</sup> Independent Chief Inspector of Borders and Immigration, note 31 above, paras.8.10-8.11.

<sup>47</sup> APPGs on Refugees and Migration, note 37 above, pp.60-61.

in need of protection’,<sup>48</sup> a referral to the NRM may be made by the Home Office before the person has been able to seek advice from a solicitor or specialist organisation, which also makes it difficult for the person to give their ‘meaningful consent’.<sup>49</sup> There is also little opportunity for people in detention to seek ongoing casework support prior to a positive reasonable grounds decision from organisations with specific trafficking expertise like the Refugee Council, Children’s Society or Helen Bamber Foundation, all of which primarily work with people outside detention. This lack of access to specialist advice is compounded for people held under immigration powers in prison, with no access to telephone, internet or the immigration advice surgeries offered in IRCs.

This lack of access to specialist advice and support undermines people’s ability to disclose and seek recognition of their status as a potential victim of trafficking who should not be in detention, as well as their capacity to seek redress where a poor quality NRM referral is made. Recognising this gap, GRETA has recommended that the UK government ‘improve the identification of victims of trafficking in detention centres, by giving access to such centres to specialised NGOs and enabling detained irregular migrants to have access to legal assistance’.<sup>50</sup>

## 7. Conclusion: Unfairness in the operation of the NRM in detention

Each of these factors contributes to unfairness in the operation of the NRM for people held in immigration detention. People in detention are denied access to an environment that is conducive to recovering from the trauma associated with trafficking or to building relationships with trusted advisors that allow them to fully disclose their experiences. With less opportunity to recover and speak out about their history of exploitation, it becomes more difficult for them to access advice and recognition, or to secure their release from detention. NRM referrals are generally made, if at all, by the same entity that is responsible for detaining them and making a reasonable grounds decision. This Home Office conflict of interest, along with the limited access to independent, specialist support, advice and referrals, can compromise the fairness of the process.

## 8. Recommendations

- More effective screening should ensure that potential victims of trafficking are not detained, and instead are given support and advice. The Group of Experts on Action against Trafficking in Human Beings provides examples of best practice, including taking individuals encountered during police raids on cannabis farms to a safe place rather than police custody, for assessment of whether they are victims of trafficking;<sup>51</sup>
- Specialised and independent case management should support people to stabilise in the community and engage with the National Referral Mechanism and immigration processes, managing any risks of absconding or re-trafficking;
- A referral to the NRM should trigger release from detention, since it is only made when there are indicators of trafficking. Potential victims of trafficking should not wait in

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<sup>48</sup> GRETA, note 25 above, para.226.

<sup>49</sup> House of Commons Work and Pensions Committee, note 8 above, para.13. Compare Shaw, note 3 above, para.1.22.

<sup>50</sup> GRETA, note 25 above, para.233.

<sup>51</sup> GRETA, note 25 above, para.228.

detention for a positive reasonable grounds decision, which evidence suggests is difficult to obtain in detention;

- NRM referrals of migrants in detention should be made by an independent first responder, since the Home Office is responsible for decisions to detain. Likewise, reasonable grounds decisions should be made by an independent, multi-disciplinary panel that is seen as ‘credible and independent’, following the lead of a recent NRM pilot;<sup>52</sup>
- Specialist, independent, face-to-face advice and support should be available to potential victims of trafficking in detention prior to an NRM referral being made;
- Training should be provided to IRC and healthcare staff to identify and support potential victims of trafficking.

## 9. About Detention Action

Detention Action is a national charity established in 1993 that aims to change the way that migrants are treated by immigration detention policy in the UK. Detention Action defends the rights and improves the welfare of people in detention by combining support for individuals with campaigning for policy change. Detention Action works in Harmondsworth and Colnbrook Immigration Removal Centres (IRCs), near Heathrow Airport in London, and the Verne IRC in Portland, Dorset.

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Written by Susannah Willcox.

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<sup>52</sup> Nicola Ellis, Christine Cooper and Stephen Roe, ‘An evaluation of the National Referral Mechanism Pilot’ (2017), p.31, [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/653703/evaluation-national-referral-mechanism-pilot-horr94.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/653703/evaluation-national-referral-mechanism-pilot-horr94.pdf)