

OSCE 16th Alliance against Trafficking in Persons Conference

PANEL 3

**Victims' rights: challenges in identification, referral and
assistance of trafficked persons**

***“Applying the Non-Punishment Principle to
Trafficked Victims’ Cases involving Forced
Criminality”***

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Irrelevance of Consent:

Trafficking Convention, Art 4(b); EU Trafficking Directive, Art 2(4):

“The consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means...have been used.”

Non Criminalisation Legal Clauses

- **Article 26** of the Council of Europe Convention on Action against Trafficking in Human Beings 2005 ('the Trafficking Convention') provides:

“Article 26 – Non-punishment provision
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.”
- **Article 8** of the EU Directive 2011/36/EU ('the Trafficking Directive') provides:

“Article 8 Non-prosecution or non-application of penalties to the victim
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 in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.”

What does “compelled” mean?

OSCE Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking”, April 2013.

“[12]... [T]he non-punishment provision should be interpreted in light of the definition of trafficking in human beings, especially with regard to compulsion. A comprehensive understanding of compulsion includes all the means of trafficking: threat/ use of force, other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability. Being “compelled” to commit a crime thus includes the full array of factual circumstances in which victims of trafficking lose the possibility to act with free will; not only under the threat of physical violence or emotional abuse, but also in the devastatingly prevalent scenarios wherein traffickers exploit victims by abuse of a position of vulnerability.”

Compelled cont...

Children's cases

OSCE Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking”, April 2013.

“[42] ...in cases involving children, the need for a broad application of compulsion needs to be understood in light of the child’s vulnerability on account of their age alone, and of the irrelevance of consent in the legal definition of child trafficking. ...where a child is exploited and/or trafficked, and is used by a trafficker for an illegal purpose, or the child commits a criminal act related to their trafficked status, the application of the non-punishment provision is crucial, not only from a child safeguarding perspective but also to prevent the risk of secondary traumatization to the child at the hands of the State.”

Key UK Cases:

- ***R v O*** [2008] EWCA Crim 2835 - successful appeal against conviction: Nigerian girl using false identity document to flee abroad from her trafficker in the UK
- ***R v N; R v Le*** [2012] EWCA Crim 189 - two Vietnamese minors convicted of cannabis offences following guilty pleas; subsequent National Referral Mechanism trafficking decisions accepted that each individual had trafficked status at the time the offences were committed, and each was a child; Art 26 Trafficking Convention relied on; however unsuccessful appeals brought against conviction, though appeals against sentences allowed. *R v N* is now pending before the European Court of Human Rights.
- ***R v L and others*** [2013] EWCA Crim 991 – June 2013; Art 8 EU Trafficking Directive was relied on; led to successful appeals by 4 unrelated appellants who had been convicted for crimes which arose as a manifestation of their trafficking; 3 had been child victim of trafficking from Vietnam who had been used by traffickers in cannabis cultivation.

Extracts from the judgment of the UK's Court of Criminal Appeal in the case of *R v L and others* (21 June 2013) [2013] EWCA Crim 991 (heard and decided by the Lord Justice of England and Wales, Lord Justice Moses, Mrs Justice Thirlwall)

Who are victims of human trafficking?

“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.”

R v L judgment extracts Cont...

Power of a court to halt a prosecution

“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.”

R v L judgment extracts Cont...

Age & Exploitation

“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.”

[Emphasis added]

R v L judgment extracts Cont...

Age Disputes:

“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...”

“19...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...”

R v L judgment extracts Cont...

Conclusions on Age:

“25.The explanatory report to the...Trafficking Convention ...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 [as to minor age in age disputed cases, under Art 10(3) of the Trafficking Convention] applies and the defendant must be treated as a child.”

R v L judgment extracts Cont...

Role of the National Referral Mechanism on criminal cases:

“28...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.”

R v L judgment extracts Cont...

Final Analysis and Role of the Court:

“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. “

[Emphasis added]

R v L judgment extracts Cont...

Conclusion in T's appeal:

“55. There were a very high number of inconsistencies in the accounts given by the appellant at various stages in the investigation. The Crown was minded to resist this appeal ...but once it was accepted that the appellant had been the victim of trafficking, and that his presence as a gardener in the cannabis factory formed part and parcel of the process in which he was victimised, a series of inconsistencies in the explanations provided by the appellant at different stages could not be determinative of the appellant's age, nor indeed whether he was the victim of trafficking. On the basis of the evidence which was not then available, the Crown accepts that had these facts been known at the time when the decision to prosecute was made, the appellant would not have been prosecuted. To that we should add that if he had been prosecuted, on the basis now available, an abuse of process argument would have been likely to succeed. This appeal will be allowed.”

[Emphasis added]

Final Reflections

OSCE Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking”, April 2013.

“[1] ...It is often a deliberate strategy of the traffickers to expose victims to the risk of criminalization and to manipulate and exploit them for criminal activities. It is therefore not uncommon that victims of trafficking commit criminal offences or other violations of the law directly connected with, or arising out of, their trafficking situation. In these situations they often come to the attention of the authorities primarily as offenders and they may not be easily recognized as actual victims of a serious crime. Therefore, States should be fully aware of these developments in order to enable accurate victim identification and effective investigation of the trafficking crime, as well as to ensure effective protection of victims’ rights, including non-punishment of victims for offences caused or directly linked with their being trafficked.”

Conclusions:

[81] Victims of trafficking are victims of serious crimes and human rights violations. Under international law, States are obliged to ensure the protection of the rights of victims, including the right to be accurately identified as trafficked adults or children, and it is this identification that is the gateway to their protection. Not only is non-punishment a principle that respects and protects a victim's rights, including the right to be free from detention and unfair proceedings, to be protected against re-victimization and re-traumatization and to be offered safety and assistance in recovery, respect for this legal principle also helps to fulfill the State's obligations towards trafficked persons in line with the European Court of Human Rights' finding in the Rantsev case. In that judgment the Court held that human trafficking falls within the protective scope of the non-derogable rights of Article 4 of the European Convention of Human Rights and that a positive obligation on States to investigate human trafficking arises where circumstances give rise to, or ought to give rise to, a credible suspicion that the person had been trafficked. In such cases, where no investigation of the trafficker takes place but the criminalization of the victim proceeds, this will give rise to an extremely serious violation of that person's human rights and also the State's obligations under human rights and EU law."

OSCE Recommendations,

Conclusions cont...

“[82] Victims of trafficking are also witnesses of serious crime. The non-punishment provision will, if applied correctly, equally and fairly, enable States to improve their prosecution rates whilst ensuring critical respect for the dignity and safety of all victims of trafficking who, but for their trafficked status, would not have committed the offence at all.”

Thank You

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