

The Baring Foundation: Working Paper No. 3
on Better Use of the Law by the Voluntary Sector

Successful Use of Strategic Litigation by the Voluntary Sector on Issues Related to Discrimination and Disadvantage: Key Cases from the UK

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The Baring Foundation

Foreword from The Baring Foundation

In March 2015 the Foundation adopted a new focus for our long standing programme to Strengthen the Voluntary Sector. We chose the theme of the better use of the law and human rights-based approaches as a powerful tool in tackling discrimination and disadvantage and one which we believe is under-used by the voluntary sector. Since then we have made 18 grants with the Legal Education Foundation which explore how this tool can be used in many different ways, including in some cases through the use of strategic litigation. Further grants will be made in 2017. As well as directly funding work we wish to add to the sector's knowledge of this issue through publications and events.

This new report, commissioned by the Foundation, for the first time brings together, in an accessible way, ten recent examples of the use by the voluntary sector of strategic litigation in a wide range of fields relating to discrimination. Strategic litigation is not a panacea and its limitations are recognised. However we hope that this report will help managers in organisations which are not specialists in the law ask if this is an approach they should explore further.

We are very grateful to Dr Vanhala for her hard work in producing this report.

1. Introduction

This paper explores examples of the successful use of strategic litigation by voluntary sector organisations (VSOs) in the UK. It is part of the Baring Foundation Strengthening the Voluntary Sector programme's commitment to sharing knowledge across the sector. This paper will be of interest to those in senior management positions in voluntary sector organisations and to funders of these organisations.

This paper's objective is to inspire those who might be reluctant to consider using law or legal tools. It offers a number of examples of the successful use of strategic litigation by VSOs to address discrimination and disadvantage in the UK. A key aim of this paper is to raise awareness of the many potential ways in which using law and legal tools can help a VSO achieve its goals. This paper will be most relevant to those organisations that might describe themselves as "law-hesitant organisations" (see Baring Foundation Working Paper 2 Framework for Better Use of the Law). It is targeted at those who do not generally incorporate legal activities or tactics into their mission or general activities (or do so only rarely); who generally do not get involved in legal networks and do not tend to incorporate the perspective of individuals with legal expertise into their work. They may be organisations that focus on grassroots or community mobilisation, campaigning or research.

Use of the law can be daunting and there are a number of ways in which it has become more difficult in recent years. Changes to the rules on legal aid, the tightening of the regulations on the use of judicial reviews by voluntary sector organisations and the introduction of court fees can all make it difficult to even consider a legal solution. In combination with limits being placed on the ability of the voluntary sector to engage in campaigning and advocacy work use of the law can seem out of reach to many organisations.

The term 'strategic litigation' is used here to refer to those cases whereby an organisation or individual will entreat a court or tribunal a) to look at an issue for the first time or potentially re-consider an issue that has been decided in the past; b) to decide an issue that will affect a significant number or class of people and/or c) to consider a particular perspective on an issue that has hitherto not been included in existing law.

However, in other ways there has never been a better time to consider using legal approaches to address discrimination and disadvantage. The policy of austerity has brought many injustices faced by those who are marginalised and vulnerable to the forefront of the public's attention. This leaves room for the courts to address important questions in the area of human rights and administrative fairness. Many judges appreciate the expert advice and research that VSOs can offer to the judicial process. The UK Supreme Court has explicitly acknowledged that third-party interventions in legal cases can make an important contribution to the interpretation of law and promote an understanding of the needs of vulnerable individuals and communities. Internationally, a growing number of human rights legal instruments and mechanisms means that groups have a wider array of possible venues in which to pursue complaints than ever before. Many of these are relatively new and untested.

This paper offers ten case studies, focusing on different organisations, judicial venues and areas of law, as illustrations of the diverse ways in which use of the law can help VSOs achieve their strategic objectives. These case studies exemplify:

- creative thinking around use of the law, including "non-standard" cases to get involved with, innovative legal arguments and the use of new judicial mechanisms;
- collaborations across voluntary sector organisations that may be new to law and those with longstanding experience of using the law and with legal capacity (be they voluntary sector organisations or independent public bodies such as the Equality and Human Rights Commission), and
- Policy and campaigning work and coalition building behind the scenes which ultimately led to legal and policy victories and important changes for the constituencies affected.

To be clear, this paper is not arguing that the use of legal tools will always work. Academic research has identified a number of potential barriers and other reasons voluntary sector organisations may not mobilise the law. This includes:

1. Low levels of legal knowledge¹
2. Lack of a legal basis on which to take legal action
3. Lack of financial resources²
4. Lack of legal resources and specialist legal advice³
5. Limited access to justice⁴
6. VSOs staff, membership or trustees are reluctant to use legal tactics⁵
7. Fear of potential unintended consequences, such as reputational risk⁶
8. Fear of jeopardising relationships with government stakeholders⁷

These are outlined in greater detail in the Baring Foundation Working Paper 2 Framework for Better Use of the Law. In each case study presented here I identify any drawbacks or unintended consequences of taking legal action that I identified during the course of the research. However, when taken together what these case studies reveal is that using the law can lead to policy and material victories in the courts that might have been impossible to achieve in any other way.

2. Methodology

Evaluating the impact of legal cases is a notoriously difficult endeavour. The relationship between a legal case and subsequent policy and practice outcomes is full of complexity and variation. The question is how do we know whether the deployment of legal tools has had an impact, whether positive or negative? This paper follows recent developments in social science research by suggesting that identifying impact requires casting the net wide and looking for impacts in law, in policy, in practice and in society more broadly.⁸ Impact can include:

- Changes in law (or protection of a favourable legal status that is under threat), for example, a favourable legal judgement for a specific claimant or community or positive developments in law in terms of a shift in/creation of generalisable principles.

1 Marshall, A. (2003). "Injustice frames, legality, and the everyday construction of sexual harassment." *Law & Social Inquiry*, 28(3), 659-689; Paris, M. (2010). *Framing Equal Opportunity: Law and the Politics of School Finance Reform*. Stanford: Stanford University Press; Pedriana, N. (2006). "From Protective to Equal Treatment: Legal Framing Processes and Transformation of the Women's Movement in the 1960s." *American Journal of Sociology*, 111(6), 1718-1761; Ewick, P and Silbey, S.S. (1998) *The Common Place of Law: Stories from Everyday Life*. Chicago: University of Chicago Press, 1998.

2 Galanter, M. (1974). "Why the 'haves' come out ahead: speculations on the limits of legal change." *Law and Society Review*, 9(1), 95-160.

3 Epp, C. R. (1998). *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective*. Chicago: University of Chicago Press.

4 Andersen, E. A. (2005). *Out of the Closets and Into the Courts: Legal Opportunity Structure and Gay Rights Litigation*: University of Michigan Press; Rhode, D. (2004). *Access to Justice*. New York: Oxford University Press.

5 Vanhala, L. (2009) "Anti-discrimination Policy Actors and their use of Litigation Strategies: the Influence of Identity Politics." *Journal of European Public Policy* 16(5), 738-754.

6 Keck, T. (2009) "Beyond Backlash: Assessing the Impact of Judicial Decisions on LGBT Rights" *Law & Society Review* 43(1), 158-186; Vanhala, L. (2011) "Social Movements Lashing Back: Law, Social Change and Socio-legal Backlash in Canada." *Studies in Law, Politics and Society* 54, 113-140.

7 Bouwen, P., & McCown, M. (2007). "Lobbying versus litigation: political and legal strategies of interest representation in the European Union." *Journal of European Public Policy*, 14(3), 422-433. Morag-Levine, N. (2003). "Partners No More: Relational Transformation and the Turn to Litigation in Two Conservationist Organizations." *Law & Society Review*, 37(2), 457-509; Vanhala, L. (2016) "Legal Mobilization under Neo-corporatism: Environmental NGOs before the Conseil d'Etat in France." *Journal of Law and Courts* 4(1): pp 103-130. Zackin, E. (2008). "Popular Constitutionalism's Hard When You're Not Very Popular: Why the ACLU Turned to the Courts." *Law & Society Review*, 42(2), 367-396.

8 Alice Donald and Elizabeth Mottershaw. 2009. "Evaluating the Impact of Human Rights Litigation on Policy and Practice: A Case Study of the UK" *Journal of Human Rights Practice* 1(3): pp. 339-361.

- Changes in public policy (or protection of policies that are under threat), for example, bringing a legal case which is then settled between governments and claimants through reaching agreement on changes in policy or guidance documents.
- Changes in practice, for example, winning a legal case that determines how “street level bureaucrats” should implement policy or interpret particular policy provisions in terms of how they deliver services.

This research takes on the challenges of identifying impact by offering “snapshots” of the use of the law and attempting to identify the factors in strategic litigation campaigns that contributed to specific successes for a VSO.

This paper focuses on the role of VSOs but it is important to acknowledge that these cases would not be possible if it had not been for the claimants in each case. Claimants in strategic litigation efforts play a crucial role and often have to take enormous personal, emotional and financial risks in order to pursue a legal action (often over many years). By focusing on the organisations I do not seek to downplay the role of claimants or their legal representatives. It is also worth noting that several case studies focus on independent public bodies, such as the Equality and Human Rights Commission. This type of organisation is fundamentally different to VSOs but their participation in legal actions is commensurate with the types of roles a VSO can play. The case studies are ordered from oldest to most recent.

3. Case Studies

3.1 Destitution in the asylum system: the case of Limbuela

Name of voluntary sector organisation involved: Liberty

Goal of legal action: To prevent destitution among asylum seekers who failed to apply for asylum “as soon as reasonable practicable”.

Nature of success: A legal victory in the House of Lords with a subsequent change in the interpretation of the Nationality, Immigration and Asylum Act 2002 to read socioeconomic entitlements into civil and political rights documents. Guidance to asylum case workers and policy teams (now part of the UK Border Agency) was revised and adopted the destitution threshold set out in the legal decision. The case had a direct impact on reducing destitution within the asylum system.

This case concerns three migrants who – because they had failed to apply for asylum as soon as reasonably practicable upon arrival to the UK – were excluded from social support (in line with Section 55 of the Nationality, Immigration and Asylum Act 2002) while their asylum applications were pending. The three men experienced various forms of hardship as a result including: having to sleep rough, having no food and possessing no right to work.⁹ They found themselves destitute, vulnerable to physical violence and unable to meet their most basic needs. Their situation was not unique. A 2003 survey by refugee agencies found that of those refused support under section 55 (almost 9 500 individuals) almost 70 per cent were sleeping rough or faced imminent homelessness; 70 per cent had difficulty accessing food each day and almost 60 per cent were experiencing negative health effects.¹⁰ The cases of these three men were heard by the High Court and then the Court of Appeal

The case reached the House of Lords when the Secretary of State appealed the 2004 ruling of the Court of Appeal. Liberty, a voluntary sector organisation, has long relied on pursuing legal cases as part of its campaigning work in promoting human rights and acted as a third-party intervener in this case. Shelter, a housing and homelessness charity, also intervened. In its intervention Liberty argued for an expansive definition of the duties of the state to prevent violations of Article 3 of the European Convention of Human Rights which protects against torture and inhuman and degrading treatment. Liberty argued (among other legal points) that the imposition by the legislature of a regime which prohibits asylum seekers from working and further prohibits the granting of welfare support when they are destitute amounts to positive action

⁹ Conor Gearty and Virginia Mantouvalou. 2011. *Debating Social Rights*. Oxford: Hart Publishing.

¹⁰ Inter-Agency Partnership. 2004. *The impact of section 55 on the Inter-Agency Partnership and the asylum-seekers it supports*, p 3.

taken by the state against asylum seekers and therefore constitutes inhuman treatment.¹¹ In November 2005 the House of Lords unanimously held that in order to avoid a breach of Article 3, the Secretary of State was obliged to provide support.

Successful impacts: The 2004 Court of Appeal judgment had already begun to have an impact before the House of Lords judgment in 2005: interviewing and assessments of eligibility under section 55 were suspended in May 2004. This had an immediate impact on the ground: in 2003 around two thirds of asylum-seekers referred for a section 55 decision were denied support; in 2004, the figure was less than 10 per cent.¹² In 2015, a decade after the case, the Government was providing support to an estimated 20 400 asylum seekers whose asylum claim had yet to be determined and who would otherwise be destitute.¹³ Following the House of Lords judgement there was a further sharp fall in the number of asylum-seekers denied support. The impact of the case is also apparent in revised guidance issues to policy teams and case workers in 2007. The guidance explicitly adopts the Court's definition of destitution: that where an applicant has no alternative means of support, including overnight shelter and access to food, support should be provided to prevent a breach of Article 3, even if the claimant is deemed to have applied for asylum late.

It's worth bearing in mind that...: There is evidence showing the rising incidence of destitution among failed asylum-seekers (who are distinct from those covered by the *Limbuela* decision which applied to asylum-seekers whose application was pending). *Limbuela* has not been interpreted as applying to failed asylum-seekers either by the UK Border Agency or by the Asylum Support Tribunal.¹⁴

3.2 Balancing the individual dignity of disabled people with the health and safety of care workers

Name of organisation involved: The Disability Rights Commission

Goal of legal action: To challenge local authority blanket "no lifting" policies that failed to take into account the specific needs of individuals.

Nature of success: A High Court judgment that found a violation of the right to respect for private and family life, contained in Article 8 of the Human Rights Act and provided a framework for public authorities to balance the dignity of the individual with the health and safety of employees through individualised risk assessments.

The case of *A and B v East Sussex County Council* addressed an issue which, on the surface, dealt with relatively technical concerns in the realm of social care regarding policies on lifting persons and the scope of responsibilities of local authorities in their provision of care services.¹⁵ At its heart, however, the case was one of the most significant human rights cases decided by the UK courts in the early part of this century: it delved into important issues of dignity, autonomy and self-determination. It took on this broader significance in part because of the involvement of the Disability Rights Commission, a public body. The DRC existed from 2000 to 2007 and its functions were subsumed into the work of the Equality and Human Rights Commission when the latter was established. The DRC intervened in the case.

The claimants, two sisters (A and B), both with profound physical and learning disabilities, had always lived in the family home and been cared for on a full time basis. Both sisters have impaired mobility and in order to carry out many of their daily activities — for example, getting out of bed or into the bath — it was necessary for them to be moved and lifted by their carers. A long-running dispute with the local authority, East Sussex County Council (ESCC), stemmed from the fundamental difference of view as to whether this moving and lifting should be done manually — as the parents preferred — or using hoisting/lifting equipment. The case was brought to the High Court and the issue decided by the Court concerned the legality of the local

11 Intervention by Liberty and Justice in *Limbuela*. 2005. Last accessed 26/11/2016: <https://www.liberty-human-rights.org.uk/sites/default/files/secretary-of-state-for-the-home-department-v-limbuela-house-of-lords-2005.pdf>

12 Figures cited in Alice Donald, Elizabeth Mottershaw, Philip Leach and Jenny Watson. 2009. *Evaluating the impact of selected cases under the Human Rights Act on public services provision*. Manchester: Equality and Human Rights Commission.

13 Home Office. 2015. *Reforming support for failed asylum seekers and other illegal migrants*. Last accessed 26/22/2016: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/451088/Reforming_support_for_failed_asylum_seekers_and_other_illegal_migrants_-_Consultation_Document.pdf

14 *Ibid*, p. 71.

15 *R v East Sussex County Council Ex parte A, B, X and Y* High Court CO/4843/01

authority's blanket policy of not permitting care staff to lift A and B manually.

The DRC intervened in the case to comment on the fact that a number of local authorities had developed and applied blanket 'no lifting' policies that they felt were highly prejudicial towards, and affected the quality of life of, large numbers of disabled people. The DRC argued that an across-the-board ban on manual lifting failed to take into account the individual needs of the disabled people involved. It argued that while the local authority had a legitimate concern for the safety of its staff, this had not been balanced against recognition of the impact that such a policy had on the quality of disabled people's lives. They argued that the bans would result in loss of dignity and autonomy for the disabled person, and sometimes compel the disabled person to go into residential care, resulting in their loss of independence.

The Court ruled in favor of the applicants. The judge took a novel approach in acknowledging both the universality of the concept of dignity and the very individualised actions the concept dictates when put into practice. This meant that any social care policy which does not at least consider individual needs or preferences may be in danger of violating the rights disabled people.

Successful impacts: During the course of the hearing, the DRC and the parties were able to reach agreement on the wording of a model manual handling policy which was approved by the Court. After the judgment the DRC carried out promotional work to ensure that local authorities (and others) develop and operate policies which ensure a proper balance is struck between meeting the needs and rights of disabled people on the one hand, and ensuring a safe environment for staff on the other. The case was widely reported in the health and social work press and the DRC was contacted by many disabled people through their call-in lines wanting copies of the judgment to help them in their own situations with their local authorities.¹⁶ Further research has shown that the imprint of the case is apparent on policy and guidance. A key guide to manual handling explicitly referenced the East Sussex decision and was edited to be less prescriptive.¹⁷

It's worth bearing in mind that...: The principles established in the case of A and B v ESCC were not totally new: there was some earlier case law, policy guidance and professional debate which laid an important foundation for this legal action. However, the case played an important role in validating the efforts of practitioners who were already challenging restrictive policies.¹⁸

3.3 Southall Black Sisters and the funding of specialist domestic violence services for BME women

Name of organisations involved: Southall Black Sisters and the Public Law Project

Goal of legal action: To challenge a local authority decision to withdraw funding for Southall Black Sisters and develop a single generic service for domestic violence

Nature of success: On the second day of the hearing in the High Court in 2008 Ealing Council withdrew from the case, agreeing to a reversal on the funding criteria and confirming that it would start the process again. The judge gave a ruling and provided helpful guidance on the issue

Southall Black Sisters is a not-for-profit organisation which provides specialist services to Asian and Afro-Caribbean women, particularly relating to issues arising from domestic violence. In the late 2000s the Public Law Project, a national legal charity, won a number of cases involving small voluntary organisations challenging the decisions of their funders on the basis that the funders had not consulted properly or taken account of their equality duties. One of the most high-profile of these cases was a judicial review of the decision to stop funding Southall Black Sisters.

Since the mid-1980s the organisation has been partly funded by the London Borough of Ealing. In June 2007 Ealing Council decided to cease funding Southall Black Sisters and develop a single generic service for domestic violence for all women in the Borough. In taking this decision Ealing failed to properly assess the

16 Lisa Vanhala. 2011. *Making Rights a Reality? Disability Rights Activists and Legal Mobilization*. New York: Cambridge University Press.

17 Alice Donald and Elizabeth Mottershaw. 2009. "Evaluating the Impact of Human Rights Litigation on Policy and Practice: A Case Study of the UK" *Journal of Human Rights Practice* 1(3): pp. 339-361.

18 Ibid.

likely impact of its decision on black minority ethnic women. In July 2008 two service-users of Southall Black Sisters, represented by the Public Law Project, took Ealing Council to the High Court over their decision. The challenge sought to clarify the law on a number of points concerning local authorities' duties under the Race Relations Act and the provision of specialist services for BME groups.

A two-day trial began in July 2008 in the High Court. At lunchtime on the second day the council withdrew from the case, agreeing to its decision on the funding criteria being quashed. It agreed to start the entire process again including a fresh race equality impact assessment on any new proposals. In his written judgment which lays out guidance for the Council, the Lord Justice Moses stated that Ealing Council had made fundamental errors when deciding to cut funding to Southall Black Sisters in favour of one generic service on domestic violence for the borough. The detailed judgement sets out several key principles about the race equality duty. Among the key findings are the following points. First, a race equality impact assessment must be undertaken before policy is decided upon/implemented and cannot be a rear-guard action to justify a policy already decided upon. Second, the impact on those losing a service should be assessed; not just the new service that is being proposed. The Court found that the Council failed to appreciate evidence put forward by Southall Black Sisters that there is serious under-reporting of domestic violence amongst BME women. Third, the Race Relations Act can require taking positive action which includes keeping a name which announced the specialist nature of the organisation. Fourth, the concept of "cohesion" does not require a generic service and that specialist projects will not necessarily undercut cohesion and in fact can promote good race relations.¹⁹ Ealing Council agreed to pay the costs of Southall Black Sisters' legal representation and unusually the costs of the Equality and Human Rights Commission which intervened in the case as an interested third party.

Successful impacts: The case has been relied on by many organisations seeking to challenge similar decisions by public bodies who have failed to properly assess the likely impact of the reduction or withdrawal of funding on the black minority ethnic communities, women and people with disabilities. Since April 2011 the equality groups have been expanded and these principles now apply to all those with protected characteristics under the Equality Act 2010. Lawyers have also identified the potential for similar legal arguments to be made in terms of the positive duties of healthcare providers to ensure access to healthcare for groups protected under equality law.²⁰

3.4 LGBT asylum seekers protected from deportation

Name of organisations involved: Equality and Human Rights Commission

Goal of legal action: To challenge the policy of deporting asylum seekers who feared persecution for their sexual orientation or gender identification.

Nature of success: A unanimous decision in the Supreme Court which provided an immediate legal basis for the Home Office to reframe its guidance for assessing claims based on sexuality.

Two men, "T" from Cameroon and "J" from Iran, in claiming asylum argued that they had a well-founded fear that they would be persecuted for their sexuality if returned to their home countries. Punishment for homosexual acts ranges from public flogging to execution in Iran. In Cameroon jail sentences for homosexuality range from six months to five years. The Convention on the Status of Refugees provides that members of social groups are entitled to asylum in states that are parties to the convention if they can establish a well-founded danger of persecution if returned to their home country. The Home Secretary had refused asylum in both cases on the basis that the claimants could be reasonably expected to tolerate being discreet about their sexual identity in order to avoid persecution.

The men challenged the decisions in a series of cases up to the Supreme Court. The Equality and Human Rights Commission (EHRC) and the UN High Commission on Human Rights (UNHCR) acted as third-party interveners in the case. The Equality and Human Rights Commission is the independent equality body in the UK which has the job of making Britain fairer. The UNHCR has a supervisory responsibility in respect of the Refugee Convention.

19 Public Law Project. 2008. *Southall Black Sisters: The case against Ealing*. Last accessed 28/22/206: http://www.voice4change-england.co.uk/index.php?q=webfm_send/23

20 David Wolfe and Rachel Logan (2009) "Public Law and the Provision of Healthcare" *Judicial Review* 14(1): 210-223.

In their submissions to the Court the EHRC and the UNHCR held that a person should not be required or expected to conceal his identity in order to avoid persecution. They pointed out that this is uncontroversial in international law. They noted that this idea is clearly endorsed by comparative case law concerning claims based on other protected statuses. The submissions cite cases that dealt with race, religion or political opinion by analogy. Moreover, the organisations argued that an additional discretion requirement for sexuality-based cases would mean discrimination between the statuses protected by the 1951 Convention.

Successful impacts: In July 2010, the Supreme Court, in a landmark decision, abolished the “reasonable tolerability” test, which held that it could be reasonably tolerable to require discretion²¹. The justices said immigration tribunals should in future decide on the evidence whether an applicant was gay and whether he would face persecution if he lived openly in his own country. If this were the case, then he would have a well-founded fear of persecution, even if he could avoid the risk by living discreetly. Theresa May, then home secretary, implemented the judgment promptly through a change in guidance to Home Office officials and immigration tribunals. She also expanded the scope of the protections by making the judgement applicable to gender identity claims as well. The Home Office worked closely with organisations such as Stonewall, the UK Lesbian and Gay Immigration Group and the UNHCR to develop training which is now mandatory for all caseworkers. Scandinavian countries then followed the approach of the UK Supreme Court: Sweden by issuing policy rules, Finland and Norway through judgments of their respective Supreme Courts.²²

It’s worth bearing in mind...: The Supreme Court did not go as far in its judgment as the interveners had suggested in their submissions, including their suggestion to completely discard the concept of “being discreet” in asylum cases. The judgement keeps an element of the “discretion” concept by creating two distinguishable categories, openly demonstrated sexuality and concealed sexuality.²³ It is also worth noting that since the decision there has been concern about the nature of Home Office interviews of gay and lesbian asylum seekers. In October 2013 the Home Affairs Select Committee published an investigation concluding that asylum seekers making sexuality-based claims faced “extraordinary obstacles” in persuading government officials of their case.

3.5 Trafficked children and forced criminality in the Criminal Court Of Appeal

Name of organisations involved: Equality and Human Rights Commission and the Children’s Commissioner for England

Goal of legal action: To quash the criminal convictions of children who had been trafficked and been forced to work in a cannabis factory and to ensure that public authorities have a responsibility to thoroughly investigate trafficking allegations.

Nature of success: The Criminal Court of Appeal scrubbed the convictions and the Crown Prosecution Service revised its guidelines on how to identify and treat possible victims of trafficking.

The question of how to treat victims of trafficking who are forced to commit crimes, particularly children, has become increasingly important as the number of trafficked people has grown. In 2012 the UK Human Trafficking Centre identified 2,225 victims of trafficking, a 9% increase from the previous year. There was a 27% increase in the number of adults trafficked for labour exploitation, a category which includes forcing people into theft, shoplifting, drug production and benefit fraud.

Of all the potential trafficking victims who were forced into cannabis cultivation, 96% were from Vietnam and 81% of them were children.

Increased legislative attention at the international and European level has begun to address some of the issues experienced by this group of vulnerable people. EU legislation against human trafficking states that signatory countries, including the UK, must allow prosecutors to drop cases if they think the defendant is the victim of trafficking. However, until an important case in the Criminal Court of Appeal there was evidence that the UK was routinely breaching the law in this regard. Neither the courts nor police were regularly

21 *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31

22 Thomas Spijkerboer. 2013. *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum*. London: Routledge.

23 Janna Webels. 2013. “HJ (Iran) and HT (Cameroon) - Reflections on a new test for sexuality-based asylum claims in Britain”. *International Journal of Refugee Law* 24(4): 815-839.

taking the possibility of child trafficking into account: easy investigation and convictions were being sought. While there was a growing understanding of the problems around trafficking and forced criminality at the senior levels of police forces this did not necessarily trickle down to those working on the ground.²⁴

In May 2013 the Criminal Court of Appeal heard four cases together, three of them concerning Vietnamese children forced to work in cannabis farms and then prosecuted and convicted of drug offences. One of the children, a 14-year-old boy was trafficked to England in the back of a refrigerated lorry. The Equality and Human Rights Commission and the Children's Commissioner for England both intervened in the case. The EHRC argued in its submission that Article 4 of the European Convention of Human Rights which prohibits slavery and forced labour and the UN Convention on the Rights of the Child required that child victims of trafficking should be given support, assistance and protection.²⁵ The Children's Commissioner's submission focused on ensuring that courts put the child's best interests first when considering a prosecution of children trafficked to the UK.

Successful impacts: The Court overturned all the convictions and in the judgment stressed that magistrates and judges should be prepared to step in and stop criminal cases against trafficking victims continuing even where the Crown Prosecution Service has brought a case to court. The Court held that criminality or culpability may be significantly diminished, and in some cases effectively eliminated, because no realistic alternative was available to the exploited victim but to comply with the dominant force of others. The CPS has since revised its guidelines on how to treat possible victims of trafficking. A bill on modern slavery was introduced in Parliament and the Modern Slavery Act became law in 2015.

It is worth bearing in mind...: That despite this ruling campaigners have been highly critical of the slow pace of progress on tackling forced labour by those trafficked. An early version of the Modern Slavery Bill failed to take a sufficiently victim-centred approach. However, after intensive campaigning on the part of organisations like Anti-Slavery and the Human Trafficking Foundation Prime Minister Theresa May announced in August 2016 that additional measures to assist the implementation of the act would be provided. This includes the creation of a task force to coordinate government action; a budget allocation of £33.5 million and an assessment of consistency in policy approach by Her Majesty's Inspectorate of Constabulary.

3.6 The treatment of 17-year olds in police detention

Name of voluntary sector organisation involved: Just for Kids Law, Howard League on Penal Reform, the Coram Children's Legal Centre

Goal of legal action: To challenge the policy of treating 17 year olds in police custody as adults.

Nature of success: Victory in the High Court and amendment to the relevant legislation and policy so that the definition of "juvenile" in police custody includes 17 year olds.

Just for Kids Law is a voluntary sector organisation that provides advocacy, support and assistance to young people in difficulty. As part of their "still a child at 17" campaign they have pursued a series of legal cases to address the problem of 17 year olds being treated as adults while in police custody. The legal actions were also supported by the families of three 17 year olds who had taken their own lives after being held by police.

In April 2013 Just for Kids Law backed a test case in the High Court brought by a south London teenager.²⁶ Hughes Cousins-Chang was 17 when he was arrested on suspicion of stealing a mobile phone. He was held for more than 11 hours in custody, his parents were prevented from talking to him and he was eventually released and no charges were ever brought. The Howard League on Penal Reform and the Coram Children's Legal Centre were granted permission to intervene to make legal arguments on the rights of young people in the criminal justice system. In 2011, the Howard League had published research on the impact of these rules on 17 year olds and access to justice generally. The interveners' contribution to the case was recognised

24 Harriet Grant. 2013. "Trafficking victims forced into crime are let down by police, report reveals." *The Guardian*. Friday 20 December 2013.

25 Equality and Human Rights Commission. 2013. Intervening in *R v L, HVN, THN and T* [2013] EWCA Crim 991. <https://www.equalityhumanrights.com/en/legal-case-work/human-rights-legal-cases>

26 *R (HC) v. Secretary of State for the Home Department* [2013] EWHC 982 (Admin)

in the High Court judgment.²⁷ Then Home Secretary Theresa May was ordered to redraft the code governing detention of teenagers under the Police and Criminal Evidence (PACE) Act. The Home Office agreed to allow 17 year olds taken into police custody to be supported by a parent or an appropriate adult. The department also accepted that parents should be informed if their 17 year old children are detained. The changes were implemented in October of that year.

Following the High Court case and the amendment to the code, it was apparent that significant anomalies remained in terms of how 17 year olds were treated. A specific concern was overnight detention of 17 year olds in police cells. All children aged 16 and under who were being held after arrest had a right to be transferred to local authority care overnight but 17 year olds were treated differently. The death of another vulnerable 17 year old, Kesia Leatherbarrow, shortly after being released from police custody in December 2013 highlighted the significant problems with the legislation. Leatherbarrow had been held for three days and two nights and had no adult representation when she was charged. Just for Kids Law, working closely with Kesia's family, issued a judicial review challenge to the Home Office's policy on detention. After beginning legal proceedings in Kesia's case the Government finally agreed to the amendment proposed by Just for Kids Law that revises the definition of "arrested juvenile" in the relevant legislation to include all those aged under 18. This is in line with the obligations the UK has as a party to the UN Convention on the Rights of the Child which requires states to treat children under 18 as juveniles.

Successful impacts: The series of legal actions brought by the families and Just for Kids Law resulted in incremental but profound changes in terms of respecting the rights of 17 year olds. These young people now have the right to be supported by a parent or an appropriate adult, their parents must now be informed of the situation and the child has the right to be transferred to local authority care homes when held for questioning.

It's worth bearing in mind that...: Just for Kids Law undertook extensive lobbying work to ensure that a positive but ultimately relatively narrow legal decision could serve as a catalyst for wider change. It worked closely with the bereaved families and with other organisations such as the National Appropriate Adults Network and the Standing Committee for Youth Justice. Campaigning work around the case involved a series of petitions delivered to Downing Street and the Home Secretary, letters from the affected families and campaigning to engage Members of Parliament and the Government.

3.7 The "bedroom tax" case: disabled children and their carers

Name of voluntary sector organisation involved: Child Poverty Action Group (CPAG)

Goal of legal action: To challenge discrimination against disabled children and their carers in the reduction of the housing subsidy.

Nature of success: Positive ruling in the UK Supreme Court in November 2016.

Since 1 April 2013 people in the social rented sector deemed to have a spare bedroom have had their housing benefit reduced by 14 per cent and people deemed to have two or more spare bedrooms have had their housing benefit reduced by 25 per cent. A number of legal cases have been brought concerning "the bedroom tax". This analysis focuses on the case supported by Child Poverty Action Group (CPAG) who work to address the problem of children in the UK growing up in poverty. CPAG acted for a family who had argued that "the bedroom tax" was unfair. CPAG's clients, Paul and Susan Rutherford, provide around-the-clock care for their grandson, Warren, who is severely disabled. They have a third bedroom in their Pembrokeshire bungalow for overnight carers who help look after Warren.

The Rutherfords successfully challenged the bedroom tax scheme in the Court of Appeal which held that the policy unlawfully discriminated against children with disabilities who need overnight care. Yet immediately after the appeal court ruling a spokesman for the Department of Work and Pensions said the government "fundamentally" disagreed with the court's ruling and announced they would challenge the decision in the Supreme Court. A three-day hearing in the Supreme Court in February 2016 addressed cases concerning disabled adults, a victim of domestic violence, adult carers and a disabled child. The final ruling came down

²⁷ Justice. 2016. *To Assist the Court: Third Party Interventions in the Public Interest*. Last accessed 26/11/2016: <https://2bquk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2016/06/To-Assist-the-Court-Web.pdf>

in November 2016 when the UK Supreme Court ruled that the Government discriminated against the Rutherfords.²⁸

Successful impacts: The series of cases over the three year period received extensive attention from the mainstream media. The final ruling in the Supreme Court had a positive result for the respondents themselves and also has implications for a broader population: those with disabled children who need overnight care will not be subject to the bedroom tax. While exact figures are elusive it has been suggested that thousands of people will no longer be affected by the bedroom tax as a result of this ruling.

It's worth bearing in mind that...: The broader bedroom tax still applies and five of the seven cases that were before the Supreme Court. One of these, "A", is a single parent who as a consequence of being assaulted and raped had a bedroom in her home specially converted into a secure "safe room". She claimed that the bedroom tax – which financially penalised the safe room – discriminated against women like her who live in "sanctuary scheme" homes. A majority of the Court failed to require the Government to create a formal exemption for those who live in Sanctuary Schemes but two of the judges, Lady Hale and Lord Carnwath, offered a dissenting opinion based on a gender equality analysis. The dissenting opinion holds that a state has a positive obligation to provide effective protection for victims of domestic violence and that a failure to do so constitutes discrimination because it has been internationally recognised that gender based violence is a form of discrimination against women. The failure of A's case means that for now there will be no formal exemption for the estimated 281 women in sanctuary schemes who are affected by the bedroom tax. A is planning to challenge the finding before the European Court of Human Rights.

3.8 The UN Committee on the Rights of Persons with Disabilities and austerity in Britain

Name of voluntary sector organisation involved: Disabled People Against Cuts (DPAC)

Goal of legal action: To bring international scrutiny to bear on the adverse effects of austerity policies on disabled people.

Nature of success: A highly critical report by the UN Committee on the Rights of People with Disabilities outlining the "systematic violations" of the rights of disabled people.

Disabled People Against Cuts (DPAC) is a grassroots campaigning organisation staffed by volunteers that was formed in 2010. DPAC campaigns against cuts to disability benefits and social care budgets and controversial changes such as the bedroom tax. According to research by the Centre for Welfare Reform, disabled people have been targeted by cuts nine times more than other citizens.²⁹ With limited effective opposition to the cuts in parliament, DPAC turned to a new UN Committee as a potential mechanism through which to achieve change.

The Convention on the Rights of Persons with Disabilities (CRPD) is an international human rights treaty of the United Nations intended to protect the rights of disabled people. The UK has signed the CRPD and the Optional Protocol which established the Committee on the Rights of Persons with Disabilities which has the responsibility of monitoring the Convention. It also set up a complaints mechanism that could be used by individuals and organisations. The Committee can consider complaints of rights violations, request information and make recommendations to the State party.

At the beginning of 2012 DPAC began collecting and sending information about the alleged adverse impact on disabled people of the implementation of a process of reforms of legislation and policies in the UK to the UN Committee on the Rights of People with Disabilities. In 2013 they made a formal request (with a number of disabled people's organisations) alleging that serious and systematic violations of the provisions of the Convention were occurring. The complaints focused specifically on policies affecting the enjoyment of the right to live independently and to be included in the community (article 19 of the CRPD), the right to an adequate standard of living and social protection (article 28) and the right to work and employment (article 27).

²⁸ *R (Rutherford and Todd) v SSWP* UKSC 0029/2016

²⁹ Simon Duffy (2013) *A Fair Society? How the Cuts Target Disabled People*. Sheffield: The Centre for Welfare Reform.

In 2014 the Committee determined that there was reliable information indicating grave or systematic violations of the Convention rights and established an inquiry. Part of this inquiry included an 11 day country visit whereby the Committee's rapporteurs visited London, Glasgow, Edinburgh, Manchester, Belfast and Cardiff and interviewed more than 200 individuals including government officers, members of the House of Lords and the House of Commons, members of the devolved legislatures, civil society organisation representatives, trade union officers, researchers, academics and lawyers. The Committee's highly critical report was released in November 2016 and concluded that austerity policies amount to "systematic violations" of the rights of disabled people. The report makes 11 recommendations, including calling on the UK government to carry out a study of the cumulative impact of all spending cuts on disabled people and to ensure that the human rights of disabled people are upheld.

Successful impacts: This is the very first inquiry of this type undertaken by the UN Committee on the Rights of People with Disabilities and so has enormous symbolic importance at the international level.

It's worth bearing in mind that...: Local authorities and councils did not cooperate with the Committee during the visit, despite several invitations inviting them to participate. It's also worth noting that Damian Green, the Work and Pensions Secretary has dismissed the critical report. The UK government argued in its response paper (published at the same time as the Committee's report) that the UN report "focuses on too narrow a scope and, in doing so, presents an inaccurate picture of life for disabled people in the UK".³⁰ It is clear that further campaigning work will be necessarily ensure the positive impacts of the inquiry are cemented.

3.9 Rights of Women, domestic violence and Legal Aid

Name of organisations involved: Rights of Women and the Public Law Project

Goal of legal action: To challenge restrictions on legal aid for victims of domestic violence

Nature of success: The court of Appeal quashed the restrictions and the government is working with Rights of Women and other groups to develop new regulations in response to the ruling of the Court.

In 2012 the then Lord Chancellor and Justice Secretary, Chris Grayling, introduced rules as part of the Legal Aid Sentencing and Punishment of Offenders (LASPO) Act 2012, with strict domestic violence evidence requirements for family law legal aid. This meant that legal aid was only granted in family law cases to claimants able to show evidence they had suffered domestic abuse in the previous two years. Such evidence could include convictions for domestic violence, non-molestation orders, evidence from doctors who had treated victims for injuries suffered as a result of domestic violence and a number of statutory remedies available only to victims who gone through formal routes to escape domestic violence. The regulations also disregarded forms of non-physical abuse, such as financial abuse. Women's rights campaigners argued large numbers of victims were being unlawfully blocked from legal aid, forcing many who had been physically and sexually abused at the hands of their partners to face them in court without legal representation.

Rights of Women is a campaign group that provides free legal advice on family law and campaigns and provides education and training on women's rights, with a particular specialism in gender-based violence. As part of their work the group undertook research which showed that 53% of those affected by domestic violence had chosen not to pursue cases in the family courts because they could not get legal aid.³¹ In 2014 Rights of Women, working with the Public Law Project, brought a legal challenge against the Justice Secretary in relation to these regulations. They lost their case in the High Court and decided to appeal.

At the heart of the 2016 Court of Appeal case was whether Regulation 33 of the Civil Legal Aid (Procedure) Regulations 2012, specifying the type of supporting evidence needed, unlawfully diminished the definition of domestic violence and went against the purpose of the LASPO Act. Regulation 33 was declared invalid insofar as it requires verifications of domestic violence within a 24 month period and omits to cater for victims of financial abuse. The Lord Chancellor is not appealing the decision.

30 The United Kingdom Government Response to the Report by the United Nations Committee on the Rights of Persons with Disabilities under article 6 of the Optional Protocol to the Convention. (2016) Last accessed 24/11/2016: <http://www.ohchr.org/Documents/HRBodies/CRPD/CRPD.C.17.R.3-ENG.doc>

31 Rights of Women. 2015. *Evidencing Domestic Violence: Nearly 3 Years On*. Last accessed 29/11/2016: <http://rightsofwomen.org.uk/wp-content/uploads/2014/09/Evidencing-domestic-violence-V.pdf>.

In April, the Government announced new interim regulations in response to the ruling of the Court, which it chose not to appeal. These regulations include an extended time limit on the forms of evidence of domestic violence from two years to five years and the Legal Aid Agency now has discretion to consider forms of evidence of financial abuse not currently set out in legislation. Rights of Women is working closely with the Ministry of Justice on a full review of the regulations for family law legal aid and the impact of the domestic violence evidence.

Successful impacts: The Court of Appeal quashed restrictions on obtaining legal aid in family court cases. This means the government has to remove the stipulation that people applying for legal aid have to produce evidence within the previous two years. It also opens up the inclusion of victims who have suffered financial abuse.

It is worth bearing in mind...: The initial claim by Rights of Women included allegations that the legislation breached the Human Rights Act. However, permission in both the High Court and the Court of Appeal, for arguing those grounds was refused.

3.10 The National AIDS Trust and the funding of PrEP

Name of organisations involved: The National AIDS Trust

Goal of legal action: To challenge NHS England's decision not to fund PrEP drugs, which protect against HIV infection.

Nature of success: The charity won in the High Court and again in the Court of Appeal in November 2016.

In September 2014 NHS England set up a committee to develop a policy on PrEP, short for "pre-exposure prophylaxis", an HIV antiretroviral drug. A recent UK study found that PrEP could reduce infection by at least 86% when provided to people at high risk of infection. The World Health Organisation also recommends that people deemed to be at substantial risk of HIV infection are offered the drugs.

In March 2016 NHS England issued a press release stating that, following legal advice, NHS England had come to the conclusion that it did not have the legal responsibility to arrange services to "prevent" the spread of HIV. It argued that its responsibilities are limited to treating those already assumed to be infected. NHS England argued that responsibility lay with local authorities.

This result was challenged by the National AIDS Trust in the High Court. The National AIDS Trust and the Local Government Association (acting as a third party intervener) argued that local authorities simply had insufficient funding for the drug regime. If it was their responsibility, it was argued, PrEP would never be commissioned. NHS England had argued that it cannot legally fund PrEP as it is a public health intervention which is the responsibility of local authorities. The case was of general public importance because it involved the balancing of the division of health responsibilities between NHS England, the health secretary and local authorities. The High Court held in favour of the National AIDS Trust. It undertook a purposive interpretation of the legislation and found that NHS England had broad and wide-ranging powers of commissioning, and could commission preventative HIV drugs. The case received extensive coverage in the mainstream press.

NHS England appealed the High Court decision. In November 2016 the Court of Appeal upheld the High Court ruling. NHS England has said it will not appeal further.

Successful impacts: Despite its decision to appeal the High Court ruling NHS England was already making concessions on PrEP before the Court of Appeal hearing. It announced it would publish a draft policy proposition for the potential commissioning of PrEP (while also making explicit that this would not imply that PrEP would actually succeed as a candidate for funding when ranked against other potential interventions). NHS England also said it would approach pharmaceutical companies to ask them to lower their prices which would clearly affect that likelihood that their drug could be commissioned. In December 2016 NHS England announced that it would fund a major new clinical trial of PrEP.

It is worth bearing in mind...: There was no guarantee that PrEP would be funded. The legal battle was particularly important and urgent because of its potential impact on the provision of other services. Nine new treatments and services NHS England had planned to make available to patients were put on hold pending the outcome of the appeal.

4. Conclusions

Litigation is expensive, risky and time consuming. This paper is not seeking to gloss over these difficulties. Yet it is also important to understand that under certain conditions strategic litigation can be very effective in helping a VSO achieve its objectives. In some circumstances it may be the only remaining way for a VSO to pursue its goals.

These ten case studies of the successful use of strategic litigation highlight the many ways in which legal action can have beneficial impacts on individual claimants, on VSOs and in society more broadly. Collectively they have shown how:

- Involvement by VSOs in legal actions can take a variety of forms including:
 - supporting individual claimants and their families;
 - acting as a claimant;
 - acting as a third-party intervener or offering expert evidence to the court;
 - playing a supporting role after a court ruling to ensure that a positive judgement is effectively implemented.
- Strategic legal action involves a number of different mechanisms and venues including:
 - Judicial review;
 - Involvement in criminal cases;
 - International tribunals.
- Positive outcomes can include a:
 - positive outcome and remedy for the claimant;
 - change in legal interpretation that affects a class or large number of people in the same situation as the claimants;
 - positive outcome for the VSO, such as continued funding or the protection of access to justice or legal aid for an organisation's constituency;
 - new balance of power in terms of relations with government stakeholders, from the local to the central level.

What this study has not been able to address in detail is the following: how these organisations came to consider using the law in the first place; how they went about seeking legal advice and finding representation; how they paid for their legal case and made decisions about whether to continue at each stage; and what each case has meant for them and others in that sector in terms of engaging with the law in the future. Addressing these types of empirical research questions could help to shed light on some of the conditions under which VSOs are more likely to successfully meet their objectives through the pursuit of strategic litigation.

Biographical note: Lisa is a Senior Lecturer in Human Rights at University College London. Lisa would like to thank the following for helpful discussions and comments during the development of this working paper: Rob Abercrombie, Neil Crowther, David Cutler, Shauneen Lambe, Louise Whitfield and participants at the December 8th 2016 workshop at the Baring Foundation. Lisa can be reached at: L.Vanhala@ucl.ac.uk

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