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Modern Slavery Victims and the Criminal Justice System

Philippa Southwell and Phillipa Roberts



About the trainers

- **Philippa Southwell** psouthwell@birds.eu.com

A criminal defence and human trafficking specialist solicitor advocate. Head of the Human Trafficking and Modern Slavery department at Birds Solicitors. Philippa has been involved in a significant number of important challenges against convictions of cases involving victims of human trafficking and forced criminality. She represented the applicant in the leading non-punishment case *THN & Ors*; and 5 of the 6 applicants in the recent Court of Appeal case *VSJ & Ors*, a specially convened victims of human trafficking court in front of the Lord Chief Justice. She is heavily involved in the training of lawyers and law enforcement and has drafted the Law Society practice note on modern slavery. She also has written and published reports and articles on this area of law and regularly lectures on the topic.

- **Phillipa Roberts** phillipa.roberts@hopeforjustice.org

Head of Travel and International Litigation at Fentons Solicitors LLP until August 2010. Phillipa served as a Legal Fellow with International Justice Mission in India, 2007-2008. She has been the UK Legal Director of Hope for Justice since August 2010. Hope for Justice is an Anti-Modern Slavery charity which exists to bring an end to modern slavery by rescuing victims, restoring lives and reforming society. Phillipa oversees a multi-disciplinary advocacy team that assists victims accessing advice and services, and supports them through criminal and civil proceedings. Phillipa inputs on law and policy at parliamentary level; and collaborates on strategic litigation.

Overview of Presentation

- Introduction to the issues
- Forms of forced criminality
- Legal framework
- S45 MSA statutory defence
- Supporting victims as defendants
- Supporting victims as witnesses

The issues

It is very common that forced criminality is used as a form of exploitation by traffickers throughout the world and member states. Traffickers continually evolve and develop this exploitation and continue to find different ways to exploit children through criminal activity. Identifying such cases of exploitation remains a challenge to member states, who continue to prosecute victims of trafficking.

- Failures of identification by law enforcement, lawyers and the courts
- The non-punishment provision is not being considered
- Many states conflate criminal and labour exploitation
- Often those who have been criminalised and prosecuted remain in a cycle of exploitation and will go on to be re-trafficked and re-criminalised several times.
- By criminalising VOTS we significantly reduce the possibility of them providing evidence or intelligence against their traffickers, as such we remain to have low conviction rates of trafficking related offences.

Common forms of forced criminality

- Cannabis cultivation and production of controlled drugs
- Pick pocketing, bag snatching, theft offences
- Forced begging
- ATM theft
- Counterfeit DVD selling
- Possession of offensive weapons
- Passport offences and fraudulent ID documents
- Drugs offences, including drugs importation
- Forced sham marriage
- Sex offences, including grooming and controlling prostitution offences
- Fraud

Production of controlled drugs

- It is very common that child will be put to work in domestic houses adapted for the purpose of drug production, commonly cannabis cultivation. This involves sophisticated electricity tapping and use of UVA lamps to cultivate and grow cannabis plants.
- Opened windows will be nailed shut and covered, sometimes, but not always will they be locked in these properties and will live and sleep in squalid conditions.
- Children seem to return to their communities and exploitation – i.e. debt bondage and also respect owed to family, other adults and communities and fact child likely to prioritise duties owed to family and adults over safety of self
- (Children forced to grow or move drugs for organised criminal gangs)
- (Often associated with debt bondage)

The transportation and supply of drugs

- Children exploited by “lover boys” or gangs may be forced to transport and supply drugs to others and not just be sexually exploited
- Children from Magreb district are being trafficked to transport drugs from their country of origin and also once they arrive in their destination country
- It is common to also see domestic national children being used in this way to transport drugs and weapons throughout one jurisdiction.

Theft and pickpocketing

- Children used to commit petty crimes
- Often children of Roma descent in organised gangs
- Roma children may pride themselves in how good they are at theft
- There is a significant discrepancy between the number of children identified by authorities as victims of trafficking and the number who have been charged for dishonesty offences such as theft, pick-pocketing and (begging).

Sham and servile marriage

- This involves EU nationals trafficked to marry non-EU nationals in order for the latter to gain residency
- The traffickers obtain the payment for the marriage
- Children are also trafficked from outside the EU so men can marry underage girls and for the purposes of servile marriages where they are slaves and not wives

Counterfeit goods

- Victims may be forced to make counterfeit goods, such as DVDs
- Victims may be forced to sell these on the streets to earn money for their traffickers
- Often they will be arrested and fined and will then return to the streets
- Probable link to debt bondage
- Usually children of Chinese origin

Immigration offences and fraudulent identity documents

- Children may also be prosecuted for possession of false passports or because they have made an illegal entry. It is common that fraudulent identity documents will then be used to open bank accounts and commit various forms of fraud, including benefit fraud.
- It is increasingly common that Polish national victims being used in forced labour will also have car insurance policies and vehicles registered in their names and with fraudulent documents, they may also be forced to drive vehicles without proper driving licences or insurance.

Sexual offences; including grooming and controlling prostitution

- It is common that those trafficked for the purposed of sexual exploitation, graduate into more senior roles while still under the control of their trafficker. This is common of children, particularly females trafficked from countries such as Morocco, Nigeria and Eastern Europe. Many incite sexual activity, have a role within a brothel and groom younger trafficked children.

Some trafficking indicators

- Showing signs that their movement has been restricted or monitored
- Unable to recall facts about identity, location or situation
- Giving false accounts to authorities
- Giving the impression they're bonded by debt
- Being ashamed of having committed a criminal act
- Being fearful, anxious, withdrawn and/or apathetic
- Showing signs of physical, emotional or sexual abuse
- Living in undignified/cramped conditions/malnourishment
- Speaking as though they've been coached/instructed
- Not possessing their own passport and/or identity documents or having false documents
- Going missing from care or missing episodes
- Hiding phones or sim cards
- Showing fear for family in country of origin
- Exhibiting distrust of the authorities
- Fear of revealing immigration status
- Often receiving phone calls when at court
- Pressure to plea guilty to offences and sudden changes in plea
- Inconsistent about age
- Inconsistent accounts
- Physical signs of abuse such as scarring, malnourishment, migraines, tattoos and branding on the skin
- Often report and evidence of older individuals present during the commission of the offence

Legal framework

- UN Convention on the Rights of the Child 1989
- UN Palermo Protocol 2000
- The European Convention for Human Rights, 1953
- CoE Convention on Action against Trafficking in Human Beings 2009
- The European Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims (2011/36/EU)

Slavery Defence 2015 s 45 statutory defence

- Section 45 of the Modern Slavery Act 2015 introduces a defence for victims who are compelled to commit criminal offences.
- The defence came into force on 31 July 2015. For offences committed by victims before this date, prosecutors should refer to the CPS guidance on ‘suspects in a criminal case who might be victims of trafficking or slavery’.

Slavery Defence 2015 s 45 statutory defence (cont.)

Under section 45:

- 1) A person is not guilty of an offence if - (a) the person is aged 18 or over when the person does the act which constitutes the offence; (b) the person does that act because they were compelled to do it; (c) the compulsion is attributable to slavery or relevant exploitation, and; (d) a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.
- 2) A person may be compelled to do something by another person or by the person's circumstances.
- 3) Compulsion is attributable to slavery or to relevant exploitation only if – (a) it is, or is part of, conduct which constitutes an offence under section 1 or conduct which constitutes relevant exploitation, or (b) it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation.
- 4) A person is not guilty of an offence if – (a) the person is under the age of 18 when the person does the act which constitutes the offence; (b) the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation, and; (c) a reasonable person in the same situation and having the person's relevant characteristics would do that act.
- 5) For the purposes of this section - "relevant characteristics" mean age, sex and any physical or mental illness or disability; "relevant exploitation" is exploitation (within the meaning of section 3) that is attributable to the exploited person being or having been, a victim of human trafficking.
- 6) In this section references to an act include an omission.
- 7) Subsections (1) and (4) do not apply to an offence listed in Schedule 4 (which includes serious sexual or violent offences).

Prosecutorial guidance

[http://www.cps.gov.uk/legal/h to k/human trafficking and smuggling/](http://www.cps.gov.uk/legal/h%20to%20k/human%20trafficking%20and%20smuggling/)

- The three-stage approach to the prosecution decision- In addition to applying the Full Code Test in the Code for Crown Prosecutors, prosecutors should adopt the following three stage assessment:
 1. is there a reason to believe that the person is a victim of trafficking or slavery? If so,
 2. if there is clear evidence of a credible common law defence of duress, the case should be discontinued on evidential grounds; but
 3. even where there is no clear evidence of duress, but the offence may have been committed as a result of compulsion arising from the person's trafficking or slavery situation, prosecutors should consider whether the public interest lies in proceeding to prosecute or not. (See the judgment in *LM & Ors* [2010] EWCA Crim 2327).

Prosecutorial guidance

- The duty to make proper enquiries & refer through NRM The Competent Authority decision
- Has the victim been compelled to commit an offence?
- Early guilty plea indicated
- Credible evidence of trafficking post-charge

Suspects who may be children: additional requirements

In cases where the defendant may be a child victim of trafficking/slavery, two linked questions must be addressed:

- what is the defendant's age?
- what evidence is there to suggest that the defendant is a victim of trafficking/slavery?

Section 99(1) of the Children and Young Persons Act 1933 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" (s150 of the Magistrates Court Act 1980; s1(6) of the Criminal Justice Act 1982; and s305(2) of the Criminal Justice Act 2003).

Case Law

- *R v O* [2008] EWCA Crim 2835
- *LM & Ors* [2010] EWCA 2327 [LM]
- *R v N and R v Le* [2012] EWCA Crim 189 [N and Le]
- *THN, T, HVN and L* [2013] EWCA Crim 991 [THN]
- *R v O* [2011] EWCA Crim 2226 [O 2011]
- *R v LZ* [2012] EWCA Crim 1867 [LZ]
- *R v VSJ et al.* [2017] EWCA Crim 36,

Non-prosecution principles

- UNICEF issues Guidelines on the Protection of Child Victims of Trafficking
- prohibit and prevent human trafficking
- encourage the investigation, prosecution and punishment of traffickers, and
- protect victims of trafficking
- Article 10 requires Member States to adopt legislative or other measures to identify, support and protect victims of trafficking.)
- Article 26 requires that Member States allow for the possibility of not imposing penalties on human trafficking victims, if they have been compelled to break the law.
- Article 8 of EU Directive
- Prosecution services in individual states usually have a prosecutorial discretion and this is why Article 8 is drafted as it is
- Issues with children as re-introduces a need to show that the child has been compelled
- See *L, HVN, THN v R* and definition adopted there for children
- Need for lawyers and guardians to understand the non prosecution principle and advocate for its application on behalf of trafficked children
- Failures of lawyers to apply guidance (eg. CPS guidance and Law Society practice notes)

Protection measures for victims

- Article 10 of the Council of Europe Convention requires signatory states to identify and protect victims of trafficking and articles 12-14 state that, once identified, victims must be afforded time, assistance and access to services.
- These articles are very important for any professional coming into contact with victims of trafficking who may not have been identified as such and who may have been arrested and charged for criminal offences that they have been compelled to commit and that are a direct consequence of their trafficking situation.

Council of Europe Convention on Action Against Trafficking in Human Beings 2005

This Convention, implemented in the UK in April 2009, aims to:

- prohibit and prevent human trafficking
- encourage the investigation, prosecution and punishment of traffickers, and
- protect victims of trafficking

Article 10 requires the UK to adopt legislative or other measures to identify, support and protect victims of trafficking.

Article 26 requires that the UK allows for the possibility of not imposing penalties on human trafficking victims, if they have been compelled to break the law.

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

- Recital 14 of this Directive states that human trafficking victims should not face prosecution or punishment for criminal activities, such as the use of false documents, prostitution or immigration offences, that they have been compelled to commit as a direct consequence of being subject to trafficking.
- Article 8, on the non-prosecution or non-application of penalties to the victim of human trafficking, states that the national authorities of EU member states should be able to not prosecute or impose penalties on people if they are compelled to commit criminal activities as a direct consequence of being a victim of human trafficking.

Supporting victims in criminal justice as defendants

If the victim is currently being prosecuted -

- If they are already being represented by a criminal defence solicitor then liaise with that individual to ensure that they are aware of the Law Society practice note on Criminal Prosecutions of Victims of Trafficking; if not connect them to experts in the field, e.g. Philippa Southwell.
- You can provide details of your client's particular circumstances and any documents, e.g. Conclusive Grounds decision.
- You can write a supporting letter for the solicitor to use when making representations to the CPS or the court.
- If they are co-operating with the police in the investigation of their trafficker, the police will often write to confirm the situation.

Supporting victims as defendants (cont.)

If the victim has already been prosecuted for offences, e.g. cannabis cultivation, minor road traffic offences –

- A referral should be made to a specialist criminal defence solicitor who can take full instructions from the client and decide the best way forward. Ensure that they are aware of issues of modern slavery and relevant law.
- Convictions can be re-opened, set aside, or reviewed if they were the result of the clients experience. Speak to the solicitor.
- You can provide details of your client's particular circumstances and any documents, e.g. Conclusive Grounds decision.
- You can write a supporting letter for the solicitor to use when making representations to the CPS or the court.
- If they are co-operating with the police in the investigation of their trafficker, the police will often write to confirm the situation.

Supporting victims as witnesses

- **The Victim's Code**

This 104 page document sets out the services and information victims of crime are entitled to from criminal justice agencies e.g.

- Written acknowledgement when you report a crime
- Kept informed of developments in the police investigation, e.g. arrests, bail conditions
- Informed if the suspect is not going to be prosecuted or is given an out of court disposal
- Make a Victim Personal Statement
- If there is a trial: pre-court familiarisation visit, meet the CPS advocate before the trial, special measures, informed of the outcome.

NB: Leaflets that summarise these rights are available in many languages.

- **Witness Charter**

The Witness Charter sets out the standards of care you can expect if you are a witness to a crime or incident in England and Wales.

Supporting victims as witnesses (cont.)

- **Victim Support**

Victim Support is an independent charity that works towards a world where people affected by crime or traumatic events get the support they need and the respect they deserve. They help people feel safer and find the strength to move beyond crime. Support is free, confidential and tailored to victims' needs.

- **Citizens Advice Witness Service**

They provide free and independent support for both prosecution and defence witnesses in every criminal court in England and Wales. Developing enhanced services for vulnerable witnesses.

- **Entitlement to Special Measures (section 46 Modern Slavery Act)**

When giving evidence in court, victims may be able to be screened off from the defendant or give evidence by video-link from another room or building. Their initial statement may be filmed (ABE Interview) and played in court to reduce the distress and the number of questions faced by the witness. Victims may be able to give their evidence in private – with the public gallery cleared. If they have communication difficulties they may be able to use an intermediary to help them understand the questions and to be understood.

Supporting victims as witnesses (cont.)

Victim Right to Review and Complaints

- Unfortunately some cases are not pursued further for a variety of reasons at a later stage in the process. Police forces now have ‘Victims’ Right to Review’ schemes. A victim in a qualifying case may ask for a review of a decision not to proceed with the case if this decision was made by the police; but they cannot ask for a review of a decision to bring less serious charges or to use an ‘out of court’ disposal. The time limits are very short but you can ask for more time to submit written submissions. If the case has gone to the CPS, they have their own right to review scheme.
- Complaints about the police can be made to the Independent Police Complaints Commission. Details of how to do this are on the website, but ordinarily a complaint is made to an individual force at first instance - see <https://www.ipcc.gov.uk/complaints>

Practical tips: general

- If supporting victims to report or victim has already reported the case to the police, obtain the crime reference and details of the officer in charge (OIC) of the case including police collar number.
- Ensure victims are aware these cases take time to investigate.
- Ensure victims are aware if they give a statement to the police they may need to go to court in the future if the case proceeds.
- If there is a Single Point of Contact (SPOC) in the police force for modern slavery and human trafficking in your area, invest in that relationship.
- Work with the police to ensure victim is regularly updated – even if the answer is investigation is still ongoing, not being updated makes victims anxious.
- Look for information that's available on victim rights in the victim's own language.
- The simpler the information, the less gets lost in translation - e.g. going to court DVD
- Understand a person's cultural context (e.g. see if there is information on criminal process in country of origin).
- Bad news should be delivered in person – you don't know what mental state someone is in and reaction to news such as a case not proceeded with.

Practical tips: pre-trial and beyond

- Its really important victims have a clear understanding of criminal justice process and will happen if they go to court, including special measures. This might need to be explained more than once due to vulnerability.
- Victims need support to the door of court and beyond. Practical support can positively impact, e.g. travel to court; ensuring victim knows where to go; victims knowing they can't take certain things to court, e.g. knife.
- Be aware victims may be going to a court in the area where they have been exploited, triggering memories and anxiety.
- Court visits via the Witness Service can be an essential way of victims visually understanding the court process and also feeling reassured of protection. An interpreter will be needed.
- Trials are extremely stressful: not only are courts intimidating environments but the victim will be reliving traumatic events. Often there are dips in mental health just before and also just after giving evidence. More concentrated support may be required around this time.

Extra Resources

- <https://www.app.college.police.uk/app-content/major-investigation-and-public-protection/modern-slavery/> (details how cases should be investigated by the police)
- <https://www.victimsupport.org.uk/>
- <https://www.citizensadvice.org.uk/law-and-rights/legal-system/going-to-court-as-a-witness/get-help-and-support-from-the-witness-service/>
- <http://victimscommissioner.org.uk/advice/victims-code-and-witness-charter/>
- <https://www.gov.uk/going-to-court-victim-witness>
- <https://www.cps.gov.uk/victims-witnesses/childs-victims-code-leaflet.pdf>
- <http://www.cps.gov.uk/publications/docs/VLU-leaflet.pdf>
- [Going to Court a Step by Step Guide https://youtu.be/aUOcoSa1WMM](https://youtu.be/aUOcoSa1WMM)