

**SOME THOUGHTS ON THE TRAFFICKING CONVENTION AND
JUDICIALLY REVIEWING DECISIONS UNDER THE NATIONAL
REFERRAL MECHANISM**

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AN OVERVIEW OF THE TRAFFICKING CONVENTION:

Trafficking Definitions

“The essence of trafficking broadly speaking is that the person is coerced or deceived into a situation where they are exploited¹.”

“An important aspect of this definition 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 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 place in another. Whether or not an international border is crossed, the intention to exploit the individual concerned underpins the entire process.”².

The Trafficking Convention:

The Council of Europe Convention on Action against Human Trafficking came into force on 01 February 2008 (EC Directive 2004/81/EC). The UK signed the Council of Europe Convention on Action against Human Trafficking on 23 March 2007. The UK ratified the Convention on 17 December 2008. The Convention came into force in the United Kingdom on 1 April 2009.

¹ From UKBA Guidance on Victims of Trafficking

² UNHCR Guidelines of April 2006 on International Protection

In a press release dated 1 April 2009, the UK government stated:

“The Council of Europe Convention on Action against Trafficking in Human Beings came into force in the United Kingdom on 1 April 2009. The implementation of the Convention forms part of the UK’s comprehensive Action Plan on Tackling Human Trafficking and demonstrates the government’s continued commitment to combating this horrific crime.

..... The UK was largely compliant with the Convention prior to its ratification in December 2008. But a limited number of legislative, policy and procedural changes have been made across the UK to enhance existing arrangements, most notably around victim identification and protection, some of which go beyond the requirements of the Convention.”

The principal obligations of the Trafficking Convention in terms of victim protection are:

- the identification of victims of trafficking, and, once identified, a commitment that a victim should not be removed from the territory until the identification is complete. The UK has an affirmative obligation to identify an individual as a victim of trafficking in terms of Article 10 of the Trafficking Convention. (Article 10);
- assistance for victims in their physical, psychological and social recovery (Article 12);
- a reflection and recovery period during the two stages of the identification process (Article 13);
- residence permits in specified circumstances for identified victims of trafficking (Article 14); and
- legal assistance and compensation for victims (Article 15).

Article 10 - Identification of the victims

(1) Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating 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 and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention.

(2) Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2.

Explanatory Report on the Council of Europe Convention on Action against Trafficking in Human Beings:

“Article 10 – Identification of the victims

127. To protect and assist trafficking victims it is of paramount importance to identify them correctly. Article 10 seeks to allow such identification so that victims can be given the benefit of the measures provided for in Chapter III. Identification of victims is crucial, is often tricky and necessitates detailed enquiries. Failure to identify a trafficking victim correctly will probably mean that victim's continuing to be denied his or her fundamental rights and the prosecution to be denied the necessary witness in criminal proceedings to gain a conviction of the perpetrator for trafficking in human beings. Through the identification process, competent authorities seek and evaluate different circumstances, according to which they can consider a person to be a victim of trafficking.

128. Paragraph 1 places obligations on Parties so as to make it possible to identify victims and, in appropriate cases, issue residence permits in the manner laid down in Article 14 of the Convention. Paragraph 1 addresses the fact that national authorities are often insufficiently aware of the problem of trafficking in human beings. Victims frequently have their passports or identity documents taken away from them or destroyed by the traffickers. In such cases they risk being treated primarily as illegal immigrants, prostitutes or illegal workers and being punished or returned to their countries without being given any help. To avoid that, Article 10(1) requires that Parties provide their competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings and in identifying and helping victims, including children and that they ensure that those authorities cooperate with one other as well as with relevant support organisations.

129. By “competent authority” is meant the public authorities which may have contact with trafficking victims, such as the police, the labour inspectorate, customs, the immigration authorities and embassies or consulates. It is essential that these have people capable of identifying victims and channelling them towards the organisations and services who can assist them.

130. The Convention does not require that the competent authorities have specialists in human-trafficking matters but it does require that they have trained, qualified people so that victims can be identified. The Convention likewise requires that the authorities collaborate with one another and with

organisations that have a support-providing role. The support organisations could be non-governmental organisations (NGOs) tasked with providing aid and support to victims.

131. Even though the identification process is not completed, as soon as competent authorities consider that there are reasonable grounds to believe that the person is a victim, they will not remove the person from the territory of the receiving states. Identifying a trafficking victim is a process which takes time. It may require exchange of information with other countries or Parties or with victim-support organisations, and this may well lengthen the identification process. Many victims, however, are illegally present in the country where they are being exploited. Paragraph 2 seeks to avoid their being immediately removed from the country before they can be identified as victims. Chapter III of the Convention secures various rights to people who are victims of trafficking in human beings. Those rights would be purely theoretical and illusory if such people were removed from the country before identification as victims was possible."

The National Referral Mechanism

According to the government statement, as from 1 April 2009 a National Referral Mechanism ("the NRM"), will provide a framework within which public bodies such as the criminal justice agencies, the UK Border Agency ("UKBA"), local authorities and third sector partners can work together to identify individuals who may be victims of trafficking and provide appropriate protection and support.

The Home Office and Scottish Government published its revised UK Action Plan on Tackling Human Trafficking in October 2009 setting out its strategy to tackle human trafficking.

The NRM provides that victims of trafficking will be identified by first responders (Police, local authorities, certain NGOs (eg Trafficking Awareness Raising Alliance: TARA) who, if they think that there are indicators of trafficking in an individual's case and the individual consents to referral, can refer the case to a "Competent Authority" who will carry out the identification process. Where there are immigration and asylum issues, the "Competent Authority" is the UKBA. Where there are no such issues, the "Competent Authority" is the UK Human Trafficking Centre. UKBA has issued guidance to provide assistance to staff in helping to identify victims of trafficking: "UKBA Guidance: Victims of Trafficking" ("the guidance").

Under the NRM, the identification process is in two stages:

(1) Reasonable grounds decision:

The Competent Authority has 5 days from receipt of the referral to reach a decision on whether there are reasonable grounds to believe that the individual is a potential victim of trafficking (“the reasonable grounds decision”). If the Competent Authority makes a positive reasonable grounds decision, the person will be given temporary admission and a 45 day period of reflection and recovery.

(2) Conclusive decision:

Thereafter, the Competent Authority must consider the information available in line with the guidance and, if appropriate, consult with any relevant agencies, including the Police and support providers to reach a conclusive decision on whether the person has been trafficked. If a conclusive decision is reached that the person is a victim of trafficking, the Competent Authority will then consider whether or not to grant a one year renewable residence permit. The residence permit will be issued where the Competent Authority considers that the victim’s stay is necessary owing to their personal situation or for the purpose of their co-operation with the competent authorities in investigation of criminal proceedings. If the conclusive decision identifies the individual as a victim of trafficking, it entitles her to wider rights under the Trafficking Convention such as employment and necessary medical treatment³.

ECHR⁴:

Siliadin v France (Application no. 73316/01) 26th July 2005.

The ECtHR considered the Trafficking Convention and trafficking generally within the context of Article 4 of the European Convention on Human Rights. The Court carried out an analysis of the various components of Article 4 and the standards which have to be met for there to be a violation of these.

Article 4 provides:

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

³ See the attached Process Map.

⁴ From an analysis on the Action on Individual Rights in Europe website: <http://www.airecentre.org/>

The Applicant was a fifteen year old girl who was brought from Togo to France by means of deceit for purposes of labour exploitation. The Court looked exclusively at France's failure to put in place adequate criminal-law provisions to prevent and effectively punish the perpetrators of those acts; the judgment however falls short of addressing the positive obligations of States in relation to the protection of victims of trafficking. In assessing whether there had been a violation of Article 4 of the Convention, the Court made fine distinctions between "slavery", "servitude" and "forced or compulsory labour" (all prohibited by Article 4) and held that an assessment needed to be made to ascertain whether the situation of the trafficked person fell into one or more of these three distinct prohibitions. The Court considered whether the Applicant's situation fell into any of those categories:

112. The Court reiterated that Article 4 enshrines one of the fundamental values of democratic societies. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 4 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation...In those circumstances, the Court considers that, in accordance with contemporary norms and trends in this field, the member States' positive obligations under Article 4 of the Convention must be seen as requiring the penalisation and effective prosecution of any act aimed at maintaining a person in such a situation...

113. Accordingly, the Court must determine whether the applicant's situation falls within Article 4 of the Convention...

117. It remains to be ascertained whether there was "forced or compulsory" labour. This brings to mind the idea of physical or mental constraint. What there has to be is work "exacted ... under the menace of any penalty" and also performed against the will of the person concerned, that is work for which he "has not offered himself voluntarily"...

118. The Court notes that, in the instant case, although the applicant was not threatened by a "penalty", the fact remains that she was in an equivalent situation in terms of the perceived seriousness of the threat. She was an adolescent girl in a foreign land, unlawfully present in French territory and in fear of arrest by the police. Indeed, Mr and Mrs B. nurtured that fear and led her to believe that her status would be regularised....Accordingly, the Court considers that the first criterion was met, especially since the applicant was a minor at the relevant time, a point which the Court emphasises.

119. As to whether she performed this work of her own free will, it is clear from the facts of

the case that it cannot seriously be maintained that she did. On the contrary, it is evident that she was not given any choice.

120. In these circumstances, the Court considers that the applicant was, at the least, subjected to forced labour within the meaning of Article 4 of the Convention at a time when she was a minor.

121. It remains for the Court to determine whether the applicant was also held in servitude or slavery.....

122. The Court notes at the outset that, according to the 1927 Slavery Convention, "slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised". It notes that this definition corresponds to the "classic" meaning of slavery as it was practiced for centuries. Although the applicant was, in the instant case, clearly deprived of her personal autonomy, the evidence does not suggest that she was held in slavery in the proper sense, in other words that Mr and Mrs B. exercised a genuine right of legal ownership over her, thus reducing her to the status of an "object".

123. With regard to the concept of "servitude", it "prohibits a particularly serious form of denial of freedom"... It includes, "in addition to the obligation to provide certain services to another... the obligation on the "serf" to live on the other's property and the impossibility of changing his status"...

126. In addition to the fact that the applicant was required to perform forced labour, the Court notes that that this labour lasted almost fifteen hours a day, seven days per week. Brought to France by a relative of her father's, she had not chosen to work for Mr and Mrs B. As a minor, she had no resources and was vulnerable and isolated, and had no means of subsistence other than in the home of Mr and Mrs B., where she shared the children's bedroom as no other accommodation had been provided. She was entirely at Mr and Mrs B.'s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred.

127. In addition, the applicant, who was afraid of being arrested by the police, was not in any event permitted to leave the house, except to take the children to their classes and various activities. Thus, she had no freedom of movement and no free time...

129. In those circumstances, the Court concludes that the applicant, a minor at the relevant time, was held in servitude within the meaning of Article 4 of the Convention."

This case involved a Russian national who entered Cyprus on an artiste visa (widely known to be used by human traffickers to bring women into the country for purposes of forced prostitution in nightclubs). Ms Rantsev escaped from the club where she was working, but her “employers” found her and brought her to a police station in order to have her deported for violating the terms of her visa. She spent several hours at the police station; the police, not intending to deport her, contacted the alleged traffickers to come and pick her up, which they did. Several hours later Ms Rantsev was found dead on the pavement outside the apartment building of one of the men concerned. The applicant (Ms Rantsev’s father) complained, principally, about the failure to investigate the allegations of human trafficking and his daughter’s death, as well as the failure of the Cypriot authorities to protect his daughter. In its judgment, the Court found violations of Article 2, 4 and 5(1):

1. Article 2, violation by Cyprus of the procedural obligation to carry out an effective investigation;
2. Article 4, in three respects:
 - (a) violation by Cyprus of the procedural obligation to put in place an appropriate legislative and administrative framework;
 - (b) violation by Cyprus of the positive obligation to take protective measures;
 - (c) violation by Cyprus and Russia of the procedural obligation to investigate human trafficking.
3. Article 5(1), violation by Cyprus arising out of Ms Rantsev’s detention in the police station until the alleged traffickers came to get her and her subsequent detention in the apartment before her death.

The novel points relate to the Court’s findings under Article 4 and Article 5 of the ECHR. When considering the text of Article 4 and the fact that trafficking was not specifically included within that Article, the Court stated at paragraphs 277 and 278 that:

‘The absence of an express reference to trafficking in the Convention is unsurprising. The Convention was inspired by the Universal Declaration of Human Rights...which itself made no express mention of trafficking...in assessing the scope of Article 4 of the Convention, sight should not be lost of the Convention’s special features or of the fact that it is a living

instrument which must be interpreted in the light of present-day conditions. The increasingly high standards required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably require greater firmness in assessing breaches of the fundamental values of democratic societies...

'trafficking in human beings as a global phenomenon has increased significantly in recent years...In Europe, its growth has been facilitated in part by the collapse of former Communist blocs. The conclusion of the Palermo Protocol in 2000 and the Anti-Trafficking Convention in 2005 demonstrate the increasing recognition at international level of the prevalence of trafficking and the need for measures to combat it'.

One of the most important aspects of the Rantsev Judgment is the Court's position regarding the approach taken in Siliadin. The Court acknowledged the analysis of the Court in Siliadin but stated:

'In light of the proliferation of both trafficking itself and of measures taken to combat it, the Court considers it appropriate in the present case to examine the extent to which trafficking itself may be considered to run counter to the spirit and purpose of Article 4 of the Convention such as to fall within the scope of the guarantees offered by that Article without the need to assess which of the three types of proscribed conduct are engaged by the particular treatment in the case in question.' (Paragraph 279)

The Court relying on the caselaw of the ICTY in which the Tribunal discussed the definition of enslavement as a crime against humanity, concluded that trafficking constituted a violation of Article 4 ECHR:

"282. There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention...the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery", "servitude" or "forced and compulsory labour". Instead, the Court considers that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention.' The Court explicitly states its view that in order to meet the positive obligations under Article 4 of the Convention, it is necessary for Member States to put into place effective provisions for the protection of victims and potential victims of trafficking in addition to criminal provisions punishing traffickers:

284....The Court considers that the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or

potential victims of trafficking. Accordingly, in addition to criminal law measures to punish traffickers, Article 4 requires member States to put in place adequate measures regulating businesses often used as a cover for human trafficking. Furthermore, a State's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking...

285....member States are required to put in place a legislative and administrative framework to prohibit and punish trafficking. The Court observes that the Palermo Protocol and the Anti-Trafficking Convention refer to the need for a comprehensive approach to combat trafficking which includes measures to prevent trafficking and to protect victims, in addition to measures to punish traffickers...The extent of the positive obligations arising under Article 4 must be considered within this broader context.

286....In order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be demonstrated that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited...In the case of an answer in the affirmative, there will be a violation of Article 4 of the Convention where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk...

287....the obligation to take operational measures must however, be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities...States are also required to provide relevant training for law enforcement and immigration officials...

The Court noted that “*victims of trafficking often suffer severe physical and psychological consequences which render them too traumatised to present themselves as victims*” (paragraph 320). Following the Rantsev judgment it may be easier to enforce domestically the provisions of the Trafficking Convention which seek to protect victims particularly Article 10. When incorporating this Convention into domestic law, the UK did not incorporate the provisions on victim protection (Articles 10 to 17) into domestic legislation. Pre-Rantsev there were difficulties in relying on these provisions under an international Treaty. However, it is now possible to argue that many if not all of the victim-protection provisions in the Convention are also covered by the positive obligations States owe victims (or possible victims) of human trafficking under Article 4. This would include the obligation on “competent authorities” to identify victims of human trafficking (Art 10), the obligation to provide material support to victims present in the UK (Art 12) and the duty to return

victims to other States “with due regard for the rights, safety and dignity of that person” (Art 16(2)). For the UK, the importance of bringing trafficking explicitly within Article 4 ECHR is that it enables victims of trafficking to pursue their claims domestically under the Human Rights Act 1998.

JUDICIAL REVIEWING DECISIONS UNDER THE NRM:

Exhaustion of remedies/interaction with asylum application

- No statutory right of appeal;
- Exhaustion of asylum appeal rights;
- Adequacy of remedy;
- NRM decision superceded by asylum decision;
- Timing;

Basis for JR:

- Legitimate expectation⁵.
- International Treaty can create no rights or obligations in domestic law⁶.
- *Wednesbury* grounds
- Misinterpretation of policy⁷
- Human Rights Act 1998

Other issues:

⁵ (Attorney General of Hong Kong v Ng Yuen Shiu [1983] 2 AC 629; R v Home Secretary ex p Asif Mahmood Khan [1984] 1 WLR 1337; R (Nadarajah and Abdi) v Secretary of State for the Home Department [2005] EWCA Civ 1363; R (on the application of BAPIO Action Ltd) v Secretary of State for the Home Department [2008] 1 AC 1003; and R (on the application of Stamford Chamber of Trade and Commerce) v Secretary of State for Communities and Local Government [2009] EWHC 719 (Admin); Anam v Secretary of State for the Home Department [2009] EWHC 2496

⁶ In re McKerr [2003] 3 WLR 568 (HL) at para 50/51.

⁷ Raissi v Secretary of State for the Home Department [2008] EWCA Civ 72

- Problems of disclosure
- The definition of “victim”
- Interrelationship with asylum process

USEFUL LINKS/FURTHER RESEARCH

Anti Trafficking Legal Project (Atlep):
<http://www.ein.org.uk/resources/printfriendly2.shtml?x=233511>

Council of Europe web pages on Action against Human Trafficking:
http://www.coe.int/t/dghl/monitoring/trafficking/default_en.asp

Inquiry into Human Trafficking in Scotland: led by Baroness Helena Kennedy QC, is due to report its findings in late 2010 followed by its final report with recommendations in 2011. Terms of reference for the inquiry can be found at:
www.equalityhumanrights.com/media-cenre/2010/february/formal-inquiry-opened-into-human-trafficking-in-scotland/.

The trafficking Convention: Meaningful Protection or Rhetoric? by Raggi Kotak, Barrister, Co-ordinator of Atlep.
http://www.asylumaid.org.uk/data/files/publications/96/final_issue_82_for_pdf_final.pdf.

Protection Not Enforcement – the Role of the National Referral Mechanism for Victims of Trafficking in the Asylum Process by Zofia Duszynska, Asylum Aid, 21 July 2009. <http://www.iasuk.org/media/17880/trafficking.doc>