

“Human Trafficking and Children: The Legal Response”

Colin Wells writes on the ongoing problems of human trafficking

The recent decision of 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, highlights the ongoing problem of human trafficking and gives further guidance in relation to the correct procedures to be followed by criminal justice practitioners.

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

The international starting point for the English case law is the Council of Europe Convention on Action Against Trafficking Human Beings (2005) (“Anti-trafficking” convention), which the UK ratified on December 17, 2008. The Anti-trafficking Convention applies to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organized crime (as *per art.2*).

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 subpara.(a) of this article;

d. “Child” shall mean any person under 18 years of age;

e. “Victim” shall mean any natural person who is subject to trafficking in human beings as defined in this article.”

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

“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

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 April 6, 2013. Recital 8 of the EU Directive underlines: “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 ”.

Recital 14 provides: “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.”

Article 8 of the EU Directive makes provision for the non-prosecution or the non-application of penalties to the victim so that: “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)”.

Article 26 Implementation

Article 26 of the Anti-trafficking convention is implemented in England and Wales, in the words of Lord Justice Hughes, in *LM and others* [2010] EWCA Crim 2327“... through three

mechanisms. First, English law recognizes the common law defences of duress and necessity ("duress of circumstances"). 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. Secondly, 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. 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 in *LM* considered the CPS guidance and concluded that: "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 art.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, its application is fact-sensitive in every case.

L, HVN, TH, T v. R, The Children's Commissioner for England, Equality and Human Rights Commission [2013] EWCA Crim 991. In June 2013, the Lord Chief Justice of England and Wales gave an important judgment in *L and others*; specifically identifying the vile trade of human trafficking and its different manifestations:

"[2] ... 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."

Specifically stating:

"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 art.4 of the European Convention of Human Rights, and were criminalized 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 April 6, 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 UK 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.

Previous Court of Appeal decisions (*R. v. K(S)* [2013] QB 82 and *R. v. Connors* [2013] EWCA Crim. 324) and *Strasbourg authorities* (*Siliadin v. France* (Application No 73316/01, October 26, 2004); *Rantsev v. Cyprus and Russia* (Application No 25965/05, January 10, 2010)) were considered and the principles to be adhered to were summarized from what was said in *R. v. N; R. v. L* [2013] QB 379 at paras.[2]-[6]:

"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".

The Lord Chief Justice observed in the *L* judgement that a trafficked person is not given an immunity from prosecution nor that a substantive defence to a criminal charge is available to a victim of trafficking. However, he went on to observe:

"[13] 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 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.”

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.

The abuse of process remedy was recognized and endorsed by the Lord Chief Justice; stating that 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.

Evidential Issues

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. 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 secondly, the evidence which suggests that he has been trafficked must be assessed. Assuming that the factual conclusion is that the defendant was a child/adult 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.

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 “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. 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). When an age issue arises, the court must be provided with all the relevant evidence which bears on it. This is particularly important for sentencing as underlined in *R. v. O* [2008] EWCA Crim. 2835, where the court emphasized 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.”

The Lord Chief Justice relied upon the art.10(3) of the Anti-Trafficking Convention 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.” to state that: “... Where there are reasons to believe that the defendant is a child, then he should be treated as a child ... 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.”

The National Referral Mechanism (NRM) set up on April 1, 2009 to give effect in the UK to art.10 of the Anti-Trafficking Convention establishes a three stage process for this purpose of establishing whether a person is a victim of trafficking:

- (i) An initial referral of a potential victim of trafficking by a first responder to a competent authority (UKBA and the United Kingdom Human Trafficking Centre (UKHTC), a multi disciplinary organization led by SOCA (The Serious and Organized Crime Agency).
- (ii) An UKBA official decides whether the person referred might have been a victim of trafficking. This is known as a “reasonable grounds” decision (aimed to be within five 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,
- (iii) consideration by UKBA whether the evidence is sufficient to confirm conclusively that the individual has been trafficked ...

Although the court is not bound by the competent authority, 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. 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.

Conclusion

Great care needs to be taken in respect of people who have been trafficked. The courts have made it clear that victims must not be punished for breaches of law where they arise as a consequence of their trafficked status. Where there are reasonable grounds to believe that an individual is, has been or may be a victim of trafficking, Judges have a responsibility in the context of court proceedings to take particular care in respect of that individual and, in a structured way, to take steps to ensure that they are benefiting from positive protection and assistance.

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