

“Human trafficking and Sensible Prosecuting”

International background

Council of Europe Convention on Action against Trafficking Human Beings (2005)

1. The international starting point for the English case law in this area is the Council of Europe Convention on Action against Trafficking Human Beings (2005). The United Kingdom ratified the “Anti-trafficking” convention on 17 December 2008, which makes reference to a number of international legal instruments in particular the United Nations Convention against Transnational Organized Crime and the Protocol thereto to Prevent, Suppress and Punish Trafficking in Persons, with a view to improving the protection which they afford and developing the standards established by them.
2. Article 1 of the Council of Europe Convention sets out its purposes as follows:
 - “1 The purposes of this Convention are:
 - a) to prevent and combat trafficking in human beings, while guaranteeing gender equality
 - b) to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution;
 - c) to promote international cooperation on action against trafficking in human beings. “
3. The Anti-trafficking Convention applies to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime (as set out in article 2)
4. Article 4 sets out a number of definitions:
 - a) "Trafficking in human beings" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

- b) The consent of a victim of “trafficking in human beings” to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
 - c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in human beings" even if this does not involve any of the means set forth in subparagraph (a) of this article;
 - d) "Child" shall mean any person under eighteen years of age;
 - e) "Victim" shall mean any natural person who is subject to trafficking in human beings as defined in this article.
5. Chapter II of the Anti-trafficking convention makes provision for the Prevention of trafficking and co-operation between different agencies.
6. Article 5 – headed Prevention of trafficking in human beings sets out the following:
- a) Each Party shall take measures to establish or strengthen national co-ordination between the various bodies responsible for preventing and combating trafficking in human beings.
 - b) Each Party shall establish and/or strengthen effective policies and programmes to prevent trafficking in human beings, by such means as: research, information, awareness raising and education campaigns, social and economic initiatives and training programmes, in particular for persons vulnerable to trafficking and for professionals concerned with trafficking in human beings.
 - c) Each Party shall promote a Human Rights-based approach and shall use gender mainstreaming and a child-sensitive approach in the development, implementation and assessment of all the policies and programmes referred to in paragraph 2.”
 - d) Each Party shall take appropriate measures, as may be necessary, to enable migration to take place legally, in particular through dissemination of accurate information by relevant offices, on the conditions enabling the legal entry in and stay on its territory.
 - e) Each Party shall take specific measures to reduce children’s vulnerability to trafficking, notably by creating a protective environment for them.
 - f) Measures established in accordance with this article shall involve, where appropriate, non-governmental organisations, other relevant organisations and other elements of civil society committed to the prevention of trafficking in human beings and victim protection or assistance.”

- g) Articles 12-16 sets out assistance to victims, recovery, legal redress, residence permit and repatriation as follows:

“Article 12

1 Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least:

- a) standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;
- b) access to emergency medical treatment;
- c) translation and interpretation services, when appropriate;
- d) counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;
- e) assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;
- f) access to education for children.

2 Each Party shall take due account of the victim’s safety and protection needs.

3 In addition, each Party shall provide necessary medical or other assistance to victims lawfully resident within its territory who do not have adequate resources and need such help.

4 Each Party shall adopt the rules under which victims lawfully resident within its territory shall be authorised to have access to the labour market, to vocational training and education.

5 Each Party shall take measures, where appropriate and under the conditions provided for by its internal law, to co-operate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims.

6 Each Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness.

7 For the implementation of the provisions set out in this article, each Party shall ensure that services are provided on a consensual and informed basis, taking due account of the special needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care.

Article 13 – Recovery and reflection period

1 Each Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities. During this period it shall not be possible to enforce any expulsion order against him or her. This provision is without prejudice to the

activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating and prosecuting the offences concerned. During this period, the Parties shall authorise the persons concerned to stay in their territory.

2 During this period, the persons referred to in paragraph 1 of this Article shall be entitled to the measures contained in Article 12, paragraphs 1 and 2.

3 The Parties are not bound to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly.

Article 14 – Residence permit

1 Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both:

- a the competent authority considers that their stay is necessary owing to their personal situation;
- b the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.

2 The residence permit for child victims, when legally necessary, shall be issued in accordance with the best interests of the child and, where appropriate, renewed under the same conditions.

3 The non-renewal or withdrawal of a residence permit is subject to the conditions provided for by the internal law of the Party.

4 If a victim submits an application for another kind of residence permit, the Party concerned shall take into account that he or she holds, or has held, a residence permit in conformity with paragraph 1.

5 Having regard to the obligations of Parties to which Article 40 of this Convention refers, each Party shall ensure that granting of a permit according to this provision shall be without prejudice to the right to seek and enjoy asylum.

Article 15 – Compensation and legal redress

1 Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand.

2 Each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law.

3 Each Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators.

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

Article 16 – Repatriation and return of victims

- 1) The Party of which a victim is a national or in which that person had the right of permanent residence at the time of entry into the territory of the receiving Party shall, with due regard for his or her rights, safety and dignity, facilitate and accept, his or her return without undue or unreasonable delay.
- 2) When a Party returns a victim to another State, such return shall be with due regard for the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim, and shall preferably be voluntary.
- 3) At the request of a receiving Party, a requested Party shall verify whether a person is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving Party.
- 4) In order to facilitate the return of a victim who is without proper documentation, the Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving Party shall agree to issue, at the request of the receiving Party, such travel documents or other authorisation as may be necessary to enable the person to travel to and re-enter its territory.
- 5) Each Party shall adopt such legislative or other measures as may be necessary to establish repatriation programmes, involving relevant national or international institutions and non governmental organisations. These programmes aim at avoiding re-victimisation. Each Party should make its best effort to favour the reintegration of victims into the society of the State of return, including reintegration into the education system and the labour market, in particular through the acquisition and improvement of their professional skills. With regard to children, these programmes should include enjoyment of the right to education and measures to secure adequate care or receipt by the family or appropriate care structures.
- 6) Each Party shall adopt such legislative or other measures as may be necessary to make available to victims, where appropriate in co-operation with any other Party concerned, contact information of structures that can assist them in the country where they are returned or repatriated, such as law enforcement offices, non-governmental organisations, legal professions able to provide counselling and social welfare agencies.
- 7) Child victims shall not be returned to a State, if there is indication, following a risk and security assessment, that such return would not be in the best interests of the child.”
- 8) Chapter IV articles 18- 26 of the Anti-trafficking Convention deals with substantive criminal law.

Article 18 specifically criminalisation of trafficking in human beings:

- 9) “Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct contained in article 4 of this Convention, when committed intentionally.”

One area of particular interest to criminal practitioners is the non-punishment provision set out in article 26 below :

- 10) “Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.”

EU Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims

1. Article 26 of the Anti-trafficking convention is echoed in the EU Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, (the EU Directive) which came into effect on 6 April 2013.
2. Recital 8 of the EU Directive underlines:
3. “Children are more vulnerable than adults and therefore at greater risk of becoming victims of trafficking in human beings. In the application of this Directive, the child's best interest must be of primary consideration, in accordance with the Charter of Fundamental Rights of the European Union and the 1989 United Nations Convention on the Rights of the Child ”.
4. Recital 14 provides:
5. “Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities ... that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators. The safeguard should not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in.”
6. Article 8 of the EU Directive makes provision for the non-prosecution or the non-application of penalties to the victim so that:
7. “Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to (trafficking)”.
8. This article 8 EU directive provision echoes Article 26 of the Anti-trafficking Convention.

English Prosecution approach

9. The delivery of basic justice relies on prosecutors and other state agencies exercising their discretions sensibly.
10. This covers the discretion to prosecute, as discussed in the CPS Code for Crown Prosecutors. Courts have recognised that prosecutors have a wide discretion to prosecute, which courts are reluctant to interfere with.
11. However, where prosecution policies are not adhered to, proceedings may be stayed as an abuse of process.
12. These issues were considered in the Court of Appeal Criminal Division in *LM and Others* [2010] EWCA Crim 2327.

LM and others

The Court of Appeal in *LM* considered the public policy and evidential basis for a prosecution in a human trafficking context.

The Anti-trafficking Convention imposes specific and positive obligations upon the United Kingdom to combat trafficking and provides measures to assist victims. Article 26, as cited above, provides for the possibility of not imposing penalties on those who have been trafficked victims who are subsequently compelled to engage in unlawful activity, such as offences connected with prostitution and unlawful cannabis factories

Article 26 implementation

Article 26 is implemented in England and Wales, in the words of Lord Justice Hughes,

"[7]through three mechanisms.

First, English law recognises the common law defences of duress and necessity ("duress of circumstances")¹.

Second, specific rules have been made for the guidance of prosecutors in considering whether charges should be brought against those who are or may have been victims of trafficking.

¹ The defences of duress and/or necessity ("duress of circumstances") may be in question where an offence has been committed by a trafficked victim whose case is that she was coerced into committing it. See *R v Z* [2005] 2 AC 467

Thirdly, in the event that the duty laid on the prosecutor to exercise judgment is not properly discharged, the ultimate sanction is the power of the court to stay the prosecution for what is conveniently, if not very accurately, termed “abuse of process”.

CPS guidance requires prosecutors to consider the public interest in prosecuting a “credible trafficking victim” and not to prosecute where there was credible evidence of duress. This is set out clearly in the guidance:

“Victims of human trafficking may commit offences whilst they are being coerced by another. When reviewing such a case it may come to the notice of the prosecutor that the suspect is a ‘credible’ trafficked victim. For these purposes ‘credible’ means that the investigating officers have reason to believe that the person has been trafficked.

In these circumstances prosecutors must consider whether the public interest is best served in continuing the prosecution in respect of the offence. Where there is evidence that a suspect is a credible trafficked victim, prosecutors should consider the public interest in proceeding.

Where there is clear evidence that the defendant has a credible defence of duress, the case should be discontinued on evidential grounds.”

Lord Justice Hughes considered the CPS guidance and concluded that :

“[10] The effect of that is to require of prosecutors a three-stage exercise of judgment. The first is: (1) is there a reason to believe that the person has been trafficked? If so, then (2) if there is clear evidence of a credible common law defence the case will be discontinued in the ordinary way on evidential grounds, but, importantly, (3) even where there is not, but the offence may have been committed as a result of compulsion arising from the trafficking, prosecutors should consider whether the public interest lies in proceeding to prosecute or not.”

Lord Justice Hughes went to observe that Article 26 works at the level of public policy, it does not create a defence or blanket immunity from Prosecution. It does not say that no trafficked victim should be prosecuted, whatever offence has been committed.

Article 26 requires Prosecution authorities to carefully consider whether public policy calls for a prosecution and punishment.

Accordingly, the application of Article 26 is fact-sensitive in every case.

Abuse of Process

Proceedings may be stayed as an abuse of process if the CPS failed properly to exercise their discretion judgement (on evidential and policy grounds) or a decision had been reached which no reasonable prosecutor could make.

The Article 26 convention obligation is that a prosecuting authority must apply its mind conscientiously to the question of public policy and reach an informed decision. If the exercise of judgment has not properly been carried out and would or might well have resulted in a decision not to prosecute, then there will be a breach of the convention and hence grounds for a stay.

Likewise, if a decision has been reached at which no reasonable prosecutor could arrive, there will be grounds for a stay. The role of the court is one of review. The test is akin to that upon judicial review.

Conclusion

There is a need, identified by Lord Justice Hughes, to bring the provisions of Article 26 to the attention of criminal justice practitioners, as

"[20] It is apparent that at present the provisions of the convention, and particularly of Article 26, are not sufficiently known generally amongst the profession."

L, HVN,TH, T v R, The Children's Commissioner for England, Equality and Human Rights Commission

7. Further analysis and guidance in relation to human trafficking and the criminal justice process was given by the Court of Appeal Criminal Division in L, HVN,TH, T v R, The Children's Commissioner for England, Equality and Human Rights Commission [2013] EWCA Crim 991
8. In the judgment of The Lord Chief Justice of England and Wales he makes a number of important observations:
 - 2) This vile trade in people has different manifestations. Women and children, usually girls, are trafficked into prostitution: others, usually teenage boys, but sometimes young adults, are trafficked into cannabis farming: yet others are trafficked to commit a wide range of further offences. Sometimes they are trafficked into this country from the other side of the world: sometimes they enter into this country unlawfully, and are trafficked after their arrival: sometimes they are trafficked within the towns or cities in this country where they live. Whether trafficked from home or overseas, they are all victims of crime. That is how they must be treated and, in the vast majority of cases they are: but not always.
 - 3) We understand that the Director of Public Prosecutions is shortly to reconsider his present guidance on the exercise of the prosecutorial discretion in relation to victims of trafficking. The form to be taken by prosecutorial guidance is ultimately his responsibility. Despite suggestions in the submissions to the contrary, the court cannot become involved either in the

investigation of the case or the prosecutorial decision whether it is in the public interest for the prosecution to proceed. Nevertheless we propose to offer guidance to courts (not, we emphasise, to the Director of Public Prosecutions) about how the interests of those who are or may be victims of human trafficking, and in particular child victims, who become enmeshed in criminal activities in consequence, should be approached after criminal proceedings against them have begun.

- 4) .We have examined the decisions of this court in [R v M\(L\), B\(M\) and G\(D\) \[2011\] 1 Cr. App. R 12](#) and R v N ; [R v L \[2013\] QB 379](#) in the light of EU Directive 2011/36/EU on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, (the EU Directive) which came into effect on 6 April 2013.
- 11) The abuse to which victims of trafficking are exposed takes many different forms. At some levels it may amount to “slavery”, or not far distant from “slavery”, “servitude”, or “forced or compulsory labour”. Activities of this kind are prohibited by Article 4 of the European Convention of Human Rights , and were criminalised in this jurisdiction by the [Asylum and Immigration \(Treatment of Claimants\) Act 2004](#) , the Gang Masters' Licensing Act 2004 , and [s.71 of the Coroners and Justice Act 2009](#) . With effect from 6 April 2013 two further offences of trafficking people set out in [ss.109 and 110 of the Protection of Freedoms Act 2012](#) have been brought into force. The first of these offences substitutes a new [s.59A in the Sexual Offences Act 2003](#) , directed at covering the trafficking of individuals within and outside the United Kingdom with a view to sexual exploitation, and the second substitutes a new [s.4\(1A\) into the Asylum and Immigration \(Treatment of Claimants etc\) Act 2004](#) an offence to cover trafficking within and outside the United Kingdom with a view to exploitation, largely directed at exploitation through labour.
- 12) We need not further expound the principles. They can be readily found in *Siliadin v France* (Application No 73316/01, 26 October 2004) ; *Rantsev v Cyprus and Russia* (Application No 25965/05, 10 January 2010) ; and [R v K\(S\) \[2013\] QB 82](#) and [R v Connors \[2013\] EWCA Crim. 324](#) where, in effect repeating what had just been said in [R v N; R v L \[2013\] QB 379](#) at paras [2]-[6], the court observed:

“Every vulnerable victim of exploitation will be protected by the criminal law, ... there is no victim, so vulnerable to exploitation, that he or she somehow becomes invisible or unknown to or somehow beyond the protection of the law. Exploitation of fellow human beings ... represents deliberate degrading of a fellow human being or human beings”.

- 13) It is surely elementary that every court, whether a Crown Court or magistrates court, understands the abhorrence with which trafficking in human beings of any age is regarded both in the United Kingdom and throughout the civilised world. **It has not, however, and could not have been argued that if and when victims of trafficking participate or become involved in criminal activities, a trafficked individual should be given some kind of immunity from prosecution, just because he or she was or has been trafficked, nor for that reason alone, that a substantive defence to a criminal charge is available to a victim of trafficking. What, however, is clearly established, and numerous different papers, reports and decided cases have demonstrated, is that when there is evidence that victims of trafficking have been involved in criminal activities, the investigation and the decision whether there should be a prosecution, and, if so, any subsequent proceedings require to be approached with the greatest sensitivity. The reasoning is not always spelled out, and perhaps we should do so now. The criminality, or putting it another way, the culpability, of any victim of trafficking**

may be significantly diminished, and in some cases effectively extinguished, not merely because of age (always a relevant factor in the case of a child defendant) but because no realistic alternative was available to the exploited victim but to comply with the dominant force of another individual, or group of individuals.

- 14) In the context of a prosecution of a defendant aged under 18 years of age, the best interests of the victim are not and cannot be the only relevant consideration, but they represent a primary consideration. These defendants are not safeguarded from prosecution or punishment for offences which were unconnected with the fact that they were being or have been trafficked, although we do not overlook that the fact that they have been trafficked may sometimes provide substantial mitigation. What, however, is required in the context of the prosecutorial decision to proceed is a level of protection from prosecution or punishment for trafficked victims who have been compelled to commit criminal offences. These arrangements should follow the “basic principles” of our legal system. In this jurisdiction that protection is provided by the exercise by the “abuse of process” jurisdiction.
- 16) In any case, where it is necessary to do so, whether issues of trafficking or other questions arise, the court reviews the decision to prosecute through the exercise of the jurisdiction to stay. The court protects the rights of a victim of trafficking by overseeing the decision of the prosecutor and refusing to countenance any prosecution which fails to acknowledge and address the victim's subservient situation, and the international obligations to which the United Kingdom is a party. The role of the court replicates its role in relation to *agents provocateurs*. It stands between the prosecution and the victim of trafficking where the crimes are committed as an aspect of the victim's exploitation (see R v Loosely A-G's Ref (No.3 of 2000) [2001] UKHL, [2002] 1 Cr.App.R.29).
- 17) In the context of an abuse of process argument on behalf of an alleged victim of trafficking, the court will reach its own decision on the basis of the material advanced in support of and against the continuation of the prosecution. Where a court considers issues relevant to age, trafficking and exploitation, the prosecution will be stayed if the court disagrees with the decision to prosecute. The fears that the exercise of the jurisdiction to stay will be inadequate are groundless.
- 18) If issues relating to the age of the victim arise, and questions whether the defendant is or was a victim of trafficking, or whether the alleged offences were an aspect of the victim's exploitation, have reached the Crown Court, or a magistrates court, they must be resolved by the exercise of the jurisdiction to stay a prosecution. In accordance with the process endorsed in M(L) (15–19) and N;L (86) that remains the correct procedure for determining such issues even after the EU Directive 2011/36/EU became directly effective. This provides sufficient vindication for the rights enshrined in the EU Directive as well as the Anti-Trafficking Convention, and indeed in Articles 4, 6 and 8 of the European Convention of Human Rights.

The evidential issues

- 19) The question whether a potential defendant has indeed been a victim of trafficking, and the extent to which his ability to resist involvement in criminal activities has been undermined is fact specific. Usually, but not always, the starting point is the moment of

arrest. When a young person is arrested the police must consider his age, and in the overwhelming majority of cases it is known or can readily be discovered. Arrangements are then made for attendance at a police station by an appropriate adult. After charge the child is brought before the Youth Court or before an Adult Court if no Youth Court is sitting. Difficulties relating to age are most likely to arise where a young person has entered the United Kingdom illegally, and has no genuine passport or similar identifying documents. When a young person without parents comes to the attention of a local authority (often via the United Kingdom Border Agency (UKBA) as an illegal entrant), the [Children Act 1989](#) imposes a duty on the local authority to determine whether he is a child in need. If so, he is entitled to number of services, including the provision of accommodation. However the first step is to establish the person's age. Since 2003 local authorities have assessed age by a process which complies with the principles set out in *R(B) v London Borough of Merton* [2003] EWHC 1689 (Admin). In the case of HVN an age assessment was carried out on the day of arrest and the fact that HVN was a child was established by the time he made his first appearance in court.

- 20) When the defendant may be a child victim of trafficking, two linked questions must be addressed. First, the defendant's age must be ascertained, and second, the evidence which suggests that he has been trafficked must be assessed. In the vast majority of cases the questions will be investigated by and in the same processes. Assuming that the factual conclusion is that the defendant was a child victim of trafficking, a quite distinct question for consideration is the extent to which the crime alleged against him was consequent on and integral to the exploitation of which he was the victim. That question also arises in the case of an adult victim. In some cases (as in these appeals) the answer to both questions will be that the criminal offence is here, or at least, a manifestation of the exploitation.
- 21) In a variety of different ways the administration of criminal justice recognises that provisions which relate to adults may have no appropriate application to cases involving individuals under 18 years of age. These are summarised in *R (HC, a child) v Secretary of State for the Home Department* [2013] EWHC 982 (Admin) paras 31-43. Self evidently we are not here dealing with children who are below the statutory age of criminal responsibility. Where questions about the age of a potential defendant arise after the case has been brought to court, the decision whether the defendant is or is not under 18 years old, or was or was not under that age for any relevant purpose, is addressed in statute. The Children's Commissioner has suggested that a thorough, multi-disciplinary approach should be taken to the assessment of the defendant's age, and she has expressed concern that there are too many occasions when the "due inquiry" into the age of the defendant who appears to be a child or young person, as required by [s.99\(1\) of the Children and Young Persons' Act 1933](#) , is overlooked. This provision directs the court to "make due inquiry" about the defendant's age, and "take such evidence as may be forthcoming at the hearing of the case" for this purpose. Similar provisions require the court addressing the age question to consider "any available evidence". ([S.150 of the Magistrates Court Act 1980](#) ; [S.1\(6\) of the Criminal Justice Act 1982](#) ; and [S.305\(2\) of the Criminal Justice Act 2003](#)).
- 22) When the issue arises, we agree that compliance with these provisions in contemporary society requires much more than superficial observation of the defendant in court or in the dock to enable the judge to make an appropriate age assessment. The facial features of the defendant may provide a clue or two, but experience has shown that this is very soft evidence indeed and liable to mislead. What we do know is that young people mature at

different ages, and that their early life experiences can sometimes leave them with a misleading appearance. We also appreciate that young people from an ethnic group with which the court is unfamiliar may seem older, or indeed younger, than those from ethnic groups with which the court has greater experience. Therefore when an age issue arises, the court must be provided with all the relevant evidence which bears on it. Although the court may adjourn proceedings for further investigations to be conducted, these have to be undertaken by one or other or both sides, or by the relevant social services. The court is not vested with any jurisdiction, and is not provided with the resources to conduct its own investigations into the age of a potential defendant until after the investigation has completed its course, and the individual in question is brought before the court.

- 23) In this context we repeat the observations of this court in *R v Steed* [1990] 12 Cr. App. R(S) 230 , where the question of the appellant's age was significant to the different methods of the disposal of the case on sentence, and therefore went to the legality of the sentence,

“It may often be right, indeed might usually be right, for the matter to be adjourned, if there is any real doubt about it, so that it may be more satisfactorily determined”.

More recently, this approach was underlined in *R v O* [2008] EWCA Crim. 2835 where the court emphasised that:

“(W)here there is doubt about the age of a defendant who is a possible victim of trafficking, proper enquiries must be made, indeed statute so required.”

- 24) The Children's Commissioner invites us to consider the impact of Article 10(3) of the Anti-Trafficking Convention which provides:

“When the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall presume to be a child and shall be accorded special protection measures pending verification of his/her age”.

- 25) The explanatory report to the Anti-Trafficking Convention also refers to a requirement that the parties should “presume that a victim is a child if there are reasons for believing that to be so and if there is uncertainty about their age.” In our judgment Article 10(3) addresses evidential issues. Where there are reasons to believe that the defendant is a child, then he should be treated as a child. In other words it is not possible for the court to brush aside evidence which suggest that the defendant may be a child. The issue must be addressed head on. If at the end of an examination of the available evidence, the question remains in doubt, the presumption applies and the defendant must be treated as a child. There is therefore no relevant difference between the approach required by Article 10(3) of the Anti-Trafficking Convention and the Guidance provided by the Director of Public Prosecutions.

- 26) The National Referral Mechanism (NRM) was set up on 1 April 2009 to give effect in the United Kingdom to Article 10 of the Council of Europe Anti-Trafficking Convention . Enough is now known about people who are trafficked into and within the United Kingdom for all those involved in the criminal justice process to recognise the need to consider at an early stage whether the defendant (child or adult) is in fact a victim of trafficking. The NRM establishes a three stage process for this purpose:

h) An initial referral of a potential victim of trafficking by a first responder to a competent authority. At present there are two competent authorities. They are UKBA and the United Kingdom Human Trafficking Centre (UKHTC), a multi disciplinary organisation led by SOCA (The Serious and Organised Crime Agency). In the present appeals we are concerned only with UKBA because the potentially trafficked individual were subject to immigration control. We note that where the potential victim of trafficking is a child his consent is not necessary before the referral is made, but where he is an adult consent is required.

ii) An UKBA official decides whether the person referred might have been a victim of trafficking. This is known as a “reasonable grounds” decision, for which UKBA have a target of five days. We are told that the average time is nine days. If and when a favourable reasonable grounds decision has been made the first responder is notified, and, in effect that decision allows for a period of forty five days during which the final stage of the NRM process continues, leading to

consideration by UKBA whether the evidence is sufficient to confirm conclusively that the individual has been trafficked.

28) Neither the appellants nor the interveners accept that the conclusive decision of UKBA (or whichever department becomes a competent authority for these purposes) is determinative of the question whether or not an individual has been trafficked... Whether the concluded decision of the competent authority is favourable or adverse to the individual it will have been made by an authority vested with the responsibility for investigating these issues, and although the court is not bound by the decision, unless there is evidence to contradict it, or significant evidence that was not considered, it is likely that the criminal courts will abide by it.

29) In the final analysis all the relevant evidence bearing on the issue of age, trafficking, exploitation and culpability must be addressed. The Crown is under an obligation to disclose all the material bearing on this issue which is available to it. The defendant is not so obliged, but if any such material exists, it would be remarkably foolish for the investigating authority to be deprived of it. Without any obligation to refer the case to any of the different organisations or experts specialising in this field for their assessments or observations, the court may adjourn as appropriate, for further information on the subject, and indeed may require the assistance of various authorities, such as UKBA, which deal in these issues. However that may be, the ultimate responsibility cannot be abdicated by the court.

30) What these appeals have revealed is that the issue of age in cases involving trafficked victims tends to attract less focus from those who act for the defendant rather than the Crown Prosecution Service which, on the whole appears to pursue the issues relating to age assessment with a measure of determination. Our view is that the professions are less well informed about the importance of these issues in the context of those who are or may be trafficked youngsters than perhaps they should be. Their importance is obvious and underlined by the outcome in each of the present appeals.

31) We suggest that where any issue arises, it should be addressed head on at the first appearance before the court, and that the documentation accompanying the defendant to court should record his date of birth, whether as asserted by him, or as

best known to the prosecution, or indeed both. Alternatively, the issues should be raised at the plea and case management hearing and appropriate adaptations should be made to the relevant forms to ensure that potential problems on this question are not overlooked.

- 32) As we have already explained the distinct question for decision once it is found that the defendant is a victim of trafficking is the extent to which the offences with which he is charged, or of which he has been found guilty are integral to or consequent on the exploitation of which he was the victim. We cannot be prescriptive. In some cases the facts will indeed show that he was under levels of compulsion which mean that in reality culpability was extinguished. If so when such cases are prosecuted, an abuse of process submission is likely to succeed. That is the test we have applied in these appeals. In other cases, more likely in the case of a defendant who is no longer a child, culpability may be diminished but nevertheless be significant. For these individuals prosecution may well be appropriate, with due allowance to be made in the sentencing decision for their diminished culpability. In yet other cases, the fact that the defendant was a victim of trafficking will provide no more than a colourable excuse for criminality which is unconnected to and does not arise from their victimisation. In such cases an abuse of process submission would fail”.

Colin Wells
Called 1987

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