

Determination of whether a person is a trafficking victim

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I. What is human trafficking?

The Palermo Protocol provided the first internationally recognised definition of human trafficking and this was subsequently incorporated into Article 4 of the Convention on Action against Trafficking in Human Beings agreed in December 2005 ('the Anti-Trafficking Convention'). This provides:

"For the purposes of this Convention:

- (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 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 of 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 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."

There is an additional provision relating to children:

- (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...

Human trafficking is legally distinct from 'human smuggling' also called people smuggling.

The UN Protocol against the Smuggling of Migrants by Land, Sea and Air, adopted in 2000 defines human smuggling as

"... the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a state party of which the person is not a national".

Human smuggling occurs when an individual seeks the help of a facilitator to enter the UK illegally, and the relationship between both parties ends once the transaction ends – it is not, without more, a form of human trafficking.

The distinction explored in the Home Office guidance by reference to the purpose:

“the purpose of human smuggling is to move a person across a border illegally, and it is regarded as a violation of state sovereignty. The purpose of modern slavery is to exploit the victim for gain or other benefit and is regarded as a violation of the person’s freedom and integrity.”¹

However, many cases involving illegal entry and exploitation are not clear cut. For example a young woman Z from Albania is promised a good job as a waitress in London by person A. He puts her in touch with person B who arranges, for a sum to be paid back in the future, for her to travel to Italy hidden in a lorry and then collect a false Italian passport which she used to fly to London. She is met in London by person A who takes the false passport as well as her real papers and coerces her into prostitution telling her that he will tell the authorities that she is illegally in the country if she does not comply. The clients pay him directly and he keeps most of it himself. She knows that if she is deported she will never be able to repay the debt of her travel to London and will be at risk in Albania from person B and his affiliates, as will her family. She complies.

¹ *Victims of modern slavery – Competent Authority Guidance* Version 3.0 published 21 March 2016, p37.

She was trafficked by person A: she was recruited by means of deception (good job in London) and she was also received by him by means of deception. This was for the purposes of exploitation (as a prostitute). It is likely that she was smuggled by person B (assuming he was not part of the recruitment or reception or subsequent exploitation).

But what if there is no recruitment by A, and Z just wants to make a better life in London and the only way she will be able to get to the UK is by through the service of traffic smugglers and she ends up in prostitution as a result of her debt bondage?

It depends which way down the lens you look at it.

If you look at the question of consent at the point of departure then you might say it is a question of smuggling – she was an economic migrant who used the services of a smugglers to get to the UK.

However, the distinction between smuggled and trafficked migrants is not straightforward. There is an excellent albeit quite old article now called ‘Smuggled or Trafficked?’ by Jacqueline Bhabha and Monette Zard² which argues that this approach assumes a hard and fast divide between ‘consent’ and ‘coercion’ when the reality is more complex.

That must be right. Going back to the definition, there is a good argument that a lot of smuggling in fact involves trafficking:

- a) the act requirement is met: ‘transportation, transfer, harbouring or receipt of persons’,
- b) the means: ‘by means of the threat or use of force or other forms of coercion... of abuse of power or of a position of vulnerability...’
- c) for the purpose of exploitation

² [http://search.ox.ac.uk/s/cache?collection=oxford-public-other&doc=funnelback-web-crawl.warc&off=115906441&len=16301&url=http%3A%2F%2Fwww.fmreview.org%2Fpeopletrafficking%2Fbhabha-zard.html&profile=default&hl=\(%3Fi\)%5Cbhabha%5Cb](http://search.ox.ac.uk/s/cache?collection=oxford-public-other&doc=funnelback-web-crawl.warc&off=115906441&len=16301&url=http%3A%2F%2Fwww.fmreview.org%2Fpeopletrafficking%2Fbhabha-zard.html&profile=default&hl=(%3Fi)%5Cbhabha%5Cb)

The crucial issue is b): what is an abuse of power or a position of vulnerability? Poverty, hunger, illness, lack of education and displacement could all in theory constitute coercive circumstances that induce a position of vulnerability and these may be exacerbated by gender issues as well.

The Bhabha and Zard article puts it well:

“There is no question that smugglers are taking advantage of the smuggled person’s desperation or vulnerability but just because the smuggler’s offer is exploitative does not necessarily mean that the smuggled migrant is coerced. However, if the smuggled migrant has no other acceptable options, if he or she would starve, or be unable to get medicine for a child unless he or she took up the offer, then the exploitative offer might legitimately be considered coercive. Formal consent in these situations (because the migrant sees no other way out) does not alter the coercive nature of the agreement. In assessing ‘coercion’ and ‘consent’, policy makers and advocates are forced to engage in moral decisions about which types of conduct are acceptable or permissible in a society and which are not. Slavery and slavery-like work are clearly not acceptable but neither is lack of access to essential food, medicine and shelter.”

The distinction being quite a difficult one, it is perhaps not surprising that the Anti-Trafficking Convention itself requires, in Article 10 that State signatories must provide its competent authorities “with persons who are trained and qualified in preventing and combatting trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims...”

There are duties of collaboration with other States signatories and with relevant support organisations.

II Gateway into domestic law

The Anti-Trafficking Convention does not have the force of law domestically, but it is the source, in practice, of certain obligations arising under the ECHR and the basis of the domestic regime.

Article 4 ECHR provides:

- "1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. ..."

In *Rantsev v Cyprus and Russia* (2010) 51 EHRR1, the ECtHR held, at para.282, that trafficking itself, within the definition of Article 4(a) of the Anti-Trafficking Convention, fell within the scope of Article 4 of the ECHR. As a result, any obligation in relation relating to trafficking arising under Article 4 ECHR are binding on public authorities as a matter of domestic law under section 6 of the HRA 1998.

The obligations imposed by Article 4 ECHR and *Rantsev* have been interpreted by the CA in its recent decision in *TDT v SSHD* [2018] EWCA Civ 1395 as imposing three main types of duty [17]:

- (a) a general duty to implement measures to combat trafficking – "the systems duty";
- (b) a duty to take steps to protect individual victims of trafficking – "the protection duty" (sometimes called "the operational duty");
- (c) a duty to investigate situations of potential trafficking – "the investigation duty" (sometimes called "the procedural duty").

Whilst *TDT* was primarily concerned with the protection duty, much of what is said in that case is of wider relevance and is particularly relevant to the procedural duty and this is examined further below.

III So how is this put into practice?

The National Referral Mechanism (NRM) is the process by which an individual is identified as a victim of modern slavery. Referrals to the NRM can only be made by authorised agencies known as First Responders.

In England and Wales the process involves three key steps which can be summarised as follows:

- 1) If a potential victim of trafficking is identified by a "first responder" the case must be referred to the UK Human Trafficking Centre ("UKHTC"), which is a unit within the National Crime Agency. First responders include the Home Office itself, police force, social services and certain Non-Governmental Organisations such as the Refugee Council and the Salvation Army.
- 2) A designated "Competent Authority" – either the UKHTC itself or a unit within the Home Office – will, if possible within five days, determine whether there are reasonable grounds to believe that the person referred is a victim of trafficking. If such a determination is made they will be given a 45-day recovery and reflection period (longer than required by the Convention), with associated support.
- 3) After the expiry of the 45 days, the Competent Authority will make a final decision as to whether there are, on the balance of probabilities, sufficient grounds to decide that he or she is a victim of trafficking – a so-called "conclusive grounds decision".

The Home Office has published guidance on the operation of the NRM to its front-line staff and to Competent Authorities. The current versions are dated 18 and 21 March 2016. These Guidance documents are long and detailed but are useful as a practical guide both in assisting anyone who wants to know what are the signs that someone they are in contact with may be a potential victim of trafficking – see for example pages 17-19 of the frontline staff guidance³ as well as for signposting the reader to where to go next. They are however the Home Office's view of the legal obligations which may not be uncontroversial: for example, p35 of the Competent Authority Guidance suggests that in the context of forced labour "as with other forms of trafficking related exploitation, a high level of harm and control or coercion is needed to trigger the UK's obligation under the [Anti-Trafficking Convention]" – whilst

³ <https://www.antislaverycommissioner.co.uk/media/1057/victims-of-modern-slavery-frontline-staff-guidance-v3.pdf>

whether that is so in any individual case is a matter of judgment this may be setting the bar rather high.

There is separate guidance for Scotland and Northern Ireland.

IV – The legal tests

The legal tests to be applied and the inter-relationship between the Guidance and Article 4 of the ECHR, however, have been a source of judicial consideration over the years. The following key propositions emerge from the recent decision of the CA in *TDT*:

- 1) There is an obligation under the Guidance on front-line staff who encounter cases where there are indicators of trafficking to refer such cases to the Competent Authority. The threshold for this obligation is very low: *TDT* at [33(1)].
- 2) There is an obligation on the Competent Authority to make a positive reasonable grounds decision where there is a reasonable suspicion that the person referred is a victim of trafficking. This threshold is higher than that applicable at the first stage but, as the Guidance itself recognises, it is still "relatively low": *TDT* at [33(2)].
- 3) Although the Guidance does not constitute legislation, any unjustified departure from their terms will be potentially challengeable by way of judicial review in the usual way: *TDT* at [25].
- 4) The Strasbourg caselaw, in particular *Rantsev* as well as other Strasbourg decisions, have referred, in relation to the Competent Authority test, not to "reasonable suspicion" but to "credible suspicion". In essence these are substantially equivalent: *TDT* at [38]. The point is that both formulations illustrate the difference between "mere allegations and those with sufficient foundation to call for an investigation". The Court of Appeal in *TDT* noted, but did not comment upon the fact that in *CN v UK* (2013) 56 EHRR 24, the Strasbourg court regarded "the credible suspicion" threshold as passed where

the putative victim's account of having been trafficked was "not inherently implausible": *TDT* at [38].

- 5) However, and although there is obviously an inter-relationship between the Guidance and the underlying obligations giving rise to it, failure to follow the Guidance does not automatically mean that there has been a breach of the procedural obligation under Article 4 ECHR: *SSHD v Hoang* [2016] EWCA Civ 565 at [35]; *TDT* at [31]. The obligations under the Guidance and under Article 4 need to be analysed separately – "there is no automatic read across".
- 6) On the face of the decision in *Rantsev*, the protection duty arises where there is credible suspicion of either of two separate things – (a) that an individual has been trafficked or (b) that he or she was at real and immediate risk of being trafficked. There was an issue before the Court in *TDT* as to whether those two elements are indeed true alternatives, so that the protection duty arises not only in the case of individuals for whom there is a (real and immediate) risk of their being trafficked in the future but also in the case of individuals who have been trafficked in the past. The Court concluded that the fact there is a credible suspicion that the person may be a victim of trafficking in the past is not necessarily enough, of itself, to trigger the Article 4 protection duty. However, such cases would be unlikely to arise often in practice and in any event, in order to decide that the protection duty did not arise the domestic authorities would have to conduct a careful assessment prior to reaching such a conclusion: [41].
- 7) On the question of "immediate" in 'real and immediate risk' – this is inevitably fact sensitive but a) 'present and continuing' captured the essence of the meaning and b) immediate did not mean imminent: *TDT* at [44]. As to "real" risk – neither likelihood nor a fairly high degree of probability was required: *TDT* at [45]. The question is simply "where the material available shows a sufficient risk – in this case of re-trafficking – for protective measures to be needed.": *TDT* at [46].

In *TDT* the Court concluded in that case that the SSHD was or should have been aware of material which gave rise to a credible suspicion that he had been trafficked

and which in the circumstances of his case meant that he was also at real and immediate risk of being re-trafficked if released from immigration detention without proper protective measures being taken to prevent that happening (as indeed was the believed to be the case as he disappeared almost immediately with a man on release). The Court held that the SSHD had acted in breach of Article 4 ECHR and thus s6 of the HRA by releasing him without having put in place adequate measures to protect him from being re-trafficked.

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