

briefing

The Anti Trafficking
Monitoring Group

Criminal justice and trafficked people

Legislation

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct contained in Article 4 (the definition) of this Convention, when committed intentionally.

(Article 18)

Laws have been adopted across the UK over the past decade relating to human trafficking, forced labour, slavery and servitude. The laws cover the definition of trafficking in human beings in the Convention. However, there appear to be specific impediments to implementing laws on preventing and prosecuting exploitation for purposes other than sexual exploitation.

In October 2009, the Home Office and Scottish government reported that, since the adoption in 2003 of the first laws against human trafficking, there had been 113 convictions for trafficking for sexual exploitation, seven for trafficking for forced labour, and three for conspiracy to engage in trafficking. No convictions had been secured in Scotland and the one trafficking conviction in Northern Ireland was subsequently overturned. Up to April 2010, there had been nine convictions under the *Gangmasters (Licensing) Act 2004* (six in England and three in Scotland).

Proving a charge of human trafficking is difficult. The Crown Prosecution Service (CPS) considers that to charge someone with trafficking it is necessary to evidence that there was an intention to exploit at the time of arranging somebody's travel to the UK (or within the UK). In effect, insufficient attention was given by those who drafted Section 4 of the *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004* to the sorts of evidence necessary to prove the offences defined in the Act, and how such evidence could be obtained.

Between April 2009 and January 2010, 36 individuals arrested in England and Wales for trafficking offences went to court. Although all 36 were arrested under the relevant trafficking legislation¹, two were convicted for causing or inciting prostitution for gain and assault and seven were convicted of offences such as causing or inciting prostitution for gain and controlling prostitution for gain. In effect, law enforcement officials found it easier to secure convictions on charges related to exploitation of prostitution rather than on (more serious) charges related to human trafficking. This has serious implications, not only in terms of official levels of the crime of trafficking and the



Photo: Pete Pattison

The Anti-Trafficking Monitoring Group is a coalition comprising Anti-Slavery International, Amnesty International UK, ECPAT UK, the Helen Bamber Foundation, the Poppy Project, Immigration Law Practitioners' Association, Kalayaan, TARA Project and UNICEF UK. The coalition was set up in May 2009 to monitor the UK government's compliance with the *Council of Europe Convention on Action against Trafficking in Human Beings* ('the Convention'), which came into force on 1 April 2009.

Between September 2009 and April 2010, the Monitoring Group consulted information from public sources, conducted 90 interviews with professionals engaged in anti-trafficking work, and reviewed the cases of 390 trafficked persons. In June 2010 the Group published *Wrong kind of victim? One year on... an analysis of UK measures to protect trafficked persons*.

appreciation of the severity of trafficking and the multitude of constituent crimes, but also in terms of victims' attempts to obtain damages.

Details about criminal proceedings involving suspected traffickers were difficult to obtain. The UKHTC published information about defendants and victims from 2008 until June 2009, but the breakdown and presentation of the information was not consistent. Unlike the Public Prosecution Service in Northern Ireland (PPS), the CPS's Case Management System (CMS) records the number of cases referred to the CPS, the number of defendants charged, and the outcome of each case. Defendants charged with offences under trafficking legislation are flagged, but the CMS is not able to record where a case is initially flagged as trafficking but charged and tried under different legislation. Similar recording systems apply for the Crown Office and Procurator Fiscal Service in Scotland. In Northern Ireland, the PSNI, PPS and Forensic Services share information electronically through a single recording system; the system records the primary offence as well as the actual charges

taken forward. In theory, the PPS is able to monitor cases where other legislation is used in convicting trafficking-related offences, however this is not currently done on a routine basis. As of April 2010, the CPS provides the UKHTC with quarterly data on the number of prosecutions under trafficking legislation.

Investigation

Each Party shall ensure that investigations into or prosecution of offences established in accordance with this Convention shall not be dependent upon the report or accusation made by a victim, at least when the offence was committed in whole or in part on its territory.

(Article 27.1)

There is not sufficient understanding among key First Responders of the forms of coercion associated with trafficking, notably debt bondage (real or perceived)² and the various ways in which those in debt bondage are controlled by exploiters. Understanding is similarly limited with specific respect to domestic workers who are trafficked into servitude or forced labour. Law enforcement officials are reported in some cases to remain unclear about what aspects of abuse should be referred to the criminal justice system and what sits within the boundaries of employment law.

The Monitoring Group was told by police officers that the police generally give priority to addressing trafficking cases that involve sexual exploitation, as they are considered to involve more harm than individuals subjected to forced labour.

A 2009 report about human trafficking in Scotland³ noted that 79 individuals believed to be victims of trafficking had come into contact with agencies in Scotland between April 2007 and March 2008. However, no prosecutions were brought in relation to the offences committed. In considering why there had been no prosecutions, the report noted that it was probably a combination of: "An unclear intelligence picture; low levels of awareness among the public; absence of witnesses; difficulties with translation during debrief of witnesses; further training needs among police and prosecution professionals; and some difficulties in obtaining warrants, including a perceived tendency for Sheriffs to favour the familiar language of brothel-keeping instead of newer legislation relating to human trafficking."

The report observed that most of these factors were likely to also be relevant to England and Wales. The Monitoring Group's research also revealed the following factors to affect the level of prosecutions in the UK:

- Failure to investigate a case after a presumed trafficked person provided a statement, especially in cases involving migrant workers subjected to domestic servitude;
- A lack of resources at borough level to conduct relatively expensive trafficking investigations;
- A lack of information sharing among the different agencies involved;
- Difficulties in bringing witnesses back to the UK after they had either returned to their country of origin or moved elsewhere.

Police officers also raised concerns that the current structure and location of the NRM can undermine prosecutions, specifically where a victim or witness in a trial receives a negative NRM decision.

"...that is a negative effect on my investigation. If I arrest a suspect for human trafficking and disclosure comes in court and they say, well the authorities say this is not a victim of trafficking, how do I proceed with that?"

Prosecution of victims

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 may have been compelled to do so. (Article 26)

A range of offences are reported to be committed which involve adults or children who are brought to the UK to commit criminal offences. Most involve organised crime, though the levels of criminality and profits vary greatly, for example between cultivating and selling cannabis and the proceeds of begging.

Guidance issued by the CPS in November 2009⁴ makes no reference to adults in debt bondage. It does contain an explicit reference to 'theft (in organised pick-pocketing gangs)' and 'cultivation of cannabis plants' and calls on prosecutors to 'be alert to the possibility that in such circumstances, a young offender may actually be a victim of trafficking and have committed the offences under coercion'. COPFS guidance published in October 2010⁵ does list 'debt bondage' as an indicator of forced labour, but does not explain the term.

The Monitoring Group is aware of a few individual cases where the intervention of the police helped to uphold the non-punishment clause. However, in several cases, even where the UK authorities have recognised that cannabis gardeners (children as well as adults) have been subjected to pressure, and where the debts migrants are required to pay have been mentioned during the trials, the possibility that defendants were subjected to debt bondage does not appear to have been taken into account and they concluded that

the individuals were responsible for their crime and should be punished. Furthermore, the UK authorities have not felt any obligation to protect the individuals concerned from the pressures exerted on them by their traffickers.

This is not only relevant in considering whether defendants were committing offences under duress, but also in determining the extent to which the UK and the devolved administrations have a responsibility to protect victims (particularly children) in the longer term, and to avoid returning them to countries or into the hands of criminals where they will be re-trafficked or subjected to other forms of forced labour. In particular, it raises questions about whether the UK is upholding its obligations to prevent trafficking as required by the Convention.

More controversially, even if an individual arrested or charged with an offence receives a positive NRM decision, the CPS, COPFS or the PPS can nevertheless pursue charges. As the NRM decision is a civil decision and therefore of a 'lower' level than a criminal justice decision, it can be taken into account by the prosecution service, but does not automatically lead to discontinuing prosecution. While it would not be appropriate for the prosecution services to grant blanket immunity in such cases, it does question the protection NRM decisions provide and how useful they are to trafficked people.

The Anti-Trafficking Monitoring Group is calling on the:

Home Office and devolved equivalents to review whether the provisions of UK legislation to protect individuals in debt bondage are adequate to ensure that such individuals are not returned to situations where those controlling them can maintain them in their servile status.

Ministry of Justice and devolved equivalents to collect statistics about the number of suspected traffickers who have been prosecuted on charges other than human trafficking, in order to assess whether legislation against human trafficking is fit for purpose, with a view to possibly amending it.

Investigation

In order to improve the level of prosecutions in the UK, law enforcement professionals interviewed by the Monitoring Group suggested trafficking in human beings should be made a police priority and be included in their control strategy. There were also suggestions that it would be helpful to appoint local level special points of contact with the CPS to deal specifically with trafficking cases (in addition to the national policy specialist), as the level of understanding and training among prosecutors tends to be mixed. COPFS has already introduced this in Scotland.

It would seem beneficial to grant the Gangmasters Licensing Authority (GLA) formal authority and the resources to investigate under the trafficking and forced labour laws, given the pro-active nature of the agency as well as its successful operation. In addition, the remit of the GLA should be extended to all industries where gangmasters operate and where instances and risks of forced labour were previously identified, such as construction, cleaning and hospitality.

Non-punishment provision

There is an urgent need for the UK government and devolved administrations to order a review of all cases where individuals have been convicted for crimes committed under duress, to ensure a coherent interpretation of both the UK's laws on the issue of forced labour and human trafficking, and international standards ratified by the UK.

In addition, the Home Office and Northern Ireland's Department for Justice should give revised guidance to the relevant prosecution services on the interpretation of 'duress'. In particular, attention should be given to the evidence available about the debts owed by individuals, in order to assess whether some were in debt bondage and subjected to forced labour without this being recognised by courts in the UK. In the cases of children, attention should be given to assessing whether all or most children who are thought to have been smuggled into the UK to work on cannabis farms have been trafficked.

Notes

¹ Section 4(1) of the *Asylum and Immigration (Treatment of Claimants, etc.) Act 2004* and sections 57 and 58 of the *Sexual Offences Act 2003*.

² Debt bondage occurs when a worker who has borrowed money (through a loan or an advance) is subsequently tied to a particular creditor for a specified or unspecified period until the loan is repaid. Traffickers may make victims believe they owe them money, regardless of the real cost of transportation, accommodation or other 'services'.

³ Lebov, K., *Human Trafficking in Scotland 2007/08*, Scottish Government Social Research, 2009.

⁴ Crown Prosecution Service, 'Prosecution of defendants charged with offences who might be trafficked victims', *Human Trafficking and Smuggling Guidance*, November 2009.

⁵ Crown Office and Procurator Fiscal Service, *Guidance on Human Trafficking*, October 2010.