

## The Criminalisation and Imprisonment of Migrant Victims of Trafficking

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### Abstract

This paper outlines the key elements of research that was carried out between 2010 and 2011 at the Institute of Criminology, University of Cambridge by Hales and Gelsthorpe (2012) on the Criminalisation of Migrant Women in terms of goals, research methods, key findings and resultant policy and practice implications. It then goes on to document developments in the UK since publication of the findings and conclusions that we can draw from these in terms of meeting the challenges of combatting human trafficking.

### Key words

Prison; women; UKHTC; Criminal Justice System

### Resumen

Este artículo traza los elementos claves -objetivos, métodos de investigación, hallazgos principales e implicaciones resultantes sobre políticas y prácticas- de la investigación *Criminalisation of Migrant Women* (criminalización de mujeres migrantes) que realizaron Hales y Gelsthorpe (2012) entre 2010 y 2011 en el Instituto de Criminología de la Universidad de Cambridge. Después, documenta los avances en el Reino Unido desde la publicación de los hallazgos, y las conclusiones que podemos extraer de aquellos en términos de superación de los desafíos que plantea la lucha contra la trata de personas.

### Palabras clave

Cárcel; mujeres; Centro de Lucha contra la Trata del Reino Unido; sistema de justicia penal

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## 1. Introduction

By the year 2009 the work of several key organisations, including the International Organisation for Migration and Anti-Slavery International, had led to awareness of the extent of national and international people trafficking and exploitation by smugglers and agents who offered to assist people in their migration to seek work or asylum. Within the UK, public knowledge had been influenced by the setting up of the UK Human Trafficking Centre in October 2006, the work of a number of human rights organisations, and media interest in some cases. However, to date, and at a time when the percentage of foreign women in custody continued to increase, no formal recognition of the numbers of potential trafficking victims in custody on criminal charges had been generated, nor had any systematic prison based research been conducted to provide evidence about how these individuals had been managed within the Criminal Justice and Immigration systems.

Our research on the criminalisation of migrant women (Hales and Gelsthorpe 2012), funded for 18 months by the Economic and Social Research Council (ESRC),<sup>1</sup> aimed to fill this knowledge gap. This research was carried out between May 2010 and November 2011 with migrant women in prison and the Immigration holding estate in the South-East of England. The key aims were to gather information about the numbers of migrant women being processed through the criminal justice and immigration systems within England and Wales. Within the context of this picture we aimed to see whether there were any women who were victims of trafficking, smuggling and *work under duress* in custody, and by examining case management identify the extent of compliance with the European Convention on Trafficking and the Convention of Human Rights.

This article aims to highlight some of the key findings of this research, resultant policy and practice recommendations and to look briefly at developments within the UK since its publication in 2012 and the workshop on human trafficking held at the International Institute for the Sociology of Law in June 2014.

At the time that this research was conducted the latest published figures on the female prison estate showed a 34 per cent increase in number of women prisoners between 1999 and 2009. The number of new receptions peaked at 12,676 in 2008, with a gradual fall since then. However, during this period, within the population where nationality has been recorded, receptions of foreign national prisoners had increased from 8 to 19 per cent of the total. In 2009 foreign nationals accounted for 26 per cent of all new untried receptions (within the UK those denied bail whilst awaiting trial or sentencing are held in local prisons which also hold sentenced prisoners) and for 16 per cent of receptions with an immediate custodial sentenced (Ministry of Justice 2010a). Over this time there had been a similar increase in the number of women held within the immigration estate (Immigration Removal Centres).

Alongside these increases we also note a shift in the balance of offence categories. The number of foreign national women who had been imprisoned for drug offences decreased between 2005 and 2009 from 68 per cent to 48 per cent, with indications that an increasing number had been charged with offences related to cannabis production. This is indicated by the fact that most Vietnamese prisoners are charged with offences in relation to cannabis production and the Ministry of Justice (2010a) data show Vietnamese to be the third highest foreign nationality group. At the same time, the proportion of foreign national women charged with offences of fraud and forgery increased from 11 per cent to 24 per cent. This contrasted dramatically with UK nationals where the percentage on fraud charges had remained stable at 3 per cent (Ministry of Justice 2010b). Data on these offence categories given in the report by the Women and Young People's Group

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(Ministry of Justice 2008) demonstrated that one third had been charged in relation to their immigration status or related offences of deception and fraud related to entering, remaining, leaving or securing work within the UK. There was also evidence of increased numbers in the foreign prisoner group involved in organised illegal activity such as selling of fake goods or street robberies. Data from voluntary sector organisations (fpwp/Hibiscus and the Detention Advice Service) working with foreign women in custody indicated that those charged within this offence group tended to be migrant women, that is, those who had entered the UK to seek work or asylum, rather than as temporary visitors or for reasons of current employment, education or marriage.

This period of growth of migrant women in custody and the immigration estate is perhaps not surprising given what a number of writers on current changes within the criminal justice procedures in Europe have described as the “criminalisation of migrants” (Palidda 2011). Within the UK, the focus had been on tightening up of border security, the introduction of a points based system for those seeking rights to enter for work, and raids on premises to identify and prosecute those employing illegal migrants, which appears to have been resultant on implementation of the Asylum and Nationality Act 2006 in February 2008. This was also a time of tighter regulation of foreign nationals in terms of rights to remain in the country and automatic deportation provisions came into effect in August 2008 for non-EU nationals who had been sentenced to a period of imprisonment of at least 12 months (see UK Borders Act 2007). These acts necessitated much closer working and information sharing between the prisons and the United Kingdom Border Agency Criminal Casework Directorate (hereinafter: UKBA CCD). As foreign prisoners were rarely deported at the Earliest Release Date (hereinafter: ERD), this had contributed to a parallel growth of those held solely on Immigration warrants. The legal routes of entry into the country, to seek work or asylum and legally accessing unskilled employment once within the UK, had therefore been closing down at a time when women seeking asylum or the opportunity to support their families by seeking labour overseas and sending money home had been increasing. Many of these women had been employed in the informal sector in their country of origin and, as pointed out by the Global Alliance Against traffic in Women (2010), there is a strong link between trafficking, migration and labour opportunities. In addition, non-EEA (European Economic Area) over-stayers or undocumented migrants had found that access to work in the informal sector has become increasingly difficult in areas where they were competing with increasing numbers of A8 and A2 nationals.<sup>2</sup>

Interlinked with this was the increasing criminal activity of illegal recruitment, transportation and employment of these migrants, who were effectively managed as profitable commodities to be bought, sold and worked in slave like conditions and whose illegal status was used as a coercive tool by their agents (Webb and Burrows 2009). In 2008 the UK Government ratified the Council of Europe Convention on Action against Trafficking in Human Beings (based on the Council of Europe Framework Decision 2002/629/JHA), to challenge this area of crime and ensure victim protection (Council of Europe 2005). This was implemented in 2009, with the imposition of custodial penalties for those found guilty of offences of trafficking. The Convention adopted the Palermo Protocol definition of *trafficking* as “acts such as recruitment, receipt, transportation, by means such as threats, coercion, deception, abuse of position of vulnerability, for the purpose of exploitation such as sexual exploitation, forced labour or slavery” (United Nations General Assembly 2000, Article 3). It also accepted that the relationship with smugglers, whose assistance is initially sought to escape persecution, could become equally abusive and fall within the same category. In the implementation of the law

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<sup>2</sup> A8 refers to the eight countries from Eastern Europe who joined the EU in 2004 (Poland, Hungary, Slovakia, Latvia, Lithuania, Czech Republic, Slovenia and Estonia), and A2, to the two who joined in 2007 (Romania and Bulgaria).

however, problems were identified in charging those who exploit trafficked labour without evidence of their direct involvement in the recruitment and transport sides. Additional legislation was thus introduced in Section 71 of the Coroners and Justice Act 2009 of holding someone in slavery or servitude or requiring a person to perform forced or compulsory labour. This came into effect in April 2010.

During the course of this research, the 2002 Framework Decision was replaced by a new fuller EU Directive that the UK government applied to opt into in April 2011, with a two year deadline for transposition and, in the new strategy on trafficking announced in July 2011, the UK government committed to improvement of victim care arrangements.

## 2. Research Methods

An initial aim of our research was to analyse quantitative data in England and Wales over a twelve month period to produce a clear profile of charges, court outcomes and numbers of migrant women in custody. Whilst we could produce a general overview of this data we were somewhat thwarted in our attempts to look at court data because the Ministry of Justice does not publish offence data in a form which facilitates analysis of offences by nationality of offender. Moreover, the data on offences is only presented in broad categories rather than according to specific offences.

A second aim was to conduct an analysis of qualitative data on the case management of potential victims and to look at this in the context of the national picture, as evidenced by data on those processed through the courts, prison and immigration estate. Individual interviews with potential victims were carried out at six key sites within the female prison and immigration estate in the south-east of England. Permission was granted to interview women in HMPs Bronzefield, Holloway, Morton Hall, Drake Hall, Downview and Yarl's Wood Immigration Removal Centre. Half way through the research, Morton Hall ceased to serve as a women's prison. To identify women in this target group, presentations were made to groups of foreign national women in the selected sites to explain the aims of the research, what was meant by the words such as *trafficking* and *domestic servitude* and to encourage those who might be victims to attend an initial meeting with the researchers. When this approach failed to identify a sufficiently large number of people, further initial screening interviews were sought with migrant women who had been charged with offences of deception and fraud to enter, remain or secure work within the UK, entry without identity of nationality or citizenship [section 2 Asylum and Immigration (Treatment of Claimants) Act 2004], or involvement in organised illegal work activities such as cannabis production or street crime. Women arrested for other offences such as drugs importation who put themselves forward for initial meetings, stating that their experiences met those outlined in the definition, were also interviewed. We were also guided to potential interviewees by prison diversity staff and fpwp/Hibiscus (a voluntary sector organisation working with foreign nationals in the female prison estate which has since changed its name to Hibiscus Initiatives).

Along with interviewee consent, basic information was gathered within all the initial screening interviews. Where the initial interview indicated that the woman had entered the country in the hands of traffickers or smugglers and/or had been working under duress, that is, met the criteria for our target group, we sought consent for future interviews and to monitor management of their cases. This was carried out through follow-up interviews, observation of relevant court hearings, communication by letter, gathering of relevant documentation and discussions with relevant others, with written consent from the interviewee.<sup>3</sup> Where possible, we

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<sup>3</sup> These letters were written in English, with a translation attached where the recipient stated that they could not read English (the English version was included to facilitate inspection of mail by prison staff). Letters were not sent where the interviewee was illiterate.

remained in contact and carried out subsequent interviews as the women moved to other prisons, Yarl's Wood Immigration Removal Centre, and the community, for those who were not deported.

The interview format was prepared in anticipation that the most likely victims would not have English as a first language, could well be traumatised by their experiences, and might still be in fear of those who brought them into the U.K. or who had controlled them once here. Great care was taken in guaranteeing confidentiality and the anonymity of data gathered. Particular attention was given to the choice of professional interpreters.

The aim was to gradually gather relevant data in several key areas, but to allow those interviewed to recount their experiences and feel in control of the meeting in compliance with World Health Organisation guidelines (see Zimmerman and Watts 2003). The key areas of discussion revolved around:

- The socio-economic background of the woman and her reasons for leaving her country of origin and seeking entry to the UK.
- Method of contact and recruitment by the travel facilitator, amount paid and information offered in terms of work, payment, intended destination and legality of position on arrival.
- Journey to the UK, including work on-route, control of travel documents and stated experience of threats or coercion to self and others.
- Access to and control over work choices once within the UK, payment received and experiences of coercion or violence and, for those who escaped from a controlled work situation in the UK, awareness of options and support available.
- Stated problems in relation to physical and mental health and indicators of stress evidenced at interviews.
- The criminal justice proceedings, from point of arrest to release from custody, with a focus on facilitation of and response to disclosures.
- The immigration proceedings, including experiences of initial asylum interviews, full interviews, appeal cases, and outcomes.
- In respect to criminal justice and immigration proceedings, access to legal representation, appropriate interpreting support and level of understanding expressed.
- Referral for assessment as victims of trafficking through the National Referral Mechanism and outcomes.
- Access to support and assistance in custody and back in the community.
- Childcare responsibilities and management of contacts.

We did not use a formal interview schedule therefore, but approached the interviews with a list of topics to cover. It should be emphasised that extreme care was taken in the interviews, given the sensitivity of the topics. In many cases it was only at the second or third interview that the women felt able to start disclosing their experiences to the researchers.

### **3. Research findings**

#### *3.1. Screening sample and key characteristics of the target group*

The total number of women interviewed over the study period of the research was 103. From these initial screening interviews 58 women fell within the research target group, of whom two were later re-assessed as children.<sup>4</sup> Forty-three had

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<sup>4</sup> Although we use the word *women* to describe those interviewed, readers should note that this group includes these two children.

entered the UK in the hands of traffickers, five had entered independently but had experienced work under slavery or servitude-like conditions within the UK, and 10 had entered the country in the hands of smugglers who reportedly abused the control they held over the women.

Conclusions as to victimisation of trafficking were drawn from accounts of recruitment, transportation, exploitation and evidence of physical and emotional abuse in line with the European Convention on Trafficking. Patient confidentiality prevented verification of medical evidence from healthcare professionals within the prison and immigration removal centres. Some medical reports used in asylum applications were however shared by the interviewee. Conclusion as to the victimisation of those who had entered the UK independently, but worked under duress or slavery like conditions within the UK was made in relation to the legal definition as outlined in Section 71 of the Coroners and Justices Act 2009. Those who entered in the hands of smugglers were also included where there was evidence of a link between abuse of power by the smuggler and the resultant criminalisation of their victims.

After the initial screening interview, follow-up interviews and the monitoring of cases focused on the 58 who fell within the target group. 59 follow up interviews were carried out with women in custody; 49 in prison and ten in Yarl's Wood Immigration Removal Centre. 15 interviews were then carried out at a later stage when those not deported were back in the community after release from custody. 33 court appearances were also observed and a number of women also took up the offer of maintaining contact by letter.

Women of 39 different nationalities were interviewed at the screening stage, with the highest numbers being: Nigerian (21), Vietnamese (18), and Chinese (12) in terms of total interviews carried out and the identification of victims of trafficking and work under slavery and servitude.

Within the target group the average age at point of arrest was 30, and 25 at point of departure from their country of origin. Five of the victims were children; two aged 14, two aged 15 and one aged 16 when taken from their country of origin. In relation to age it should be noted that from point of arrest, actual age is assumed by those who manage the case through the criminal justice and immigration system to be that on documents in possession of the arrestee, even if they are being charged with having false documents. This is only amended if formally contested. This occurred with two interviewees, both of whom were under the age of 17 at point of arrest and detention in the adult estate.

Six women were pregnant at point of arrest and four gave birth whilst in custody. Seven others stated they had dependent children within the UK and 21 had children and dependant others in their countries of origin. Most dependants were their own children, but also included financially dependent siblings. Data in relation to this is missing in nine cases. Only one of the women interviewed had been in a marriage or formal relationship that offered emotional and financial security at the time of departure from her country of origin and linked to reasons for migration were the financial responsibilities they held for their children and the wider family.

Educational achievement recorded with 50 out of the 58 cases shows that six women had accessed less than a couple of years at school and as a result were illiterate and almost half, 24, had only completed primary education. Only 11 had completed secondary education with 9 going on to access further education. Of the 48 on which there is data on areas of work before departure, the majority, 38, were in the unskilled sector. Four were studying and only six had worked in the skilled or professional sectors of work.

In relation to reasons for departure, four victims had no involvement in the decision to move them and a fifth bought into what was sold to her, and the others trafficked with her as a "holiday". The other 53 women and children had reasons

why they initially arranged or consented to leave their country of origin, in response to the offer that was made to them. With each victim it was a unique mixture of push factors in terms of their own survival and pull factors in terms of trying to accessing a better future. The key reasons stated for migration were;

- Accessing work 24 cases
- Asylum 16 cases
- A mixture of asylum and work 9 cases
- Accessing school/education 4 cases

### 3.2. Recruitment and Transport

From information gathered in interviews and publications it is apparent that those who managed the recruitment, transport, and work on destination might be a couple of individuals, including family members or involve organised groups or cartels in each of the three phases, as pointed out in the work of Webb and Burrows (2009) and Blank (2007). Few of the victims knew the real or full names of their agents and the extent of the networks they operated in. Eight of those within the target group had been trafficked to and worked in other countries before arrival to the UK and one had been re-trafficked as a child after deportation from the first country where she had been worked as a prostitute. Others were aware that they had been sold between different agents. As the research progressed common themes became apparent in the accounts of victims from specific geographical areas in terms of their experiences and the local culture of migration.

A common factor for all women interviewed who had been *assisted* in their migration was a power imbalance from the first point of contact. Agreements, or promises, used by agents in their marketing strategies were never formalised and the recurring theme was being in control of others. They were not informed of the route taken, nor the length of time that would be spent en route. Some did not know where the destination would be, were not allowed to hold onto their travel documents and were intimidated by those who moved them. Some of those interviewed described horrific experiences, including physical and verbal abuse, gang rape, and not being offered enough food and for those moved from the Far East the journey was lengthy and arduous. There were also accounts of being forced into sex work on-route to start repaying their debts and the observed murder of a fellow traveller for refusal to comply. For some it was during this period of transportation that they first became aware of their enslavement as they became aware of negotiations in relation to their market value, between those moving them to those they were being sold to.

### 3.3. Experiences in the UK prior to arrest

One of the common experiences of all women brought into the UK by traffickers and worked under duress was that of enforced dependency, followed by emotional and physical abuse and threats of what would happen if they did not comply. Due to their illegal status on arrival in the UK, debt bondage, withholding of any travel documentation and threats by those who had moved them, the majority of those interviewed had no option but to accept the work to which they were allocated.

In relation to enforced labour, work in provision of sexual services was the most common (20 cases) followed by involvement in cannabis production (17 cases), domestic servitude (eight cases), and drugs importation (two cases). Eight women in the sample had experienced other types of work in the hands of those who trafficked them into the UK, or the agents they had been sold onto. Two who had originally been trafficked in for sex work were carrying out street robberies, as their profitability in sex work had declined due to ill health. Others from China were selling fake goods, again under the control of traffickers.



The drugs importation cases are significant in that at the time of the research, and to date, no defendants arrested in the UK as drug mules have been recognised and dealt with as victims of trafficking. However, both women had been taken and held in another country and subject to physical and emotional abuse. One had already been held for five years as a victim of sex trafficking and was told that she had to carry the drugs to start and buy herself out. Other victims talked of being given the option of carrying drugs to speed up repayment of their *debts*.

For those who had managed to escape the control of their traffickers this issue of finding work to survive remained uppermost. The majority had no documentation by which they could access work in the formal sector or claim state benefits. They remained vulnerable to others who would abuse their situation by offering low paid work and, in relation to offence categories, the largest group of interviewees were those arrested in relation to their illegal status within the UK and use of false documents to survive.

In summing up statements of those within this target group, there were very few interviews where experiences of disempowerment, victimisation and threats against the individual and her family were not reported. Many of the women reported that they had been victims of on-going brutal sexual, physical and emotional abuse. For those who migrated to escape, these experiences started prior to migration. For others, it was integral to the relationship they had with those who brought them to the UK and worked them under duress. For some, the hold and threats made by those who moved and worked them did not disappear on arrest. These apparent human rights abuses and offences to which they were subject reflect the model outlined in the OSCE report on the business model of trafficking as outlined in Table 1 below (Aronowitz *et al.* 2010). The only exception to this is murder and the removal of organs, which two women in the sample witnessed in relation to other victims during their hold in other countries.

TABLE 1

<b>Recruitment</b>	<b>Transportation</b>	<b>Exploitation</b>	<b>Victim Disposal</b>	<b>Criminal Proceeds</b>
Fraudulent promises	Assault	Unlawful coercion	Assault	<i>Money laundering</i>
Kidnapping	Illegal deprivation of liberty	Threat	Abandonment	<i>Tax evasion</i>
<i>Document forgery</i>	Rape	Extortion	Murder	<i>Corruption of government officials</i>
<i>Illegal adoption (for purposes of exploiting child)</i>	Forced Prostitution	Sex or Labour exploitation	Victim sold to another trafficker	
	<i>Corruption of government officials</i>	Illegal deprivation of liberty		
	<i>Document forgery</i>	Theft of documents		
	<i>Abuse of immigration laws</i>	Sexual assault		

		Aggravated Assault (cruel and degrading treatment)		
		Forced participation in crimes (forced begging, transportation of drugs, organised theft)		
		Rape		
		Murder		
		Removal of organs		
		<i>Corruption of government officials</i>		

**Table 1. Trafficking in Human Beings as a Process and other Related Crimes.**

Taken from Aronowitz *et al.* 2010.

Offences in *italics* are not perpetrated against the individual victims.

We learned from the women that their experiences had left them feeling socially isolated, vulnerable, traumatised, subject to flashbacks, ashamed and too frightened to tell others what had happened. They indicated that they also found difficulty in knowing whom to trust and fearful of men. In addition, they reported that one of the biggest threats by those who held them was to hand them over to the police or immigration. This is significant when we look at how these women were then actually then managed by the criminal justice and immigration systems.

### 3.4. Experiences in the Criminal Justice System

In this section, we gathered information on the experiences of the target group in relation to the arrest procedures, laying of charges, management through the court proceedings and the use of the National Referral Mechanism.

In relation to arrest procedures the themes which were consistent were:

- Fear about what was going to happen, as arrest was the realisation of one of the major threats that their traffickers had made to them if they failed to do as instructed.
- Confusion as to what was happening and why. This was exacerbated for those for whom English was not their first language, particularly where they spoke some English and it was assumed by the police that no language support was needed.
- Not being aware of who to tell and what to disclose. This was exacerbated when they were advised by the duty solicitor to say "no comment".
- Their perception that as a foreign national the police viewed them in a negative light.
- The police stated that they did not believe what they disclosed or failing to respond to what were obvious indications of being a victim of trafficking.
- Where there is evidence that the arrestee was unable, unwilling or too frightened to give her full account at the first interview, no opportunity was given for further interviews.
- None of those in the target group, including those with dependent children in the community, had been granted bail and were thus in custody from point of arrest.

The themes of confusion and fear were reiterated when the women were processed through the courts and observation by the researchers of 33 court appearances validated the comments that the women made. Indeed, one of the key questions put to the researchers was *Can you tell me what is happening?* The impact of being

processed through an unfamiliar system in a foreign country was very evident and the key themes that arose in interviews and from observation were in relation to:

- The lack of a relationship of trust with the legal representative due to absence of prison visits and being represented by different people at each hearing.
- The impact of being remanded in custody from point of arrest which impacted on pleas entered. With the awareness that pleading not guilty would lengthen their time in custody and in some instances separation from dependent children, many of those opted for a guilty plea, as advised by their solicitor, to *get out as quickly as possible*. It also increased the likelihood of co-defendants being held in the same prison and pressure being put on those who wished to plead not guilty not to disclose information. Thirdly, the longer a woman remained in custody the more likely it became that her asylum interviews would be processed in the prison environment without access to legal representation.
- Repeated failures in provision of adequate interpreting facilities and the false assumption that those who spoke some English could understand what was being said in court and the use of legal terms. This failure and time limitations where the only contact with a legal representative was in the cells at the court also impacted on the ability of the defendant to communicate effectively with their legal representative.

Information was also gathered and analysed in terms of the primary offences with which the women were charged and the sentencing outcomes as outlined on Table 2 below.

TABLE 2

<b>Criminal Charge for primary offence</b>	<b>For victims of trafficking and those worked under slavery or servitude</b>	<b>For those who entered country in control of smugglers</b>	<b>For others interviewed</b>	<b>Total</b>	<b>Average sentence within offence category</b>
<b>Use of false instrument with intent</b>	18	2	7	27	10 months
<b>Possession of false documents/ fraud charges</b>	2	1	8	9	13 months
<b>Entry in fake marriage</b>	2	0	5	7	10.5 months
<b>Production of controlled drug (cannabis)</b>	14	0	3	17	1 year 9 months
<b>Conspiracy or money laundering offences in relation to cannabis production</b>	3	0	1	4	4.5 years
<b>Entry to country with valid identification</b>		6	0	6	3 months
<b>Importation of Class A drugs</b>	2	0	10	12	8 years

<b>Street robberies</b>	2	0		2	4.5 months
<b>Other charges</b>	5	1	8	14	
<b>No charge</b>	2	0	3	5	
<b>Totals</b>	48	10	45	103	

**Table 2. Offence Category Breakdown and Sentencing Outcomes.**

As outlined in this table the three dominant offence categories for those who had been trafficked were:

- The use of false instrument with intent (18) and related charges of possession of false documents and fraud (2). These were also secondary charges with those arrested for entry into fake marriages (2).
- Production of a controlled drug that is cannabis (14) with related offences of conspiracy and money laundering (3).
- Importation of a class A drug (2).

Five of those interviewed in the target group were being held purely because of their illegal immigration status as no criminal charge had been served.

With regards to sentencing outcomes it should be noted that as well as determining the period of time served in custody, sentences given to foreign nationals had a more fundamental impact on their future, since non-EU nationals sentenced to twelve months or over were subject to automatic deportation. Within the target group of 58 women, 25 fell into this category. Five had been sentenced for use of false instrument with intent, one had been sentenced for entry into a fake marriage, 13 (out of the total of 14) were sentenced in relation to cannabis production and two sentenced for importation of class A drugs.

### *3.5. Use of the National Referral Mechanism (NRM)*

From the data gathered in the context of interviews and from matching this up with the trafficking indicators, as outlined in the European Convention, there was evidence that 43 of the 103 women and children we interviewed were victims of trafficking.

Despite these findings, only eleven of those interviewed were processed through the NRM. In four other cases, the option of an NRM referral was made and rejected by the woman on the basis of the desire to return home as soon as possible at the end of their sentence or because of fear of the repercussions of such a referral. It is not insignificant that the first person to take action in response to indicators for eight of these cases were workers within a third sector organisation that has since lost its contract in one of the key prisons. In two other cases it was the CPS, in one it was the prison diversity team and in another an Immigration Officer.

The actual referral to the NRM was not made in two of these cases until the victims had been sentenced and, in one case, this was at the point of release on completion of the sentence. From the time when someone was first alerted to potential victim status of the person in custody to the actual interview by a recognised First Responder there was a gap of a number of weeks and then there were further lengthy delays in the making of Reasonable and Conclusive Grounds (RG and CG) Decisions. Only one victim was granted bail once the RG decision had been made.

The Competent Authority for all these cases was the UK Borders Authority and in a number of cases the same officer was involved in both this process and decisions on the asylum application. The Conclusive Grounds decision made on four of these cases was negative and two of these were later overturned following judicial

reviews. Even where referrals were made to the NRM, that led to a positive decision and non-prosecution, the victim spent on average four months in custody. One of the victims spent 11 months in custody and there was no compensation for this.

For the others, there was no formal recognition of their victim status and no protection from deportation other than going down the asylum route and all initial decisions on asylum applications by the adult women in the target group were negative. Of equal significance is the fact that in only one of these cases did victim disclosure result in a full police investigation in relation to the actions of the perpetrators.

The key factors identified in relation to failures in processing these cases were:

- Apparent failure by those making arrests to facilitate or respond appropriately to disclosures of victimisation and to understand the impact of on-going threats on the arrestee's ability to freely and fully disclose their experiences.
- Inconsistent and limited time with legal representatives.
- The impact of imprisonment from point of arrest on pleas entered.
- Disempowerment by the criminal justice system where the victim is already traumatised and does not understand the system.
- Lack of knowledge and /or uncertainty by potential first responders in terms of the NRM and roles and responsibilities.
- Narrow interpretation of the Convention for those arrested for involvement in cannabis production and those arrested after a period of time living physically independently from their traffickers.
- Immigration acting as the Competent Authority for non-EU nationals and assessing trafficking victim status alongside asylum status.

### 3.6. *Experiences within the immigration system*

Within the target group of 58 women, reasons for migration in the first place included the need to seek asylum. This was stated to be the primary reason in 16 of the cases and to be one of the key elements in another nine. For 22 of the 43 women who had been trafficked, the additional need for asylum was in response to the threat of being sent back into the hands of those who had trafficked them in the first place, and to whom they were still *in debt*. The women indicated that their position on return would be even more vulnerable than on departure and the risk of re-trafficking was high.<sup>5</sup> Being sent back was the key stated reason for anxiety and this was exacerbated by difficulties in accessing immigration advice in custody. One emotional plea in an interview was: "Please do not let them send me back. I will be killed".

Where victims are formally identified based on Reasonable Grounds decision, the reconciliation and reflection period is 45 days. At the end of this period they, as illegal migrants, are subject to deportation, unless they are cooperating with a police investigation. For all those interviewed their only option for long term protection was to apply for asylum. However, throughout the period of this research there were only two positive outcomes in relation to being granted leave to remain in the UK. These were for the two child victims and even with these cases there was a proviso in that they would have to re-apply within five years.<sup>6</sup>

Women in the target group reflected that finding their way through the complexities of the immigration system, in a custodial environment, without access to legal representation and appropriate translation provision presented what felt like an

<sup>5</sup> One of the children in our sample group had already been re-trafficked from Nigeria.

<sup>6</sup> After completion of the research two victims were later granted leave to remain in the UK following successful appeals on their conviction and sentence at the Court of Appeal.

“impossible challenge”. The management of their asylum applications, in terms of interviewing and cross examining at Immigration Appeal Tribunals, pointed towards a lack of recognition of the impact of the repeated trauma that several women indicated that they had suffered, especially where applications were rejected on the basis of inconsistency. In addition, there appeared to be little recognition of the continuing threat that traffickers present to those they control through *indebtedness*.

The failure to be granted leave to remain in the UK, by all but two of those cases monitored in the target group to date, has meant that they have all had to go through the appeal process. In addition to being treated as offenders in the criminal justice system and given custodial sentences, that in some cases have excluded their right to asylum, they have been dealt with as illegal migrants in the immigration system. In both systems, effective challenges to this require good legal representation, access to which is fraught with difficulties. Looking at the common experiences through both systems we see what has been described by writers, such as Sayad (2004), as “double punishment”.

### 3.7. *Life after release*

By the end of the research period, we had updates on 46 of the 58 cases within the target group. Of these:

- 13 were still being held in the prison estate,
- 12 had been deported following immigration holds in prison and/or Yarl’s Wood IRC of between one week and 9 months,
- 2 were still on hold in the IRC, and
- 19 were residing within the community.

Apart from the two children who were provided with safe accommodation by social services, the main issue for all those within the target group who were not immediately deported was gaining some residency status and access to accommodation and means for survival. As all were effectively illegal migrants the latter necessitated qualifying for support as a victim of trafficking through the NRM or through Asylum Support Services by ensuring that an asylum claim had been made. The housing need was most acute where there were also dependent children and for the two mothers who had lost their social housing when found guilty of using false identity documents, re-unification with their children was dependant on this.

Life in the community for those in the target group was far from easy. By the end of the research project there were no examples of life having returned to, or the potential for it returning to, any form of acceptable normality. One of the key elements of the Convention is protection and support for victims. Statements and emotions expressed in post release interviews demonstrated that this is dependent on early and effective recognition of their victim status, criminal investigations into their abuse and for those with grounded fears of return, leave to remain in the UK and re-start their lives.

## 4. Key Policy and Practice Implications

The research findings and observations lead us to raise the following specific questions and suggestions in relation to policy and practice.

**The identification of victims.** It is arguable that this could be improved by:

- The use of the transposition phase of the new EU Directive to develop a greater and wider understanding of offences potentially resultant on victimisation by traffickers and for closer adherence to the CPS guidelines.

- Exploring of different ways of increasing awareness of the trafficking indicators by the police, DWP and relevant others, when making arrests for offences such as deception, fraud and cannabis production, where the incidence of links between the offence and trafficking is highest.
- Where there are indicators of victimisation, irrespective of whether this impacts on the decision to proceed with criminal matters, the instigation of automatic follow-up interviews, carried out by female staff and with appropriate interpreting support, to investigate the alleged abuse of human rights.
- In recognition that defence counsel cannot act as first responders, it may be helpful to establish guidelines to facilitate speedy Reasonable Grounds (RG) assessments by experienced advocates for those appearing in court and for whom bail is routinely denied until this decision has been made. The assumption could then be for bail to be granted for the reflection and recovery period and a Conclusive Ground decision.
- Within the prison environment similar established guidelines for accessing these RG decisions alongside formal record keeping by appropriate members of staff in relation to this.
- Research findings also suggest that the training of and involvement by healthcare staff as active first responders might merit closer examination, as they are often the first staff to be able to identify the health indicators.

**Management through the criminal justice system.** This could be improved by the following:

- Access to induction videos for all remand prisoners, with interpreted subtitles in the key languages on how the court system functions and what happens at different phases, including explanation of legal terms such as indictment, plea and mitigation.
- Standard questions before police interviews and at all court appearances on the need for interpreting support, with follow up checks that the defendant understands what is being said. In some cases, it may not be sufficient just to ask "Do you need an interpreter?"
- It may be worth considering whether the routine translation of letters and court documents would help ensure the defendant understands what is happening and their rights in relation to this.

**Management through immigration procedures.** This could be improved by:

- Access to an induction video with subtitles available for all foreign national prisoners and detainees who wish to claim asylum, explaining the application procedure within the UK and impact of a prison sentence on this.
- Recognition that the illegal migrant status of many victims of trafficking may be the result of the actions of others who brought them into and held them in the UK, withheld their documents and sometimes issued their victims with false identities.
- Recognition given to the asylum needs of some victims in relation to implementation of threats to the victim and their family and the risk of being re-trafficked to pay off alleged debts.
- In recognition that those in custody rarely have access to immigration solicitors, advance written notice of all immigration interviews, with notes explaining the structure and aims of the interview and advice on how they can best prepare for this meeting. The option of a female case worker and interpreter would also seem important.
- We would also suggest that it may be helpful for all communication from the UKBA to be sent in a language that the recipient understands.

- In addition, the experience of our target group suggests that it is important to take account of the multiple trauma, sexual abuse and the disempowering effect of trafficking on the applicant in the management of asylum claims.

**Ensuring that the best interests of the child are met where the arrestee is the mother.**<sup>7</sup> The policy and practice suggestions here include:

- The need for sufficient time and support to be given at the point of arrest for preparations to be made for the separation and to access a carer known to the child would be helpful.
- That it is appropriate at all bail applications for the bench to be aware of childcare responsibilities before deciding, to ensure that there is an appropriate balance between the risk of absconding by the defendant and what is in the best interests of the child.
- Where a placement in the care of social services is the only option, it would seem appropriate to set in place contact arrangements from day one, with provision for a supervised phone call in relation to this between both parents if there are joint arrests.
- The findings indicate that support facilities for those in custody to re-establish links with their families would be of value.

## 5. Developments in the UK since publication of the findings

Since completion of the research and publication of *The Criminalisation of Migrant Women* we have put time and energy into dissemination of our findings through additional publications and presentations to policy makers and interested parties. This has resulted in increased awareness of failures to manage victims of trafficking who have been charged with criminal offences in compliance with the Council of Europe Convention on Action against Trafficking (2005) and, for those sentenced since 2011, the EU Directive.

Of significance is the fact that cases of three of the women/children identified in our target group were also taken to the Court of Appeal where two convictions were overturned and one sentence was reduced to below 12 months, ensuring the victim was no longer subject to automatic removal. One of these cases was dealt with in a group of convictions for 4 victims of trafficking, for which all the findings of guilty were overturned in 2013, helping to set a new precedent in the management of future cases (see *L, HVN, THN and T v R* 2013). These appeal cases were not directly resultant on any action by the researchers. However, in the context of our interviews victims became more aware of their status and rights and, when requests were made, we signposted them to access further support and legal advice).

Of equal significance is the fact that the report has provided strong evidence that prisons in England and Wales have been and will be holding unrecognised victims of trafficking and Her Majesty's Inspectorate of Prisons took note of our findings in revising their Expectations Document for the women's prison estate in 2013.

Generally, over the last two years, awareness of people trafficking in the UK is far greater in terms of the provision of training, police activity and reports in the media. The number of organisations that can take on the official role of First Responder within the NRM has increased and the 2013 data produced by the National Crime Agency (NCA) indicates a 47% increase of referrals from 2012, with a total of 1746 referrals of potential victims. In addition to this, these potential victims were reported to be from 112 countries of origin; and this represents an 18% increase on 2012 country of origin totals (NCA 2014). One explanation of this

<sup>7</sup> A focus on children of victims of trafficking was not a focus in the set-up phase of the research – but failures in procedures to meet the best interests of dependent children became obvious in the context of the research (details of this are not included in this paper).



is that there is better awareness. However, it could also indicate a rise in the activity of trafficking.

However, there are still many shortcomings in the recognition and management of victims, as outlined by the Group of Experts on Action against Trafficking in Human beings (hereinafter: GRETA) in their first report on the UK in 2012 (followed by the second report in 2014) where they state:

The British Authorities should take further steps to ensure that the human rights based and victim centered approach underpinning the Convention is fully reflected and applied in the national policy to combat THB, from prevention to protection, prosecution and redress (...). This includes taking measures to ensure that all persons who were subject to trafficking are identified as victims of trafficking, regardless of when the trafficking took place (...). Identification will ensure that victims, even when they are *historic*, can benefit from the right to compensation and legal redress and be protected from punishment for their involvement in unlawful activities while being trafficked. (GRETA 2012)<sup>8</sup>

To achieve this improvement in identification, support and protection means removing the Immigration and Visas Department from acting as a Competent Authority within the NRM and separating management of victims from those categorised as illegal or undocumented migrants. This has become more critical since completion of our research as the immigration issue has been high on the political agenda with a worrying demonization of immigration by all parties to win votes. The UK government's accepted view is for the need to get tough on immigration, clamp down on those who "abuse public services" for their own benefit, and ensure that any "foreign criminal" is sent back home. In response to this a new Immigration Bill received Royal Assent in the UK in May 2014, with the underlying objective of creating a hostile environment for migrants, with the introduction of landlord immigration checks, reducing rights for free access to public services and removal of rights of appeal on immigration decisions unless it is a decision to refuse a claim of asylum or humanitarian protection. This was taken one step further when on 29<sup>th</sup> July the prime minister stated further changes that would be made in terms of an "immigration crackdown", in favour of a system that "puts Britain first". This does not bode well for the survival of unrecognised victims of human trafficking.

Alongside this, government cutbacks have had a disproportionate impact on this group of vulnerable people. Increased imprisonment together with cutbacks in prison funding have led to reduced ratios of staff to prisoners and the termination of contracts with non-government agencies (NGOs), who, as our research demonstrated, were one of the most effective in alerting first responders. Cuts in legal aid have meant that contacts between victims and their legal representatives continue to be inadequate to build up trust and cuts in the budget for court interpreter provisions has led to a deterioration of the level of service delivery. Unfortunately, this has not been alleviated in any way by a positive response to the suggestions in our report for the use of video systems for all non-UK nationals in custody for the purposes of explaining the Criminal Justice System and Immigration Systems. Nor has there been any move on the part of the Home Office Immigration and Visas Department to communicate by letter in a language that is understood by the recipient.

The net result is that victims are still being charged with offences, and/or being dealt with as illegal migrants and remanded in custody and NGOs are still making the relevant referrals on a regular basis from the prisons in which they have managed to maintain their contracts (Hibiscus Initiatives who attend HMP Holloway two days per week reported on average one referral per month for those in custody there between 2012-13). Despite more training on trafficking indicators for the

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<sup>8</sup> GRETA were advised of our research at the time they were gathering information in preparation of this first report and they requested a copy of our findings report to consider in their follow up report.

police and relevant others, evidence gathered from one prison would appear to indicate that even where an NRM referral is made at point of arrest, the person charged with a criminal offence is refused bail and they remain in custody for up to five months until there is a positive conclusive grounds decision and the criminal charge is dropped (Hibiscus Initiative). NGOs also report challenges faced by those in custody in developing sufficient trust to disclose sufficient information to an official first responder when they have not met this person before and time allocated is just one interview.

In 2013 the UK Government set up an All Party Parliamentary Committee (APPC) to gather extensive evidence for a new Bill to tackle human trafficking and there was excitement amongst activist groups that the UK would effectively move forward. However, the draft of the Modern Slavery Bill, produced initially in December 2013, totally failed to address the protection of victims. Nor did it separate the issues of trafficking from border control by leaving the Home Office UK Visas and Immigration Office as a Competent Authority within the NRM.

These failings are currently being challenged by members of the APPC and the Anti Trafficking Monitoring Group (ATMG) has published an alternative Bill "to assist in the scrutiny and strengthening of the government's Modern Slavery Bill currently before the Parliament" (ATMG 2014). This alternative bill:

- Has stronger, simplified offences to cover wide range of forms of modern slavery, including child-specific offences.
- Contains comprehensive victim protection measures, including a statutory NRM, statutory defence for victims of modern slavery that are forced to commit crimes, independent legal child guardians with robust legal powers and independence, and the provision of compensation and remedies.
- An Overseas Domestic Worker provision, which reinstates all the protections in place before the 2012 visa change, as well as additional ones.
- A Transparency in Supply Chains provision to tackle slavery in supply chains.
- An Anti-Slavery Commissioner role which is independent from the government and has a broad remit, with the freedom to choose his/her activities'.

## 6. Conclusion

In conclusion, it is apparent that now, as in the period of data collection for the original research, we still have a long way to go to effectively comply with the EU Directive in the manner in which we manage victims who come in contact with the criminal justice system. Comparable research in Spain (Villacampa and Torres 2014) has provided evidence that this is not a failing limited to the UK. Nor is the impact of the political focus on getting tough on migration limited to the UK.

In developing effective support for victims we need to ensure that they are treated in a humane way and not viewed as illegal migrants who willingly engage in criminal activities. To do this we should perhaps not focus so much on new legislation, but rather ensure that the UK and all the other countries that have formally adopted the European Directive ensure that the recognition and management of potential victims, as well as those who profit from this illegal activity, is fully compliant with its very clear and well thought out Directive guidelines.<sup>9</sup>

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<sup>9</sup> As was one of the conclusions drawn at the *Final Reflections and Future Planning* workshop at the *Human Trafficking: Challenges and Opportunities for the 21<sup>st</sup> Century* seminar, held at the International Institute for the Sociology of Law in June 2014.

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**Appendix. Abbreviations and terms used**

APPC	All Party Parliamentary Committee
CA	Competent Authority (In relation to decision making within the NRM)
CG	Conclusive Grounds (Decision that the individual is a victim of trafficking)
CPS	Crown Prosecution Service
DAS	Detention Advice Centre
DWP	Department for and Work and Pensions
ECHR	European Convention of Human Rights
ERD	Earliest Release Date
ESRC	Economic and Social Research Committee
EU Directive	European Union Directive on Trafficking
fpwp/Hibiscus	Female Prisoners Welfare Project/Hibiscus
GAATW	Global Alliance Against Traffic in Women
GRETA	Group of Experts on Action against Trafficking in Human Beings
HMP	Her Majesty's Prison
IOM	International Organization for Migration
IRC	Immigration Removal Centre
IS91	Immigration Holding Warrant
NCA	National Crime Agency
NGO	Non-Governmental Organisation
OSCE THB	Office for Security and Co-operation in Europe; Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings
NRM	National Referral Mechanism (for potential victims of trafficking)
RG	Reasonable Grounds (Decision the individual is a victim of trafficking)
UNHCR	United Nations High Commission for Refugees
UKBA	United Kingdom Border Agency
UKBA CCD	UKBA Criminal Casework Directorate
UKHTC	United Kingdom Human Trafficking Centre
WHO	World Health Organisation