

Introduction

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2 Human Trafficking – Human Rights/ chapter 1

An important understanding of this definition [of trafficking] is an understanding of trafficking as a process comprising a number of interrelated actions rather than a single act at a given point in time. Once initial control is secured, victims are generally moved to a place where there is a market for their services, often where they lack language skills and other basic knowledge that would enable them to seek help. While these actions can all take place within one country's borders, they can also take place across borders with the recruitment taking place in one country and the act of receiving the victim and the exploitation taking part in another. Whether or not an international border is crossed, the intention to exploit the individual concerned underpins the entire process.

UNHCR Guidelines on International Protection: The application of article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked (7 April 2006)

www.unhcr.org.au/UNHCRguidelinesonInternationalProtection.shtml

Trafficking in human beings

- 1.1 Trafficking in human beings contains two elements: transfer and exploitation. Human beings are transferred in order to be subjected to very serious, criminal forms of exploitation. They can be exploited more easily once they have been transferred into an unfamiliar environment.
- 1.2 The process of securing control may be done by recruitment by way of complete coercion through abduction or kidnapping, sale of a child, deception by promises of legitimate employment and/or entry, deception about working conditions or abuse of vulnerability, or a combination of these.¹ Threats, abuse of vulnerability or debt bondage may be used to secure labour at the destination.
- 1.3 Interest in trafficking outstrips information as to its scale. Lack of information is in part due to the hidden nature of the business. The estimates are as fluid as the economics of supply and demand which leads to the problem. At the global level, four organisations have databases on trafficking in human beings: the US State Department, the International Labour Organization (ILO), the International Organization for Migration and the United Nations Office on Drugs

1 *Human trafficking: an overview*, United Nations, 2008 pp11–12 (www.ungift.org/docs/ungift/pdf/knowledge/ebook.pdf).

and Crime. The ILO has estimated² that the minimum number of human beings in forced labour (including sexual exploitation) as a result of trafficking, at any one time, is 2.5 million globally and 270,000 in industrialised countries. The US State Department has estimated that 800,000 people are trafficked across national borders annually.³ The annual profits, according to the ILO, are estimated at \$31.7 million globally and \$15.5 million in industrialised economies.⁴ The traffickers may be part of an efficient criminal organisation, or the chain of transfer may be carried out by individuals who are only loosely, or not at all, previously connected. Crucial to an understanding of the issue is the economics of trafficking, which, as regards trafficking within and into Europe, occurs at the intersection of global labour supply and demand. Thus, any nation that primarily receives trafficked human beings has to consider a strategy to address demand – for example, demand for cheap flexible labour in particular sectors such as care, construction, hospitality and agriculture, or the demand for cheap flexible sexual services. In each case, trafficking occurs in unregulated or inadequately regulated areas.

1.4 Representing clients who have been trafficked is a challenge for the practitioner. The law is novel and rapidly evolving, with significant aspects governed by international law. As a result, there is more history and theory and sometimes discussion on law reform in this book than is usual in Legal Action Group publications. However, this is neither a book for black letter lawyers nor a policy book. This is a practitioner's book which considers what can be done to assist clients now, using existing legal tools.

1.5 The adviser may be advising clients before as well as after they have been identified as victims of trafficking. The adviser therefore needs to be aware of what facts may point to the client having been trafficked and to be aware of what to do when they are alerted to the possibility that this may be the case. Indeed, the client may not initially self-identify as a victim of trafficking. Potential clients may have worked within a hidden economy⁵ without regulation or

2 ILO, *A global alliance against forced labour*, Geneva, International Labour Office, 2005.

3 United States of America, Department of State, *Trafficking in persons report 2007* (www.state.gov/g/tip/ris/tiprpt/2007/).

4 Patrick Belser, *Forced labour and human trafficking: estimating the profits*, working paper, Geneva, International Labour Office, 2005, p17.

5 See the *Grabiner report on the informal economy*, HM Treasury March 2000, which touched briefly on unauthorised work by migrants (chapter 4).

protection. They may be traumatised. There may often be significant cultural and communication barriers, including, but not limited to, language barriers. Reaching the clients requires significant proactive outreach skills and linguistic accessibility.

A human rights approach

1.6 Anti-slavery agreements are often termed the first human rights agreements, concerned as they were with crimes against humans rather than against states per se. While a human rights model has existed for almost a century in ILO Conventions and other UN Conventions, only recently, with the coming into force of the UN Convention against Transnational Organized Crime, has that human rights model come fully into focus. However, even with a human rights model, the phenomenon of modern human trafficking does not sit easily within traditional human rights law which is orientated towards breaches by the state.⁶ In contrast, human trafficking is a market activity often carried out by powerful private criminal organisations.

1.7 Human rights law has dealt with this so far through the imposition of positive obligations on the state. The nearest the UK has to a constitutional guarantee against the trafficking of human beings is Article 4 of the European Convention on Human Rights, set out in schedule 1 to the Human Rights Act 1998, prohibiting slavery, servitude and forced and compulsory labour. While both Article 4 and the ILO Conventions on forced labour were initially concerned with labour exacted by force by the state, it is now recognised that Article 4 entails obligations to take positive steps:

The Court considers that limiting compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective.

Siliadin v France, European Court of Human Rights,
Application no 73316/01, 89.

1.8 Positive obligations involve the protection of victims and the taking of effective steps to prevent trafficking as well as prohibition

6 See generally 'The "not-a-cat" syndrome: can the international human rights regime accommodate non-state actors?' Philip Alston in *Non state actors and human rights*, ed Alston, OUP, 2005.

and punishment.⁷ The creation and enforcement of specific criminal prohibitions represents a progression from the previous approach, focusing solely upon immigration control, which failed to distinguish between trafficker and trafficked.

- 1.9 However, criminal and immigration law are essentially reactive to a crisis. Preventive steps required to discharge the state's positive obligations will include addressing the causes of trafficking to prevent trafficking generally. They will also include putting in place a system of early warnings as specifically preventive steps. In a destination state such as the United Kingdom, this includes the inspection of relevant agencies and workplaces and the provision of civil law rights and remedies.
- 1.10 Finally, in furtherance of its positive obligations, the state has given itself considerable powers as against suspected individuals. These can be justified as measures necessary for the protection of the rights of others, but should be continually measured against the outcomes for that stated aim.

Multi-disciplinary law

- 1.11 The practitioner reaches for the existing law to provide a remedy for a wrong. There are now specific prohibitions in criminal law and a growing body of case-law. The civil law adviser has more diffuse sources of rights to consider. Issues raised by human trafficking cases may give rise to public law, immigration, employment, contract and tort as well as issues under the Human Rights Act 1998. There is a need for advice on immigration status, work, support and/or care and decisions on long-term future. Claims for compensation should be considered. Since there is at present no specific civil law framework for victims of trafficking, relevant pre-existing law has to be identified and used.

Partnership approach

- 1.12 A human rights lawyer interested in practising in this field will do well to set aside any automatically adversarial habits. This is an area

7 Sandhya Drew, *Human trafficking, a modern form of slavery?* [2002] EHRLR 481; Tom Obokata, *Trafficking of human beings from a human rights perspective*, Martinus Nijhoff, 2006; Sandra Fredman, *Human rights transformed: positive rights and positive duties*, OUP, 2008.

where a partnership approach is more effective.⁸ A multi-agency approach by the state is combined with a partnership between the state, trade unions, employers and business, non-governmental organisations (NGOs) and civil society. In turn, advisers will be more effective and informed about the context in which their clients have been existing where they have adequate community links. Conversely, many community groups seek legal advice and this is likely to increase from 1 April 2009 with the system of support measures following identification as a victim.⁹

1.13 It will also sometimes be necessary to get information about conditions in other countries, where to get information about the sending state or information on why the client should not be returned.

1.14 This book will also focus on the circumstances in which advisers may be encountering victims of trafficking in the course of other work and applies the definitions of trafficking to a practical context. It is important to be aware that even the adviser who does not set out to specialise in this field may be faced with a request for advice. It is therefore important either to be able to provide initial advice or to be aware of where to refer the request.

Professional conduct, client care and practical issues

1.15 The usual professional conduct rules continue to apply to legal advisers.

Professional duty of confidentiality

1.16 A lawyer has a duty of confidentiality to his or her client or former client except where disclosure is required or permitted by law in advance or agreed by the client: Rule 4.01 of the Solicitors' Code of Conduct 2007 (Solicitors Regulation Authority);¹⁰ para 702 of the Bar Code of Conduct, 8th end.¹¹ There are very limited exceptions to that rule. The first is that notification duties arise where a lawyer who

8 The partnership approach was pioneered by the ILO.

9 See chapter 8.

10 Available at www.sra.org.uk/solicitors/code-of-conduct/214.article. The Code is dated 1 July 2007.

11 See www.barstandardsboard.org.uk/standardsandguidance/.

handles money has reason to believe that it may be connected to money laundering. The second exception is that it is necessary to breach confidentiality for the purposes of child protection. In practice, and subject to the exceptions, this means that where a client does not agree to disclosure, the adviser's role is limited to informing and advising the client. This does not prevent referral of the client for counselling.

Effective communication with the client

- 1.17 Many clients speak English and are happy to communicate in English. However, it is important that they be offered the choice of giving instructions in another language. Any interpreter used should be properly qualified, both linguistically and in dealing with traumatised clients.¹² If the client has been referred from a support network such as the POPPY Project, then it is likely that he or she would already have received counselling. If not, the adviser should consider directing the client to specialist counselling in tandem with legal advice given. Where the adviser is acting for a group of clients, it will be important to make contact with all claimants, but particularly all the test claimants.
- 1.18 Where the adviser suspects that trafficking may have taken place, it is important to explain to the client that the information is being asked for in order to provide full advice and support and to stress the duty of confidentiality. In assessing the facts, the diagnostic criteria may be considered, but should be no substitute for analysis of the full facts.

Registration with the Office of the Immigration Services Commission (OISC)?

- 1.19 An adviser who is not a lawyer or a legal executive needs to consider whether they are giving immigration advice or services and thus need to apply for registration or exemption with OISC (details at www.oisc.gov.uk).

Funding

- 1.20 CETS Convention 197 requires access to information on legal rights. Such advice should be independent. However, there has been no

¹² See Resources.

visible attempt by the UK government to put such a system in place. Where the victim is currently a defendant, advice to them can be provided as part of the representation in the criminal proceedings.¹³ This is not the case for advice on civil justice. In some cases, the support agencies working under contract will have the informal capacity to refer cases for legal advice. However, this is unlikely to satisfy the requirement for a properly structured system. As a matter of course, legal aid is not available for proceedings before the Criminal Injuries Compensation Authority (CICA), for personal injury claims, or for proceedings before the Immigration Tribunal or the Employment Tribunal. An adviser who is a registered provider of legal services may be able to make an application on the particular merits for funding to the Legal Services Commission.¹⁴ Exceptionally, the Equality and Human Rights Commission may be able to fund a case.¹⁵ A conditional fee agreement may be considered in multi-party actions.¹⁶ Unions may also fund litigation.

Scope of this book

- 1.21 It is not within the scope of this book to consider the important long-term preventive actions which may be taken, such as the development of corporate social responsibility, the ILO Decent Work programme, or international bilateral work, whether between law enforcement or unions. One of the most effective steps to eliminate labour trafficking is corporations' proper monitoring of their supply chains to avoid exploitation, whether trafficked or in situ.
- 1.22 This book aims to set out the national legal framework on trafficking, broadly divided into the three areas of prohibition, protection and prevention. Chapters 2 and 3 set out the background at international and at regional level. Chapter 4 sets out basic principles of national law and practice. Chapters 5, 6 and 7 describe the relevant specific criminal offences. Chapter 8 sets out the law on immediate support which must be provided for a victim of trafficking. Chapter 9 sets out practical steps to support victims who find themselves in the criminal courts, whether as a victim or as a defendant. Chapter 10

13 See chapter 8.

14 See www.legalservices.gov.uk.

15 See legal strategy 2008/9 at www.equalityandhumanrights.com.

16 Such an agreement needs to comply with relevant professional guidance.

describes how to recover compensation for trafficked people. Chapter 11 sets out how to secure long-term solutions on rehabilitation and resettlement. Chapter 12 considers the labour inspection regime in the UK and how victims may be protected under it. Chapter 13 considers issues arising in the representation of migrant workers. Chapter 14 considers the legal framework for asset recovery. Finally, there is a section with contacts details for available resources.

