

**THE CHALLENGES ASSOCIATED WITH IDENTIFYING VICTIMS
OF HUMAN TRAFFICKING**

by

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ABSTRACT

Human Trafficking is not only a global crime but also in the UK as a result of the Human Rights Act 1998, human trafficking is considered as a human rights violation. Within the different stages of recruitment and exploitation, various rights are violated. These include rights to freedom of movement, liberty and association. In many cases, the right not to be subjected to torture and/or cruel, inhuman and degrading treatment are violated. Trafficking involves millions of vulnerable people affected by war and displacement, climate change and extreme poverty. It is often difficult for trafficked victims to be identified and for victims to self-identify and for victims to be distinguishable from other groups of vulnerable people such as economic migrants, asylum seekers, refugees and smuggled persons.

The increased identification of victims present greater opportunities for trafficked individuals to escape exploitation, and to access essential support to help them recover from their ordeal. This research examines the environments where difficulties of identifying foreign victims exist, or overlook the issue of identification entirely.

This research argues that a victim centred approach is required to instil confidence in the referral and identification process in the UK. Where more foreign victims are identified as victims, they will not be misidentified as other types of migrant, not prosecuted for offences committed under duress, or deported where they could run the risk of being re-trafficked. The purpose of this research is to contribute to existing work academics have done, to help anti-trafficking organisations, charities, public authorities and staff within the UK's National Referral Mechanism play a pivotal role in referring and identifying more foreign trafficked victims, despite the current negativity surrounding immigration.

DEDICATION

I wish to dedicate my work in the memory of Chris Davis, and to Lisa Davis who has given me support and encouragement. Also, I wish to dedicate this work to Millie and Mollie who have been a constant presence during the many hours of writing.

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AZ (Trafficked Women) Thailand CG [2010] UKUT 118 (IAC)

Demirkaya v SSHD [1999] ImmAR 498

DPP v Howe [1987] AC 417

EK (Article 4 ECHR: Anti – Trafficking Convention) Tanzania [2013] UKUT 00313 (IAC)

Ex parte Hoxha [2005] UKHL 19

FM v SSHD [2015] EWHC 844 (Admin)

Haci Demirkaya v Secretary of State for Home Department [1999] EWCA Civ 1654

HD (Trafficked women) Nigeria CG [2016] UKUT 00454 (IAC)

Islam v SSHD (United Nations High Comr for Refugees Intervening) [1999] 2 AC 629

Januzi v SSHD [2006] UKHL, 5

O v Commissioner of Police for the Metropolis [2011] HRLR 643

PO (Trafficked Victim) Nigeria [2009] UKAIT 00046

R (Cristy Ferrer Poquiz) v SSHD [2015] EWHC 1759 (Admin)

R (FX) v SSHD [2016]

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R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD [2016] EWHC 942 (Admin)

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R (on the application of Atamewan) v Secretary of State for the Home Department [2013] EWHC 2727 (Admin)

R. (on the application of Brown) v Secretary of State for the Home Department [2015] UKSC 8

R (on the application of FM) v Secretary of State for the Home Department [2015] EWHC 844

R (on the application of K) v SSHD [2015] EWHC 3668 (Admin)

R [2010] EWCA Crim 194
 R v Abbott [1976] 3 All ER 140
 R v Abdul-Hussain [1999] Crim LR 570
 R v Ahluwalia (1993) 96 Cr App R 133
 R v Baker [1997] Crim LR 497 (CA)
 R v Bowen [1996] 2 Cr App R 157
 R v GAC [2013] EWCA Crim 1472
 R v Gotts [1982] 2 AC 412
 R v Graham (1982) 74 Cr App R 235
 R v Hasan [2005] 2 Cr App R 22
 R v Hasan [2005] UKHL 22
 R v Immigration Appeal Tribunal and another, ex parte Shah [1999] 2 AC 629
 R v Joseph & Others [2017] EWCA Crim 36
 R v Joseph [2017] 1 Cr App R 33
 R v L and other appeals [2013] EWCA Crim 991
 R v LM, MB, DG, Betti Tabot and Yutunde Tijani [2010] EWCA Crim 2327
 R v N & LE [2012] EWCA Crim 189
 R v O [2008] EWCA Crim 2835
 R v Rahman [2010] EWCA Crim 235
 R v Steane [1947] 1 KB 997
 R v THN [2014] 1 All ER
 R v Van Dao [2012] EWCA Crim 1717
 Re Acosta (1985) 19i & N.211
 SB (PSG- Protection Regulations – Reg 6) Moldova CG [2008] UKAIT 00002 Asylum & Immigration Tribunal 26th April 2007
 Secretary of State for the Home Department v Lyudmyla Dzhygun (Immigration Appeals Tribunal), Appeal No: CC-50627-99 (00TH00728), April 13, 2000

European Court of Human Rights

Rantsev v. Cyprus and Russia, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010

Scotland

Cochrane v HM Advocate 2001 SCCR 655

Galbraith v HMA 2001 SCCR 551

HM Advocate v Raiker 1989 SCCR 149

Table of Legislation

United Kingdom

Coroners and Justice Act 2009

Domestic Violence, Crime and Victims Act 2004

Homicide Act 1957

Immigration Act 1971

Immigration Act 1971

Misuse of Drugs Act 1971

Modern Slavery Act 2015

Nationality and Immigration and Asylum Act 2002

Sexual Offences Act 2003

The Human Trafficking & Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015

Treaties

Council of Europe

Council of Europe Convention on Action against Trafficking in Human Beings, 16 May 2005

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

EU Directives

EU Directive 2011/36/EU Of The European Parliament And of The Council of 5 April 2011 On Preventing And Combating Trafficking In Human Beings And Protecting Its Victims, And Replacing Council Framework Decision 2002/629/JHA

EU Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries

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EU Council Framework Decision 2002/629/JHA

EU Council Directive 2004/81/EC 29 April 2004 on the Residence Permit issued to Third-Country Nationals

European Recital to Directive 2011/36/EU, European Union

United Nations

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others 96 UNTS 271

The 1951 International Convention Relating to the Status of Refugees Text of the 1967 Protocol Relating to the Status of Refugees Resolution 2198 (XXI) adopted by the United Nations General Assembly with an Introductory Note by the Office of the United Nations High Commissioner for Refugees

UN Convention on Transnational Organised Crime Convention, resolution A/RES/55/25 November 2000

UN Convention relating to the Status of Refugees 1951 as amended by the 1961 Protocol Relating to the Status of Refugees

UN Protocol against the Smuggling of migrants by Land, Sea and Air, Supplementing the UN Convention against Transnational Organised Crime, GA Res 55/25, 2000

UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000

UN Universal Declaration of Human Rights 10 December 1948 GA Resolution 217 A (III)

UNODC Model Law on Human Trafficking, UNODC

Other Legal Instruments

The Refugee or Person in Need of International Protection (Qualification) Regulations 2006

UN Recommended Principles and Guidelines on Human Rights and Human Trafficking (UN Doc E/2002/68)

UNHCR Guidelines on International Protection: Protocol relating to the Status of the Status of Refugees to victims of trafficking and persons at risk of being trafficked, HCR/GIP/06/07, 7 April 2006

Miami Declaration of Principles of Human Trafficking (2005)

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Anti-Trafficking Organisation (ATO)
Competent Authority – CA
Conclusive Grounds Decision - CGD
Convention Relating to the Status of Refugees - Refugee Convention
Council of Europe - CofE
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Member of Parliament - MP
National Crime Agency - NCA
National Health Service - NHS
National Referral Mechanism - NRM
Non-Governmental Organisation – NGO
Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organised Crime - Smuggling Protocol
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Reasonable Grounds Decision - RGD
Third Sector Organisation – TSO
UK Modern Slavery Trafficking Unit - MSHTU
United Kingdom Border Agency - UKBA
United Nations - UN
United Nations General Assembly – UNGA
United Nations High Commissioner - UNHCR

CHAPTER 1 – INTRODUCTION AND CONTEXT

Human trafficking continues to be a global crime problem, prevalent across the world. Victims are often from developing, but also from developed countries. Victims can be either male or female, young or old, and are trafficked for sex, or exploited for labour.¹ Human trafficking exists in a tangled web of networked groups operating either within States, or transnationally, demonstrating a complex, and highly organised form of criminal activity. It remains a profitable criminal enterprise, with the estimated returns from exploiting roughly 21 million² victims, amounting to billions of dollars per year.³ Due to the small fraction of trafficked victims being identified and because of low conviction rates,⁴ many traffickers are able to continue exploiting vulnerable individuals with impunity.⁵

States typically respond to human trafficking by primarily adopting a crime control approach, satisfying their positive obligations by criminalising the offence.⁶ Whilst I agree with this approach, this thesis argues where States carry out their international legal obligations to

¹ The International Labour Organisation (ILO) estimates that the large majority of victims are trapped in forced labour, rather than sexual exploitation. See “Global Estimates of Modern Slavery: Forced Labour & Forced Marriage,” International Labour Organisation, September 2017, found at www.ilo.org/global/topics/forced-labour/statistics/lang--en/ondex.htm.

² M.B. Gerrard, “Climate Change and Human Trafficking After the Paris Agreement,” (2018) University of Miami Law Review, Vol 72, 345 at 346.

³ The Human Rights Activist Organisation, ‘Human Rights First’ states human trafficking earns profits of roughly \$150 billion a year for traffickers. See “Human Trafficking by the Numbers,” 17th Jan 2017, found at <https://www.humanrightsfirst.org/resource/human-trafficking-numbers>.

⁴ Whilst prosecutions have remained stable over the past 2 years, the number of convictions have fallen. See CPS “Violence against Women & Girls, 10th Report,” found at https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2017_0.pdf at 15.

⁵ For example, during 2017 in the UK, the CPS prosecuted 295 people in England and Wales for trafficking offences. See “CPS hosts international summit to improve the prosecution of modern slavery,” 21st February 2018 found at <https://www.cps.gov.uk/cps/news/cps-hosts-international-summit-improve-prosecution-modern-slavery>.

⁶ For example, a type of positive obligation can be evidenced from Article 4 European Convention on Human Rights which prohibits slavery and forced labour, and for States to prosecute any act by a person which enslaves another person. See ECHR Guide on Article 4 of the European Convention on Human Rights at page 14, found at https://www.echr.coe.int/Documents/Guide_Art_4_ENG.pdf.

criminalise acts, States have moral obligations⁷ to protect the rights and interests of individuals.⁸ Furthermore, it has been stated that:

“States do not act by themselves; they must be made to act by leaders and citizens. Even if States can be said to have obligations, the leaders and citizens must believe that they have a duty to guide the State in a way that is consistent within those obligations.”⁹

Whilst States have moral obligations to obey international law, the position this thesis takes is that States also have moral obligations beyond international law requirements; moral obligations towards the victims of trafficking who come to the attention of the State and require protection regardless of their nationality. The obligation is moral, because victims are able to be used by the State for their criminal justice purposes to bring heinous criminals to account. Therefore, difficult processes are necessary and demand attention. As the thesis will argue, it is because the State has a direct interest in identifying more trafficked victims in order to potentially help authorities to combat human trafficking by prosecuting traffickers that this moral obligation arises. Due to the greater awareness of modern slavery and the increased numbers of referrals of potential victims coming to the attention of the State, the thesis argues that States presently have a moral duty to committing to protecting victims from the crime within its borders and not subject them to the risk of being re-trafficked and/or at risk of future harm.

A moral obligation can be considered to exist based upon the commitments made towards trafficked victims by politicians including Sarah Newton, the then Home office minister who

⁷ See E.A. Posner, “Do States Have a Moral Obligation to Obey International Law?” (2003) Stanford Law Review 55, 1901 at 1902 which states that ‘international law is a source of moral obligations that influence states by constraining their prudential decisions.’

⁸ See E.A. Posner, “Do States Have a Moral Obligation to Obey International Law?” (2003) Stanford Law Review 55, 1901 at 1904.

⁹ E.A. Posner, “Do States Have a Moral Obligation to Obey International Law?” (2003) Stanford Law Review 55, 1901 at 1904.

insisting that “the welfare of victims and potential victims is at the heart of everything we do”.¹⁰ Furthermore, it can be seen from government that the creation of an Anti-Slavery Commissioner arising from the requirement from the *Modern Slavery Act 2015*¹¹ to protect and identify victims¹² signifies a commitment from the Government which needs to be upheld and practically demonstrated in real life where trafficked victims come into contact with authorities. Additionally, the existence of a Victims code and Witness charter¹³ outlines the rights of individuals who have been victims of crime in the UK, including a needs assessment which the police should have to complete. There is a Victims’ Commissioner who is appointed by government ministers but acts independently and encourages good practice and ensures that the code is being adhered to by agencies. The code of practice reserves enhanced rights for vulnerable victims and lists trafficked victims as one of those groups of victim who are entitled to enhanced entitlements.¹⁴ A strong commitment to victims is clear and things like the Modern Slavery Act 2015 and participation in EU measures emphasising how serious the victimisation is makes this commitment to trafficked victims irrefutable.

On the one hand, one may say that in reality obligations cannot always be met due to politics, or in respect of the transnational nature of trafficking, the true extent to whether all victims whether they be UK nationals or foreign citizens are protected was not properly thought through, one can say that the fact that where there are commitments which have been made,

¹⁰ See A. Christie, “Theresa May promised to help victims of trafficking. Why is she doing the opposite?” The Guardian, 23 Nov 2018.

¹¹ See Sections 40 – 44 Modern Slavery Act 2015.

¹² It is expected that the Anti-Slavery Commissioner will “encourage good practice to drive an increase in the identification and protection of victims of modern slavery, and to ensure the provision of enhanced support for all victims and survivors in the UK.” See HM Government Appointments at <https://publicappointments.cabinetoffice.gov.uk/appointment/independent-anti-slavery-commissioner/>

¹³ Code of Practice for Victims of Crime, Ministry of Justice, October 2015. This was created through section 33 of the Domestic Violence, Crime and Victims Act 2004.

¹⁴ See ‘Enhanced Entitlements’ at Section 1.1 on page 11 which explains how vulnerable victims are entitled to an assessment by the police to identify any needs or support required and the information should be passed to other service providers with responsibilities under the Code and to victim support services.

either spoken by politicians or created by statute, they signify that they have meaning and they should be honoured. This creates accountability towards those who make the commitments and reassures trafficked victims that their rights will be upheld, regardless of their nationality as a result of a crime being committed in the State. As this thesis will argue, their rights as trafficked victims are overlooked because of the issue of illegal immigration which overshadows the recognition of trafficked victims.

When States fail to properly identify victims which are incompatible with the commitments shown above, they are failing in their moral duty towards all vulnerable individuals, regardless of their nationality. The rights of victims have been elevated by these commitments and therefore it is up to the State to act upon them. Consequently, the way in which States honour their moral obligations to protect trafficked victims from further harm from traffickers is by the Government encouraging other agencies¹⁵ of the State, and the third sector to provide assistance and support to help victims recover from their ordeal. There are naturally limits to what States can provide to protect and assist victims on their own in the way of services and support. Therefore, a moral obligation of the State also arises through the implementation of government policies from each State can help to protect trafficked victims. The moral obligation which arises here is through the acknowledgment from the role which victims can potentially play in helping authorities combat trafficking in their State by assisting in police investigations. This thesis argues that the victim can play a central importance in assisting prosecutors by providing evidence against traffickers. The moral obligation arises where the State has the opportunity to persuade victims to help break the organised crime groups so that the State can prosecute and convict more traffickers whilst protecting the victim. However, for this to happen, victims must first be given recognition as a trafficking victim, regardless of

¹⁵ Agencies include the Home Office, the Border Agency and also civil society such as charities and voluntary groups.

their nationality. The gap in provision for victims are often successfully filled by voluntary groups and charities. Third sector organisations often bridge the gap between the State on one hand, and the individual on the other by providing specific help, support and advice. Often individuals require assistance from non-profit community and voluntary organisations before they come to the attention of either the police or the Border Agency (UKBA). Furthermore, charities provide useful and valuable services to individuals who rely upon them for assistance. The State, on the other hand cannot offer all solutions to all problems, neither provide all types of service to individuals. Consequently, there is a moral obligation on States to provide enough resources and funding to assist victims whilst simultaneously obeying their international legal obligations through criminalisation and provision of care for victims.

Victims often come into contact with charities first before contact with public authorities. Therefore, States require the assistance of and cooperation from civil society to help distinguish trafficked victims from other groups of migrants.

To satisfy their obligations alongside the negative rhetoric towards immigrations, States must take greater responsibility to understand what the challenges to identifying trafficked victims are, and to understand the complexity of how the crime occurs. The current challenges for victims to self-identify exist because of how traffickers inflict harm onto them, and their methods must also be better understood by authorities and those who come into contact with potential victims. A State satisfying these obligations will overcome the barriers to identifying more trafficked victims, alongside creating an environment where more victims feel safe in self-identifying to authorities.

I. INTRODUCTION

This thesis examines the present challenges for agencies to identify foreign trafficked victims found in the three jurisdictions in the UK (England & Wales, Scotland and Northern Ireland), alongside the barriers for these victims to self-identify. The end result (if these challenges are overcome) will be to arrive at a situation where the victim is identified as a trafficked victim, and having access to support without the fear of being misidentified and re-trafficked. The current approach to identification highlights how victims may either not be identified at all, or are at risk of being misidentified. This can often lead to the risk of being prosecuted, or at risk of deportation, increasing the likelihood of trafficked victims being re-trafficked in the future. Therefore, this thesis will identify and examine a number of challenges associated with identifying foreign trafficked victims. These are understanding how difficult it is for trafficked victims to self-identify, and the difficulty of society and agencies to distinguish between trafficked victims and other types of migrants. Victims are exposed to being misidentified as offenders (if prosecuted for offences committed whilst being exploited) and EU and non EU trafficked victims face challenges seeking international protection which would ensure that victims are protected and not exposed to further risk of harm if deported. These are challenges which must first be identified and countered to facilitate a victim-centred approach to identification. A victim centred approach can be described as “endorsing a human rights-based and victim-centred approach to anti-trafficking action; an approach that respects the dignity and human rights of trafficking victims at all times.”¹⁶ A victim-centred approach can be practically implemented by focussing on the physical, psychological and emotional needs of the victim. This may include access to medical services and social welfare and support from service providers, so that victims can participate in potential criminal proceedings against

¹⁶ OSCE Resource Police Training Guide: Trafficking in Human Beings, TNTD/SPMU Publication Series Vol 12, Vienna, July 2013 at 125.

traffickers. Therefore, the experiences and the needs of victims should be a consideration, especially in light of legal obligations afforded to trafficked victims by States who are non-nationals.¹⁷ States are also capable of satisfying moral obligations towards victims by supporting third sector organisations to help trafficked victims access a range of services and support which the State and government cannot offer by itself. A conjoined approach where the State on one hand through government action commits to understanding the needs of trafficked victims and on the other a well-resourced civil society to help trafficked victims will ultimately satisfy a victim centred approach.

This thesis demonstrates this approach as necessary. The following list is presented as a set of challenges which will be examined in more depth throughout the thesis:

- The contemporary political context; allowing an anti-immigration rhetoric to exist creates the risk of misidentifying foreign trafficked victims as other groups of migrants, such as smuggled persons or economic migrants.
- Trafficked victims may have difficulty self-identifying themselves because they may not realise that they are in fact victims. And, if they do recognise themselves as victims, there may be significant barriers which prevent them from accessing help, such as not being able to escape, or the onset and stigma of having a mental health problem and/or a perceived stigma of being a migrant, discouraging them from doing so.
- The present system of identification in the UK has ‘institutional design defects’ facilitating the potential for bias, against trafficked victims. This continues to affect the numbers of foreign trafficked victims being positively identified.

¹⁷ For example Article 25(1) UN Convention on Transnational Organised Crime Convention, resolution A/RES/55/25 November 2000 which sets out the obligation for States to protect and assist victims found in their territory.

- Foreign victims are often misidentified as offenders and are prosecuted, rather than protected and positively identified. Prosecutions prevent victims from accessing help and support which States have agreed to provide to trafficked victims.
- Foreign victims face challenges in legalising their immigration status in the UK. States have obligations not to return victims where they can be persecuted, discriminated against and ostracised, leading to an increased risk of being re-trafficked and enduring future cyclical forms of abuse and exploitation. Shortly, I will consider how the issue of immigration has become politicalised, preventing positive identifications from taking place, because of a negative perception of migrants which politically favours the State.

At present, much has been written about measures to combat human trafficking from a crime control perspective.¹⁸ In contrast, my research advocates that States should also complement a crime control approach to combatting human trafficking by adopting a victim centred approach,¹⁹ arguing that identification is an opportunity for the State to satisfy their moral obligations towards trafficked victims by protecting them from being re-trafficked, by supporting civil society (such as charities and voluntary groups) to help provide essential support to foreign victims to assist their recover from their ordeal. As a result, it has been argued that the issue of identification is directly linked with the observance of ensuring the rights of trafficked victims.²⁰ Therefore, where victims are positively identified and have access

¹⁸ See K. Bruckmuller & S. Schumann, "Crime Control versus Social Work Approaches in the Context of the 3P Paradigm: Prevention, Protection, Prosecution found in J. Winterdyk, B. Perrin & P. Reichel, "Human Trafficking: Exploring the International Nature, Concerns and Complexities," (Taylor & Francis Group, 2012) at 103.

¹⁹ A victim centred approach concentrates on the victim, understanding the experience the victim has had and looking to establish what is in the best interests of the victim in terms of help and support, regardless of nationality, and treating them as a fellow human being by protecting the victim from further harm.

²⁰ See R on the application of K & SSHD at para 73, where it can be assumed that the rights of victims are directly tied to the issue of identification where the judge "referred to paragraph 127 of the Explanatory Report to the Trafficking Convention, specifically its reference to a "failure to identify a trafficking victim correctly will probably mean that victim's continuing to be denied his or her fundamental rights."

to services and support, this is evidence of moral obligations towards trafficked victims being satisfied.

Previous research has concentrated upon the international obligations of States to adopt a crime control approach,²¹ through the criminalisation of trafficking, and by arresting and prosecuting traffickers. However, this thesis is fundamentally taking a victim-centred approach to the issue of identification. Typically, the concept of who an ideal victim is and in what situation a trafficked victim exists. For example, “the official discourse reinforces the image of trafficking as something that happens to young, naïve, impoverished, helpless women.”²² The stereotyping of victims can often be unhelpful given the complexity of the crime and the difficulty of identifying trafficked victims. Therefore, the thesis will examine the issue of identification (and self-identification) through a number of relationships and interactions trafficked victims have with other individuals, groups and authorities. Trafficked victims will routinely interact with offenders (traffickers). It is necessary to understand the interaction and dynamics which occur in this type of relationship between the trafficker and the victim to understand how deception, control and coercion starts and continues during exploitation, which also prevents the self-identification of victims. Secondly, trafficked victims are often grouped within a type of ‘migrant’ and authorities interact with trafficked victims as well as economic migrants, refugees and smuggled persons. Consequently, trafficked victims may be misidentified as another type of migrant during this interaction. Thirdly, a trafficked victim will interact with the State, for example with the criminal justice system if victims come to the attention of police.

²¹ A crime control approach typically includes the arrest, prosecution and punishment of traffickers which has been regarded as a way of contributing to the protection of victims. See at J. Winterdyk, B. Perrin & P. Reichel, “Human Trafficking: Exploring the International Nature, Concerns and Complexities,” (Taylor & Francis Group, 2012) at 107 -108.

²² J. Winterdyk, B. Perrin, P. Reichel, “Human Trafficking: Exploring the International Nature, Concerns and Complexities,” (CRC Press Taylor & Francis Group, 2012) at 271. Also see J. Srikantiah, “Perfect victims and real survivors; The iconic victim in domestic violence human trafficking law,” (2007) Boston University Law Review, 87(1), 157 at 194-195 which states that “the iconic victim concept contemplates a victim totally under the traffickers control and trafficked for sex.”

Therefore, understanding what happens in terms of prosecuting victims at the expense of acknowledging some victims commit crimes under duress must be considered to understand the effect on the victim to overcome the challenges in identifying victims correctly. Whilst there is general literature about the harm trafficking victims experience,²³ this thesis consolidates the specific environments where these challenges exist. The current research fills a gap in knowledge and contributes to the current published substantial research, but fails to acknowledge what the present challenges of identification are.

The thesis is concerned with how the ‘means’²⁴ of the offence impacts directly upon victims, resulting in how victims develop mental health conditions. Utilising research on the types of mental health conditions which can arise, my research contributes to how psychological harm is inflicted on victims, preventing self-identification. This research takes a step back from the diagnosis of a mental illness by establishing how traffickers manipulate victims by deception, coercion and control, preventing victims from self-identifying themselves. No research has been carried on how these specific means affects victims’ ability to self-identify. Essentially, victims are broken emotionally, controlled psychologically, and their vulnerability is exploited by traffickers, leading to a sense of powerlessness and the continued repression of victims. My research highlights how Third Sector Organisations (TSOs) and Public Authorities (PAs) should respond to potential victims when they come into contact with them, so that victims can be identified as quickly as possible. My work demonstrates how self-identification is more challenging given the stigma attached to individuals who are migrants, and the stigma attached to trafficked victims experiencing mental health issues.

²³ Most books on human trafficking are a set of chapters without a specific theme running throughout. For example, see J. Winterdyk, B. Perrin & P. Reichel, “Human Trafficking: Exploring the International Nature, Concerns and Complexities,” (Taylor & Francis Group, 2012) and M. Malloch & P. Rigby, “Human Trafficking: The Complexities of Exploitation,” Edinburgh University Press, 2016) as two recent examples.

²⁴ The means element is how the physical, or psychological harm is committed against the victim, by the trafficker.

A separate issue regarding the process of referring potential victims relates to how trafficked victims are identified by the State. From existing research, there has not been an acknowledgment that the National Referral Mechanism (NRM)²⁵ is a UK wide framework, and operates within different jurisdictions which have different approaches to prosecuting victims. This thesis will examine the effect this has on victims by drawing together existing case law on how trafficked victims are often prosecuted, rather than diverted to the NRM along with the opinion that the present defences which are available to victims do not presently serve the best interests of victims. When victims are rescued or escape from trafficking,²⁶ they require support from organisations. However, previous research by anti-trafficking groups have found that victims are often dissatisfied with the existing levels of protection within the NRM and afterwards. My research examines in greater detail why this is happening and offers solutions to encourage more trust and cooperation between the victim and authorities.

Trust and cooperation between the State and victim can be facilitated if victims are granted international protection from being deported, persecution, discrimination and ostracism. Previous research²⁷ has been limited to whether trafficked victims meet the criteria for asylum only. My research advocates that not only is it right for States to provide stay in their country after identification to satisfy their international obligations, States must also fulfil their obligations towards victims by implementing domestic Government policies to facilitate a victim centred approach, which may encourage identification and self-identification.

²⁵ The National Referral Mechanism (NRM) is the formal identification process which potential victims will have to go through so that they become entitled to help and support whilst a formal decision is reached confirming that they are regarded as a trafficked victim or not by either the UK Visa and Immigration office or the Modern Slavery Trafficking Unit. This will be examined in more detail in Chapter 3.

²⁶ There are many forms of trafficking including sex, labour, organ harvesting, domestic servitude, forced marriage and debt bondage. This thesis will focus on the two main types, sex and labour exploitation as these will be referred to in light of the existing literature which dominates the current discussion.

²⁷ See R. Piotrowicz, "The UNHCR's Guidelines on Human Trafficking," (2008) Oxford University Press, and R. Piotrowicz, "Victims of People Trafficking and Entitlement to International Protection," (2005) 24 Aust. YBIL 159.

The challenges presented above may be resolved by small solutions taking place, but facilitated through the introduction of a trafficking advocate to help victims at varying stages of the referral and identification process.

There is a limit to what one thesis can examine. A careful analysis of the challenges and issues of introducing a trafficking advocate requires further research. In any event, the thesis does not argue that the advocate solution is the main solution to the challenges identified and examined in my research. To solely concentrate on this solution would deflect from the fact that there are other simpler solutions to existing procedures and mechanisms which may be actioned more swiftly which may benefit the best interests of trafficked victims. It is envisaged that where the interests of the State and the victim are both satisfied, it may increase the numbers of trafficked victims self-identifying, being referred, identified and protected.

Where more positive identifications can take place, a dual benefit for both the State and the victim may emerge. The victim will benefit from identification as they may become entitled to help and support. It is in the interest of the State for victims to recover from their ordeal in order to be able to effectively and participate in police investigations to assist increased prosecution of traffickers. Due to the cross border characteristics of how human trafficking organised criminal gangs operate, States have a legal obligation to combat the crime from a transnational organised crime perspective,²⁸ but also to balance this with their legal obligations towards trafficked victims through identification, many of whom will be from a different country.²⁹

²⁸ See UN Convention on Transnational Organised Crime Convention, resolution A/RES/55/25 November 2000. Article 1 Statement of Purpose explains that “the purpose of this Convention is to promote cooperation to prevent and combat transnational organised crime more effectively.” An acknowledgement that victims can be from within a country and exploited across borders should be made.

²⁹ See Article 10 Council of Europe Convention on Action against Trafficking in Human Beings, 2005 which requires States to train competent authorities to identify and protect potential victims of trafficking.

The manner in which trafficked victims are treated as offenders by being prosecuted for offences committed under duress may prevent them from being recognised as a victim. There is a legal obligation to protect human beings from slavery, but victims being prosecuted whilst traffickers escape with no accountability for the crimes they have committed is counter-intuitive. The methods States adopt to protect vulnerable people from other countries, such as trafficked victims reflect how other countries perceive the UK. As it will be seen, there is a difference between fighting human trafficking and protecting victims. Consequently, the balancing of addressing human trafficking from a crime control approach, while adopting a victim centred approach is not an easy balance to strike, especially when victims are treated as offenders by the criminal justice system. The thesis challenges this present situation, especially where traffickers and organised groups are able to continue operations and escape criminal liability whilst victims are unfairly punished. Furthermore, by preventing effective identification to take place, the obligations of the State to protect victims cannot be seen to be satisfied and fundamentally undermines the interests of justice for victims.

In summary, the thesis identifies different disciplines of knowledge, presenting a holistic approach to the issue of identification. These include health, sociology, law and criminology. The thesis will illustrate how interdependent the above disciplines are. Overarching themes of criminality and immigration, intertwined with the coercive, controlling and manipulative way the offence is committed, makes identification difficult. This thesis will unpack the above themes to address the challenges for the better identification of trafficked victims by authorities or those who come into contact with potential victims.

II. POLITICAL CONTEXT – THE ISSUE OF IMMIGRATION

This section will examine how the issue of immigration has become heavily politicised, creating challenges for individuals to become identified as a victim of trafficking. It is

impossible to embark on this research (and for public action to take place) without first recognising how the issue of identifying foreign trafficking victims takes place in a current hostile environment to immigration. The thesis argues that the identification of trafficked victims should not be framed as an immigration issue, but one which should be prioritised essentially as a human rights issue. Human beings have the right to be recognised, identified and protected from further harm as trafficked victims, primarily because of how traffickers have exploited and abused them. States have a legal obligation to facilitate these rights through positive identification³⁰. It has also been argued that “if it is in our power to prevent something bad from happening, we ought, morally, to do it.”³¹ The way in which the moral obligation can be seen to be achieved is by acting upon beyond their legal obligations, fulfilling a victim centred transnational approach to victims. This can be seen on a deeper level through the commitment to trafficked victims on a practical level by protecting them from prosecution, and providing them with help and support via the third sector. Unfortunately, due to the politicisation of immigration where States have advocated a tough stance on immigration, this may be having an adverse effect on identifying trafficked victims.

If hostility continues to be shown towards migrants, this can contribute to the negatively charged political environment towards immigration. This situation prevents States from being able to satisfy their moral obligations towards trafficked victims in their entirety, because of political pressure from part of the electorate who may be hostile to increased immigration.

A. Attitudes Towards Immigration Within The UK

The continuing challenges of identifying trafficked victims (and for victims to self-identify) in the UK take place simultaneously under the umbrella of a negative perception towards

³⁰ See Article 10 Council of Europe Convention on Action against Trafficking in Human Beings, 2005.

³¹ P. Singer, B. Gates, M. Gates, “Famine, Affluence and Morality,” (Oxford University Press, 2015) at 5-6.

immigration. There is every reason to believe that the adoption of a nationalist approach to immigration which led to the 2016 Referendum in the UK³² will make trafficked victims less likely to self-identify, and will further drive potential victims underground. Human trafficking is a crime which takes place in the shadows with invisible or disguised victims. Brexit has unfortunately fuelled this hostility towards immigration, which has been present within the UK for decades.

From the 1960s when migration to the UK increased from commonwealth countries, to more recently when Member States accepted more Eastern European countries into the European Union, immigration has always been growing as a more important issue for voters.³³ From the recent advancement of nationalist political views, favouring more restrictive immigration policies,³⁴ coupled with a broader protectionist approach in responding to globalisation,³⁵ immigration has started to become a scapegoat issue for many social problems. Politicians embracing a politics of fear of immigration facilitates a divisive ‘them and us’ attitude, compromising trafficked victims, because migrants may be perceived as having less worth.

The trend from the last 5 five years demonstrates that a negative response towards immigration remains largely consistent with calls to reduce the numbers of people entering the UK from EU and non-EU countries³⁶ for economic purposes:

³² EU referendum, which took place on 23rd June 2016 in the UK by a majority of 52% to 48% to leave the European Union. See later the reasons for the increased hostility towards immigration.

³³ Various research from firms such as Ipsos Mori, Gallup and YouGov showed a growing trend of hostility toward migration. Existing research showed that “the proportion of respondents citing immigration (as an important political and social issue) increased from 12% in 2003 to nearly 20% in late 2006.” See T. Hatton, “Migration & Public Opinion and the Recession in Europe,” *Economic Policy* (2016) 31 at 232.

³⁴ As seen from elections in recent 2018 elections in Italy and Hungary.

³⁵ As seen from the current U.S Trump Administration which is imposing tariffs on goods, and waiting to re-negotiate trade agreements such as NAFTA.

³⁶ See 2013 British Social Attitudes Survey which showed large majorities endorsing the reduction of migration, and the Transatlantic Trends Report 2014 which found there were calls by voters to reduce the numbers of people entering the UK for economic purposes, combined with the concern about nationals and Non-EU nationals entering the UK.

“More than three-quarters of the public (77%) want to see a reduction in immigration into Britain and public views of the level of immigration are significantly more negative than in 2011. This year’s reading is at a similar level to 2008 and we can see that the public’s attitude to immigration into Britain has remained broadly consistent over the past decade.”³⁷

A recent Migration Observatory study specifically found “attitudes toward low skilled labour migrants and asylum seekers are more negative to high skilled migrants and students,”³⁸ showing discrimination lies within the hostility seen towards groups of migrants. Because of the many sub-groups within the term ‘migrant,’ the perception and labelling of who a migrant is by the media remains an issue,³⁹ framing migrants as a threat and the reckless use of language which may promote a culture of fear:

“An analysis of British print media between 2010 and 2012, the most common descriptor of the word “immigrants” across all newspaper types is “illegal”, which was used in 10% of mid-market stories, 6.6% of tabloid stories and 5% of broadsheet stories.”⁴⁰

We have learnt how a hostile attitude towards immigration has been part of the UK for decades. But what are the reasons for the present hostility, and how do they impact on trafficked victims being recognised as different from other migrant groups? We will now see how national

³⁷ NatCen Social Research, “British Social Attitudes 2013: Attitudes to immigration,” found at <http://www.natcen.ac.uk/media/205569/immigration-bsa31.pdf>.

³⁸ Migration Observatory 2011 study found at S. Blinder, “UK Public Opinion toward Immigration: Overall Attitudes and level of Concern,” The Migration Observatory at the University of Oxford, published 20th August 2015.

³⁹ These include asylum seekers, smuggled persons, trafficked victims and economic migrants, bounded together under the umbrella of the term ‘migrant.’

⁴⁰ B. Duffy & T. F. Smith, “Perceptions and Reality, Public Attitudes to Immigration” IPSO Mori Social Research Institute, January 2014 at 89.

attitudes to increased immigration combined with the global phenomenon of the refugee crisis can make identification of trafficked victims even more challenging.

B. The Reasons Behind The Present Hostility Towards Immigration

The anti-immigration sentiment the UK currently experiences can be attributed to a fear of how immigration is changing the culture of the UK, placing increased pressure upon public services. Towns and cities have differing levels of immigrants living within communities,⁴¹ leading to some residents fearing that immigration has altered the character of the town. Critics argue that “immigration is contributing to the erosion of British traditions, values and way of life while placing pressure on Britain’s public resources and infrastructure.”⁴² Politicians have consistently been expected to reduce levels of immigration to the U.K.⁴³ Particular pressures on public services through increased immigration include the demand for primary school places, GP appointments and hospital operations, the availability of well paid jobs and access to affordable social housing. These views create sweeping generalisations about the harm immigration can do to a country which may then affect the treatment of settled migrants. However, this negative narrative fails to consider that ‘migrants’ also include vulnerable individuals such as refugees and trafficked victims.

Where people often blame migrants for many of the social issues within the UK today, an anti-immigration electorate blames mainstream political parties and the European Union for the facilitation of increased immigration. Trusting the political establishment has wavered, with

⁴¹ Boston in Lincolnshire has seen the “highest percentage increase of immigrants living there between the years 2001–2011,” as found in J. Gross & J. Douglas, “U.K’s Immigration Unease Animates ‘Brexit’ Vote; Surge of new arrivals fuels support for leaving the European Union,” Wall Street Journal Online 16 June 2016.

⁴² J. Gross & J. Douglas, “U.K’s Immigration Unease Animates ‘Brexit’ Vote; Surge of new arrivals fuels support for leaving the European Union,” Wall Street Journal Online 16 June 2016.

⁴³ For example, in 2016, there was a need to explain to the electorate why there is a growing gap between the headline official immigration statistics and the number of people arriving in the U.K registering for National Insurance numbers which are necessary to work and claim benefits in the U.K. See J. Gross, “U.K’s Immigration Statistics Gap Explained by Short Term Stays,” Wall Street Journal Online 12 May 2016.

recent surveys showing the failing levels of trust between the electorate and politicians from all parties.⁴⁴ This has allowed populist parties to gain influence and popularity within a politically charged negative environment towards immigration.⁴⁵ Increased immigration has seen a rise and influence within Europe to populist right wing political parties.⁴⁶

Their success has been measured by the increase of the vote share achieved in European Parliament Elections, where for example the British National Party and the UK Independence Party performed well. In 2004 the share of the vote in right ring parties was 20.4%, and this has steadily increased to 22.8% in 2009, and reached 28.6% in 2014.”⁴⁷ The upward trend shows that populist parties “have used nationalism and xenophobia” to influence parts of the electorate to adopt an anti-migrant platform to disenfranchised voters. Therefore, it has been more difficult for States to advocate and justify an empathetic and liberal approach to taking in greater numbers of refugees in the present political climate, although Canada has shown it is possible to show a humanitarian lead by accommodating more than 25,000 Syrian refugees.⁴⁸

The negative political rhetoric towards immigration has been taking place at the same time as regional instability continues in the Middle East. Recent conflicts in Iraq, Afghanistan and Libya with the continuing Civil War in Syria has contributed to the recent phenomenon of migration resulting in the highest numbers of displaced persons since the Second World War,⁴⁹ with the United Nations High Commissioner for Refugees (UNHCR) estimating that:

⁴⁴ See statistics from “The Problem of Trust” at <https://yougov.co.uk/news/2012/11/13/problem-trust/>.

⁴⁵ See how political disaffection with mainstream politicians has increased the popularity of the UK independence Party at <https://yougov.co.uk/news/2014/10/29/political-disaffection-not-new-it-rising-and-driving/>.

⁴⁶ Populist parties have been growing in stature, particularly those who speak about the problems associated with the free movement of people, and the negative impact on communities within the UK.

⁴⁷ Figures from European Election Database and www.europarl.europa.eu/pdf/elections_results/review.pdf

⁴⁸ See “Syrian Refugees Horizontal Initiative” found at <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/departamental-performance-reports/2016/section-4.html>.

⁴⁹ The UNHCR Global Trends report finds 65.3 million people, or one person in 113, were displaced from their homes by conflict and persecution in 2015 accessible from

“There are 4,088,099 registered Syrian refugees in neighbouring countries, including 1,939,999 in Turkey, 1,113,941 in Lebanon, 629,266 in Jordan, 249,463 in Iraq, 132,375 in Egypt and 24,055 in several countries in North Africa.”⁵⁰

The instability resulting from regional conflicts in the Middle East has produced challenges to regional institutions such as the European Union in their efforts to control immigration, whilst smugglers are simultaneously facilitating the migration of vulnerable and displaced people towards Europe.⁵¹ The different types of individuals referred to as migrants such illegal immigrants, economic migrants, asylum seekers, unaccompanied minors and trafficked victims are now moving at a faster pace. To counter the security implications of those entering Europe by means of smuggling and the lack of formal documenting of migrants, States have tightened their border security, exposing undocumented migrants to the risk of being exploited by traffickers.

States have been warned not to use the issue of human trafficking to take advantage of adopting a crime control approach by tightening their borders, because “they are not satisfying their moral obligation to take their fair share of refugees, and manipulate the two issues to impose a more restrictive immigration policy.”⁵² Furthermore, where States adopt this position they are not satisfying their obligations towards genuine trafficked victims.

The challenge for States is to address the humanitarian issue whilst at the same time combating illegal immigration. The grouping of all migrants together without distinguishing them is

<https://s3.amazonaws.com/unhcrsharedmedia/2016/2016-06-20-global-trends/2016-06-14-Global-Trends-2015.pdf>.

⁵⁰ “Worsening Conditions inside Syria and the region fuel despair, driving thousands towards Europe,” UNHCR found at <http://www.unhcr.org/55eed5d66.html>

⁵¹ See Statistics from IOM on the numbers of migrants and refugees arriving in Europe, <https://www.iom.int/news/mediterranean-migrant-arrivals-2016-204311-deaths-2443>.

⁵² J. Hathaway, “The Human Rights Quagmire of Human Trafficking,” (2008) *Virginia Journal of International Law* 49, at 26.

unhelpful to identifying the genuine victims of human trafficking. Being able to understand the significance of understanding the difference between human smuggling and human trafficking is vital so victims can become recognised in their own right, distinguishable from other groups of migrants.

III. THE CONTEXTUAL ISSUES ASSOCIATED WITH HUMAN TRAFFICKING

The previous section deals with the political background surrounding immigration and discussed the negative views and high levels of concern about immigration in the UK. This section examines the contextual issues associated with human trafficking itself, driven by how trafficking takes place alongside and sometimes in conjunction with human smuggling.

Human smuggling is not the same as human trafficking, because of the exploitative element which is key to distinguishing the latter. The failure to differentiate between the two prevents correct identification and overlooks genuine trafficked victims. It prevents trafficked victims from being recognised as their own group with their own characteristics, distinct from smuggled persons. Furthermore, in most cases, the failure to distinguish between smuggling and trafficking may result in misidentification.

This thesis will identify the environments where potential victims come into contact with society featuring an increased risk of misidentification occurring. Essentially, human trafficking is regarded as a modern form of slavery and a human rights violation.⁵³ It can become easily confused with human smuggling which is principally a crime against the State.

⁵³ Paragraph 1 of the Miami Declaration of Principles on Human Trafficking (2005) refers to human trafficking as a contemporary form of slavery. Directive 2011/36 EU of the European Parliament and of the Council on preventing and combatting trafficking in human beings and protecting its victims, describes human trafficking as a 'gross violation of fundamental rights.'

Where misidentification does occur, it may lead to victims being treated as offenders by the criminal justice system, prosecuted and they can be then deported. For example, if an individual comes to the attention of the State without immigration papers and an adequate investigation does not take place as to the circumstances as to why that person is presently in the UK, that person may be treated as an illegal immigrant and deported. In these situations, States (without realising) have failed in their moral obligation to protect trafficked victims.

Tom Obokata rightly argues that human smuggling is a criminal act conducted by individuals or groups against the State and “smuggling can be summarised as an act of facilitating illegal immigration.”⁵⁴ States have agreed on the definition of human smuggling, which is defined 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 of which the person is not a national or a permanent resident.”⁵⁵

Organised criminal networks have, for example, been able to take advantage of the conflict and displacement occurring in Syria by facilitating journeys across the Mediterranean Sea which are continuing to prove fatal.⁵⁶ Smuggling has unintended consequences for the displaced because criminal gangs can take advantage of their vulnerability in the same way as smugglers have profited from the migration crisis, as Nickerson highlights:

⁵⁴ T. Obokata, “Trafficking of Human Beings from a Human Perspective, Towards a Holistic Approach,” (Martinus Nijhoff, 2006) at 21.

⁵⁵ Article 3(a) UN Protocol against the Smuggling of migrants by Land, Sea and Air, Supplementing the UN Convention against Transnational Organised Crime, GA Res 55/25, 2000.

⁵⁶ See IOM “IOM Monitors Migrant Arrivals, Deaths in Italy, Greece and Spain,” 9th September 2015 found at <https://www.iom.int/news/iom-monitors-migrant-arrivals-deaths-italy-greece-and-spain>.

“People end up in a vulnerable situation. Even though they (smugglers) may never be a plan for them to be trafficked for the purpose of exploitation, they could end up in that situation because they are exposed to risks criminals see as an opportunity.”⁵⁷

Amnesty International agrees that traffickers are using the migration crisis as a way of fuelling exploitation by waiting for smuggled persons to arrive to take advantage of them:

“There are reports of former people smugglers branching out into trafficking; some of the gangs organising the illegal migration across the Mediterranean have now hooked up with criminal gangs in Europe who are taking people into forced labour.”⁵⁸

The appeal for smugglers are the large financial rewards available by facilitating the movement of people across borders, transporting them from one place to another to meet a demand for cheap labour or sexual services. Those escaping conflicts are vulnerable people and families, either seeking asylum, travelling as economic migrants, or they may be intentionally trafficked by criminal networks, or once at the destination, they may be at risk of trafficking and exploitation. This is happening at the same time as increased migration, which has been seen across the world. Within these two constructs lie human trafficking and human smuggling.

Whereas human smuggling is an act of transferring an individual from one country to another illegally, in contrast, human trafficking is a criminal act carried out by an individual or group, in order to exploit the human being. The legal definition of human trafficking is:

⁵⁷ J. Nickerson, “Traffickers v Smugglers: The Refugees crisis is changing how migrants are moved,” New Statesman, 12 May 2016 at <http://www.newstatesman.com/world/europe/2016/05/traffickers-v-smugglers-refugee-crisis-changing-how-migrants-are-moved>.

⁵⁸ J. Nickerson, “Traffickers v Smugglers: The Refugees crisis is changing how migrants are moved,” New Statesman, 12 May 2016 at <http://www.newstatesman.com/world/europe/2016/05/traffickers-v-smugglers-refugee-crisis-changing-how-migrants-are-moved>.

“...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 the 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 over another person, for the purpose of exploitation.”⁵⁹

Examining the definition, it is clear the ‘purpose’ of the act is a central issue distinguishing trafficking from smuggling. The purpose of trafficking another human being is to exploit them. However, it can be difficult to establish at what point the trafficking (the movement with at least the simultaneous intent to exploit) takes place. In reality, these categories will often overlap, especially for example where a person voluntarily agrees to be smuggled but then is trafficked and exploited. In these situations, individuals become offenders and victims simultaneously. In these cases, decisions would have to be made based on their personal circumstances and an attempt to take action by the State against smugglers and traffickers is required. Furthermore, this makes identifying human trafficking victims difficult.⁶⁰ A person may voluntarily agree to be smuggled, but then the relationship becomes exploitative. This produces an interesting dynamic. Their status is that they are trapped in exploitation and exposed to the criminal and/or immigration law if they escape or come into contact with authorities. Individuals are then effectively an offender and a victim at the same time.⁶¹

⁵⁹ Article 3 UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Organised Crime, 2000.

⁶⁰ This issue will be examined further in Chapter 2 when the thesis discusses where consenting sex work ends and sexual exploitation facilitated by victims being coerced begins.

⁶¹ This impacts on victims not self-identifying themselves due to the status of the person being illegal being in that State. A distinction is required to be made to distinguish an individual who has been trafficked from a person who has been smuggled. This can be facilitated via a formal identification process in the UK which will be examined later in the thesis.

Conclusion

The challenges addressed by this thesis do not take place in a vacuum but in a highly charged context which adds significantly to them. The present negative attitude to immigration within the UK consisting of a combination of issues including xenophobia, a distrust of politicians and political institutions, along with increasing nationalism has contributed to portraying a negative perception to immigration. The advancement of a negative rhetoric continues to undermine the trafficked victim in being firstly identified as a distinct type of migrant who has been exploited, understood as a victim of a global crime instead of being treated as an illegal immigrant, and recognised as a victim of a human rights violation deserving of recognition and protection by the State.

The following four chapters examine the challenges trafficked victims have in becoming identified as a trafficked victim within environments which they come into contact with the State and society. Alongside identifying challenges this thesis will, however, also demonstrate the opportunities to identify victims which will not only be in the interest of the victim, but also in the interest of the State to demonstrate to the international community that it has satisfied its moral obligations towards trafficked victims.

The following chapter examines the challenges for individuals to self-identify themselves as victims due to how the offence is committed and the harm which is inflicted, resulting in victims developing mental health conditions, preventing them from accessing help.

CHAPTER 2:

THE CHALLENGES FOR INDIVIDUALS TO RECOGNISE THEMSELVES AS VICTIMS OF HUMAN TRAFFICKING

I. INTRODUCTION

This chapter examines how difficult it is for most trafficked victims to self-identify as victims. This will be done by looking at the challenges from the trafficked victims' perspective to better understand what these barriers entail. Unfortunately, it will be shown that in most cases, exploited individuals will have to rely on other agencies to recognise them as potential trafficked victims because of the difficulties victims face in terms of identification.

To be able to adopt a victim centred approach it is crucial to understand what difficulties victims face in being able to self-identify as victims. A host of extrinsic pressures from traffickers prevent their escape, together with numerous intrinsic factors, such as being unaware that they are trafficked victims. By understanding the challenges associated with self-identification better, this acknowledges the entrapment which victims endure, making it difficult for victims to escape, speak out, or be rescued from abuse. It is not only a problem of external perception but often one inherent in the particular experiences of trafficked victims. There are a host of reasons why it is in the best interests of trafficked victims to self-identify:

- 1) Individuals recognising themselves as victims is the first step in trying to stop the exploitation;
- 2) Self-identification will help to access various rights and mechanisms of assistance and support and empowerment and is also the first stage in the process of recovering from the serious personal and mental health effects of trafficking;

- 3) Self-identification provides for the possibility that the trafficker will be held accountable by being prosecuted, meaning the victim may get justice for the harm which has been suffered, and
- 4) Self-identification presents the opportunity for victims to regularise their immigration status, and reduce the risk of being deported if they cannot prove their identity.

Where victims are identified, it is in the interest of the State because victims may potentially help the police with investigations which can lead to prosecutions. Self-identification is challenging for 3 principal reasons:

- 1) The first is how the subtle means of deception, coercion and control are used to exploit victims, which makes it difficult for victims to acknowledge that they are victims of exploitation. The way in which the harm is inflicted on the victim manipulates vulnerable individuals and keeps victims in an exploitative situation, making self-identification difficult. This is often contingent upon a failure to self-identify.
- 2) The second challenge is understanding the impact of exploitation on the mental health of trafficked victims, making it difficult for victims to understand and cope with what they are experiencing. Due to the hidden symptoms associated with the nature of mental health, victims may often find it difficult to speak out for help.
- 3) The third challenge are the stigmas attached to having a mental health issues⁶² and also being a migrant⁶³ in a country which is hostile towards immigration. The stigma of

⁶² For an explanation as to why people with mental health issues are seen as being tainted and of less worth, see P. Haddad & I. Haddad, "Mental Health Stigma," British Association for Psychopharmacology (BAP), 3rd March 2015 found at <https://www.bap.org.uk/articles/mental-health-stigma/>.

⁶³ For an explanation of the stigmatisation of some EU migrants, occurring since the Brexit vote, see T. Roulet, "EU citizens in Britain are already being stigmatised – and it's likely to get worse," London School of Economics, 23 Jan 2018 found at <http://blogs.lse.ac.uk/politicsandpolicy/eu-citizens-in-brexit-britain/> and how stigma can facilitate discrimination, see E. Kofman, S. Lukes, A. D'Angelo & N. Montagna, "The equality implications of being a migrant in Britain," Equality & Human Rights Commission, Research Report 19 (2009) for how stigma can often facilitate discrimination towards migrants.

mental health means victims may be prevented from seeking help, and the stigma of being a migrant may result in being discriminated against, by not having the opportunity to access support. Both groups are perceived as being less desirable or tainted in some way.

Each of these challenges will be examined in further detail to demonstrate that where there is a lack of identification, neither the State nor the victim benefits. Where victims are trapped in a cycle of exploitation, traffickers are able to get away with their actions. Therefore, trafficked victims may often be reliant upon an intervention by the State such as an immigration or police raid so that they can be rescued and referred to the National Referral Mechanism (NRM) to be identified.

By the end of this chapter, it will be evident from the perspective of victims what the challenges of self-identification are. It will show how States can take greater responsibility to protect trafficked victims when they come into contact with authorities. A State has responsibility not to create an atmosphere containing a negative rhetoric towards immigration making self-identification more difficult and must indeed proceed conscious of the complexity and harm infliction mechanisms, given how the crime occurs.

II. THE 1st CHALLENGE – UNDERSTANDING HOW THE MEANS ELEMENT PREVENTS SELF-IDENTIFICATION

A common response to a victim who has being exploited or abused is, “why didn’t the person just leave?” This section seeks to answer this question and argues that it is difficult for victims to escape and self-identify because of how the harm is inflicted upon them by traffickers.

This chapter will examine the different aspects of self-identification. The victim will experience internal barriers to self-identification, subjective to their own situation which they find themselves in. For example, the way the harm has been inflicted may mean that the victim does not realise or would not regard themselves as a victim. Additionally, there will be things which stop victims from being able to come forward even if they realised they are a victim, and would want to come forward. There will be things which discourage victims from coming forward as a victim, such as having a means of escaping from a trafficking environment.

Victims are often manipulated and unable to recognise that they are a victim of trafficking because of the psychological impact that victims are exposed to. The way in which the offence is carried out is referred to as the ‘means.’ Typically, the means has been framed as a legal definition issue.⁶⁴ However, rather than examining the means from the legal definition, I am assessing the harm which is committed from a victimological perspective. I am reframing how the ‘means’ element (in the legal definition) should be understood by society where victims who are subjected to one or more of the means elements over a long period of time essentially become trapped by their own inability to self-identify.

One of the central concerns of this thesis is to examine the means in more detail to establish how the harm by trafficker is inflicted upon their victims. The harm suffered is often not visible for people to see which contributes to the invisibility of victims within society. Deception, coercion and control all occur and are carried out by the trafficker at varying times during the crime of trafficking and exploitation.

The United Nations Protocol defines the various ways in which human trafficking is facilitated by traffickers. These are as follows:

⁶⁴ A. Gallagher, *“The International Law of Human Trafficking,”* (Cambridge University Press, 2010) at 31-32.

“by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the 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 over another person.”⁶⁵

This definition demonstrates a number of potential ‘means:’ deception, coercion and control.

A. Deception

Deception is the first means found within the UN definition of human trafficking. It typically occurs at the beginning of the trafficking experience. The motive of the trafficker is to deceive, coerce and control vulnerable victims so that it becomes easier to exploit them at a later stage. Deception includes the use of words or conduct as to the nature and conditions of the work that the person will engage in,⁶⁶ or to the extent that the individual is free to leave the environment in which that person is being exploited in.⁶⁷ The way in which traffickers do this is to entice vulnerable people either online or face to face, with a range of deceptions that traffickers use from the highly skilled, (such as grooming) to the low skilled (the offering of drugs and alcohol).

Traffickers often use “advertising, websites, social media and visits to their locale from people posing as successful employees who had earned considerable amounts while employed in the United Kingdom.”⁶⁸ They target young people who are often marginalised and those from disadvantaged areas. Traffickers can often deceive and take advantage of people looking for a

⁶⁵ Article 3 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000.

⁶⁶ Article 5(1)(f) UNODC Model Law.

⁶⁷ P. Chandran, “*Human Trafficking Handbook: Recognising Trafficking and Modern Day Slavery in the UK*,” (LexisNexis, 2011) at 12.

⁶⁸ J. Laird, “Responding to Victims of Human Trafficking: The Good, the Bad and the Ugly,” found from M. Malloch & P. Rigby, “*Human Trafficking: The Complexities of Exploitation*,” (Edinburgh University Press, 2016) at 105.

relationship, especially after emotional attachments are formed. This is because the relationship created between the trafficker and the victim is not equal. The trafficker is deceiving the victim simultaneously while the victim's emotional needs are being met, albeit through grooming, showing it is not reciprocal. The exploitation which occurs after the deception is facilitated through a relationship before the specific harm takes place, "usually over a period of time and within specific relationships and contexts."⁶⁹ This is one of the barriers of self-identification because of the emotional bond which has been developed will make it difficult for victims to escape.

Additionally, an individual's poor financial, economic and social circumstances provide opportunities for vulnerable individuals to be taken advantage of, deceived, trafficked and exploited. Jean Allain speaks of a continuum and how it "forces a person to decide between disagreeable alternatives – for instance, between working for less than minimum wage, or not working at all."⁷⁰ The opportunity to travel to another country for a promise of a job (especially if they are younger in age) may be a factor even though there are risks attached to accepting an offer. For example, "while women might be wary of employment offers for easy money that seems too good to miss, their economic circumstances push them into precarious situations."⁷¹ In circumstances where regions are experiencing extreme levels of poverty or effects from a natural disaster,⁷² it is a mistake to believe that the individual always has a choice to leave or not. In fact, the element of choice and autonomy may have been taken away from the victim, because the decision to stay in their present environment may have results far worse than

⁶⁹ C. Coutois, "Complex Trauma, Complex Reactions: Assessment and Treatment," *Psychological Trauma: Theory, Research, Practice and Policy*, (2008) Vol 5, No 1 86 at 86.

⁷⁰ J. Allain, "*Trafficking and Human Exploitation in International Law with Special Reference to Women and Children in Africa*," found in B. Lawrence & R. Roberts, "*Trafficking in Slavery's Wake*," (Ohio University Press, 2012) at 152.

⁷¹ J. Goodey, "Sex Trafficking in Women from Central & East European Countries: Promoting a 'Victim Centred' and 'Woman-Centred' approach to Criminal Justice Intervention," *Feminist Review* (2004) 76, 26 at 28.

⁷² For example the tsunami in Southern Asia in 2004, the 2010 earthquake in Haiti, the 2011 drought in Horn of Africa, and the 2013 typhoon in the Philippines.

travelling to escape poverty and the chance of a better life elsewhere. A trafficker may benefit from this naivety and precarious situation of victims by taking advantage of them through exploitation.

When victims have been deceived, and forced into slavery, they may recognise themselves as a trafficked victim, but the shame which victims experience because they have consented to travel to work prevents them from disclosing their victim status. It may be more difficult for victims to divulge that they have been deceived. Additionally, victims who may have been deceived may not fit with an ‘ideal trafficked victim persona.’⁷³ As explained by Christie, in order to be recognised as victims, they must be weak, having blamelessly fallen prey to a predatory stranger. The reality of trafficked victims may often be more nuanced, e.g. a vulnerable victim, and cannot always be blamed for becoming a victim and the offender is often bad and someone who is unknown to the victim. This situation may exist where a trafficked victim may be a vulnerable young woman, travelling to another country and then exploited, without finding the strength to escape. The complicity in her decision to travel and the feeling of embarrassment may prevent her seeing herself as a victim, judging herself just as broader society may do.

B. Coercion

The means element is not confined just to deception, but encompasses other “means of trafficking including not only force or threatened force, but also other means of coercion and

⁷³ For further examinations of an ideal victim, see N. Christie, “The Ideal Victim,” from E.A. Fattah, *From Crime Policy to Victim Policy*, (Macmillan Press, 1986) at 17 – 30, and for an ideal victim of human trafficking, see J. Srikantiah, “Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law” *Boston University Law Review* (2007) 87: 157 and from an international crime perspective, see J. van Wijk, “Who is the ‘Little Old Lady’ of International Crimes? Nil Christie’s concept of the ideal victim reinterpreted,” *International Review of Victimology* (2012), 1.

abuse of power or of a position of vulnerability.”⁷⁴ Coercion is the second means found within the UN definition of human trafficking. For example, an abducted victim who is overpowered is physically coerced. Often, the type of harm inflicted during trafficking is psychological, occurring either after a victim has been deceived, or during exploitation where traffickers coerce victims to commit criminal acts which directly benefit their exploiters. Understanding coercion requires a careful examination of how the trafficker creates an environment where the victim’s choices may be severely restricted, preventing the possibility of the victim escaping the exploitation. Physical threats are evident to see by the naked eye, but victims may experience non-physical threats which are carefully hidden. This is ‘psychological coercion.’

The issue of psychological coercion and the effect upon trafficked victims remains a vital issue in understanding the barriers to self-identification. Similar parallels have been drawn between trafficked victims experiencing psychological coercion alongside other victim groups such as “hostages, political prisoners, prisoners’ of concentration camps, battered women and other victims of captivity.”⁷⁵ Dando, Walsh & Brierley point out in their research, that victims “did not fully understand psychological coercion, and what constitutes manipulative, nonphysical abuse.”⁷⁶ As Srikanthiah further acknowledges, “the determining of whether a victim was defrauded or coerced by the trafficker (beyond the typical push factors) requires a complex and

⁷⁴ K. Kim, “Psychological Coercion in the Context of Modern-Day Involuntary Labour: Revisiting *United States v Kozminski* and Understanding Human Trafficking,” *University of Toledo Law Review* (2007) Vol 38, 941 at 961.

⁷⁵ E. Hopper & J. Hidalgo, “Invisible Chains: Psychological Coercion of Human Trafficking Victims,” *Intercultural Human Rights Law Review* (2006), 1: 185 at 191.

⁷⁶ C. Dando, D. Walsh & R. Brierley, “Perceptions of Psychological Coercion and Human Trafficking in the West Midlands of England: Beginning to Know the Unknown,” *PLoS One* (2016), 11(5) at 8-9.

detailed factual examination of the victim's state of mind and the trafficker's actions."⁷⁷ One such framework to see how coercion is present is Biderman's theory of coercion.⁷⁸

This theory highlights how individuals are often deceived and then placed into an exploitative situation, making it difficult for some victims to escape. Victims may be subjected to range of methods, carried out by traffickers to make trafficked victims physically and psychologically exhausted.⁷⁹ This is done where the victim is isolated from established norms such as breaking down current existing family and friend networks in favour of building emotional reliance on the trafficker. Traffickers employ this technique because it "effectively isolates victims from any sources of information, material aid, or emotional support. It also creates a psychological sense of disconnection from others."⁸⁰ The shift in behaviour represents victims moving away from past relationships to new ones which are more unpredictable in nature. Traffickers start to exert their influence and power over victims due to the unfamiliarity and unequitable relationships which have developed. Hom & Woods highlights the subtle power traffickers employ:

"Non-violent control usually involved manipulation, fear, or incessant monitoring. Often, traffickers would threaten the woman or girl's friends or family, Isolation included the pimp/trafficker emphasising to the women that no one other than the pimp

⁷⁷ J. Srikantiah, "Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law" *Boston University Law Review* (2007) 87: 157 at 192.

⁷⁸ This theory was established 50 years ago for understanding psychological coercion in terms of captivity, see S. Baldwin, A. Fehrenbacher & D. Eisenman, "Psychological Coercion in Human Trafficking: An Application of Biderman's Framework," *Qualitative Health Research* (2015), Vol 25(9), 1171.

⁷⁹ For further examination of the characteristics associated with Biderman's theory of coercion, see C. Dando, D. Walsh & R. Brierley, "Perceptions of Psychological Coercion and Human Trafficking in the West Midlands of England: Beginning to Know the Unknown," *PLoS One* (2016), 11(5) at 3.

⁸⁰ E. Hopper & J. Hidalgo, "Invisible Chains: Psychological Coercion of Human Trafficking Victims," *Intercultural Human Rights law Review* (2006), 1: 185 at 195.

cared about them, no one would come to rescue them, and if they were to try to escape, no one would be there to help.”⁸¹

Over time the trafficker may start to play a more significant role in the victim’s life. As Herman argues “in situations of captivity, the perpetrator becomes the most powerful person in the life of the victim, and the psychology of victim is shaped over time by the actions and beliefs of the perpetrator.”⁸² The Silence Compliance Model that Beccy Johnson explains shows how victims are in a position where either they do not fully understand that they are being coerced by their exploiter, or are just too scared to speak out because of the fear of being arrested, deported or being subjected to further violence:

“...even where escape is physically possible, [trafficking] victims may be psychologically incapable of escape due to their constant terror.”⁸³

The isolation and disconnection which the victim may feel because of coercion may become extremely alienating to victims. As Baldwin, Fehrenbacher & Eisenman explain, “the interaction of the coercive tactics created anxiety about leaving the house and a sense of futility about even venturing outside.”⁸⁴ The geographical movement involved in trafficking will massively exacerbate these effects and facilitate isolation, especially where victims do not speak the language of the country. Over time, the dynamic between the victim and the trafficker changes where “an anxious attachment is formed because the victim is vulnerable and

⁸¹ K. Hom & S. Woods, “Trauma and its Aftermath for Commercially Sexually Exploited Women as Told by Front-Line Service Providers,” (2013) *Issues in Mental Health Nursing*, Volume 34, Issue 2 75 at 77.

⁸² J. L. Herman, “Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma,” *Journal of Traumatic Stress*, (1992) Vol 5, No 3, 377 at 383.

⁸³ H. Sadruddin, “Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses,” 16 *Stanford Law & Policy Review*, (2005), 379 at 405.

⁸⁴ S. Baldwin, A. Fehrenbacher & D. Eisenman, “Psychological Coercion in Human Trafficking: An Application of Biderman’s Framework,” *Qualitative Health Research* (2015), Vol 25(9), 1172 at 1174.

dependent upon the trafficker.”⁸⁵ This identification with the trafficker on an emotional level as been referred to as ‘trauma bonding’ or Stockholm syndrome.⁸⁶

Victims may have a lower chance of self-identification because of this type of relationship they have with the trafficker. As discussed earlier, victims often form an emotional attachment to their trafficker, described by Raghavan and Doychak as a form of trauma bonding:

“The theory surrounding trauma-coerced bonding posits that victims of abuse can form powerful emotional attachments to their abusers, as a result of a complex interaction of abusive control dynamics, exploitation of power imbalances, and intermittent positive and negative behaviour.”⁸⁷

Victims who bond with traffickers presents barriers for them to see the harm which is being inflicted upon them. Individuals may not know, understand or acknowledge that they are a victim of psychological abuse because the two are involved in a relationship but being simultaneously being exploited by the perpetrator. The trafficker may know that it will be difficult for the victim to break free from this situation, and will continue to use this tactic to manipulate that person. At the same time, victims may often subjected to a continuous cycle of physical, mental and emotional abuse at the hands of traffickers. The type of conditions suffered by victims “confirm high rates of violence inflicted to victims during and in some cases before trafficking, and a high prevalence of symptoms suggestive of anxiety, depression and post-traumatic stress disorder (PTSD).”⁸⁸ The harm suffered by victims restricts the opportunity for them to speak out and trust strangers, because “symptoms of depression,

⁸⁵ E. Hopper & J. Hidalgo, “Invisible Chains: Psychological Coercion of Human Trafficking Victims,” *Intercultural Human Rights law Review* (2006), 1: 185 at 199.

⁸⁶ F. Ochberg & D. Soskis, “*Victims of Terrorism*,” (Boulder CO, Westview 1982) at 123 – 124.

⁸⁷ C. Raghavan & K. Doychak, “Trauma-coerced Bonding and Victims of Sex Trafficking: Where do we go from here?” *International Journal of Emergency Mental Health & Human Resilience* (2015), Vol 17, No 2, 583 at 583.

⁸⁸ S. Crabb & G. Schinina, “Mental Health of Victims of Trafficking: a right, a need and a service,” (2016), *Epidemiology and Psychiatric Sciences*, Vol 25, Issue 4 at 345.

hopelessness and feelings of guilt will be unlikely to mobilise the resources needed to escape a trafficking situation.”⁸⁹ A further analysis of how the harm is inflicted on victims through coercion and control resulting in the onset of victims developing mental health issues will be undertaken below.

Victims may often be placed in vulnerable situations because the trafficker controls their environment and ensures that they are prevented from being seen by authorities as illegal immigrants by taking possession of their identification documents.⁹⁰ The victim may know that there is a risk of being found by authorities who will either prosecute or deport them, giving traffickers increased control over their environment, using threats of informing authorities if an escape is attempted. This type of harmful environment where the nature of the relationship occurs remain a pivotal challenge victims to escape from.

For example, environments involving sex work provides a very clear example of the reasons coercion may not be obvious to the victim.⁹¹ Coercion illustrates the influence that traffickers have on victims of sexual exploitation, either by abuse (threatened or actual), or placing them in a position where victims have no other choice but to consent to being exploited.

This may be contrasted with the position of a freely consenting sex worker who is choosing to use their autonomy. In some circumstances, if the sex worker becomes threatened, consent may have been given for fear of retribution from their trafficker. In this circumstance, where a sex worker has consented out of fear, this would still be classed as human trafficking. Where there has been evidence of recruiting, transporting, transferring harbouring or receiving of persons

⁸⁹ E. Hopper, “Under-identification of Human Trafficking Victims in the United States,” (2004) *Journal of Social Work Research & Evaluation*, Volume 5, No 2 at 130.

⁹⁰ This behaviour from traffickers is common as it illustrates the control that traffickers seek to keep victims in an environment of exploitation, and increases the vulnerability of the victim.

⁹¹ For a full analysis of consent, see J. Elliott, “The role of consent in the trafficking of women for Sexual Exploitation: Establishing who the victims are, and how they should be treated,” PhD thesis, University of Birmingham, 2011.

for the intended use of exploiting them, then the individual's consent to be subjected to this is not relevant. Under the definition, "the consent of a victim of trafficking in persons to the intended exploitation shall be irrelevant where any of the means have been used."⁹² Therefore, under the UN definition, victims who are coerced and have still given consent under duress are given protection as it is regarded as human trafficking, but victims may still be dissuaded to self-identify as States are left to their own discretion as to how they legislate and regulate voluntary prostitution. From the perspective of self-identification, there may be two distinct point here. Firstly, the harm constituting the means may have an impact on the victim such that they do not identify as a victim. Secondly, States define the harm in such a way that victims would not see themselves as coming within that definition. Any victims are unlikely to know the law in any case. This legal nuance will do nothing to alter their sense of complicity and thus exclusion from any 'true' victim status.

As Joseph Dunne suggests, the "narrow definition of the elements of trafficking only include women and children who are involuntarily forced into the sex trade."⁹³ This view overlooks men seeing themselves as victims of sex trafficking which presents a different set of challenges relating to self-identification such as embarrassment and concerns about discrimination because of their male gender and sexual orientation. As a result, Edwards acknowledges that "because of shame, stigma and distrust towards initiatives and people in a position to help, effective rescue and aid operations for males become challenging."⁹⁴ The issue of sex trafficking has become not limited to being just a human rights issue, it is also a gender and feminist issue. The nexus between consensual sex workers and victims of sexual exploitation have been highlighted by feminist and activist groups alike, both advocating for the protection

⁹² Article 3(b) UN Trafficking Protocol.

⁹³ J. Dunne, "Hijacked: How efforts to redefine the international definition of human trafficking threaten its purpose," *Willamette Law Review*, (2012), Vol 49, 403 at 411.

⁹⁴ O. Edwards, End Slavery, "The Secret Victims of Sex Trafficking," July 2015 found at <http://www.endslaverynow.org/blog/articles/the-secret-victims-of-sex-trafficking>.

against violence against women but having differing opinions regards attitudes to consenting to sex work as a women's right to choose.⁹⁵ Despite the law considers consent irrelevant, two situations exist which makes self-identification difficult.

The first situation is related to where a victim is initially gives consent to sex work, but is later coerced in committing further acts, which the victim does not consent to, resulting in her becoming sexually exploited. The specific period of time from when the consent is withdrawn becomes relevant, because the withdrawal of consent changes her status to a victim, because the environment is now an exploitative one where coercion is likely to take place, keeping the victim in slavery.

According to the definition from the UN Palermo Protocol, trafficking occurs where the purpose is to exploit another person.⁹⁶ Establishing trafficking requires establishing the means rea of the trafficker. The means rea is established by examining the intention of the trafficker who wishes to exploit a person and restrict the movements of a person. In some cases, victims may not know that they are being trafficked, because they believe that they are being smuggled.

Proving an exploitative intention becomes even more complicated because of how trafficked victims are recruited. The recruitment process – referred to as grooming - is the period which occurs before the movement and exploitation of a person.⁹⁷ Grooming relies on building an emotional attachment between the trafficker and the intended victim. This facilitates the

⁹⁵ See The International Human Rights Network (IHRN) which is made up of NGOs including the Coalition Against the Trafficking of Women (CATW), European Women's Lobby (EWL) and the International Abolitionist Federation (IAF), who advocate an abolitionist approach to prostitution and the more liberal approach from The Human Rights Caucus (HRC) including Global Alliance against Trafficking in Women (GAATW), Foundation against Trafficking in Women, and the Asian Women's Human Rights Council (AWHRC) favouring the distinction between free and forced sex work.

⁹⁶ Article 3a UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention against Transnational Organised Crime, 2000.

⁹⁷ At the point of grooming, no exploitation takes place, but the intention of the perpetrator is to exploit the victim.

movement of the victim (either internally or across another border, legally or illegally) and for the victim to be coerced into committing other acts for the trafficker to make money from.

Where victims have self-identified it would be easier to show that exploitation has taken place. Unfortunately, this is too late for the victim to escape the ordeal because the harm has already been suffered.

It is even more difficult to establish where exploitation starts in cases of sexual exploitation. In this exploitative environment, there is often evidence of threats of violence or coercion made to victims as well as physical violence being inflicted upon them. Where cuts and bruises are clear to see, this makes it easier to identify exploitation has taken place. In cases of voluntary sex work, a sex worker consents freely to move location and works in the sex trade cannot, therefore be considered to be trafficked.

The line between voluntary and coercion within sex work may often be thin, which makes it difficult to establish where voluntary sex work finishes and where sexual exploitation starts. Where it can be seen, it illustrates a change of status from someone who originally gives voluntary consent to sex work to someone where the same work becomes exploitative and the victim becomes trapped in that environment. This situation can also occur where a smuggled person consents to being smuggled but then is exploited and trafficked thereafter. In cases of voluntary migration, it will be easier to identify where the exploitation starts; a typical situation would be instances of legal migration through applying for a work visa in another country, travelling there and starting work but then becoming exploited, as seen from the case of *Rantsev v Cyprus & Russia*.⁹⁸ Alternatively, trafficking may occur either immediately after an act of smuggling has taken place, or at a later time in the future. Furthermore, a person may change

⁹⁸ See *Rantsev v. Cyprus and Russia*, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010, available at: <http://www.refworld.org/cases,ECHR,4b4f0b5a2.html>.

status from a trafficked person to a historical victim of trafficking who has escaped and is free from exploitation for a period of time.⁹⁹

Wijers believes that the way that coercion or force are defined present victims self-identifying because it “excludes women who consciously make the decision to work in the sex industry, but who are subject to force and abuse in the course of their work. The abuses she undergoes are considered to be the consequences of her willingness to be a prostitute.”¹⁰⁰ There is no present protection for individuals who are in this predicament.

The second situation which may occur is where the individual initially chooses to travel expecting to work in one type of environment, but then finds that the job is exploitative, engaging in sex work. The individual may then choose to carry on with the exploitation because of shame or embarrassment. This prevents the individual from seeing themselves as an ideal victim, one where he or she is not complicit in their own decision making which has resulted in an exploitative situation. The above situation is a good example of a person’s agency becoming so limited that though it may form a barrier to self-identification. The challenge remains for victims to self-identify because they may not see themselves as worthy victims in light of their actions which continues to be a problematic issue. The challenge of distinguishing between a consenting sex worker and coerced trafficked victim is difficult and demonstrates the complexities the identification of trafficked victims may present, especially because the fear of being stigmatised and ostracised is in play. Therefore, victims may be more likely to accept the exploitative situation.

⁹⁹ The effect of being a historical victim of human trafficking on becoming identified will be examined later in Chapter 5 of this thesis.

¹⁰⁰ M. Wijers, “Purity, Victimhood and Agency: Fifteen years of the UN Trafficking Protocol,” *Anti-trafficking Review*, (2015) Issue 4, 56 at 60.

C. Control Over Another Person

Control is the third means found within the UN definition of human trafficking. Previously, I have examined coercion which places the victim into an exploitative environment. In contrast, traffickers will exert control over the victim by restricting their ability to leave the exploitative situation, making it more difficult to escape and for them to self-identify. Control over victims occurs during repeated exploitation, keeping victims trapped.

The way in which the means is carried out by a trafficker also highlights the repeated cycle of harm that is inflicted upon the victim with “prolonged, repeated trauma where the victim is in a state of captivity, unable to flee and under the control of a perpetrator. Examples of such conditions include brothels, and other institutions of sexual exploitation.”¹⁰¹ The type of harm committed here is psychological. Traffickers manipulate victims in believing they will be at further risk of being prosecuted or deported if they escape.

Where victims have recognised themselves as victims, they may not know where to get help which presents a barrier for victims to escape from exploitation. As Andrea Lange asserts in her research, “victims describe difficulties gaining access to a phone or other outside contact since every move is monitored by their traffickers.”¹⁰² Other factors Lange found include “shame, cultural biases and stigmas also drive down reporting, with some immigrant women embarrassed that they are conducting illegal activities such as prostitution and do not wish to report their victimisation.”¹⁰³ In this type of situation where victims have acknowledged their

¹⁰¹ J. L. Herman, “Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma,” *Journal of Traumatic Stress*, (1992) Vol 5, No 3, 377 at 377 -378.

¹⁰² A. Lange, “Research Note: Challenges of identifying female human trafficking victims using a national 1-800 call center,” (2011) *Trends Organised Crime* 14: 47 at 49.

¹⁰³ A. Lange, “Research Note: Challenges of identifying female human trafficking victims using a national 1-800 call center,” (2011) *Trends Organised Crime* 14: 47 at 49.

victim status, the risk of leaving one situation, especially where there is lot of uncertainty as to what exists in the next environment remains a barrier for victims to take action to leave.

Coercion and control overlap with one another because when a trafficker coerces the victim into an act such as forced labour or sexual exploitation, the trafficker may threaten the victim with consequences such as contacting authorities or with punishment beatings, thereby exercising control. Victims may also fear speaking out because of the consequences to themselves, and their families who run the risk of reprisals from traffickers. This is often the case in labour exploitation where “foreign nationals who work in or are vulnerable to situations of forced labour are increasingly likely to mistrust not only law enforcement, but also well intentioned community organisers. Forced underground, these workers will be harder to find and to assist.”¹⁰⁴ In addition, victims may be in an unfamiliar environment where they are unable to speak the language or know the culture of that country. As a result of these issues, it is easy to understand why some victims accept their situation and shows why human trafficking and exploitation remains a hidden crime.

As Flannery and Harvey explain, victims who are being controlled do not have many options of escape:

“An individual may appear helpless because of a sense of hopelessness because of an absence of alternative options, and the victim perceives no reasonable escape.”¹⁰⁵

Trafficked victims “face a fear of their traffickers but also are afraid that their cooperation with authorities will lead to harm to their families if victims ever report what is happening to law

¹⁰⁴ D. Brennan, “Competing Claims of Victimhood? Foreign and Domestic Victims of Trafficking in the United States,” *Sexuality Research & Social Policy*, December 2008, Vol 5, No 4 at 47.

¹⁰⁵ R. Flannery & M. Harvey, “Psychological Trauma and Learned Helplessness: Seligman’s Paradigm Reconsidered,” *Psychotherapy*, (1991) Vol 28, No 2 374 at 377.

enforcement.”¹⁰⁶ Additionally, if victims are foreign victims they may not be treated not as trafficked victims, but “undocumented, or illegal immigrants and treated as criminals and subject to deportation hearings.”¹⁰⁷ This is because the acts that they are committing are often illegal and their immigration status has not been regularised, making them liable to prosecutions in some States as Dina Francesca Haynes highlights:

“Trafficked persons are reluctant to seek help in countries of destination or transit, for fear of being arrested for engaging in prostitution or deported for violating immigration laws.”¹⁰⁸

Therefore, victims are at more risk from prosecution for immigration offences if and when they are brought to the attention of authorities, especially those who have no legal right to be in that country. If individuals are trafficked illegally, they are at particular risk of being prosecuted under immigration law. A recent study of 55 women trafficked into the UK and being supported the Poppy Project¹⁰⁹ showed that “80% were in the UK illegally at the time that they were detained, 4% had already applied for asylum, 7% were in the UK legally and 2% had had their asylum applications refused.”¹¹⁰ Often, traffickers take away the identification and immigration papers of victims, preventing them from proving their immigration and work status, making victims even more vulnerable. Additionally, “victims are told that if they escape, the police will arrest them and deport them. Deportation could easily lead to re-victimisation and re-

¹⁰⁶ United States Department of State Trafficking in Persons Report 2012 at 15.

¹⁰⁷ H. Clawson & N. Dutch, “Identifying Victims of Human Trafficking: Inherent Challenges and Promising Strategies from the Field,” US Department of Health & Human Services, Office of the Assistant Secretary for Planning and Evaluation, at 3.

¹⁰⁸ D. Francesca Haynes, “Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and Secure the Prosecution of Traffickers,” (2004) Human Rights Quarterly, Volume 26, Number 2, at 261.

¹⁰⁹ The Poppy Project was an initiative within the Eaves charity supporting victims of human trafficking. This now ceases to exist as of Oct 2015 due to funding issues.

¹¹⁰ S. Stephen-Smith, “Detained: Prisoners with No Crime, Detention of trafficked women in the UK,” 2008 at 4.

trafficking.”¹¹¹ The actions of traffickers may often a deterrence for victims to escape and more likely for victims to stay in a cycle of exploitation.

Where the autonomy of the victim is taken away, it isolates victims from other people and breaks any emotional ties the victim has with the outside world. Traffickers control of the victim’s body and their bodily functions. Other examples Herman states the “deprivation of food, sleep, shelter, exercise, personal hygiene, or privacy”¹¹² as examples of control. Ioannou & Oostinga suggest traffickers primarily use four methods of control to keep trafficked victims under their authority. These are “1) the confiscation of travel documents, 2) the use of violence, 3) the threat to harm family members, and 4) a financial dependency upon the human trafficker.”¹¹³ These methods of control creates a sense of hopelessness and powerlessness which the victim must endure, restricting their means of escape.

David Canter developed a Victim Role model which has been “the basis for differentiating offending styles in other violent interpersonal offences.”¹¹⁴ Canter describes three control styles which highlight how an offender views the victim as a commodity and then acts in a way to control the victim in order to exploit them. The three main control styles are (i) seeing the victim as an object, (ii) seeing the victim as a vehicle and (iii) seeing the victim as a person.¹¹⁵ Each style has their own control attached to them as Canter & Young explain:

¹¹¹ J. N. Sigmon, “Combating Modern – Day Slavery: Issues in Identifying and Assisting Victims of Human Trafficking Worldwide,” (2008) *Victims & Offenders*, Vol 3 Issue2-3 245 at 254.

¹¹² J. L. Herman, “Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma,” *Journal of Traumatic Stress*, (1992) Vol 5, No 3, 377 at 377.

¹¹³ M. Ioannou & M. Oostinga, “An empirical framework of control methods of victims of human trafficking for sexual exploitation,” *Global Crime* (2015), Vol 16, No 1 34 at 35.

¹¹⁴ M. Ioannou & M. Oostinga, “An empirical framework of control methods of victims of human trafficking for sexual exploitation,” *Global Crime* (2015), Vol 16, No 1 34 at 34.

¹¹⁵ For a more detailed analysis of the Victim Control Framework, see D. Canter & D. Youngs, “Sexual and Violent Offenders’ victim role assignments: a general model of offending style,” *The Journal of Forensic Psychiatry & Psychology* (2012) 23: 3 297.

“The first form of control allows for physical control of the victim. A second type of control takes the form of abuse, whether physical, verbal or psychological which allows for emotional or psychological control. The third form is achieved through the coercion and manipulation of the victim. This allows a behavioural control of the victim’s actions.”¹¹⁶

The Canter Control framework illustrates how the victim is kept in the same exploitative situation, making it difficult to escape. Applying the Canter Victim Model also shows the challenges of identifying individuals as victims because of their reluctance to ask for help because of threats that are being placed upon them, threatening their family and keeping them in an exploitative environment for a longer period, enduring them to increased physical and psychological harm.

All three forms of control from the trafficker demonstrate a disregard of empathy towards the victim in the pursuit of exploiting the victim. Each form of control has different characteristics associated with them. For instance, when the trafficker sees the victim as an object, they will have “a complete lack of empathy for the victim, a lack of awareness of their humanity that produces objectification of the victim, and attempts to impose the control directly and will inflict physical harm to force this.”¹¹⁷ The physical harm is inflicted to keep the victim confined to the place where they are exploited. A cycle of behaviour exists where victims are physically hurt but are manipulated to stay in the same negative cycle. The presence of violence is still a constant factor in keeping victims exploited and trapped. As Zimmerman found during her research on victims:

¹¹⁶ D. Canter & D. Youngs, “Sexual and Violent Offenders’ victim role assignments: a general model of offending style,” *The Journal of Forensic Psychiatry & Psychology* (2012) 23: 3 297 at 299.

¹¹⁷ M. Ioannou & M. Oostinga, “An empirical framework of control methods of victims of human trafficking for sexual exploitation,” *Global Crime* (2015), Vol 16, No 1 34 at 40.

“Nearly all women (95%) reported sexual or physical violence with three quarters having been physically hurt, and 90% reporting having been sexually assaulted. The majority also reported threats of violence to themselves (89%) and many reported threats to their children and family (36%). Almost three quarters of women (77%) reported that they had no freedom of movement.”¹¹⁸

Controlling victims may include restricting their movements. This involves moving trafficking victims around different locations, which increases their vulnerability and helps to evade capture by police. Additionally, victims may be moved regularly to other regions to meet the demand from users of victims’ services. Often, the motive to exploit victims is financial, as trafficking continues to be considered a huge business operation,¹¹⁹ which is a pull for criminal organisations to become involved. The constant movement of location also disorients victims. In a survey of 169 trafficked victims in England, it was found that “60% of men and 81.3% of women reported extreme restriction of movement during trafficking, as did 52.6%, 83.7% and 90.7% of people trafficked for labour exploitation, domestic servitude, and sexual exploitation, respectively.”¹²⁰ The means of escape are extremely limited because of the control that the trafficker has because “the barriers to escape are generally invisible. They are nonetheless extremely powerful and are rendered captive by economic, social, psychological and legal subordination, as well as by physical force.”¹²¹ Traffickers demonstrate “an

¹¹⁸ C. Zimmerman, M. Hossain, K. Yun, B. Roche, L. Morison & C. Watts, “Stolen Smiles: a summary report on the physical and psychological health consequences of women and adolescents trafficked in Europe,” (2006) London School of Hygiene and Tropical Medicine at 10.

¹¹⁹ It is estimated that the business of human trafficking is worth \$150 billion a year for traffickers, according to the ILO. The following is a breakdown of profits, by sector: \$99 billion from commercial sexual exploitation, \$34 billion in construction, manufacturing, mining and utilities, \$9 billion in agriculture, including forestry and fishing, \$8 billion dollars is saved annually by private households that employ domestic workers under conditions of forced labour. Figures from 7th Jan 2017, accessed from <http://www.humanrightsfirst.org/resource/human-trafficking-numbers>.

¹²⁰ S. Oram, M. Abas, D. Bick, A. Boyle, R. French, S. Jakobowitz, M. Khondoker, N. Stanley, K. Trevillion, L. Howard & C. Zimmerman, “Human Trafficking and Health: A Survey of Male and Female Survivors in England,” *American Journal of Public Health* (2016), Vol 106, No 6 1073 at 1075.

¹²¹ E. Hopper & J. Hidalgo, “Invisible Chains: Psychological Coercion of Human Trafficking Victims,” *Intercultural Human Rights law Review* (2006), 1: 185 at 190-191.

exploitative approach to the victim that is based on a lack of empathy, and the victim essentially becomes a vehicle for the expression of the offender's desires and or anger and the control is mainly emotional or psychological."¹²² It has been suggested that sex workers are more likely to be subjected to physical violence than non-sex workers due to the nature of the work and this violence can happen quite early in the trafficking experience:

“Data on the prevalence of violence at or shortly after women's entry into sex work and reported that the odds of violence were significantly higher for trafficked women versus non-trafficked sex workers.”¹²³

Controlling victims by enticing them with drugs and alcohol is prevalent too. Forcing victims to take drugs against their will which then they become dependent upon the trafficker and being forced to watch others getting hurt either by other victims or by traffickers is common. For example, “one young victim who had been enslaved for most of her life helped to hold down one of the other girls while her trafficker raped them.”¹²⁴ It has been argued that victims start acting in a more unconventional, less socially acceptable manner when there is a stronger influence around who demonstrates control over them. Social scientists studies “have demonstrated that people will behave in ways that are morally offensive to them under the presence of strong enough authority.”¹²⁵ The actions of the trafficker increases the victim's sense of culpability, making the victim feel less deserving of help. These acts present a sense of fear and control that traffickers obtain over victims which are used to inflict harm upon other

¹²² M. Ioannou & M. Oostinga, “An empirical framework of control methods of victims of human trafficking for sexual exploitation,” *Global Crime* (2015), Vol 16, No 1 34 at 36.

¹²³ S. Oram, H. Stockl, J. Busza, L. Howard & C. Zimmerman, “Prevalence and Risk of Violence and the Physical, Mental, and Sexual Health Problems Associated with Human Trafficking: Systematic Review,” *PLoS Medicine*, (2012) Volume 9, Issue 5 at 5.

¹²⁴ “Hidden Slaves: Forced Labour in the United States” Free the Slaves & the Human Rights Centre, University of Berkeley (2004) at 37.

¹²⁵ E. Hopper & J. Hidalgo, “Invisible Chains: Psychological Coercion of Human Trafficking Victims,” *Intercultural Human Rights law Review* (2006), 1: 185 at 196.

victims and contribute to their sense of helplessness, shame and unwillingness to request help, believing others will not forgive them for their actions and complicity.

The trafficker may have difficulty acknowledging the victim as a person because of the way that the victim is treated as a means to exploiting them. The trafficker shows a “form of empathy deficit based upon a general undervaluing of the individual.”¹²⁶ This control is “achieved by manipulation because the victim is undervalued in a preparedness to take advantage of them as people.”¹²⁷ It is designed to “deliberately attempt to break down the will of individuals and are often used to induce the sense of learned helplessness.”¹²⁸ Violent control takes place where the victim is subjected to physical abuse such as beatings and rape in order to make them fearful of a failed escape, leaving them in a situation where they feel that they cannot run away. This is clearly a barrier to victims identifying themselves to State authorities.

Victims may often be kept in a form of ‘invisible capacity,’ chained to their trafficker through manipulation. Even though there are no visible chains (though victims be chained to prevent escape) the restrictions are more psychological in nature resulting in the victim fearing escape because of control. The victim is considered to be more of a person in confinement because of their situation but it is more difficult to remove themselves from as Herman acknowledges because there is a complicated dynamic to the relationship between victim and offender which is difficult to see:

“Captivity which brings the victim into prolonged contact with the perpetrator creating a special type of relationship, one of coercive control. This is equally true whether the

¹²⁶ M. Ioannou & M. Oostinga, “An empirical framework of control methods of victims of human trafficking for sexual exploitation,” *Global Crime* (2015), Vol 16, No 1 34 at 36.

¹²⁷ M. Ioannou & M. Oostinga, “An empirical framework of control methods of victims of human trafficking for sexual exploitation,” *Global Crime* (2015), Vol 16, No 1 34 at 42.

¹²⁸ E. Hopper & J. Hidalgo, “Invisible Chains: Psychological Coercion of Human Trafficking Victims,” *Intercultural Human Rights law Review* (2006), 1: 185 at 189.

victim is rendered captive primarily by physical forced (as in the case of prisoners and hostages), or by a combination of physical, economic, social and psychological means (as in the case of religious cult members, battered women, and abused children.)”¹²⁹

An individual may have a misguided loyalty to their trafficker, preventing them from acknowledging that they are a victim. Traffickers frequently alternate “between kindness and viciousness and the victim may form positive feelings for that part of the perpetrator that is kind and ignore the vicious side.”¹³⁰ In addition, “this attachment can result in illogical victim behaviour and a victim may even become protective of the perpetrator and excuse violent behaviour as an aberration.”¹³¹ This behaviour makes the likelihood of self-recognition of being a victim less likely, and the exploitation to continue for a longer period more likely:

“Once the perpetrator has established this degree of control, he becomes a potential source of solace as well as humiliation. The capricious granting of small indulgences may undermine the psychological resistance of the victim far more effectively than unremitting deprivation and fear.”¹³²

This process, known as ‘psychological infantilism’ “compels the victim to cling to the very person who is endangering their life.”¹³³ This behaviour is damaging because the trafficker may threaten the victim with informing authorities who will deport them or make threats of violence towards family members if they do not comply with requests which ultimately further

¹²⁹ J. L. Herman, “Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma,” *Journal of Traumatic Stress*, (1992) Vol 5, No 3, 377 at 378.

¹³⁰ J. Srikantiah, “Perfect Victims and Real Survivors: The Logic Victim in Domestic Human Trafficking Law” *Boston University Law Review* (2007) 87: 157 at 201.

¹³¹ J. Srikantiah, “Perfect Victims and Real Survivors: The Logic Victim in Domestic Human Trafficking Law” *Boston University Law Review* (2007) 87: 157 at 201.

¹³² J. L. Herman, “Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma,” *Journal of Traumatic Stress*, (1992) Vol 5, No 3, 377 at 383.

¹³³ J. L. Herman, “Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma,” *Journal of Traumatic Stress*, (1992) Vol 5, No 3, 377 at 384.

exploit them. The victim should still be regarded as a victim despite their fear or under the control of a trafficker. However, this is not always the case as in circumstances where the victims fears for their safety, “or still under the trafficker’s psychological control, her legitimacy as a victim may be in question.”¹³⁴ Even where the individual is under the control of a trafficker they are a victim but what is important is for the victim to acknowledge this themselves which is more challenging. The way in which the trafficker seeks to control the victim contributes to the issue of invisibility. This is complicated by the challenge that the individual may not believe that they are victim, making self-recognition more difficult, especially because trafficking is often associated with occurring in a foreign country where victims have no support network, and a lack of language skills. This enhances the control of the victim and the increased dependence of the victim upon the trafficker.

Conclusion

As has been shown, deception, coercion and control are the three means of how human trafficking which take place and facilitate the exploitation of vulnerable victims. I have shown how each of the ‘means’ affect victims self-identify. The way in which the psychological harm is committed creates internal barriers for victims to recognise that they are a victim. Secondly, I have shown in cases where victims know that they are victims, it is difficult for victims to escape situations where they have formed an emotional bond with their trafficker. Additionally, victims may feel shame or will not be able to know how to escape from the exploitative environment. Consequently, some victims may not believe that they can be considered victims, because of the way in which the means have been defined.

¹³⁴ J. Srikantiah, “Perfect Victims and Real Survivors: The Logic Victim in Domestic Human Trafficking Law” Boston University Law Review (2007) 87: 157 at 199.

As a result of the factors above, it is not easy for victims to escape from this type of abusive and exploitative environment. The complexity of the situation and the numerous dynamics at play illustrate how deep and obscure the path for victims is to leave the exploitation through their own choice or volition. The next section will examine the detrimental effect on a victim's mental health as a result of being exposed to coercion and control methods from a trafficker which makes self-identification even more challenging.

III. THE 2nd CHALLENGE – MENTAL HEALTH CONDITIONS ARISING FROM EXPLOITATION AS BARRIERS TO SELF- IDENTIFICATION

The previous part of this chapter examined how methods of deception, coercion and control are inflicted upon individuals which makes self-identification challenging. I have argued that the means element of the crime inflicts both physical and psychological harm upon victims which are not clearly visible. This section will examine the difficulties which individuals face in self-identifying as victims of human trafficking, because of the onset of mental health conditions, brought on as a result of being subjected to coercion and control. The nature of mental health, perceived as a hidden health concern prevents victims from being visibly seen by society combines with the difficulty of victims to admit they are trafficked victims whilst experiencing mental health conditions. Understanding how mental health conditions often prevent victims from coming forward are crucial, because organisations such as the police and NHS staff are frontline first responders who can refer potential victims, especially where vulnerable individuals will not be able to do this themselves.

There are three important reasons why it is challenging for trafficked victims to self-identify themselves in this respect. Firstly, a victim (in addition not being able to recognise themselves

as a trafficked victim) may not know that they are suffering from a mental health condition. Secondly, the victim may feel embarrassed to firstly acknowledge, then secondly disclose what they are feeling which will make them more likely to stay complicit in their own exploitation. Thirdly, conditions associated with mental health are often hidden and require victims to be out of the exploitative situation and within a medical environment in order for them to be diagnosed correctly. As the issue of mental health is such a major health concern within society,¹³⁵ with recent research from the Mental Health Foundation suggesting that across the world, there are 450 million people experiencing mental health issues, this section illustrates clearly how mental health needs arise purely from their victimisation.

A. The Onset of Mental Health Conditions as a Result of Coercion and Control

During exploitation, many victims experience trauma, sustained from physical and sexual abuse. Victims who are exposed to this type of harm may experience mental health issues. Trafficked victims who are subjected to complex trauma are more likely to suffer from “depression, anxiety, self-hatred, dissociation, substance abuse, and are more at risk for self-destructive and risk-taking behaviours, re-victimisation and experience difficulties with interpersonal and intimate relationships.”¹³⁶ These conditions become more severe, dependent upon the length of time which victims have been held captive and exploited.

¹³⁵ P. Gallagher, “Do 34 million British adults really have mental health problems?” 9th May 2017, found at <https://inews.co.uk/essentials/news/health/mental-health-issues-british-men-problem/><https://inews.co.uk/essentials/news/health/mental-health-issues-british-men-problem/>.

¹³⁶ B. Johnson, “Aftercare for Survivors of Human Trafficking,” *Special Work & Christianity*, (2012), Vol 39, No 4 370 at 375.

Research has confirmed that the longer the period of repeated cycle of violence and trauma, the longer the time which is required to recover.¹³⁷ This has implications for long-term care once the victim is removed from the abusive environment. The reasons for not deporting victims back to countries and places where the original recruitment of trafficking took place is justified here because of the increased vulnerability of victims, the increased exposure to re-trafficking which will exacerbate their mental health issues, and the cyclical nature of exploitation.

The purpose of this section is to identify and examine the three main mental health conditions which result from human trafficking. Understanding them in greater detail helps to recognise the harmful effect of traffickers on the mental health of victims which often prevents victims from being able to self-identify themselves. As the section will illustrate, there is an established link between trafficking and mental health problems, and continued exploitation leads to the increase in mental health conditions developing, creating a sense of hopelessness where victims will not be able to ask for help or have the strength to escape.

The three main mental health conditions are anxiety, depression and Post Traumatic Stress Disorder (PTSD) which may “manifest through panic attacks, insomnia, depression, low self-esteem, eating disorders and body dysmorphia.”¹³⁸ The three conditions are inter-related and have a negative impact on the wellbeing of the victim. A previous study in 2010 which looked at 204 women and children confirmed that “55% met the criteria for displaying high levels of depression symptoms, 48% met our criteria for high levels of anxiety and 77% had possible

¹³⁷ See how the effect on women and children differs and the greater time needed to be allocated for post trafficking care depending upon the period of time in slavery in M. Hossain, C. Zimmerman, M. Abas, M. Light & C. Watts, “The Relationship of Trauma to Mental Disorders Amongst Trafficked and Sexually Exploited Girls and Women,” *American Journal of Public Health*, (2010), Vol 100, No 12 2442 at 2446.

¹³⁸ M. Kliner & L. Stroud, “Psychological and Health Impact of Working with Victims of Sex Trafficking,” *J Occup Health* (2012): 54: 9 – 15 at 9.

PTSD.”¹³⁹ As a result of the victim experiencing exploitation, both of a sexual and labour trafficking nature the treatment of these mental health conditions discussed below will require specific mental health provision services including psychiatric professionals to help treat the victim and ensure the path to recovery is a coordinated and sustained approach and in the best interests of the victim.

(i) **Depression**

There are many symptoms associated with depression including a lack of interest in things, no motivation to engage in hobbies, loneliness and suicidal thoughts. Studies have shown that trafficked victims report “high levels of depressive and anxiety symptoms since leaving a situation of exploitation.”¹⁴⁰ In the same way that isolation is a main feature which brings on other mental health issues such as anxiety, it also has a negative impact in terms of the onset of depression because “women frequently associate their depression with their loneliness, and many perceived that being alone led to thinking too much, which intensified their sadness.”¹⁴¹ These feelings victims have illustrate the isolation that victims feel, leading to a lower probability of seeking help, being diagnosed and being identified as trafficked victims.

The depression which victims may feel manifests itself in, and can often be traced back to the victim’s past negative experiences of childhood. For example, women survivors of human trafficking from Moldova who were interviewed as part of a study in 2013 were found to have “a high rate of adverse experiences in childhood, a low level of education beyond the age of

¹³⁹ M. Hossain, C. Zimmerman, M. Abas, M. Light & C. Watts, “The Relationship of Trauma to Mental Disorders amongst Trafficked and Sexually Exploited Girls and Women,” *American Journal of Public Health*, (2010), Vol 100, No 12 2442 at 2445.

¹⁴⁰ E. Turner-Moss, C. Zimmerman, C. Howard & L. Oram, “Labour Exploitation & Health: A case of Men & Women Seeking Post-Trafficking Services,” *Journal of Immigrant and Minority Health/ Centre for Minority Public Health* (2013) at 10.

¹⁴¹ C. Zimmerman, M. Hossain, K. Yun, B. Roche, L. Morison & C. Watts, “Stolen Smiles: a summary report on the physical and psychological health consequences of women and adolescents trafficked in Europe,” (2006) *London School of Hygiene and Tropical Medicine* at 18.

14, and the trauma as part of the trafficking and the high level of ongoing environmental stressors would all influence the onset and persistence of depression.”¹⁴² It may be more difficult for victims who have been previously abused to recognise that they are now being exploited because they may not believe that the behaviour is any different to that that they had previously experienced, making themselves more vulnerable to traffickers who prey upon certain type of individuals who are exposed to unstable family relationships which have not made them safe and secure earlier in their childhood. The fact that vulnerable adults are less likely to self-recognise themselves as abuse victims may make it more likely that they could be targeted by traffickers and result in further harm, making escape from this cycle of exploitation even more challenging for them and for agencies to find and identify potential victims. Therefore when authorities come into contact with an abused individual and potential trafficked victim, it is vital for authorities to protect them from further exploitation by adequately obtaining background information.

Some victims may have experienced historical abuse which has affected their lives and mental health. A study in 2010 studied 204 trafficked victims from 12 different countries and it found that “participants reported high levels of physical and sexual abuse prior to and during the trafficking experience. Fifteen percent had experienced child sexual abuse, and 25% had experienced sexual violence in adulthood prior to being trafficked.”¹⁴³ Furthermore, in a survey of 169 trafficked victims in England, it was found that “58.2% of women reported pre-trafficking physical violence and 30% of them reported pre-trafficking sexual violence,

¹⁴² M. Abas, N. Ostrovski, M. Prince, V. Gorceag, C. Trigub & S. Oram, “Risk Factors for Mental Disorders in Women Survivors of Human Trafficking: A Historical Cohort Study,” (2013) *BMC Psychiatry*, 13: 204 at 8.

¹⁴³ M. Hossain, C. Zimmerman, M. Abas, M. Light & C. Watts, “The Relationship of Trauma to Mental Disorders amongst Trafficked and Sexually Exploited Girls and Women,” *American Journal of Public Health*, (2010), Vol 100, No 12 2442 at 2444 – 2445.

perpetrated predominantly by partners (9.2%) and family members (5.1%).”¹⁴⁴ The figure for women in this study subjected to pre-trafficking abuse is higher than male victims, suggesting that when examining the role of pre-trafficking abuse, females are more likely to be affected by this than men.¹⁴⁵ A means of safeguarding victims who display such mental health issues arising from past or present abuse should be correctly acknowledged and understood, with the priority of any such framework to keep such victims safe to minimise the risk of victims re-entering an abusive cycle and to start to provide access to medical care to facilitate a recovery process.

It is argued that the trafficking experience triggers the onset of mental health conditions in victims who have been previously exposed to circumstances that can result in exacerbation of mental harm. In a 2013 study, it was found that the chances of a victim experiencing a mental health problem 6 months post return was “increased by childhood emotional abuse, physical abuse and sexual even after adjusting for pre-trafficking socio-economic position.”¹⁴⁶ As Beddoe, Bundock, & Jordan found from their research from victims who encountered mental health issues after exploitation, “it was evident that dealing with day to day situations, such as attending appointments, reading letters, paying bills or meeting friends, many felt overwhelmed without support and thus provoked and exacerbated feelings of isolation.”¹⁴⁷ This can lead to the second common mental health condition which is anxiety.

¹⁴⁴ S. Oram, M. Abas, D. Bick, A. Boyle, R. French, S. Jakobowitz, M. Khondoker, N. Stanley, K. Trevillion, L. Howard & C. Zimmerman, “Human Trafficking and Health: A Survey of Male and Female Survivors in England,” *American Journal of Public Health* (2016), Vol 106, No 6 1073 at 1075.

¹⁴⁵ 28.9% of men reported being subjected to pre-trafficking abuse according to research from S. Oram, M. Abas, D. Bick, A. Boyle, R. French, S. Jakobowitz, M. Khondoker, N. Stanley, K. Trevillion, L. Howard & C. Zimmerman, “Human Trafficking and Health: A Survey of Male and Female Survivors in England,” *American Journal of Public Health* (2016), Vol 106, No 6 1073 at 1075.

¹⁴⁶ M. Abas, N. Ostrovschi, M. Prince, V. Gorceag, C. Trigub & S. Oram, “Risk Factors for Mental Disorders in Women Survivors of Human Trafficking: A Historical Cohort Study,” (2013) *BMC Psychiatry*, 13: 204 at 5.

¹⁴⁷ C. Beddoe, L. Bundock, T. Jordan, “Life beyond the Safe House for Survivors of Modern Slavery in London, Gaps and Options Review,” Human Trafficking Foundation, July 2015 at 25.

(ii) **Anxiety**

The removal from an exploitative environment does not resolve or bring closure to their trafficking ordeal. Victims may still fear a sense of danger after being rescued, and still feel threatened. Symptoms associated with anxiety include being very distressed and having a sense of panic along with being restless and a nervous disposition and becoming very fearful of the future. As Zimmerman, Hossain, Yun, Roche, Morison & Watts identify, victims, particularly women still fear harm despite being rescued or removing themselves from the exploitative environment:

“Women’s anxiety is complex as many women still face real dangers related to their trafficking experience even once out of the situation. Studies have shown that trafficked women continue to receive threats by phone and in person, both against themselves and their families.”¹⁴⁸

A study in 2013 found that “when women had first returned to Moldova after being trafficked, 85% met the criteria for a mood or anxiety disorder.”¹⁴⁹ The combatting of being removed from the exploitation is a positive step, but the challenge of dealing with the after-effects of their ordeal then begins. Anxiety makes it difficult for them to control how they feel and it will have an impact on their ability to communicate their ordeal because of the gravity of the situation. Adjusting to a different life, free from exploitation takes time, and the anxiety or not knowing what type of life exists afterwards can also facilitate anxiety.

¹⁴⁸ C. Zimmerman, M. Hossain, K. Yun, B. Roche, L. Morison & C. Watts, “Stolen Smiles: a summary report on the physical and psychological health consequences of women and adolescents trafficked in Europe,” (2006) London School of Hygiene and Tropical Medicine at 18.

¹⁴⁹ M. Abas, N. Ostrovschi, M. Prince, V. Gorceag, C. Trigub & S. Oram, “Risk Factors for Mental Disorders in Women Survivors of Human Trafficking: A Historical Cohort Study,” (2013) BMC Psychiatry, 13: 204 at 4.

Conversely, if they choose to self-identify, victims will have new fears. Foreign nationals, trafficked from abroad will also be anxious about being deported if they self-identify themselves, but without having legal identification papers. The risk of being deported may be one of the main reasons why they will not self-identify. This fear may breed insecurities about the future. A victim may feel less safe self-identifying with the prospect of being deported, thus staying in an exploitative situation.

A current negative perception towards immigration encompassing various groups of vulnerable people from other countries such as refugees may make the identification of trafficked victims more challenging. It has been found that “whatever the sequence of interaction may be, the results suggest that asylum-seekers experiencing high levels of anxiety and depression are a vulnerable group in relation to key stressors associated with the asylum seeking process.”¹⁵⁰ This is the case when it comes to the issue of deportation. It has been acknowledged that “asylum seekers live in a constant fear of insecurity with the constant fear of being repatriated.”¹⁵¹ This situation is not helped by the fact that during this process that refugees and trafficked victims are not able to have access to welfare, education or work opportunities during this period which contributes to making them feel anxious. Feelings of isolation and alienation also contribute to victims feeling invisible, particularly if they cannot speak the language, justifying a view that human trafficking victims remain a hidden group of persons in society.

¹⁵⁰ D. Silove, I. Sinnerbrink, A. Field, V. Manicavasagar & Z. Steel, “Anxiety, depression and PTSD in Asylum Seekers: Associations with pre-migration trauma and post-migration stressors,” *Psychiatry Research and Teaching Unit, School of Psychiatry, University of New South Wales*, (1996) at 351 – 358 at 355.

¹⁵¹ D. Silove, I. Sinnerbrink, A. Field, V. Manicavasagar & Z. Steel, “Anxiety, depression and PTSD in Asylum Seekers: Associations with pre-migration trauma and post-migration stressors,” *Psychiatry Research and Teaching Unit, School of Psychiatry, University of New South Wales*, (1997) 170: 351 – 358 at 353.

(iii) **Post-Traumatic Stress Disorder (PTSD)**

The third mental health condition trafficked victims may experience is Post Traumatic Stress Disorder (PTSD). The symptoms associated with having PTSD include experiencing sudden emotional and physical reactions to past events and recurrent flashbacks which result in an inability to control their emotions, leading to victims having difficulty maintaining a normal life with difficulty sleeping. The American Psychiatric Association states that PTSD can result when people have experienced “extreme traumatic stressors involving direct personal experience of an event that involves actual or threatened death or serious injury; or other threat to one’s personal integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate.”¹⁵² As one victim describes:

“It comes every time that I close my eyes...when I testified against my traffickers...and when I am at home...always in my dreams. I see myself still being taken to clients.”¹⁵³

In one of the first studies on evaluating the physical and mental health effects in trafficked victims, it was found that “57% of participants reported one or more symptoms of post-traumatic stress. Between one quarter and one third of the sample endorsed the following symptoms: recurrent thoughts or memories of the most hurtful or terrifying events 33%, recurrent nightmares 27%, trouble sleeping 27% and feeling on guard 27%.”¹⁵⁴ A study in 2013

¹⁵² M. Farley & H. Barkan, “Prostitution, Violence and Posttraumatic Stress Disorder,” *Women Health* (1998), 27:3 37 at 38.

¹⁵³ C. Zimmerman, M. Hossain, K. Yun, B. Roche, L. Morison & C. Watts, “Stolen Smiles: a summary report on the physical and psychological health consequences of women and adolescents trafficked in Europe,” (2006) London School of Hygiene and Tropical Medicine at 22.

¹⁵⁴ E. Turner-Moss, C. Zimmerman, C. Howard & L. Oram, “Labour Exploitation & Health: A case of Men & Women Seeking Post-Trafficking Services,” *Journal of Immigrant and Minority Health/ Centre for Minority Public Health* (2013) at 9.

on women who returned to Moldova after being trafficked abroad showed that 36% of them had PTSD.¹⁵⁵ A study from 2010 showed that “injuries and sexual violence during trafficking were associated with higher levels of PTSD, depression and anxiety. Sexual violence was also associated with higher levels of PTSD.”¹⁵⁶ Those suffering from PTSD may be “mistrustful and experience difficulty in modulating feelings of frustration, thus increasing the risk of conflict with authority figures and /or making it more difficult to find and sustain employment.”¹⁵⁷ Due to the psychological harm caused, there is a long process of recovery for survivors of trafficking.

A human trafficking experience that a victim experiences may also trigger mental health issues originating from past abuse or trauma resulting in the suffering of mental health issues which are being experienced in the present. Present triggers may include, “hearing specific types of music, being around addicts or other sex workers, socialising with men.”¹⁵⁸ In the same way that negative childhood experiences may bring on anxiety and depression the experience of human trafficking can also trigger PTSD. It has also been proposed that “pre-trauma experiences such as childhood abuse – can act through cognitive and biological mechanisms, to increase risk of PTSD in adulthood.”¹⁵⁹ From research conducted in San Francisco, it was found that “57% of individuals engaged in prostitution had a history of childhood sexual abuse by an average of 3 perpetrators, and 49% were hit or beaten by a caregiver in the past.”¹⁶⁰ This

¹⁵⁵ M. Abas, N. Ostrovschi, M. Prince, V. Gorceag, C. Trigub & S. Oram, “Risk Factors for Mental Disorders in Women Survivors of Human Trafficking: A Historical Cohort Study,” (2013) *BMC Psychiatry*, 13: 204 at 1.

¹⁵⁶ M. Hossain, C. Zimmerman, M. Abas, M. Light & C. Watts, “The Relationship of Trauma to Mental Disorders Amongst Trafficked and Sexually Exploited Girls and Women,” *American Journal of Public Health*, (2010), Vol 100, No 12 2442 at 2442.

¹⁵⁷ D. Silove, I. Sinnerbrink, A. Field, V. Manicavasagar & Z. Steel, “Anxiety, depression and PTSD in Asylum Seekers: Associations with pre-migration trauma and post-migration stressors,” *Psychiatry Research and Teaching Unit, School of Psychiatry, University of New South Wales*, (1996) at 351 – 358 at 356.

¹⁵⁸ K. Hom & S. Woods, “Trauma and its Aftermath for Commercially Sexually Exploited Women as Told by Front-Line Service Providers,” (2013) *Issues in Mental Health Nursing*, Volume 34, Issue 2 75 at 78.

¹⁵⁹ R. Yehuda & J. LeDoux, “Response variation following trauma: a translational neuroscience approach to understanding PTSD,” *Neuron Review* (2007), 56: 19 – 32.

¹⁶⁰ M. Farley & H. Barkan, “Prostitution, Violence and Posttraumatic Stress Disorder,” *Women Health* (1998), 27:3 37 at 40.

situation has been more difficult for victims exposed to past negative experiences including homelessness. It is said that “homelessness is connected with prostitution in that survival may involve the exchange of sexual assault for a place to stay, and food.”¹⁶¹ It has been found that there are a high percentage of individuals working in prostitution who have been homeless at so stage in their lives have been.¹⁶² Recognising that they are victims becomes difficult, because they may not know any different and believe that the abuse they are experiencing is acceptable and normal, based on the experiences they had during childhood. Therefore, the evidence of childhood abuse provides authorities with clues that individuals may be at risk, and vulnerable to traffickers and identification shows how important safeguarding measures are to prevent further exploitation. It can be seen that all of the situations above are interconnected and one problem can facilitate another problem, making the issue a PTSD a complex one.

Many victims of sexual exploitation victims who have been rescued by organisations report that they have experienced a range of historical abuse during their childhood. Abas, Ostrovski, Prince, Gorceag, Trigub & Oram identified different types of abuse that victims experience, during both pre-trafficking and present exploitation. It was found that “over three quarters of victims (79.2%) reported abuse in childhood; 30.8% reported sexual abuse, 65.8% physical abuse, and 71.7% emotional abuse.”¹⁶³ Those individuals who come into contact such as health professionals and social services will need to appreciate how mental health conditions relate to the victims directly in order to appreciate and empathise with the victim’s circumstances.

In addition, substance use, self-harming disorders and sexually transmitted diseases are common to trafficked victims. Traffickers often give victims drugs “encouraging addiction to

¹⁶¹ M. Farley & H. Barkan, “Prostitution, Violence and Posttraumatic Stress Disorder,” *Women Health* (1998), 27:3 37 at 47.

¹⁶² 84% of 130 prostitutes surveyed disclosed current or past homeless, as found in M. Farley & H. Barkan, “Prostitution, Violence and Posttraumatic Stress Disorder,” *Women Health* (1998), 27:3 37 at 37.

¹⁶³ M. Abas, N. Ostrovski, M. Prince, V. Gorceag, C. Trigub & S. Oram, “Risk Factors for Mental Disorders in Women Survivors of Human Trafficking: A Historical Cohort Study,” (2013) *BMC Psychiatry*, 13: 204 at 5.

the point where the women would be driven to prostitution to fuel their chemical dependencies.”¹⁶⁴ This makes the treating of the mental health conditions more difficult, because of deeper routed dependency issues.

For a trafficked victim to be able to fully participate in identification proceedings, and potentially giving evidence in trials against traffickers, victims must be mentally well enough to have the capacity to engage in self-identification. For this reason, “the health problems sustained by trafficked women pose serious challenges not only for the women themselves but also for administrative and law enforcement personnel. A women’s participation in legal proceedings often depends upon her emotional and intellectual capacity.”¹⁶⁵ The priority of a victim’s mental health must be given priority over any duty to cooperate and give interviews to law enforcement about their exploitation. This obviously will create a tension between the needs and duties of the police to investigate and prosecute and with the wellbeing and a safety of the trafficked victim. Long term care is required for victims to help them resolve their mental health issues. This cannot happen if the threat of deportation is present. It has been acknowledged that “granting trafficking survivors an adequate period of recovery and reflection or asylum status might foster improvements in survivor’s health and enable them to make considered decisions about their security and future well-being.”¹⁶⁶ If support is not available, victims are more likely to experience more mental health issues:

¹⁶⁴ K. Hom & S. Woods, “Trauma and its Aftermath for Commercially Sexually Exploited Women as Told by Front-Line Service Providers,” (2013) *Issues in Mental Health Nursing*, Volume 34, Issue 2 75 at 77.

¹⁶⁵ C. Zimmerman, M. Hossain, K. Yun, B. Roche, L. Morison & C. Watts, “Stolen Smiles: a summary report on the physical and psychological health consequences of women and adolescents trafficked in Europe,” (2006) *London School of Hygiene and Tropical Medicine* at 22.

¹⁶⁶ C. Zimmerman, M. Hossain, K. Hun, V. Gajdadziev, N. Guzun, M. Tchomarova, R.A. Ciarrocchi, A. Johansson, A. Kefurtova, S. Scodanibbio, M.N. Motus, B. Roche, L. Morison & C. Watts, “The Health of Trafficked Women: A Survey of Women Entering Posttrafficking Services in Europe,” (2008) *American Journal of Public Health* Vol 98, No 1 55 at 58.

“A study of Moldovan survivors revealed that 55% met the criteria for mental disorders, 6 months after returning home. These studies suggest that psychological morbidity may be increased by violence before and during trafficking and by poor social support and unmet needs in the post-trafficking period.”¹⁶⁷

Identifying victims and then treating them correctly, to assist them in recovering so that they can play a part in the criminal justice system in due course is in the interest of the State who will continue to shoulder the responsibility to combat this crime and bring traffickers to justice.

IV. THE 3rd CHALLENGE – UNDERSTANDING HOW THE STIGMA OF MENTAL HEALTH AND BEING AN IMMIGRANT PREVENTS SELF-IDENTIFICATION

The previous section of this chapter examined various types of mental health conditions that trafficked victims experience which may make victims have difficulty self-identify. This section will unpack the difficulties and challenges that stigma has on trafficked victims where they acknowledge that they are a victim, but they may experience difficulties taking action to remove themselves from the exploitative situation. In some cases victims may also be stigmatised for being immigrants and refugees, preventing them from disclosing their victim status to authorities. If victims are non-nationals and are stigmatised, they may be subjected to increased societal barriers, which may reduce the levels of referrals, particularly given the negative discourse towards immigrants and migrants.

¹⁶⁷ S. Oram, M. Abas, D. Bick, A. Boyle, R. French, S. Jakobowitz, M. Khondoker, N. Stanley, K. Trevillion, L. Howard & C. Zimmerman, “Human Trafficking and Health: A Survey of Male and Female Survivors in England,” *American Journal of Public Health* (2016), Vol 106, No 6 1073 at 1073.

A. The Stigma Of Mental Health Which Can Prevent The Identification Of Trafficked Victims

The Mental Health Foundation estimate that nearly “nine out of ten people with mental health problems say that stigma and discrimination have a negative effect on their lives, and many people’s problems are made worse by the stigma and discrimination they experience from society, families, friends and employers.”¹⁶⁸ Lippincott, Williams and Watkins argue that there are two types of stigma associated with mental illness. The first is that people with mental health conditions are “responsible for their own disorder,” whilst the second is that some members of the general public “view people with mental illness as dangerous report fear of them, try to avoid them, and endorse coercive services for them.”¹⁶⁹ There is an insensitive and ignorant nature associated with mental health issues which leads to individuals with mental illness becoming stereotyped as dangerous:

“Commonly held stereotypes about people with mental illness include violent people with mental illness being dangerous, incapable of independent living or real work, and blamed for having weak character.”¹⁷⁰

In contrast to this view, research shows that people with mental health problems are widely seen as the most discriminated groups in the UK:

“67% of British adults say people with mental health problems are discriminated against and the mentally ill are more widely seen as discriminated against than gypsies

¹⁶⁸ Mental Health Foundation found at <https://www.mentalhealth.org.uk/a-to-z/s/stigma-and-discrimination>.

¹⁶⁹ Lippincott Williams & Watkins, “Mental Illness Stigma and Care Seeking,” (2003) *Journal of Nervous and Mental Disease*, Volume 191, No 5 339 at 339.

¹⁷⁰ P. Corrigan, “How Stigma interferes with Mental Health Care,” (2004) *American Psychologist* Volume 59, No 7, 614 at 616.

and travellers (62%), transsexuals (62%), immigrants (58%), Muslims (57%) or disabled people (57%).”¹⁷¹

Often, victims encounter feelings of shame and guilt, making it especially difficult to re-integrate with communities and general society after exploitation as Woods and Hom identify:

“Depression and a lack of self-esteem were prevalent amongst the women. The majority of women came to believe that their self-worth was linked with the value placed on their bodies. Shame and guilt were prominent feelings. Some spoke of a cultural context as many women were unable to return to families upon rescue or escape because of the shame associated with being a prostitute or having been trafficked.”¹⁷²

Individuals, particularly those from other countries and ethnic groups, may experience two forms of stigma associated with being a victim of human trafficking. One stigma is from their home communities, who may stigmatise the fact that they have been trafficked and been exploited, making them social outcasts compared with the rest of their community. The second stigma comes from victims who may be rescued and identified in another country and suffering from the fact that they have mental health issues as a result of their exploitation. These stigmas have a detrimental effect on the wellbeing of victims because they inhibit the opportunities for victims to recover from their ordeal and become integrated back into society and have access to health, education and job opportunities to reintegrate back into a normal life. Particular sensitivity is required to acknowledge their ordeal and understand the short, medium and long term effects that victims will have to manage. The barriers to accessing these opportunities are rooted in prejudice and discrimination and have arisen as a negative response to dealing with

¹⁷¹ William Jordan, YouGov research, “Mentally ill most discriminated against group in Britain,” October 2013 at <https://yougov.co.uk/news/2013/10/01/mentally-ill-most-discriminated-against/>.

¹⁷² K. Hom & S. Woods, “Trauma and its Aftermath for Commercially Sexually Exploited Women as Told by Front-Line Service Providers,” (2013) *Issues in Mental Health Nursing*, Volume 34, Issue 2 75 at 78.

the issue of a person who is vulnerable and requiring acknowledgement as to their status as a victim of trafficking.

As Patrick Corrigan states, “stigma yields 2 kinds of harm that may impede treatment participation: It diminishes self-esteem and people of social opportunities.”¹⁷³ The first type Patrick Corrigan advocates is the public stigma, “what a naïve public does to the stigmatised group when they endorse the prejudice about that group,”¹⁷⁴ and the second type of stigma is self-stigma where “members of a stigmatised group may do to themselves if they internalise the public stigma.”¹⁷⁵ This is one of the reasons why it is important for victims to be identified to have the accessibility of frontline medical services. The stigma of mental health prevents victims from accessing medical care because the “negative effects of stigmatising attitudes dissuade people from seeking care because they do not want to suffer the corresponding label of mental patient.”¹⁷⁶ Additionally, without medical help victims will not be able to recognise what they require in terms of specific help.

The stigma of mental health poses a unique challenge to self-identification, because it has been framed as being misunderstood. Trafficked victims are a group who are part of our society, and it is reasonable to expect that they will suffer from any of the conditions in the same way as everyone else. What differentiates trafficked victims from other migrants is that mental health conditions have been brought on directly by being exploited. Victims fearing that they will not

¹⁷³ P. Corrigan, “How Stigma interferes with Mental Health Care,” (2004) *American Psychologist* Volume 59, No 7, 614 at 614.

¹⁷⁴ P. Corrigan, “How Stigma interferes with Mental Health Care,” (2004) *American Psychologist* Volume 59, No 7, 614 at 616.

¹⁷⁵ P. Corrigan, “How Stigma interferes with Mental Health Care,” (2004) *American Psychologist* Volume 59, No 7, 614 at 616.

¹⁷⁶ Lippincott Williams & Watkins, “Mental Illness Stigma and Care Seeking,” (2003) *The Journal of Nervous and Mental Disease*, Volume 191, No 5 339 at 339.

be believed or treated respectfully is a further challenge, due to the stigma of being an immigrant.

B. Prejudice and Discrimination Towards Minorities such as Trafficked Victims Who are often Referred to as Migrants

The second barrier to recognising that individuals have been trafficked and distinct from other individuals is discrimination and prejudice which may lead to either non-identification of the victim or misidentification, usually as an illegal immigrant. Discrimination makes it challenging for victims to self-identify, especially if their immigration papers have been taken away by traffickers, thereby victims are unable to prove their identity. This raises the risk of being deported if they come forward. Consequently, trafficked victims can be subjected to a double stigma, a mental health stigma and the stigma of being a migrant, making it challenging for them to want to identify themselves as trafficked victims. Discrimination and prejudice towards trafficked victims with mental illness creates a cognitive response where people “endorse negative stereotypes and generate negative emotional reactions as a result, such as they scare me.”¹⁷⁷ Some members may react negatively to a person with mental illness and not give any consideration to the fact that they may also be trafficked victims and have additionally experienced abuse and trauma whilst being held in slavery.

Discrimination and prejudice continue to be barriers to adequate identification of trafficked victims, especially because of the current negative rhetoric that surrounds immigration. It has also been highlighted that “prejudice denotes thoughts and feelings that members of one group have about individuals in another group that are frequently based on stereotypes and

¹⁷⁷ P. Corrigan, “How Stigma interferes with Mental Health Care,” (2004) American Psychologist Volume 59, No 7, 614 at 616.

unsubstantiated information.”¹⁷⁸ Prejudice is a cognitive process, and the presence of prejudice can lead to acts of discrimination taking place, creating an inequality of ‘them and us.’ Faye Gray, a Medical Professor of Nursing for Vulnerable and at Risk Persons states that “when dominant groups members express certain stereotypes about minority groups, and then act in ways that are not in the best interest of these groups, discrimination is in action.”¹⁷⁹ Discrimination is also an act played out as a result of stigma and prejudice because the access to services and support may be greatly limited or are refused to specific groups of persons based on certain characteristics of the people of that group wishing to use them.

The effect of prejudice and discrimination shown towards victims of sexual exploitation presents difficulties in being accepted by family and also being re-integrated into communities and societies. As the International for Organisation Migration (IOM) stresses:

“The shame of sexual exploitation can lead to social ostracism for trafficked women and girls, and is a fact of life for victims all across the world. Families either disown their offspring or risk being disowned themselves by communities who believe that the fault lies with the victim and not the trafficker.”¹⁸⁰

The tendency of society and communities to blame victims for their own predicament of exploitation at the expense of acknowledging the criminal behaviour of traffickers stigmatises the issue and does not help to progress the victim in their recovery. Often, victims can become isolated. The victim may become more at risk if there is a lack of close support and understanding for the victim’s circumstances. Often, the case is that issues such as sex,

¹⁷⁸ F, Gray, “Stigma: Barrier to Mental Health Care amongst Ethnic Minorities,” (2005) *Issues in Mental Health Nursing*, Volume 26: 10, 979 at 980.

¹⁷⁹ F, Gray, “Stigma: Barrier to Mental Health Care amongst Ethnic Minorities,” (2005) *Issues in Mental Health Nursing*, Volume 26: 10, 979 at 981.

¹⁸⁰ IOM found at www.iom.int/statements/more-needs-be-done-address-stigma-and-discrimination-towards-women-trafficked-sexual.

exploitation and abuse are not spoken about and hidden from some section of societies compounding the suffering and prevents the victim from gaining help, advice and advocacy support required to make identification a possibility. These factors are important for authorities to consider when making determinations as to whether an individual is a trafficked victim and in making efforts to identify victims. Authorities may currently be influenced by bias against immigrants and be unaware of the deeper and complex issues which are present.

CONCLUSION

In this chapter, I have argued what the three main challenges for victims to self-identify are. Thus although the general public might expect it is up to the individual to take responsibility to self-identify, but as the chapter has shown, this is extremely difficult for victims to do. Victims may often reliant upon someone else to intervene, such a specific trafficking operation carried out by the police taking place, or an opportunist situation where a victim escapes and comes into contact with a public authority or a charitable organisation.

The means element remains important to acknowledge because it illustrates how the suffering of trafficked victims occurs. The subtle tactics of traffickers to coerce, control and deceive for a purpose of exploitation are all defining features of how human trafficking occurs. This highlights how difficult it is for victims to escape the cycle of exploitation. Victims who have been deceived or coerced into exploitation will experience physical harm but victims will also suffer from the after effects of non-physical harm, namely psychological distress keeping victims in fear, and in slavery. Traffickers use control methods to keep victims in a state of fear or under their control by getting the victim to bond with their exploiter in order to continue the repeated exploitation. Problematically, the fact that the crime of trafficking is often hidden mirrors the invisible nature of the psychological harm experienced by victims. Non-physical abuse is not as identifiable as physical harm, making it difficult for them to self-identify. This

chapter has also contributed to the existing knowledge of acknowledging, understanding and appreciating the effect on a victim's mental health through the non-physical harm inflicted upon them by traffickers. Where victims know that they are being exploited, the onset of mental health problems will be a barrier for them to self-identify to authorities.

As we have seen, trafficked victims can develop mental health conditions resulting from the exploitation and abuse include anxiety, depression and post-traumatic stress disorder. They are long term conditions that will require time for victims to recover from their ordeal depending upon the length and severity of the abuse. Studies evidenced in the chapter have shown the strong link between human trafficking and mental health conditions of victims. Consequently, the similarity of vulnerable groups experiencing mental health effects arising from coercion, deception and control can now be established and acknowledged paving the way to adopt a victim centred approach of providing the specific mental health needs to all vulnerable groups including those experiencing homelessness, domestic violence and historical childhood sexual abuse. The mental health implications discussed above also highlight how difficult it is for victims to self-identify, escape and seek help. Therefore, the research in this area on trafficked victims is significant as it highlights the form of abuse that victims experience and can lead to an increased awareness and acknowledgement of their status as victims of trafficking as opposed to other social groups such as domestic violence victims, rape victims or other groups of migrants such as smuggled persons or economic migrants.

Finally, the chapter argued how the challenges for victims to self-identify are compromised by stigmas attached to attitudes towards mental health and also the negative stigma towards migrants. Trafficked victims may be discriminated against because they are non-nationals and have mental health issues. The first challenge of overcoming a negative stigma towards mental health, and the second challenge of addressing prejudice and discrimination towards minorities

such as trafficked victims who are often referred to as economic migrants or smuggled persons need to be overcome so that victims feel safe in disclosing their victim status. This requires other agencies and authorities to play a greater role in creating safe environments for victims to self-identify in and fostering an environment of trust. This would make it easier for victims to have confidence to come forward.

The thesis will now move on to examine the various environments where the possibility of identifying individuals of human trafficking arise. By examining these environments, it will also become clear what the challenges for public authorities, third sector organisations and the State are to identify more victims of human trafficking. By better understanding how the 'means' directly affects the ability of victims to self-identify, organisations may be able to spot the signs that an individual is a potential victim.

The next chapter will examine the challenges for trafficked victims to be identified because of the difficulties authorities have in meeting their responsibilities to refer potential victims. It will examine the National Referral Mechanism (NRM) which is the framework to formally identify individuals as victims of trafficking, by outlining its function and purpose along with some of the flaws associated with the current system of recognition and identification. This thesis argues that the State has a moral obligation to protect victims from exploitation and the best action the State can take is to identify victims. It remains in the interest of the State to help identify more victims so that more traffickers can be prosecuted. This is in the interests of victims to obtain justice for the wrongdoing committed against them.

CHAPTER 3:

THE RESPONSE OF CIVIL SOCIETY IN IDENTIFYING

VICTIMS OF TRAFFICKING ALONGSIDE A NATIONAL

REFERRAL MECHANISM IN THE UK

I. INTRODUCTION

This chapter examines the role which Third Sector Organisations (TSO),¹⁸¹ First Responders (FRs),¹⁸² and Public Authorities (PAs)¹⁸³ play when they come into contact with vulnerable individuals, and the opportunities to refer them as potential victims of trafficked victims to the National Referral Mechanism (NRM).¹⁸⁴ It is worth noting that the NRM has a UK-wide responsibility in fulfilment of the UK's international obligations to identify victims of trafficking. But within the UK the picture is more complex because Scotland, NI, and England & Wales are distinct jurisdictions for the purposes of criminal justice, and each jurisdiction has enacted its own version of the Modern Slavery Act (which is the legislation which applies to England & Wales). Thus different criminal law issues and processes arise depending on where in the UK the victim is found. Furthermore, activities in various other sectors (e.g health), are devolved and in that context England and Wales are not a single jurisdiction, as is the case in the criminal field. However, the NRM is a UK-wide mechanism and immigration control is not a devolved area. In other sections of chapters where differences between different parts of the

¹⁸¹ Third Sector Organisations (TSO) are charities and non-profit organisations or unincorporated community or voluntary organisations. Examples include Citizens Advice Bureau, the housing charity Shelter, and Women's Aid.

¹⁸² FR are organisations who refer potential victims to the National Referral Mechanism where they can be identified.

¹⁸³ Any authority which governs or administers public life.

¹⁸⁴ The UK created and introduced the NRM in April 2009 to comply with Article 10 of the Council of Europe (CoE) Convention, containing the obligation to train competent authorities identifying and helping victims.

UK are material to their operation, they are discussed. For the purposes of this chapter however we are concerned with the role of NRM as a UK-wide entity.

Trafficked victims will come into contact with organisations either by self-identifying themselves, or (more likely) if they come to the attention of the State after a police or immigration raid. In both circumstances they present the opportunity for potential victims to be referred, enabling them to become identified as trafficked, and have access to support. This chapter will examine the difficulties which TSOs and PAs may have in recognising potential victims.

The first part of the chapter will discuss the challenges victims of trafficking have being identified by a FR (such as the Salvation Army or in the case of child victims, Barnardos), a Public Authority (PA) (such as the police or local authority) or a Competent Authority (CA), (an agency responsible for formal identification of a victim such as the Home Office or UK Human Trafficking Centre) within a hostile, anti- immigration environment. This will be done by looking at the current ‘top down approach’ via practical guidance, issued from the Home Office to Public Authorities (PA) and also to Competent Authorities (CA) outlining their responsibilities to identifying trafficked victims and ensuring that their rights as trafficked victims are protected. Where guidance is issued, it may blur the line between referral and identification. Therefore, it will be demonstrated how the top down approach demonstrates how PAs are becoming decision makers, before victims are even referred to the NRM. Consequently, this approach also presents a tension between duties to refer individuals and the interests of the victim who may also be illegal immigrants who fear being deported. Additionally, due to a lack of awareness, there may be cases where genuine victims may have been missed, or misidentified as other types of migrants.

In contrast I will examine how a grassroots approach to identification¹⁸⁵ requires a commitment to additional funding to organisations and authorities to help educate about human trafficking in order to help reduce the risk of non-identification or the non-referral of victims. One of these areas is understanding how important it is for health professionals to spot the signs of mental illness in potential victims.

This chapter will also identify the present system of identification in the UK, and examine how the NRM operates by identifying its flaws which prevent the effective advancement of trafficked victim interests. In some cases it may expose them to a greater risk of being re-trafficked, because of a bias against victims, contributing to less numbers of trafficked victims being recognised and positively identified. Solutions will be discussed to offer more help for the victim during this process.

As highlighted earlier in previous chapters, all of these above issues take place behind a backdrop of increased cynicism towards migration, which can create challenges to the identification of potential trafficked victims, which can make it difficult for TSOs and PAs to refer potential victims of trafficking. The benefit of more potential victims being referred and identified by the State is that they can distinguish between genuine trafficked victims from other types of migrant, whilst adhering to their obligations to give victims support. Where FRs, PAs and CAs are not referring and identifying victims, this is not in the interest of the State because opportunities are missed to prosecute and indeed prevent the exploitation of vulnerable individuals and combat organised crime.

¹⁸⁵ Article 10 of the Council of Europe Convention on Action against Trafficking in Human Beings provides that each State should train qualified competent authorities to identify and help victims. The UK has complied with this obligation by creating the National Referral Mechanism which will be examined in more detail later in the chapter.

By the end of this chapter, the ways in which an individual who may be referred as a potential victim of human trafficking by a FR and PA to the NRM will be made clearer. It will also demonstrate how the victim's path through the NRM has substantial gaps in protection as a result of the current failures within the NRM, compromising victims' best interests.

II. THE PRESENT APPROACHES WITHIN SOCIETY TO REFER AND IDENTIFY POTENTIAL VICTIMS

As discussed in the introductory chapter, there is evidence to suggest that the impact which immigration has had on people accessing public services, housing and employment has created a negative view towards immigration.¹⁸⁶ Therefore, the difficulty of recognising and distinguishing a trafficked victim from other groups of 'migrants' within this negative and hostile environment towards immigration becomes more challenging. This presents a challenge not only to public authorities, such as the police and border staff, and broader society.

Behind the political issues surrounding migration, it is important to bear in mind that there are human stories of physical and non-physical abuse where people have been coerced or deceived into exploitation, perhaps involving migration. The difficulty here is that investigations involving slavery and exploitation are often complex and obtaining information and evidence takes time and resources. From a national interest perspective, combating human trafficking becomes a question of priorities as each government decides what its main priorities should be.¹⁸⁷ The issue here is how much of a priority States should give to the issue of identification

¹⁸⁶ See "UK Public Opinion toward Immigration: Overall Attitudes and Level of Concern," The Migration Observatory, 7 Jun 2018 found at <https://migrationobservatory.ox.ac.uk/resources/briefings/uk-public-opinion-toward-immigration-overall-attitudes-and-level-of-concern/>.

¹⁸⁷ For example of this, see how Russia has chosen not to take meaningful action to combat human trafficking from C. Dietel, "Not our Problem: Russia's resistance to joining the Convention on action against trafficking in human beings," (2009) Suffolk Transnational Law Review, Vol 32, Issue 1, 161.

of trafficked victims. The UN Protocol¹⁸⁸ provides no obligation for States to identify trafficked victims, but the Council of Europe Convention against Trafficking imposes obligations to identify victims correctly.¹⁸⁹ The UK introduced the National Referral Mechanism (NRM) which satisfies the obligations set out in Article 10 of the CofE Convention. Article 10 states that:

“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.”¹⁹⁰

The UK has gone further than its legal obligations because it has not only trained persons to help victims and identify them, but has also created a recognised referral framework for potential victims to access. In addition to the NRM, both TSOs (acting as First Responders) and official decision makers (CAs) play an important role in referring and identifying potential victims.

¹⁸⁸ UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime (2000).

¹⁸⁹ Article 10 Council of Europe Convention on Action against Trafficking in Human Beings (2005).

¹⁹⁰ Article 10 Council of Europe Convention on Action against Trafficking in Human Trafficking, 2005.

A. The Role of First Responders, Public Authorities and Competent Authorities

Under the umbrella of organisations termed as TSOs are First Responders (FR) who play a role in identifying and meeting the needs of trafficked victims. FRs are organisations who come into contact with victims during their work. FRs are often charities that have departments specialising in the provision of offering support and advice to trafficked victims. These include the Salvation Army, Barnardos and Migrant Help. Victims are often more likely to have contact with FRs before they have contact with PAs. Examples of PAs include the police, local authorities and the UK Border Agency (UKBA). Victims may trust FRs in the first instance, rather than the State, because they may be scared, and do not trust them. Victims may also come into contact with FRs for assistance with a linked issue, such as being a victim of crime such as rape or domestic violence, creating an opportunity to be referred to the NRM to start the process of identification.

There are two Competent Authorities (CA). The first is the Modern Slavery Human Trafficking Unit (MSHTU)¹⁹¹ which deals with referrals from PAs such as the police, and local authorities. The second competent authority is the Home Office Immigration and Visas (UKVI) which deal with referrals identified as part of the immigration process, typically when an individual is applying for asylum. Together, they process potential victims referred through the NRM.

The next section examines the approaches employed by PAs to identify victims of trafficking. As it will be seen, there is both a top down and grassroots approach adopted by FRs, PAs, and CAs to assist in referrals and identification of trafficked victims.

¹⁹¹ The Modern Slavery Human Trafficking Unit (MSHTU) was previously called the UK Human Trafficking Centre (UKHTC).

The work of FRs shows a grassroots approach to help increase awareness of spotting signs of human trafficking to the general public, civil society groups, PAs and CAs. In contrast, CAs and PAs have been given specific guidance from the Home Office to help them in their work of identification and to satisfy a duty to inform a CA respectively. This can be considered as a top down approach.

B. A Top Down Approach to Referral and Identification

The Home Office has produced practical guidance¹⁹² for companies who believe that individuals may have been trafficked. It outlines steps to be taken either by a manager, a recruiting manager or a frontline worker to address suspicions that someone may be trafficked. In circumstances where charities may believe that there is the possibility of an individual who may have been trafficked, that the organisation would need to contact a FR such as Salvation Army to seek guidance and support. I will argue that there are two issues affecting victims where a top down approach is adopted. The first is that it distorts the boundary between referral and identification, and the second is the negative impact which the statutory duty¹⁹³ has on potential victims.

(i) Blurred Lines between Referral and Identification

Frontline staff working at the Home Office have been issued with guidance¹⁹⁴ to help them make a referral of a potential trafficked person to a CA. The purpose of such information is to identify victims of trafficking so that they can start to receive the services that they are entitled to:

¹⁹² Home Office - Human Trafficking – Practical Guidance.

¹⁹³ A statutory duty is imposed on specific bodies by law to inform a specified authority of a potential victim.

¹⁹⁴ Victims of Modern Slavery – Frontline Staff Guidance 18 March 2016.

“This guidance gives information for frontline staff in the Home Office to help them identify and help potential victims of modern slavery (including human trafficking). This guidance tells you how to identify potential victims of modern slavery in England and Wales because they are a potential victim of human trafficking, refer potential victims to the National Referral Mechanism (NRM), and make sure victims have access to the services they are entitled to.”¹⁹⁵

The method by which to start the process of identifying a potential victim of human trafficking is by spotting the signs that an individual may have been trafficked. This is seen from the guidance which lists indicators for frontline staff to look for. The guidance has been split into specific sections to highlight the different types of harm which victims are exposed to from perpetrators. These are, namely, physical and psychological signs, indicating that a person has been sexually exploited or exploited for labour purposes.¹⁹⁶

I am arguing that the guidance from the Home Office burdens staff with looking at the medical conditions when looking at the signs of trafficking. This alters their role from referring potential victims to identifying them. I believe this crosses the line between referrals and identification for the following reasons.

Despite the indicators capturing the physical harm that trafficked victims often experience, there are practical problems in obtaining the information from the victim. The physical injuries suffered by victims may be as a result of violence from their perpetrators. Some of the injuries may be clearly visible, such as cuts and bruises, but some, such as internal injuries to the

¹⁹⁵ Victims of Modern Slavery – Frontline Staff Guidance 18 March 2016 at 6.

¹⁹⁶ These include “injuries apparently as a result of assault or controlling measures, neurological symptoms, headaches, dizzy spells, memory loss, gastrointestinal symptoms (symptoms relating to the stomach or intestines), cardiovascular symptoms (symptoms relating to the heart), musculoskeletal symptoms (symptoms relating to the bones or muscles), tattoos or other marks indicating ownership by exploiters, work related injuries often through inadequate personal protective equipment or poor health and safety measures,” Victims of Modern Slavery – Frontline Staff Guidance 18 March 2016 at 18.

stomach or intestines, may require more medical examination. The method of examining a victim's body has safeguarding and ethical implications. For instance, it would not be appropriate for a frontline worker to examine a victim's body without adequate organisation policies and procedures in place to conduct such examinations. Furthermore, the victim may be reluctant to give information to authorities for fear of reprisals or a translator may be necessary, because the potential victim may not speak the same language as the person asking the questions. A trafficked victim from abroad may not be registered with a GP, and have no access to any medical services, making a diagnosis difficult.

Another indicator to look out for are psychological factors. Psychological indicators include unhealthy behaviour which is often hidden from view and require more questioning of the victim to understand their circumstances and situation with behaviour issues, along with drug and/or alcohol dependency.¹⁹⁷ Primarily, these will be mental health issues which victims may experience.

These symptoms include anxiety and depression. They may be harder to identify given the stigma of having mental health conditions. Here we see the practical challenges FRs are faced with. Spending time on this approach will be very difficult for other TSOs who already struggle to keep up with demand for their services, due to limited financial budgets and resources.

A further indicator issued in the guidance highlights where an individual may have been sexually exploited. Indicators include the following warning signs are also listed in the Home

¹⁹⁷ This behaviour may include "an expression of fear or anxiety, depression (lack of interest in engaging in activities, lack of interest in engaging with other individuals, hopelessness), isolation, suffering from post-traumatic stress and/or a range of other trauma induced mental or physical illnesses, symptoms of post-traumatic stress may include, hostility, aggression, difficulty in recalling details or entire episodes, difficulty concentrating, drug use, alcohol use, self-harm, suicidal feelings, an attitude of self-blame, shame and an extensive loss of control" Victims of Modern Slavery – Frontline Staff Guidance 18 March 2016 at 18.

Office guidance.¹⁹⁸ In the similar way as physical conditions are examined, these injuries are extremely intimate for the individual and require an intimate examination of the individual to assess the true extent of their injuries. Giving medical consent is relevant here and also the inappropriateness of a person working in a frontline organisation having to ask specific personal questions without any knowledge, training or awareness of the issues is a problematic, ethical issue. The instruction of a qualified medical expert would be the most appropriate person to assess such injuries, but this will be outside of a charitable organisation remit to do. Hence, the importance of potential victims being referred through the NRM as quickly as possible to obtain the necessary medical assistance.

In summary, the guidance captures the essence of how a victim of trafficking could be spotted. The primary issue is how to effectively implement these guidelines within a practical setting. Presently, it is difficult to spot a potential trafficked victim using the guidelines above, because this takes time and allocated resources. Formal investigations may need to take place to establish what harm the victim has suffered but this is not acknowledged by the Guidance. The question of who is better placed to take on this role requires answering. The advancement of a trafficking advocate that could be introduced to take on this role. Further tasks that an advocate could do to aid investigations will take place later in the thesis but this issue demonstrates a potential for an advocacy approach to be adopted in conjunction with the present guidance, at least in terms of signposting potential victims to obtain medical help which should trigger, for example a referral from NHS staff to the NRM.

¹⁹⁸ “pregnancy as a result of their modern slavery situation or they may have recently been forced to terminate a pregnancy, sexually transmitted diseases, injuries of a sexual nature, gynaecological symptoms such as urinary or vaginal infections, pelvic inflammation or pain or irregular bleeding” Victims of Modern Slavery – Frontline Staff Guidance 18 March 2016 at 18.

It would be useful to provide more help to organisations to facilitate referrals and show victims that their circumstances will be looked at thoroughly by specialists at the referral stage.

(ii) **The Duty to Inform CA of a Potential Trafficked Victim**

The top down approach presents a problem for PAs because they are under a statutory duty to notify a CA. In England & Wales, the ‘duty to notify’ arises from Section 52 of the Modern Slavery Act 2015. In Scotland, there is a duty on “certain Scottish public bodies who must notify the Chief Constable of Police Scotland if they become aware of a person who is or appears to be a victim of an offence of trafficking or a victim of an offence of slavery, servitude or forced and compulsory labour.”¹⁹⁹ They will then have to notify another agency in the same way as the duty operates in England & Wales. In Northern Ireland, there is a duty for “a specified authority to notify the National Crime Agency (NCA).”²⁰⁰ I will explain how the duty affects trafficked victims who may be illegal immigrants. I am arguing that the current statutory duty, placed upon PA, is a heavy burden.

It will be seen that staff are being asked to look at the character of the victim, not the evidence. Consequently, I am of the opinion that PA have too much power deciding whether a person is trafficked or not, and believe that the decision making should be left to the staff at the NRM. I will explain how the statutory duty²⁰¹ to refer can be satisfied by working with organisations to collate evidence to help refer more potential victims. As Oonagh Gay states, the main provisions of the duty were included as far back to 2013 in the Government’s White Paper:

¹⁹⁹ Section 38 Human Trafficking & Exploitation Act (Scotland) 2015.

²⁰⁰ Section 13 Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.

²⁰¹ As discussed earlier in the chapter, each of the UK countries have their own statutory duty. In effect, they are result in the same outcome which is either the NCA incorporating the Modern Slavery Human Trafficking Centre being notified, or the Home Office.

“The draft Bill contains provisions to Consolidate and simplify existing slavery and trafficking offences, Increase the maximum sentences available to life imprisonment; Introduce civil orders to restrict the activity of those who pose a risk and those convicted of slavery and trafficking offences; Create a new Anti-Slavery Commissioner, and establish a legal duty on specified public authorities to report potential victims of trafficking.”²⁰²

Section 52 of the England & Wales Modern Slavery Act 2015 places a duty upon specific public authorities to notify of a potential trafficked victim in the operation of their work. It states:

“If a public authority to which this section applies has reasonable grounds to believe that a person may be a victim of slavery or human trafficking it must notify –

(a) The Secretary of State, or

(b) If regulations made by the Secretary of State require it to notify a public authority other than the Secretary of State, that public authority.”²⁰³

Establishing ‘reasonable grounds’ implies that the PA must take practical steps to obtain more information from the potential victim and is therefore making an assessment, which is more alike to identifying a victim, rather than making a referral. This shows an overlap between referral and identification.

²⁰² Draft Modern Slavery Bill Standard Note: SN/HA/6792 Last updated: 15 April 2014 Author: Oonagh Gay Section Home Affairs Section.

²⁰³ Section 52(1) Modern Slavery Act 2015. For the purposes of who a public authority is Section 52(8) Modern Slavery Act 2015 makes reference to any of the following agencies (a) A Chief officer of police for a police area, (b) The chief constable of the British Transport Police Force, (c) The National Crime Agency, (d) A county council (e) A county borough council (f) district council, (g) A London borough council, (h) The Greater London Authority, (i) The Common Council of the City of London, (j) The Council of the Isles of Scilly, (k) The Gangmasters Licensing Authority.

Alongside the statutory duty, the Home Office Competent Authority Guidance makes reference to Section 52 of the Modern Slavery Act 2015 which details the statutory duty of frontline staff within the PA who encounter a potential victim of modern slavery to notify the Home Office:

“From 1 November 2015, specified public authorities have a duty to notify the Secretary of State of any person encountered in England and Wales who they believe may be a victim of slavery or human trafficking. Therefore certain frontline staff who encounter a potential victim of modern slavery are required to notify the Home Office under Section 52 of the Modern Slavery Act.”²⁰⁴

Significantly, the duty only applies to PAs, but not to FRs. The distinction between a FR and PA was not always clear during the debates on the Bill. This adds to the confusion of the role and responsibilities of the FR. It was reported that “the Bill will include a clause about a duty on a FR to report a case when they see someone who has been a victim of slavery or trafficking.”²⁰⁵ However, FRs were not included within the statutory duty as they are not listed as PA in Section 52. Organisations and charities have discretion, but not a statutory duty to inform a PA of a potential trafficked victim.

The purpose of this duty is “intended to help build a more comprehensive picture of the nature and scale of modern slavery.”²⁰⁶ The responsibility is placed upon the PA to notify a CA in a situation where there are “indicators of trafficking in an individual’s case, the CA will carry out the identification process. The referral form lists indicators of trafficking.”²⁰⁷ This duty must be adhered to regardless of whether the victim consents. During the drafting of the Modern Slavery Act 2015, Oonagh Gay stated “this new duty to report will mean that adult

²⁰⁴ Victims of modern slavery – frontline staff guidance, 18th March 2016 at 51.

²⁰⁵ Daily Hansard Debate 10 Jun 2014; Column 389 at 420.

²⁰⁶ Victims of modern slavery – frontline staff guidance 18th March 2016 at 51.

²⁰⁷ Z. Duszynska, “Victims of Trafficking and the Law,” Hammersmith & Fulham Community Law Centre at 6.

potential victims of trafficking, who do not wish to be referred, assessed and supported through the NRM process will still be referred through for data purposes by specified public authorities.”²⁰⁸ This presents an issue to the potential victim, who may be referred to the State as an illegal immigrant, because most of the decisions which are made by the CA, as to whether a person has been trafficked or not. Due to a current ‘hostile environment towards immigration’ existing within the current political climate,²⁰⁹ bias may be shown towards a victim as a result of the decision from authorities being based on their immigration status, rather than based on whether the person is a victim of human trafficking.

Even though the details can remain anonymous, vulnerable individuals who are also illegal immigrants may have given their consent without understanding their rights as a victim, or fail to understand their lack of rights having an illegal immigration status. It also raises questions as to whether the victim has autonomy to give consent to being referred. The method of how potential victims of trafficking are treated by being referred to an agency controlled by the State is unique to trafficked victims. No other victim of crime (such as domestic violence or rape) are referred in this manner via a statutory duty, or through a referral mechanism.

The statutory duty placed upon a PA may prevent more potential victims from coming forward if the statutory duty means that they will be referred automatically, a process which potential victims may not fully understand the consequences of. The top down approach by being referred may satisfy attempts to refer all potential victims to the NRM, but it also conflicts with the interests of victims not being deported, and exacerbate their fear of being deported. Additionally, the victim may not want to be identified as a trafficked victim, because the

²⁰⁸ Draft Modern Slavery Bill Standard Note: SN/HA/6792 Last updated: 15 April 2014 Author: Oonagh Gay Section Home Affairs Section 3.4 at 6.

²⁰⁹ R. Merrick, “Theresa May refuses to roll back 'hostile environment' policy despite calls from her own home secretary,” The Independent, 9th June 2018 found at <https://www.independent.co.uk/news/uk/politics/theresa-may-hostile-environment-sajid-javid-windrush-scandal-refuses-three-times-a8391066.html>.

individual may not realise that they are a victim of exploitation, given the nature of the manipulative abuse they have experienced. The issues above present the PA with a dilemma. On the one hand, they have a statutory duty to report the potential victim, but on the other hand, it exposes the victim to the risk of deportation proceedings at the expense of not being referred to the NRM if they are indeed an illegal immigrant. It may also be practically difficult to explain to the potential victim that they are being referred to another decision making body, especially where the individual is wary of trusting authorities and has fears of being deported. The statutory duty must be adhered to and once the PA discharges their duty, they have no further interaction with the individual which at that stage is transferred to the CA.

Whilst it may be in the State's interest for the victim to be referred, it may not be in the interest of the victim, unless there is an advocate to protect them by explaining the procedures involved to support the potential victim. In the short term where the client is fearful, it may be in the victim's best interests to be given information and guidance on where to access help and support as well as the opportunity to be referred. Even in circumstances where the potential victim has been referred, there may be a danger of the victim not having adequate knowledge of the procedures and may be at risk of being misidentified and prosecuted for other criminal or immigration offences.²¹⁰ In issues where the victim is placed within a mechanism to evaluate the past and present circumstances of the victim, it is advisable from the victim's perspective to have an advocate to safeguard the interests of the victim at all times.

In summary, whilst a top down approach may be useful, there is a tension between the duties of PA in making a referral and respecting the autonomy of the potential victim not to be referred at that time which may not be in the best interests of the potential victim. To discharge their

²¹⁰ The issue of prosecuting trafficked victims will be examined in Chapter 3, and Chapter 4 will examine the challenges for victims to regularise their immigration status after identification by the NRM.

duty they should use the information from the FR when the referral was made to them, and then refer onwards. Then, the potential victim is referred based on the information, not made on the judgment of the PA which will remove the potential for bias against the potential victim.

Some of these issues may be resolved or at least alleviated by the introduction of an advocate as envisaged in this thesis. An advocate may be useful to give advice to PAs on referrals to a CA. More cooperation may be required between FRs and PAs so that correct referrals are made and an advocate could facilitate this. Ultimately, it is a choice for victims, but trust needs to be installed in the referral process so more victims are encouraged to consent to being referred with support from FRs and advocates employed within organisations who would play a greater role in the process which would increase the numbers of referrals and positive identifications.

C. A Grassroots Approach to Referral & Identification

Arguably it would be preferable if the FR had a statutory duty to refer and inform a PA. I will argue that FRs can play a critical role in referring victims because they may be the first contact potential victims have since escaping exploitation. It also provides the opportunity for victims to be protected from traffickers. As I examined above, there are trust issues between potential victims and authorities. Therefore, the needs of victims needs to be addressed. I propose that organisations have the following support to reduce the gaps:

(i) The Need for Increased Awareness

As discussed earlier, the main challenge for FRs, PAs and CAs is understanding and recognising the signs of trafficking. A lack of awareness from professionals of what human

trafficking is continues to be a barrier to identifying more victims.²¹¹ During the Parliamentary debates on the Modern Slavery Act, it was acknowledged that:

“One of the key issues in dealing with modern slavery is being able to identify those subject to it or to human trafficking. This is why it is so important to train our Border Force officials to spot people who may have been trafficked when they enter the country, and it is why the national referral mechanism review will crucially look at identification.”²¹²

In addition to CA having increased awareness, an approach to educate professionals was taken up by the previous Immigration Minister, Mark Harper, who advocated the need to invest more resources into this area:

“Training will be delivered by five charities²¹³ who have been given grant funding from the Home Office to work with professionals who are most likely to encounter victims in their day to day work.”²¹⁴

With greater understanding from professionals of what human trafficking is, all organisations and authorities may be more likely to be able to play a role in assisting a victim and notifying other authorities. A leading NGO on combating human trafficking in the United States, Polaris Project,²¹⁵ offers guidance for authorities to spot potential indicators and ‘red flags’ when identifying victims of human trafficking. Similar training in the UK is offered by Unseen UK²¹⁶

²¹¹ See J.N. Sigmon, at footnote 105 who argues that most people think slavery is a thing of the past and cannot imagine the abuse and trauma inflicted on victims.

²¹² Daily Hansard – Debate 10 Jun 2014 Column 389 at 417.

²¹³ NSPCC, Stop the Traffik, Eaves, Thames Reach and the Counter Trafficking Bureau.

²¹⁴ Mark Harper, “More training to identify and support victims of human trafficking,” Press release from www.gov.uk/government/organisations/home-office, 21 January 2013.

²¹⁵ See Polaris Project at <http://polarisproject.org/>.

²¹⁶ Unseen UK is a registered charity that support victims, enhances collaboration between agencies and educate frontline staff. For more information, see <http://www.unseenuk.org/>.

which trains frontline professionals who may come across trafficked victims. In the same way that safeguarding training and domestic violence awareness is given to TSOs dealing with adults, more anti-trafficking education may be taught on a larger scale to encourage more awareness.

Anti-Trafficking Organisations (ATO) often advocate for stronger legislation, and provide services to victims of trafficking and work with them to recover from their ordeal.

ATO educating TSOs is an example of how they help combat human trafficking. As Farrell acknowledged, it also serves as a way for more trafficked victims becoming positively identified:

“...the low number of cases identified might be attributable, in part, to agency leaders who do not perceive trafficking as a problem as well as to a lack of training and guidance to identify and investigate these cases.”²¹⁷

Awareness and identification should be seen as existing ‘hand in hand’ with one another. Another challenge for FRs is to recognise that trafficked victims exist within circumstances facilitated by legal and illegal types of migration. Therefore, distinguishing victims from other sub groups of migrants is often not easy, making identification problematic. The fact that trafficking can occur as a result of other forms of migration highlights the difficulty in correctly distinguishing trafficked victims from economic migrants or smuggled persons. Consequently, the awareness of how human trafficking occurs, and for frontline services to become able to spot the signs of trafficking, remains a crucial issue and practical challenge to increase identification of victims.

²¹⁷ A. Farrell, J. McDevitt & S. Fahy, “Where are all the victims? “ (2010) American Society of Criminology, Vol 9, Issue 2 at 225.

(ii) **Connecting Mental Health with Signs of Human Trafficking**

Mental health issues may prevent potential victims from wanting to or be able to self-identify. Therefore, understanding the role mental health plays when looking at behaviour of victims is important. One sector where awareness of human trafficking is crucial is within the health system. According to a recent study, “almost 30% of victims will end up somewhere in the health care system seeking treatment for illnesses or injuries sustained while in captivity.”²¹⁸ Thus the health sector provides one of the main opportunities for the individual both to be treated as a patient, and to be referred as a potential trafficked victim. Guidance from the Department of Health in England and Wales was introduced in 2013 after the Public Health Minister Anna Soubry acknowledged that “surgeries and hospitals are sometimes the only place where victims come into contact with people who care and are concerned for their welfare.”²¹⁹ It is estimated that 1 in 8 healthcare staff will come into contact with victims of slavery.²²⁰ This claim is substantiated by Nursing Standard research from 2015 which revealed that “464 suspected or confirmed modern slavery victims were identified at 29 trusts and health boards over the past two years.”²²¹ The NHS England Director of nursing and deputy chief nursing officer, Hilary Garratt further acknowledges that because vulnerable people will come into contact with the service, greater support and training in understanding coercion and slavery is required.²²² This justifies the view that PAs within environments are likely to come into contact with potential victims who require more support and guidance to spot the signs.

²¹⁸ K. Peters, “The Growing Business of Human Trafficking and the Power of Emergency Nurses to stop it,” (2013), *Journal of Emergency Nursing*, Vol 39, Issue 3 at 280.

²¹⁹ Anna Soubry, “Help for NHS staff to spot and support trafficking victims,” Press release from www.gov.uk/government/organisations/department-of-health, 18 April 2013.

²²⁰ S. J. Berry, “Nurses at the Forefront of Fight against Modern Slavery,” (2017) *Royal College of Nursing Journals*, Vol 32, Issue 14, 12 at 13.

²²¹ S. J. Berry, “Nurses at the Forefront of Fight against Modern Slavery,” (2017) *Royal College of Nursing Journals*, Vol 32, Issue 14, 12 at 12.

²²² S. J. Berry, “Nurses at the Forefront of Fight against Modern Slavery,” (2017) *Royal College of Nursing Journals*, Vol 32, Issue 14, 12 at 12.

However, the lack of awareness of human trafficking amongst health service staff remains a significant barrier to achieving significant progress. Research published in 2015 of NHS healthcare professionals confirmed that there is much work to do to educate professionals with “60.2% of respondents reported very little knowledge regarding their role in identifying and responding to human trafficking, assessing danger for a patient who may have been trafficked, and local and national support services for trafficked people.”²²³ It is clear that whilst progress has been made, the majority of professionals lack the knowledge and confidence to assist a potential victim of trafficking. A joined-up strategy, linking TSOs with health service personnel is required on a grassroots level, offering best practice and coordinated outreach anti-trafficking services to aid health professionals and refer potential victims.

The introduction of specialist trafficking advocates working within the environments where potential trafficked victims are likely to be found may be a start to encourage and build upon a grassroots approach. Advocates would work on behalf of victims and either paid for by charities and voluntary groups funded for by Government. They would be appointed when potential victims come into contact with charities or when they come into contact with the police, healthcare professionals or the Border Agency. Their function would be to assist victims in being referred to the NRM. I accept that budget constraints exist at present, but the provision is now a question of political will. After all, it is in the Government’s interest to show that the scourge of modern slavery is being seen to be tackled by prosecuting traffickers and rescuing victims.

The top down and grassroots approaches show there is a strategy of looking to be more proactive in referring and identifying victims of trafficking. As a direct consequence of a FR

²²³ C. Ross, S. Dimitrova, L. Howard, M. Dewey, C. Zimmerman & S. Oram, “Human Trafficking and Health: A cross-sectional survey of NHS professionals’ contact with victims of human trafficking,” *BMJ Open* (2015) at 4.

notifying a CA that an individual may be a victim of human trafficking, the individual is then processed through the National Referral Mechanism (NRM). This is a State run framework which formally decides whether a potential victim is a victim of human trafficking. This is the focus of the next part of this Chapter.

III. THE UK'S NATIONAL REFERRAL MECHANISM

The previous section of the chapter examined the interaction between TSOs/PAs with a potential victim of trafficking. It outlined how they may both facilitate a path forward for a potential victim to be referred to the NRM. This part of the chapter will examine the NRM in greater detail. This section will set up the final section of this chapter which will examine some of the flaws in the NRM which affects the interests and rights of victims, making positive identification increasingly more challenging for genuine trafficked victims.

A. Origin Of The NRM

The UK created and introduced the NRM in April 2009 to comply with Article 10 of the Council of Europe (CofE) Convention, containing the obligation to identify victims.

Additionally, the UN Principles and Guidelines on Human Trafficking requires States to “ensure that such identification can, and does take place.”²²⁴ The UN Principles are not international instruments as such, but clarify what the standards are, and provide guidance and recommendations on how to put them into practice. The CofE Convention does not specifically oblige States to create a NRM, but the UK has created one in order to facilitate the identification

²²⁴ UN Principles and Guidelines at Guideline 2 which can be found at <http://www.ohchr.org/Documents/Publications/Traffickingen.pdf>.

of victims. Therefore, by creating the NRM, the UK has gone beyond its legal obligations by creating an institutional framework.

A referral of an individual to the NRM is seen as the “official gateway for adult victims to access safe houses and other support provided under the Government contract for victims of modern slavery.”²²⁵ As discussed previously, where there is suspicion that an individual may be a victim of human trafficking, PAs such as the Police, Border Agency, and social workers are under a duty to inform either by the Modern Slavery Human Trafficking Unit (MSHTU), or if the issue is one of immigration, the Home Office (UKVI) will start the process of identification.

Recent research has highlighted that “the estimated number of people living in the UK as modern day slaves are 11,300.”²²⁶ Sarah Newton, the Parliamentary Under Secretary of State for Crime, Safeguarding and Vulnerability, told the House of Commons Work and Pensions Committee that “there was a big gap between the estimated prevalence of modern slavery and the number of people officially identified as victims.”²²⁷ The following figures appear to reinforce this view.

According to the latest statistics from 2017, from the National Crime Agency²²⁸ (NCA), there were 4,714 victims from England referred to the NRM, 207 from Scotland, 193 from Wales and 31 from Northern Ireland.²²⁹

²²⁵ C. Beddoe, L. Bundock, T. Jordan, “Life beyond the Safe House for Survivors of Modern Slavery in London, Gaps and Options Review,” Human Trafficking Foundation, July 2015 at 12.

²²⁶ Global Slavery Index 2016 at 152.

²²⁷ House of Commons Work and Pensions Committee, Victims of Modern Slavery, 30 April 2017, HC 803 of session 2016–17, p 5.

²²⁸ The National Crime Agency help fight serious organised crime in the UK and across borders. See <http://www.nationalcrimeagency.gov.uk/>.

²²⁹ National Referral Mechanism Statistics – End of Year Summary 2017, published 26th March 2018 at 1.

Despite the total number of referrals steadily increasing from 1,745 in 2013, 2,339 in 2014 3,261 in 2015, 3,804 in 2016,²³⁰ the number of Positive Conclusive Grounds Decisions (PCGD)²³¹ have fallen from 1133 in 2016 to only 665 in 2017.²³²

It is disappointing that with the numbers of referrals increasing, the number of positive conclusive grounds decisions have fallen. As the thesis has previously highlighted, identifying a potential trafficked victim is difficult because the victim may not be displaying any physical signs of harm, and the harm that is often inflicted is often of a non-physical nature which makes it difficult to spot. But such factors are constant over time and would (one would hope) be countered by increased training. And one would hope increased political attention has led to this. Nevertheless, the task of identifying a potential victim takes place within a current environment of negative rhetoric about immigration, which may potentially influence the actions of decision makers and TSOs who come into contact with potential trafficked victims, because “even if they are well motivated, officials are human too, and there is no reason to think that they are immune from the kinds of biases that affect ordinary people.”²³³ If there is bias, it may be easier for officials and TSOs to either overlook what is going on, or simply not be able to see what is happening. Showing a bias against a migrant who is a potential trafficked victim will not serve the victims’ best interests, and this is against the State’s interests as from combatting the trafficking of human beings from a crime control context.

The NCA reports that the numbers of UK victims recognised are higher than from other parts of the world. Anti-trafficking groups report that “UK citizens who were referred were speedily identified as victims of trafficking with a rate of 76 per cent of cases positively identified. The rate of nationals from other EU states identified as trafficked was 29.2 per cent, while that of

²³⁰ National Referral Mechanism Statistics – End of Year Summary 2017, published 26th March 2018 at 5.

²³¹ Individuals who have been judged to have been trafficked and awarded victim status.

²³² National Referral Mechanism Statistics – End of Year Summary 2017, published 26th March 2018 at 5.

²³³ C. Sunstein, “Why Nudge? The Politics of Libertarian Paternalism,” (Yale University Press 2014) at 100.

nationals from countries outside the EU was only 11.9 per cent.”²³⁴ This suggests that nationals from the UK have a greater chance of being identified by the NRM than EU and non EU nationals, demonstrating that the ‘hostile environment’ is having an effect.

The NRM has a two stage route for potential victims to be processed through. The first stage is the Reasonable Grounds Decision (RGD), followed by the Conclusive Grounds Decision (CGD).

B. The Reasonable Grounds Decision (RGD)

Under Article 10(2) Council of Europe Convention against Action on Human Trafficking, the UK is under a duty to ensure that where there is a reasonable suspicion that an individual has been trafficked, the State has an obligation to investigate this further, and the individual cannot be deported during this time. The Convention states:

“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.”²³⁵

When a potential victim has been referred to the NRM through a CA, the decision maker must decide within 5 days²³⁶ whether the individual has been trafficked or not. The threshold to be met is from the information that the decision maker has available so far “it is reasonable to

²³⁴ Anti -Trafficking Monitoring Group, “Wrong kind of victim? One Year on: an analysis of UK measures to protect trafficked persons,” June 2010 at 9.

²³⁵ Article 10(2) Council of Europe Convention on Action against Trafficking in Human Beings, 2005.

²³⁶ Home Office - Victims of modern slavery – Competent Authority guidance, January 2019 at 16.

believe that a person is a victim of human trafficking or slavery, servitude or forced or compulsory labour.”²³⁷ Upon receipt of this decision, the individual can access services and support for 45 days,²³⁸ when a Conclusive Grounds Decision (CGD) is made. This period is known as a reflection period, during which the individual is given time to start to recover from the trafficking ordeal. Under Article 13 of the CofE Convention, victims will be protected from deportation and at least 30 days reflection and recovery period can start to help the victim recover from their ordeal. Each country in the UK has gone further than their obligation by granting more than 30 days.²³⁹ The Salvation Army in 2011 was awarded the contract from the Government to provide support to victims during the reflection period. Their responsibility is to “monitor and coordinate the services provision, making sure that victims can access their entitlements under the Convention.”²⁴⁰ Services typically include the provision of safe housing to support victims from the risk of further retaliation from traffickers. Victims will also have access to “services including but not limited to medical and dental treatment, sexual health services, specialist counselling, resettlement support and support with application for benefits.”²⁴¹ The immediate provision is not guaranteed and there may be waiting lists for some services such as counselling.

Victims waiting for services will obviously delay their recovery process. To avoid further anxiety and stress, it is essential for trafficked victims to be granted a positive RGD to access services. Figures found in the Home Office Review found that “74% of referrals achieved a

²³⁷ Home Office - Victims of modern slavery – Competent Authority guidance, January 2019 at 49.

²³⁸ Home Office - Victims of modern slavery – Competent Authority guidance, January 2019 at 54.

²³⁹ Section 49 Modern Slavery Act 2015 and the Northern Ireland Human Trafficking & Exploitation (Criminal Justice and Support for Victims) Act 2015 provide for 45 days support. In Scotland the Human Trafficking and Exploitation (Scotland) Act 2015 offer support where there are reasonable grounds to believe that the person is a trafficked victim, and ends when a conclusive determination is made.

²⁴⁰ C. Andreatta, Centre for Social Justice and Change, “Protection, assistance and social; (re) integration of human trafficking survivors: a comparative analysis of policy approaches and practices in the UK and in Italy,” (2015) at 18.

²⁴¹ Home Office, “Review of the National Referral Mechanism for Victims of Human Trafficking,” November 2014 at 34.

reasonable grounds decision and 30% of positive reasonable grounds decisions do not result in a conclusive grounds decision.”²⁴² Positive RGD increased to 86% after the judgment from the case of *R v Atamewan*²⁴³ where it was held that historical victims of trafficking could still be regarded as trafficked victims despite the fact that exploitation had ended some time ago where certain factors are evidenced showing the victim’s personal circumstances.²⁴⁴ The issue of historical victims of trafficking (where victims have been subjected to trafficking and exploitation in the past but presently have escaped from the situation but continue to feel the mental and physical effects of the trauma) will be discussed later in Chapter 5 when advocating for trafficked victims applying for stay in the UK to access services, based on their compelling personal circumstances.

C. The Conclusive Grounds Decision (CGD)

The next stage of the NRM is the decision maker deciding (on a balance of probabilities) whether the individual ‘is more likely than not that the individual is a victim of human trafficking or modern slavery.’ The CA obtains further evidence, with an “expectation that a Conclusive Grounds decision will be made as soon as possible following day 45 of the recovery and reflection period. There is no target to make a conclusive grounds decision within 45 days.”²⁴⁵ The advantage of receiving a CGD is that the victim can apply for Discretionary Leave to Remain (DLR) in the UK.

²⁴² Home Office, “Review of the National Referral Mechanism for Victims of Human Trafficking,” November 2014.

²⁴³ *R (on the application of Atamewan) v Secretary of State for the Home Department* [2013] EWHC 2727 (Admin).

²⁴⁴ For an explanation of these factors, see *R (on the application of Atamewan) v Secretary of State for the Home Department* [2013] EWHC 2727 (Admin) at para 41.

²⁴⁵ National Crime Agency (NCA) – National Referral Mechanism, found at <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism>.

Upon the result of a positive CGD, victims leave the NRM and the support and assistance which has been granted within 14 days. If individuals are given a negative decision, they will be released from the NRM within a period of 48 hours.

IV. THE CHALLENGES FOR INDIVIDUALS IN BEING CORRECTLY IDENTIFIED AS TRAFFICKED VICTIMS WHEN REFERRED TO THE NRM

The previous part discussed the creation and framework of the NRM. This section examines a host of problems and issues connected to the functioning and institutional design of the NRM which may affect the individual from being identified as a trafficked victim by misidentified either as a smuggled person, economic migrant or illegal immigrant. The issues may illustrate a bias in favour of the State against potential victims who are processed through the NRM. This issue feeds back to the question of whether the State is adopting a victim centred approach towards identifying trafficked victims in the UK. Four current issues will be discussed, which contribute to the fifth issue, which is a lack of trust between the trafficked victim and the State. This section will further examine the gaps in protection of trafficked victims during and after the NRM. The National Referral Mechanism Review was commissioned by the Home Secretary in April 2014 as part of the Government's wider commitment to eradicate slavery and protect victims. The Review was asked to examine and make recommendations to the Home Secretary on six key areas.²⁴⁶ The review will be referenced during this chapter to justify my existing concerns for trafficked victims because of the present way which the NRM

²⁴⁶ These included 1) The identification of potential victims, 2) How they access support, 3) The level of support that victims receive, 4) The quality and consistency of decision making, 5) Governance of the NRM including oversight and accountability, and 6) The collection and sharing of data. These can be found from the Home Office, "Review of the National Referral Mechanism for Victims of Human Trafficking," November 2014 at 7.

continues to operate today, raising concerns that the current method of identification is not a victim centred approach.

A. Institutional Culture & State Bias against Trafficked Victims

It is only the State who can formally identify a victim of human trafficking. There has been concerns raised which cause scepticism about how well the NRM works, and how fair the system operates on victims. The fact that the NRM is a framework of the State and created by the Government so strongly emphasising hostility to migration raises the significant question of whether its operation signifies a bias against trafficked victims, and whether it provides a comprehensive victim centred approach which positively benefits victims.

A leading NGO, the Anti-Trafficking Group²⁴⁷ raised a serious of concerns shortly after the creation of the NRM regards the operation of the system. Its view was that the NRM is “failing to treat those who have been trafficked as victims of crime and places too much emphasis on scrutinising them, rather than protecting them and contributing to bringing traffickers to justice.”²⁴⁸ This situation creates inequity between the State on one side (who are looking at the evidence and judging their behaviour), and the victim on the other (whose purpose is to become identified as a trafficked victim).²⁴⁹ The following part of the chapter examines some of the issues for victims which continue to exist today and will answer whether the NRM is falling victims.

²⁴⁷ The Anti-Trafficking Monitoring Group (ATMG) is a coalition of organisations, hosted and lead by Anti-Slavery International to monitor UK anti-slavery law.

²⁴⁸ Anti-Trafficking Monitoring Group, “Wrong kind of victim? One Year on: an analysis of UK measures to protect trafficked persons,” June 2010 at 67.

²⁴⁹ There will be rare cases where someone falsely claims that they have been trafficked. This is why a NRM is required which functions well and effectively for the effective identification of victims who are genuine.

(i) **The State identifies Victims, rather than an impartial Tribunal**

The Modern Slavery Human Trafficking Centre (MSHTC)²⁵⁰ and Home Office UK Visa and Immigration department (UKVI) are the two decision making bodies instructed by the State to decide whether an individual is a trafficked victim or not.²⁵¹ The Anti-Trafficking Monitoring Group states that “the UK Human Trafficking Centre has a significantly higher rate of positive decision-making than the Home Office UKVI.”²⁵² It was reported that in 2013 – 2014 “69% of referrals into the NRM were made by UKVI so this particular body has a significant and important part to play in victim identification.”²⁵³ According to National Crime Figures in 2015, there were 3266 referrals made by PA to CA.²⁵⁴

In 2015, out of those 3266 cases, it was confirmed that “70% of referrals were handled by the Home Office UK Visa and Immigration (UKVI), amounting to 2291 referrals. This was an increase from 63.2% in 2014.”²⁵⁵ In 2016, the UKVI continues to handle the vast majority of cases, equating to 2729 cases, which is 71.7% of all referrals.²⁵⁶

The fact that decision makers who say whether a person has been trafficked or not are more likely to be immigration officials. This places the State in a strong position of power in terms of decision making and places the victim at a disadvantage, because one of the UKVI’s primary duty is to make decisions on granting and refusing visas, rather than the identification of victims. Where this occurs, the State is not adopting a victim centred approach. This is because

²⁵⁰ Before the NCA incorporated the MSHTC into its agency, it was previously known as the UK Human Trafficking Centre.

²⁵¹ If the issues relating to the potential trafficked victim involve immigration, the UKVI will have authority to deal with the matter of identification.

²⁵² Anti-Trafficking Monitoring Group, “The National Referral Mechanism – A Five Year Review,” February 2014 at 10.

²⁵³ J. Elliott and K. Garbers, “The National Referral Mechanism Pilots: A Review of the Training,” University of the West of England at 20.

²⁵⁴ National Referral Mechanism Statistics – End of Year Summary 2015, published 11th Feb 2016 at 3.

²⁵⁵ National Referral Mechanism Statistics – End of Year Summary 2015, published 11th Feb 2016 at 4.

²⁵⁶ National Referral Mechanism Statistics – End of Year Summary 2016, published 7th April at 4.

the objectives of the UKVI in terms of their powers and decision making conflicts with the needs of trafficked victims to be positively identified due to the issue of their immigration status. Therefore, a State can still meet its moral obligations towards victims as long as they instruct an authority under their control to focus solely on decision making on whether a person has been trafficked or not, without interference regards any immigration issues.

The process for which agency deals with the case of a potential victim is as follows:

“All referrals to the NRM from first responders must be sent to MSHTU initially. MSHTU makes reasonable and conclusive grounds decisions on all cases involving a UK national, a European Economic Area (EEA) national (except where there is a live immigration issue). When MSHTU receives a referral relating to an EEA or non-EEA national who is subject to immigration control, they will refer the case to the Home Office Competent Authority, who will make the reasonable and conclusive grounds decisions. If a case involves a non-EEA national with no active immigration issues, MSHTU also refers the case to the Home Office Competent Authority who will make the reasonable and conclusive grounds decision.”²⁵⁷

The Modern Slavery Human Trafficking Unit (MSHTU) took only 20.4% of referrals, totalling 778 cases. Given the specific expertise within this agency, one would expect this figure to be higher, especially where the MSHTU was set up as a support based, multi-agency operation, designed to combat trafficking and identify victims.

²⁵⁷ National Crime Agency, Human Trafficking found at <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism>. Also see, Group of Experts on Action Against Trafficking in Human Beings, “Report concerning the implementation of the council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom,” Second Evaluation Round, 2016 at para 142.

This situation supposes that a decision may be influenced by the need to control immigration. This argument has been made by Lucy Maule, Senior Researcher at the Centre for Social Justice during the Joint Committee on the Draft Modern Slavery Bill:

“The authority that UKVI has to make decisions at the moment is not appropriate. It is not really fair to expect a potential victim to make the welfare case around trafficking to the same agency that is making a decision on whether they have a right to be in the country.”²⁵⁸

Therefore, a person’s immigration status may be the issue that is prioritised over the issue of whether the person is a potential victim or not, who receives a positive or a negative decision or not. The current system places more emphasis on the immigration status of the individual, primarily because more cases are decided by immigration officials. In cases where victims have given consent to be referred, victims are trusting the State to look at their case on merit, whilst at the same time fearing deportation. Concerns about human rights violations can often be sidelined where a tough stance on immigration is maintained. This provides a plausible explanation why the numbers of referrals is increasing, but a disparity exists with some trafficked victims not receiving positive conclusive grounds decisions. From a victim centred perspective, authorities should take into consideration all appropriate information for them to make a decision.²⁵⁹ This approach would safeguard the victim and ensures transparency throughout the referral mechanism guaranteeing victims that their decisions have been made robustly.

²⁵⁸ L. Maule, “Senior Researcher Centre for Social Justice (former specialist adviser to the Joint Committee on the draft Modern Slavery Bill) Committee Debate: 1st Sitting: House of Commons, 21 July 2014 at Column 25.

²⁵⁹ See Group of Experts on Action Against Trafficking in Human Beings, “Report concerning the implementation of the council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom,” Second Evaluation Round, 2016 at para 148 which states that “Competent Authorities should take into account the expert views of those surrounding the person when unsure about the reasonable grounds decision outcome. If it appears that the reasonable grounds test is going to be negative, they must contact the First Responder, the support services, the police and local authorities to give them the opportunity to provide further information, and must give due weight to their reports and views.”

The number of positive decisions made varies according to whether the MSHTU or the UKVI makes the decision. Figures from 2012 state that out of 299 referrals to the MSHTU, 80% received a Positive CGD, contrasted with less than 20% of 875 referrals made to the Home Office.²⁶⁰ The fact that the Home Office UKVI is an immigration authority shows that the decision taken is whether the person has a valid visa to be in the country or not, rather than assessing the crime and the likelihood of being a victim. As an anti-trafficking advocate, it is uncomfortable to find that the large majority of cases will be decided by the UKVI, proving to me that there are problems of institutional design within the present system of identification.

It would be reasonable to assume that the expertise of the MSHTU would be more specific than the Home Office to make decisions. The Anti Trafficking Monitoring Group are rightly concerned that the Home Office do not have specific expertise in human trafficking and are “relying excessively on the discretion of officials who receive minimal training to staff a mechanism supported by flawed legal guidance relating to who should be identified as victims of trafficking, and without a formal appeals process.”²⁶¹ This situation where more referrals are being processed through the Home Office is not using the capabilities of specialised staff within the NCA to its potential. Where victims continue to be treated as illegal immigrants, individuals are not being either listened to or recognised as victims, which is not within the spirit of Article 10, without actually breaching it.

(ii) **The Issue of Immigration Dominates and Overshadows Victims Recognition**

Whilst the focus remains on immigration, the rights of individuals to be treated as a potential victim of crime and being identified as a victim of trafficking can become a secondary issue.

²⁶⁰ Figures from NRM found at Anti-Trafficking Monitoring Group, “The National Referral Mechanism – A Five Year Review,” February 2014 at 11.

²⁶¹ Anti-Trafficking Monitoring Group, “Wrong kind of victim? One Year on: an analysis of UK measures to protect trafficked persons,” June 2010 at 9.

Whilst immigration remains a very emotive subject, there is a risk that decision makers may be confusing potential victims with illegal immigrants.

The functioning of the NRM relies on officials who are not human rights experts making decisions regarding whether an individual is a victim of a crime. However, the decision maker may often be an immigration official, who assesses individuals based on their immigration status as Anti Trafficking Monitoring Group has argued:

“The system appears to be putting more emphasis on the immigration status of the presumed trafficked persons, rather than the alleged crime committed against them.”²⁶²

To combat this perception, increased intensive training should be given to decision makers to assist them in distinguishing trafficked victims from other groups such as illegal immigrants and smuggled persons. Even though the job of immigration officials is to identify individuals who do not have a right to be in a country, they are being asked to make decisions which require an additional holistic skill set. The issue of whether CAs have all the required expertise and knowledge in being able to come to a decision is a valid one to address.²⁶³ The fact that most of the decisions whether an individual is trafficked or not will be made by immigration authorities. Consequently, the importance of providing enough training to help them make decisions becomes paramount.

The Centre for Social Justice²⁶⁴ believes that the separation between identifying human trafficking and discussing immigration is not distinct enough to ensure that individuals are not

²⁶² Anti-Trafficking Monitoring Group, “Wrong kind of victim? One Year on: an analysis of UK measures to protect trafficked persons,” June 2010 at 9.

²⁶³ This was raised by Anthony Steen MP during a debate on human trafficking in Westminster Anthony Steen MP Debate on Human Trafficking in Westminster Hall 20th January 2010 found at <https://www.theyworkforyou.com/whall/?id=2010-01-20b.103.0>.

²⁶⁴ The Centre for Social Justice (CSJ) was established as an independent think-tank in 2004 to put social justice at the heart of British politics and make policy recommendations to tackle the root causes of poverty.

exposed to a disadvantage when decisions are being made, especially if they are not UK nationals:

“It is problematic how the NRM interacts with other immigration issues. The two are, somehow, conflated together because the decision making process is handled by the Home Office which is in charge for immigration controls. In some cases, a decision on a trafficking claim reads word by word like an asylum decision, and victims have to prove they are victims when they are not supposed to.”²⁶⁵

The link between nationality and successful identification can be seen from assessing the figures from the NCA which suggest that nationality also plays a part in whether they are identified as a trafficked victim. The fact that many victims are not UK nationals places them at risk of being deported.

According to figures the UK has the highest percentage of potential victims who were given a positive CGD in 2013.²⁶⁶ In contrast, countries that are prevalent to human trafficking such as Vietnam, Nigeria and Albania have a much lower percentage of potential victims who received a positive CGD.²⁶⁷ This highlights that potential victims from source countries are not receiving positive CGDs, and a preference for identifying UK victims may be made at the expense of

²⁶⁵ C. Andreatta, Centre for Social Justice and Change, “Protection, assistance and social; (re) integration of human trafficking survivors: a comparative analysis of policy approaches and practices in the UK and in Italy,” (2015) at 16.

²⁶⁶ The proportion of potential victims from the UK referred to the NRM in 2013 that received a positive conclusive grounds decision was 88%. Figures from the Home Office, “Review of the National Referral Mechanism for Victims of Human Trafficking,” November 2014 at 44.

²⁶⁷ The proportion of potential victims from Vietnam, Nigeria and Albania referred to the NRM in 2013 that received a positive conclusive grounds decision was 29%, 32% and 33% respectively. The percentage of Home Office, “Review of the National Referral Mechanism for Victims of Human Trafficking,” November 2014 at 44.

non-national victims, which can be clearly seen from the high disparity between the numbers of victims from the UK and from other countries of origin.²⁶⁸

Victims from Non EU countries have difficulty being positively identified too. Out of 189 individuals from Nigeria who were referred to the NRM in 2013, only 62% of individuals received a positive reasonable grounds decision. This can be contrasted with individuals from the UK (95%) and EU countries such as Poland (99%), Hungary (89%) and Lithuania (84%).²⁶⁹ It shows that if an individual is from an EU country, there is a higher possibility of receiving a positive RGD. If decisions are being made on the victim's nationality "the NRM is open to discriminatory decision-making."²⁷⁰ Individuals from non EU countries continue to face a significant challenge of being identified especially if they are experiencing difficulties in explaining their situation. This is because of language issues, and other challenges associated with being a trafficked victim such as dealing with "trauma (mental, psychological, or emotional), an inability to express themselves clearly, a mistrust of authorities, feelings of shame or painful memories (particularly those of a sexual nature)."²⁷¹ An individual who has difficulty with mental health may have a lesser chance of being identified by the State, and justifies an advocate to act on their behalf during the NRM process to support victims.

²⁶⁸ Further research is required to see if this trend remains the same. The NCA only collates data on the number of positive conclusive grounds decisions made, without breaking down decisions according to the nationality of victims.

²⁶⁹ Figures from Home Office, "Review of the National Referral Mechanism for Victims of Human Trafficking," November 2014 at 27. Again, further research is required to see if this trend remains the same.

²⁷⁰ Anti-Trafficking Monitoring Group, "The National Referral Mechanism – A Five Year Review," February 2014 at 8.

²⁷¹ Anti-Trafficking Monitoring Group, "The National Referral Mechanism – A Five Year Review," February 2014 at 11.

(iii) **No Right of Appeal, which Prevents Transparency, and a Lack of Accountability**

Presently, when a potential victim receives a negative decision from officials, there is no appeal available. The lack of an appeals process calls into question how the mechanism operates without accountability. Decision makers are regarded as “a delegated considerable authority on identification to a flawed mechanism, staffed by substantially unaccountable officials.”²⁷² The lack of an appeals process to challenge decisions strengthens the arguments which critics have that the system is seen as too heavily weighted towards the interests of the State. Currently, there is “no policy framework for reporting on the outcomes of people who are referred into the NRM.”²⁷³ When the NRM was created, there was no legal framework with any mechanisms built in to safeguard the rights of potential victims. The NRM was formed as a response from the obligation of the CoFE Convention to train competent authorities help and identify potential victims. Parosha Chandran states:

“The NRM is a creature of policy, not statute. Its objective is to formally identify victims of human trafficking in the UK, and it provides statistics on the number of individuals, adults and children, who have been referred to it and the identification decisions it has made in respect of those persons.”²⁷⁴

Due to the omissions of any provision to challenge a decision of the Home Office, the absence of an appeal prevents the potential victim from challenging the reasons why the decision was refused. A victim may believe that not all of the information had been considered correctly in

²⁷² Anti-Trafficking Monitoring Group, “Wrong kind of victim? One Year on: an analysis of UK measures to protect trafficked persons,” June 2010 at 7.

²⁷³ C. Beddoe, L. Bundock, T. Jordan, “Life beyond the Safe House for Survivors of Modern Slavery in London, Gaps and Options Review,” Human Trafficking Foundation, July 2015 at 13.

²⁷⁴ P. Chandran, “Human Trafficking Handbook: Recognising Trafficking & Modern-Day Slavery in the UK,” (Lexis Nexis, 2011) at 31.

arriving at a decision in a situation where a potential victim has felt that not all of the relevant information has been considered for the CA to make a decision. However, there is no mechanism in place to facilitate this. Unlike a negative decision given in a welfare benefit system where an individual has been denied a specific benefit, there is no mandatory reconsideration procedure for victims to use. The introduction of an appeals process is essential.

There is, however, the opportunity to apply for a judicial review. This is a process which decides whether the way in which a decision was made was lawful or not. A judicial review “is the process used by courts to examine the decisions made by public bodies, to make sure that they are lawful and fair. It can only be used when there is no other way to effectively challenge a decision.”²⁷⁵ A judicial review is not a substitute for an appeal process, but provides a basis to challenge how a decision was made. The time taken to progress through a judicial review can be detrimental to the victim because “not only is it time-consuming and costly, but it can also cause severe stress and anxiety.”²⁷⁶ Victims may be given an opportunity to challenge the decision within 30 days, and request the decision maker to make a further decision based upon further evidence and grounds from the individual as to why they disagree with the decision. This is the same process as requesting a Mandatory Reconsideration.²⁷⁷ The success of the judicial review is dependent upon the issue of whether a proper investigation of the victim’s circumstances has taken place.

²⁷⁵ Centre for Human Rights in Practice, “Judicial Review,” found at <https://warwick.ac.uk/fac/soc/law/research/centres/chrp-old/projects/spendingcuts/resources/database/legal/judicial-review/>.

²⁷⁶ Anti-Trafficking Monitoring Group, “The National Referral Mechanism – A Five Year Review,” February 2014 at 9.

²⁷⁷ A Mandatory Reconsideration of a decision takes place within the UK welfare system after a claimant wishes to dispute a decision within one month made by either the JobCentre or the Department for Work & Pensions (DWP).

In *R (on the application of AB)*²⁷⁸ a victim of trafficking was sectioned under Mental Health Act, after receiving a positive RGD but negative CGD. The decision was challenged on the basis that expert medical evidence was not taken into account. Previously abused and exploited before being brought to the UK from Belgium, the victim worked in domestic servitude. It was held that:

“...there were two reports from the Claimant’s treating psychiatrist. They had been treated in the same way by the decision-maker, mentioned but not engaged with Ms Mair said. The medical reports were highly significant in that the diagnosis was that the Claimant had longstanding and serious mental health problems. This directly conflicted with the decision-makers’ assertion in the decision letter that the Claimant was not suffering from mental health problems in 2005 she said. Yet there was no mention at all of the content (as opposed to the existence) of either of these medical reports in the decision letter.”²⁷⁹

It was later decided by the judge that “the decision-maker was under a clear obligation to explain how she had come to the conclusion that there was ‘no evidence’ that the Claimant was suffering from mental health illness [in 2005]... Having wholly failed to do so in my judgment the decision is irrational.”²⁸⁰ Judicial review may be pursued if victims believe that their facts and personal circumstances have not been considered in the correct manner.

In summary, judicial review is a possibility to pursue, but the longer term issue is reforming the institutional design of the NRM for it to become victim centred. In any event, the victim

²⁷⁸ *R (on the application of AB) v Secretary of State for the Home Department* [2015] EWHC 1490 (Admin).

²⁷⁹ *R (on the application of AB) v Secretary of State for the Home Department* [2015] EWHC 1490 (Admin) at para 12.

²⁸⁰ *R (on the application of AB) v Secretary of State for the Home Department* [2015] EWHC 1490 (Admin) at para 39.

will still have to wait for a decision. So, in theory it sounds a good idea, but in practice, this would not benefit the victim because of the wait which will be incurred.

(iv) **The Lack of Cooperation between Agencies**

Advice from the Organisation for Security and Cooperation in Europe (OSCE) on the NRM advises that “all the different organisations involved in an NRM should co-operate to ensure that victims are offered assistance through referral to specialised services.”²⁸¹ Where different agencies do not work together, it may affect the effectiveness and efficiency of the identification process. As noted earlier, the “numbers receiving positive conclusive grounds decisions are lower (45% of all referrals in 2013).”²⁸² However, the fact that there is an increase in referrals which receive a positive RGD does not automatically mean that individuals will receive a positive CGD. It appears that there is a discrepancy between victims proceeding through the first stage of the referral but then a lower chance of receiving a positive CGD. There may be reasons as to why this is the case.

Agencies such as the Poppy Project²⁸³ have proved they can help victims receive positive grounds decisions,²⁸⁴ by providing expertise and knowledge which increase the chances of a positive decision. Unfortunately, due to funding issues, the Poppy Project closed in 2015, breaking the direct link between victims and support networks. It was found that after the closure, 18 out of the 73 survivors that they were assisting became unaccounted for, and the

²⁸¹ Anti-Trafficking Monitoring Group, “Wrong kind of victim? One Year on: an analysis of UK measures to protect trafficked persons,” June 2010 at 25.

²⁸² Home Office, “Review of the National Referral Mechanism for Victims of Human Trafficking,” November 2014 at 25.

²⁸³ The Poppy Project was set up in 2003 and assisted victims of trafficking and provided support. It lost funding and closed in 2015.

²⁸⁴ Anti –Monitoring Group found that an average of 80% of Poppy Service users were granted positive Reasonable Grounds decisions and 86% of users were granted Positive Conclusive Grounds decisions through the NRM. This has been found from Anti-Trafficking Monitoring Group, “The National Referral Mechanism – A Five Year Review,” February 2014 at 14.

victims were classed at a “very high risk of re-traumatisation and with the lowest levels of independence.”²⁸⁵ Not only does the support and services provided for during the NRM matter, but also once victims have left the NRM after being identified, it also becomes an important source of assistance for victims. The needs of an advocate being integrated within with the NRM process would be positive, because “survivors want and need experts who can provide them with trafficking reports and advocate for their conclusive identification as victims of human trafficking with leave to remain in the UK.”²⁸⁶ Advocates may also coordinate and liaise with relevant support groups on behalf of victims.

(v) **Perceived Objectivity of Processes and Trafficked Victims’ Mistrust of the State**

Consequently, victims experiencing issues within the NRM may lead to a lack of trust between the victim and the State. In situations where victims wish to get support, they may mistrust those who may rescue and assist them. Victims suffering from mental health issues may inhibit their ability to seek out the required help and assistance. In circumstances where victims are presented to authorities, they may not trust the authorities to believe their allegations that they have been trafficked. Evidence of a lack of trust between authorities and the victim when addressing a complaint about violence from perpetrators may affect the ability of more victims to speak out.

Where victims provide evidence to substantiate grounds that they have been trafficked, victims should be entitled to have the circumstances and details of their exploitation considered adequately by the State. As the Home Office NRM review highlighted, “there are significant

²⁸⁵ Human Trafficking Foundation, “Day 46: Is there life after the Safe House for Survivors of Modern Slavery?” October 2016 at 9.

²⁸⁶ Human Trafficking Foundation, “Day 46: Is there life after the Safe House for Survivors of Modern Slavery?” October 2016 at 11.

dependencies between organisations that are involved in the identification and support of victims but note there is some antagonism between the organisations involved in the work of supporting trafficked people. This is not in the best interest of victims.”²⁸⁷ It is not in the interest of victims if they have no confidence that they will be heard and recognised.

Trafficked victims may not wish to be referred to the NRM if they do not trust authorities charged with protection, such as the police, or fear border staff who may deport them. Trafficked victims must have the confidence to participate in a fair and transparent referral process to better aid identification so that they can be recognised and given victim status.

A way in which the current process can be improved is for FRs to have better training on human trafficking and by taking the initial RGD away from the CAs and for trained staff within FR organisations to make this first decision. The evidence and information used to make a reasonable grounds decision can be accessed from the first responder who first notified the CA. At present, the role of the FR is to make a referral to the NRM within 5 days, and it is expected that the FR is expected to obtain information about a presumed trafficked person to refer the case.”²⁸⁸ It is unreasonable to expect the FR to build trust with the victim in order to obtain this information within this time frame:

“The staff of First Responders criticised the short time available for the preparation of referrals. There was a rush to collect evidence to support a referral. This allows inadequate time to build trust; far too little enable many people who have been trafficked to disclose what happened to them.”²⁸⁹

²⁸⁷ Home Office, “Review of the National Referral Mechanism for Victims of Human Trafficking,” November 2014 at 49.

²⁸⁸ Anti-Trafficking Monitoring Group, “Wrong kind of victim? One Year on: an analysis of UK measures to protect trafficked persons,” June 2010 at 34.

²⁸⁹ Anti-Trafficking Monitoring Group, “Wrong kind of victim? One Year on: an analysis of UK measures to protect trafficked persons,” June 2010 at 55.

Additionally, the amount and quality of training which FRs receive must be improved. Present training has been criticised as being inadequate because “it has not been approved, accredited or standardises by any formal system.”²⁹⁰ They must also have greater funding to keep potential victims safe. This may be needed to pay for suitable accommodation for a small time period whilst information can be obtained from the potential victim. The victim may not cooperate with the FR within 5 days so the FR would need time to obtain this information. The victim may want to be kept safe from their trafficker or fear of being re-trafficked. A recommendation from the Anti-Trafficking Monitoring Group suggests that training is to be given to FR on how to complete referral forms correctly, but this does little for the main issue, which is the time constraint of having to get the required information from the potential victim within the specified 5 day timeframe. This training appears to be a necessity because “99 out of 1072 submitted referrals between Jan – June 2014 were returned because of errors.”²⁹¹ This represents 9% of all referrals. Therefore, 99 potential trafficked victims were compromised by not having a RGD as soon as they would have which also compromises their ability to access services and support as a direct consequence of a positive reasonable grounds decision.

The Home Office Review has proposed FRs having a greater role by making determinations on RGD. This would be done by having a “properly constructed referral by a trained and accredited Slavery Safeguarding Lead.”²⁹² This may have an advantage of removing the State bias from the decision making process but at the same time burdens a FR with the responsibility of making a decision which they may be under pressure to make, due to time constraints. The

²⁹⁰ J. Elliott and K. Garbers, “The National Referral Mechanism Pilots: A Review of the Training,” University of the West of England (2016) at 19.

²⁹¹ Home Office, “Review of the National Referral Mechanism for victims of Human Trafficking,” November 2014 at 24.

²⁹² Home Office, “Review of the National Referral Mechanism for victims of Human Trafficking,” November 2014 at 29.

risk is that they may make more referrals to give the benefit of the doubt and overburden the NRM with longer waiting times to process CGDs.

As we have seen, the problems above represent significant challenges for victims in being successfully identified by the State. At the time of writing, the NRM is nine years old and despite the recommendations from the Home Office on improving the framework, individuals are finding themselves being placed through a mechanism which has substantial flaws within it which affect their ability to be recognised as trafficked victims. In addition, there are substantial gaps of protection which are not being afforded to individuals during and after the NRM procedure. These will now be examined in further detail.

B. The Gaps in Protection for the Trafficked Victim during and after the NRM Procedure

As discussed earlier, the obligation of the State from the CofE Convention is to provide services and support to victims for 30 days.²⁹³ The Organisation for Security and Cooperation in Europe²⁹⁴ advocates that referral of services is part of States wider obligations to victims:

“The basic aim of an NRM is to ensure that the human rights of trafficked persons are respected and to provide an effective way to refer trafficked victims to needed services.

This process includes all the different organisations involved in a NRM, which should

²⁹³ The UK has exceeded its obligations from Article 13(1) of providing for a recovery and reflection period of 30 days by guaranteeing 45 days.

²⁹⁴ Office for Security & Cooperation is an intergovernmental organisation comprising of 57 States which seeks to cooperate together on matters such as maintaining security, combatting terrorism and protecting human rights. See <http://www.osce.org/whatistheosce>.

co-operate to ensure that victims are offered assistance through referral to specialised services.”²⁹⁵

However, it was a matter of government policy to create the NRM. The agencies which identify trafficked victims are not responsible for providing services to the victim; neither are they responsible for referring them to medical and support services. Significant resources are required to fund the identification and support of victims:

“It has been estimated that that it “costs millions of pounds each year finding victims and then at least a further £4 million supporting people.”²⁹⁶

Since 2011, the Ministry of Justice awarded the Salvation Army with a Government contract to help victims of human trafficking in the UK. Specifically, they are contracted to “provide support and assistance to adult victims of human trafficking for a minimum of 45 days or until a victims receives a Conclusive Grounds decision.”²⁹⁷

Whilst the UK has exceeded its legal obligation by supporting victims for more than 30 days, the 45 days is not enough time to help and support victims sufficiently. This is due to the complexities of help and support required by victims. Jim Laird²⁹⁸ states that he has “yet to meet any victim who has not required support of varying kinds beyond a forty-five day period.”²⁹⁹ If waiting times for health treatment are factored in, it may be the case that 45 days elapses without starting treatment. However, there is the obligation to provide individuals

²⁹⁵ OSCE, “Trafficking in Human Beings: Identification of Potential and Presumed Victims A Community Policing Approach,” June 2011 at 36.

²⁹⁶ Human Trafficking Foundation, “Day 46: Is there life after the Safe House for Survivors of Modern Slavery?” October 2016 at 2.

²⁹⁷ C. Beddoe, L. Bundock, T. Jordan, “Life beyond the Safe House for Survivors of Modern Slavery in London, Gaps and Options Review,” Human Trafficking Foundation, July 2015 at 3.

²⁹⁸ Jim Laird has extensive experience of working for Migrant Help working across the UK with trafficking victims.

²⁹⁹ J. Laird, “Responding to Victims of Human Trafficking: The Good The Bad & The Ugly,” from M. Malloch & P. Rigby, “Human Trafficking: The Complexities of Exploitation,” (Edinburgh University Press, 2016) at 110.

identified as trafficked victims to be provided with help and assistance at different times of the identification process.³⁰⁰

Identification and support can be seen as a duty, but also requires a significant financial commitment too, especially due to the length of time required for victims to recover. This is a crucial time for victims to receive help as a means of opportunity to start the recovery process. If the needs of individuals going through the NRM are not addressed at various times of the NRM procedure, gaps in support and protection may emerge and expose individuals to the risk of being re-trafficked. The gaps are visible during the NRM and after a decision has been made which will now be discussed.

(i) Gaps in Protection during the NRM Process

Presently, the reflection and recovery period of 45 days starts from when the individual receives a RGD. Once the 45 days expires then the support is stopped. However, it is evident that individuals do not always receive a CGD within 45 days. According to statistics from 2013, the average time to wait for a CGD is 56 days.³⁰¹ There may be a detrimental effect on the mental health of victims during this time, because victims are left without support for this period of time. Furthermore, 56 days is only an average, in one case involving victims from Eastern Europe, it was known to take much longer:

“Two Albanian survivors entered the NRM at similar times and were supported in the same house. One of them received a positive Conclusive Grounds Decision. The other

³⁰⁰ Article 11 Directive 2011/36/EU of The European Parliament And Of The Council of 5 April 2011 On Preventing And Combating Trafficking In Human Beings And Protecting Its Victims, And Replacing Council Framework Decision 2002/629/JHA states that “Member States shall take the necessary measures to ensure that assistance and support are provided to victims before, during and for an appropriate period of time after the conclusion of criminal proceedings.”

³⁰¹ NRM data 2013 (as of 08/09/2014) time from referral to conclusive decision for those cases getting a positive reasonable grounds decision.

was still waiting after two years; she had to leave the safe house before a decision was made, and she ended up feeling extremely isolated and forgotten.”³⁰²

Recently, the situation has got worse with “845 people referred into the NRM in 2015 were still waiting on a reasonable grounds or conclusive grounds decision by 6 January 2017. Each of those people will have waited at least 12 months for a decision.”³⁰³

Inconsistencies in waiting times for decisions alongside waiting to be referred for health treatment may make victims anxious and exposed to an increased risk of being re-trafficked. It may transpire that the 45 days will expire and no obligation arises to provide treatment, but the victim is waiting for a decision. A decision is required as soon as possible to regularise their immigration status as it was made clear in the case of *R (on the application of AG RT) and SSHD & DWP*.³⁰⁴

“it is contended that there is no requirement in the Guidance or in the contract with the Salvation Army requiring routine assessments of need in individual cases after the 45 day recovery and reflection period and no criteria as to when support is to be provided pending a decision on an application for Discretionary Leave to Remain (DLR) which is the way in which the United Kingdom gives support and assistance to trafficking victims in accordance with its international obligations.”³⁰⁵

However, the 45 day period can be extended for specific purposes. The case of *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD* listed the “likely reasons

³⁰² C. Beddoe, L. Bundock, T. Jordan, “Life beyond the Safe House for Survivors of Modern Slavery in London, Gaps and Options Review,” Human Trafficking Foundation, July 2015 at 22.

³⁰³ P. Burland, “Counting the Days: A Study of Kalayaan’s referrals into the National Referral Mechanism in 2015,” found at <http://www.kalayaan.org.uk/wp-content/uploads/2014/09/Counting-the-Days-Study-of-2015-NRM-referrals.pdf> at 4.

³⁰⁴ *R (on the application of AG RT) and SSHD & DWP* [2016] EWHC 942 (Admin).

³⁰⁵ *R (on the application of AG RT) and SSHD & DWP* [2016] EWHC 942 (Admin) at para 6.

which will include serious health issues, serious mental health or psychological issues (including post-traumatic stress disorder) requiring longer period of recovery and reflection and high levels of victim intimidation.”³⁰⁶ If an individual can prove that they are suffering from a psychological condition or experiencing serious physical health conditions, and that they are receiving treatment to control these conditions, they stand a good possibility of having this period extended. It is vital for victims to get a diagnosis of a mental health condition as soon as possible too. This will strengthen grounds to extend the 45 days. The likelihood of most trafficked victims experiencing mental health issues justify in most cases for the 45 day period to be extended. It is unclear whether all victims would be capable of applying for an extension themselves. An advocate could be instructed to do this on behalf of the victim.

(ii) After the NRM Process

The second situation where individuals are exposed to a gap in protection is the period after the victim has receives a positive or negative decision. One may expect that when a victim has been identified, the protection afforded to victims will be enhanced. Sadly, this is not the case. If individuals receive a positive CGD, services and support are withdrawn after 14 days. The lack of data on what happens to victims after the identification process in terms of support services is problematic as there is a question mark as to what happens to victims after exiting the NRM:

“There is no reliable information as to where they go and what happens to them. It is not possible to say whether any of these individuals have been re-trafficked, exploited

³⁰⁶ *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD* [2016] EWHC 942 (Admin) at para 83.

or subjected to further harm, but it is equally clear that there are no statutory agencies that can state with certainty that they have not.”³⁰⁷

As discussed above, when a CGD has been made reached, the victim is eligible for continued support for a very limited period. In contrast, in cases where the victim has been given a negative CGD, this situation is more serious for the victim because “the Home Office only allows 48 hours for an individual to exit a safe house.”³⁰⁸ In both situations where a negative or positive decision has been made, victims are exposed to a continued risk of being re-trafficked if support mechanisms are taken away. The Human Trafficking Foundation³⁰⁹ points out that:

“When there is no adequate move on support, the level of a person’s vulnerability will have to do much more than they would have otherwise to help this person recover.”³¹⁰

The 2016 US Trafficking in Persons (TIP) Report³¹¹ criticised the failing of the UK government to provide adequate support and services after the 45 day period. The report states:

“Authorities have acknowledged NRM support is not intended to provide rehabilitation and noted that many victims are still profoundly vulnerable after 45 days. NGOs

³⁰⁷ C. Beddoe, L. Bundock, T. Jordan, “Life beyond the Safe House for Survivors of Modern Slavery in London, Gaps and Options Review,” Human Trafficking Foundation, July 2015 at 14.

³⁰⁸ C. Beddoe, L. Bundock, T. Jordan, “Life beyond the Safe House for Survivors of Modern Slavery in London, Gaps and Options Review,” Human Trafficking Foundation, July 2015 at 5.

³⁰⁹ The Human Trafficking Foundation is an All-Party Parliamentary Group on Human Trafficking and Modern Slavery, established to support and add value to the work of charities and agencies operating to combat human trafficking in the UK.

³¹⁰ C. Beddoe, L. Bundock, T. Jordan, “Life beyond the Safe House for Survivors of Modern Slavery in London, Gaps and Options Review,” Human Trafficking Foundation, July 2015 at 8.

³¹¹ Trafficking in Persons Report (TIP) is a US government report which ranks all countries attempts to combat human trafficking. This is produced annually and focusses on a different theme associated with human trafficking every year.

reported cases of victims returning to prostitution or being re-trafficked due to lack of long-term support.”³¹²

One solution would be to increase the 14 day period after the CGD is made. In the same way as the 45 day period could be extended, the same applies to the 14 day period. In the case of *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD*³¹³ it was held that:

“The Home Office does grant extensions to this 14 day extra support period for those with a conclusive grounds decision based on individual circumstances, which vary from case to case...common grounds for granting an extension are to allow a victim to obtain identity documents, or while an application for DLR is outstanding, or because they are waiting for suitable accommodation to move to.”³¹⁴

Unlike the possibility of getting an extension to the 45 day period, it has been reported that extending the 14 day period at the end of the NRM is more common. Recent research shows that “in the six month period ending 8 March 2016, 33 extensions were sought from the Modern Slavery Unit relating to DLR purposes and 32 were granted.”³¹⁵ Therefore, this extension is a possible route for victims to take and it is advisable for victims to apply for DLR after identification, and to get the extension for additional support and assistance extended after the 14 days on the basis of obtaining DLR.

(iii) **Easing the Anxiety of Victims**

³¹² US TIP Report 2016 found at <https://www.state.gov/documents/organization/258882.pdf>.

³¹³ *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD* [2016] EWHC 942 (Admin).

³¹⁴ *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD* [2016] EWHC 942 (Admin) at para 84.

³¹⁵ *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD* [2016] EWHC 942 (Admin) at 86.

The Home Office Review has suggested increasing the length of support from 45 days to 90 days and include a mentor to assist which could assist in “gaining access to work and housing beyond the 45 day reflection period.”³¹⁶ This would be a good idea in principle, but has drawbacks because once again the 90 day period is time limited and not all victims will be fully prepared to exit the support due to the complexity of the mental health trauma that they have experienced.

The Modern Slavery (Victim Support) Bill³¹⁷ is presently being debated and will be voted upon, extending the provision from 45 days to 90 days. If passed, it is hoped that it will lead to more consistency and continuity of available help and support whilst victims hear about their conclusive grounds decision.³¹⁸ The provision for after care once a victim has been identified will also increase under the proposals from 14 days to 45 days. This move on support is a good proposal so that adequate arrangements can be sort for accommodation needs. For the first time, the definition of what assistance and support is will be clarified,³¹⁹ and 12 months’ support will be guaranteed in law under Section 48(B)(3) once a positive CGD has been made. It is hoped that, with the new provisions, it will encourage more victims to participate in referrals and make the Government more accountable for providing funded care.³²⁰ In terms of leave to stay in the UK, the State must ensure that a person is granted leave to remain for as long as necessary for that person to receive support.³²¹

³¹⁶ Home Office, “Review of the National Referral Mechanism for Victims of Human Trafficking,” November 2014 at 35.

³¹⁷ Modern Slavery (Victim Support) Bill [HL] 26th June 2017.

³¹⁸ The Bill has gone through the House of Lords and will return to the House of Commons on 23rd November 2018 for its second reading.

³¹⁹ See 48C Modern Slavery (Victim Support) Bill [HL] 26th June 2017.

³²⁰ In 2016, there were 1,440 adult potential victims who entered government-funded care as evidenced from “Modern slavery victims to receive longer period of support,” <https://www.gov.uk/government/news/modern-slavery-victims-to-receive-longer-period-of-support>, 26 October 2017.

³²¹ 48B Provision of assistance and support to victims of modern slavery, Modern Slavery (Victim Support) Bill [HL] 26th June 2017.

Victims receiving a Positive CGD is significant, but the broader issue for victims is regularising their immigration status. In fact, the US TIP Report highlights that once a CGD is made, “authorities typically deport foreign victims,”³²² which illustrate that victims identified as trafficked must regularise their immigration status through Asylum or Discretionary Leave. Regularising their immigration status will entitle victims to support and welfare. This is also a politically charged issue. The Home Office (HO) does not seem to address the long term needs of victims during the NRM. The Human Trafficking Foundation questions the motives of the HO:

“It almost seems as if the HO intentionally does not want to deal with the question of what to do with victims of trafficking once they have entered mainstream systems of support in the UK. As a consequence, victims are left in limbo and unable to move on from their trafficking.”³²³

It is important for this period of time to be extended as victims report that they feel let down by the fact that support is withdrawn after the 45 days. Without continuous support, it has been argued that victims are “still profoundly vulnerable and are left to negotiate on their own alongside the accessing of any mainstream support.”³²⁴ UK’s Anti-Slavery Commissioner, Kevin Hyland states:

“Improving efforts to identify potential victims so that individuals can be removed from situations of exploitation, protected from further harm and referred for appropriate care

³²² US TIP Report 2016 found Human Trafficking Foundation, “Day 46: Is there life after the Safe House for Survivors of Modern Slavery?” October 2016 at 13.

³²³ Human Trafficking Foundation, “Day 46: Is there life after the Safe House for Survivors of Modern Slavery?” October 2016 at 23.

³²⁴ Home Office, “Review of the National Referral Mechanism for Victims of Human Trafficking,” November 2014 at 34.

is essential. Support will be most effective when it is informed and guided by survivors' experience and expertise.”³²⁵

Victims without support after this break in the continuation of care may be exposed to being re-trafficked if they feel there are no support mechanisms in place to assist them, and any progress regards their mental and physical health may be interrupted and ended prematurely.

To protect the victim in terms of safeguarding their interests at the end of the NRM, an ‘individual needs assessment’ may be required to assess what care and support services they require once the support and services have been discontinued. This idea has been suggested in the case of *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD*,³²⁶ and should take place in four situations:

“First, when victims request DLR. Second there has to be an assessment made before deciding if the 14 day post conclusive decision period should be extended. Third, there are provisions (see part 24.5 of the Guidance) which require the Competent Authority when granting an extension to minute a summary of progress of the victim since the last review including reference to any mental health issue or compassionate circumstances, a brief action setting out what steps will be taken in the next period to progress the claim and a recommendation clearly setting out the argument for extending the recovery and reflection period further. Fourthly, similarly when refusing an extension, the Competent Authority must, amongst other things send a letter to the individual explaining the reasons for the refusal.”³²⁷

³²⁵ N. Winchester, House of Lords, Library Meeting, Modern Slavery (Victim Support) Bill [HL] (HL Bill 4 of 2017–19), 17 August 2017 at 2.

³²⁶ *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD* [2016] EWHC 942 (Admin).

³²⁷ *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD* [2016] EWHC 942 (Admin) at para 101.

At present, these assessments do not take place after the end of the identification process. Instead, the burden falls on the victim solely without the assistance or support from a support worker and therefore “the onus is on survivors being able to pro-actively seek help for themselves, or on limited and ad-hoc support that may be provided by a small number of NGOs who work independently of the Government contract.”³²⁸ There has been a call to introduce individual assessments to establish the needs of the victim at the start of the NRM process, but presently an assessment at two points within the NRM would seem most appropriate. The review recommends “providing support based assessment of the individual needs of the victim. Consideration should be given to entry and exit timescales, support following conclusive identification and the audit and inspection of support provision.”³²⁹ It seems that an assessment should take place at two points within the NRM process. One assessment should occur at the beginning of the referral process to establish what care is required for the 45 day period, and a further assessment should be undertaken at the end of the referral after the decision in order to establish what provisions are required in light of the decision made. Additional reporting and progress reviews have been recommended by the Home Office in their 5 year review to develop an outreach support service which would be available for “up to 12 months after the exit of an eligible victim, and to provide a system for monitoring and tracking service users for up to two years after exit from the service.”³³⁰ Again, these are included in proposals set out in the HL Bill. Concerns about the immigration system having too much control in decision making have been considered in a new pilot scheme in consultation with the Independent Anti-Slavery Commissioner. One proposal is to replace the existing process by creating a single unit responsible for decision making, employing an independent panel of experts to review all

³²⁸ C. Beddoe, L. Bundock, T. Jordan, “Life beyond the Safe House for Survivors of Modern Slavery in London, Gaps and Options Review,” Human Trafficking Foundation, July 2015 at 20.

³²⁹ Home Office, “Review of the national Referral Mechanism for Victims of Human Trafficking,” November 2014 at 8.

³³⁰ Home Office, “Review of the national Referral Mechanism for Victims of Human Trafficking,” November 2014 at 38 -39.

negative decisions which would be beneficial.³³¹ It may allay concerns that the present system is bias towards the State and create more trust and reassurance that victims will be heard and have the right to have their personal circumstances heard by an impartial group. This group could include a legal expert who can advise on the criminal and immigration law, a medical professional to consider the health of the victim and a decision maker.

The above suggestions may guarantee and safeguard the individual from the beginning of the NRM until the end of the process.

CONCLUSION

In this chapter, I have set out the different roles played by various organisations, and authorities involved in the referral and identification process. I have illustrated how the roles played in two approaches, a top down approach and a grassroots approach. Both serve different purposes.

The first part of the chapter discussed the challenges that a victim of trafficking has in either identifying themselves as a victim, being referred by a PA, or identified by a CA within a hostile anti- immigration environment. There are practical challenges for FRs, PAs and CAs to overcome.

Two approaches to meet the challenges of identification were discussed. A top down approach via practical guidance issued by the Home Office to staff outlined their responsibilities to notify a CA of a potential victim. Notification of a potential victim may not be in the best interests of the victim because if decision makers are unaware of how human trafficking occurs and that in some cases victims have no immigration status placing them at risk of deportation or at risk of

³³¹ "Modern Slavery Taskforce agrees new measures to support victims," <https://www.gov.uk/government/news/modern-slavery-taskforce-agrees-new-measures-to-support-victims>, 17 October 2017.

being re-trafficked. Additionally, guidance for charities and organisations who may come into contact with potential victims do not presently exist. Clarification and guidance on their role and responsibilities should be addressed, given the high possibility of contact of victims with TSOs. The role of an advocate to assist other organisations when potential victims are presented to them and to facilitate the submission of all relevant and required evidence about the individual may assist the decision maker and hopefully increase the numbers of potential victims becoming officially identified as trafficked victim status.

The top down approach highlighted the importance of public authorities distinguishing between making a referral to a CA and not becoming too involved in the identification process. This was argued to be difficult as referral and identification overlap on a practical level. Organisations cannot refer without making some sort of identification. To refer, there must be some degree of identification which needs to take place and this usually happens where authorities become aware of the signs of trafficking.

The grassroots approach led through increasing the levels of awareness illustrate the positive practical method of educating the public and wider civil society along with decision makers to increase the likelihood of trafficked victims being identified and in the process distinguished from other migrant groups. However, the lack of unaccountability of decision makers continues to be an issue and the pursuit of an advocate to help deliver and ensure CAs have all the relevant information to base a decision should be pursued to satisfy the duty of looking at the best interests of the trafficked victim.

In contrast, the grassroots approach requires investments to educate FRs to make them more aware of the signs of human trafficking and the role of mental health.

What is clear from my research is that there needs to be more cooperation between FRs and PAs in helping victims by working together to make a referral to a CA. The roles of FRs and PAs overlap and a collaborative approach to working would help build trust between agencies and FRs can encourage more victims to consent to being referred through the NRM.

To coordinate the two approaches, there does appear to be the justification for advocates who have the knowledge of how human trafficking occurs (especially through the migration crisis) and assist the potential victim. The potential victim would then have the protection of an advocate who could monitor the referral and identification process in order to facilitate the two approaches, and may also symbolise a check and balances approach to referral processes, leading to higher numbers of NRM positive CGDs.

The second part of the chapter showed that a NRM was introduced in 2009 to refer potential victims of human trafficking with a view to receiving 45 days support from the time that individuals received a reasonable grounds decision. It was shown that the numbers of EU and non EU nationals been granted CGD are lower than those from the UK, suggesting that nationality and the source country where victims are from continue to play a part in determining whether they receive a positive identification, or not. Immigration continues to be a powerful political issue, which presents challenges to those agencies interacting with potential victims of trafficking. This attitude does not appear to be changing anytime soon. However, despite the challenges and negativity towards migrants, there is a framework of guidance for front line professionals to be more aware of human trafficking and can contribute to more individuals being referred as potential victims. Unfortunately, decision makers remain unaccountable for their decisions which may be based on bias shown towards immigrants.

The third part of the chapter discussed the institutional defects in the design of the NRM, creating problems for individuals who are looking to be identified as a victim by the State.

Naturally, decision makers who work for agencies of the State may have some biases towards victims. State bias has been shown to possibly exist by the fact that the UKVI identifies less trafficked victims than those identified by the MSHTU. The issue of identification is dominated by the issue of immigration and not helped by an immigration entity who may make determinations on victims based on their nationality and immigration status. Potential victims may be placed at a disadvantage and exposed to the State within a negative political attitude to immigration. Victims are not given a right of appeal against decisions made by the State, which is detrimental to due process and can leave some victims feeling more like a criminal rather than a victim, especially if they are deported afterwards. Only by introducing impartiality within the NRM will there be fairness within the system between the State and the individual. One such way which was discussed was introducing FRs to greater training on human trafficking in order for them to make reasonable grounds decisions and take this determination away from the State. Whilst this sounds encouraging, an advocate would still be required to act for the victim when waiting for an outcome on a CGD. Once the 45 day period has elapsed it was found that the needs of victims were not been met and that in some specific circumstances the 45 day period and the 14 day period after the exit of the NRM can be extended. It would be reasonable for this period to be extended for a longer period to suit each victim in order for them to stand a chance of recovering from their ordeal. An advocate for victims may be required to provide support when victims are going to be referred to the NRM so that victims can be informed as to the procedure. An advocate is more likely to signal failings which affect the interests of victims, and in the long term help to change the system so that more victims can develop more confidence in the system so that more potential victims are not afraid to come forward, increasing the rates of identification.

I have argued that the NRM in its present form does not demonstrate that the State is adopting a victim centred approach to identification. I have examined how the gaps in protection

adversely affect the rights of victims. The existence of these flaws continue to compromise the trust and confidence which victims should have in the mechanism. It is in the interest of the State and its duty of them to treat each case on their own merit. However, the present system does not do this sufficiently. If a victim centred approach is adopted, it will benefit both victims and the State in the long term.

Broadly speaking, the above issues continue to take place behind a backdrop of increased cynicism towards migration, creating challenges for trafficked victims to be distinguishable from other groups of migrants and identified in their own right as victims of a global crime. Combatting the flaws within the NRM will not only enhance trust between the State and the victim, it may persuade more victims to come forward, to receive support which may empower them to recover from their ordeal.

Despite the existence of a NRM in place within the UK, there are other challenges for individuals who are victims of human trafficking which prevent them from being identified as trafficked victims and offered protection and assistance under the Council of Europe Convention. In addition to the problems associated with the NRM, victims of human trafficking encounter problems in being successfully identified from other groups of migrants, and victims often find themselves in a host of environments where they can be misidentified. These affect the obligation of States to protect victims from further harm. For example, they can be prosecuted as criminals for committing criminal offences during the period of exploitation. This will be the subject of the next chapter.

CHAPTER 4:

THE PROSECUTION OF TRAFFICKED VICTIMS

I. INTRODUCTION

The previous chapter examined the challenges victims face in being referred by civil organisations and identified via the National Referral Mechanism (NRM). This chapter will examine the way trafficked victims come into contact with the criminal justice system, and will evaluate whether trafficked victims are misidentified as offenders and unfairly prosecuted by the State for criminal offences whilst being coerced and controlled by traffickers into that conduct rather than recognised as victims. This situation where the State sanctions victims prevents correct appropriate and deeper identification and results in traffickers escaping criminal liability.

I will discuss whether States under international law are under a clear legal obligation not to prosecute victims. This section of the chapter will also briefly examine how the international obligations have been incorporated by each jurisdiction within the UK, which will involve discussing statutory defences within anti-trafficking legislation from England and Wales, Northern Ireland and Scotland. We will see how Scotland differs from other jurisdictions because there is no express statutory defence when the defendant is a victim of trafficking, but instead has a presumption of non-prosecution. Despite the NRM being a UK wide mechanism, different jurisdictions within the UK have different approaches to non-prosecution. This has a different legal consequence for trafficked victims depending which UK criminal law jurisdiction is dealing with the criminal allegation. This chapter will argue that this approach has a detrimental effect on how one victim may be treated in one part of the UK, compared to another. It will highlight how these inconsistencies may make it difficult for the UK to

demonstrate a consistent victim centred approach to protecting trafficked victims from prosecution.

This chapter will argue that trafficked victims should not to be prosecuted because they lack the requisite moral culpability to justify the imposition of the criminal sanction. We will see that in principle such individuals do have a number of defences available to them if they are charged with criminal offences. However, it will be argued that the defences available to victims are inadequate in a range of different ways and thus fail to provide such persons with the protection. We will see that the legal defences which are available to trafficked victims do not provide victims with sufficient protection against criminal liability.

The final section of this chapter will argue that the best way to protect a trafficked victim to not be in the position where they have to rely on defences and not be prosecuted in the first place. The chapter will examine how important the decision by prosecutors to prosecute is, and the crucial role of prosecutors and defence representation play in identifying trafficked victims before a trial starts. We will see how there is still a lack of awareness of human trafficking within the legal profession, relying on Third Sector Organisations (TSOs) to help protect the interests of victims. I will show how the identification of victims by prosecutors, defences and judges has often occurred too late in criminal proceedings, meaning victims have been prosecuted by the State rather than being referred and identified by the NRM. I will examine existing gaps in the current procedure which could be filled by a trafficking advocate who is available to prosecutors to ensure that the decision to prosecute is the correct one, taking into account whether an individual is a trafficked victim. Victims deserve to have their criminal liability diminished if they have been exploited and held under duress and coerced to commit criminal offences and therefore they should not be held morally culpable.

By the end of this chapter, it will be clear to see how victims have been prosecuted, whilst the traffickers are able to get away with crimes of great severity. To combat human trafficking – and indeed associated crime committed also by victims – the State must concentrate on prosecuting those traffickers who are truly culpable. Traffickers should be held accountable for their actions via or by way of prosecution. Furthermore, it is not in the interest of the State to sanction a victim, especially when they have already been exploited by a non-state actor. It is neither in the interest of the victim or the State to have inadequate defences, because the fear of prosecution will prevent potential victims from coming forward. Where prosecutions are taking place at the expense of referrals to the NRM shows that the State is not presently adopting a victim centred approach to identifying trafficked victims. It will be shown how the UK having differing approaches to non-prosecution remains problematic, and is not in the interests of victims who are found in England, Wales or Northern Ireland, rather than Scotland where the presumption of non-prosecution exists. The inconsistencies shown do not demonstrate a united approach from the UK in persuading more victims to come forward, nor do they effectively protect victims from criminal prosecution.

II. NON-PROSECUTION OF TRAFFICKED VICTIMS - THE INTERNATIONAL OBLIGATIONS

There are three sets of international law obligations bearing upon the prosecution and/or punishment of victims of trafficking who may commit criminal offences as consequence of the situation they find themselves in. Firstly, I will look at the approach from the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*³³² followed by the regional approach set out in the *Council of Europe Convention on Action*

³³² UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, 2000.

against Trafficking in Human Beings.³³³ Finally I will examine the European Union's approach to this issue through *Directive 2011/36/EU in 2011 on preventing and combatting trafficking in human beings and protecting victims*. We will see that these instruments do not adopt the same approach to the issue. The matter is complicated by the fact that non-prosecution is often referred to as non-criminalisation, non-punishment and non-prosecution in different international obligations with varying approaches, complicating the issue of non-prosecution.

In this chapter I will refer to the term 'non-prosecution' more than 'non-criminalisation' and 'non-punishment' in order to highlight the risk to victims being prosecuted by the State for offences carried out under duress whilst being exploited.

A. The United Nations Protocol

The United Nations (UN) Protocol UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children mentions the issue of criminalisation. Article 5 states:

“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.”³³⁴

The Protocol focuses upon the obligation of States to legislate for the criminalisation of human trafficking, rather than offering protection to trafficked victims from the criminal law. This approach is understandable, given a State's main function is to protect its citizens from threats

³³³ The Council of Europe Convention on Action against Trafficking in Human Beings was adopted by the Committee of Ministers of the Council of Europe on 3 May 2005, to help combat trafficking in human beings by seeking to strengthen protection by considering the human rights perspective. For further information, see <https://www.coe.int/en/web/anti-human-trafficking/about-the-convention>.

³³⁴ Article 5 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, 2000.

and the obvious way of doing this is to criminalise acts as a means of a deterrence. Furthermore, any victim centred approach advocated by victims and activists will be met with resistance from States who will favour a crime control approach. However, it has been recognised that in some situations, trafficked victims are often prosecuted for offences due to their illegal entry in another country.³³⁵ Protection for victims can be evidenced from the UN who issued *Recommended Trafficking Principles and Guidelines for trafficked victims*.³³⁶ These guidelines advocate that victims should not be prosecuted for offences whilst committed under exploitation:

“Trafficked persons shall not be detained, charged or prosecuted for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.”³³⁷

The guidelines are more explicit in protecting victims than the UN Protocol. A second example of soft law is the *Model Law against the Trafficking in Persons drafted by the UN Office for Drugs and Crime (UNODC)*.³³⁸ Specifically, Article 10 of the Model Law recognises the

³³⁵ The non-punishment principle has also been recognised in the UN Convention Relating to the Status of Refugees under Article 31.1 where “Parties shall not impose penalties on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened.” It has also been recognised by the General Assembly UN (UN Resolution on Traffic in Women and Girls, A/RES/55/67, 31 January 2001 at para 6, the Brussels Declaration on Preventing & Combatting Trafficking in Human Beings, 14981/02, 29 Nov 2002 at para 7, and in the Miami Declaration of Principles on Human Trafficking, 10 Feb 2005 at para 28.

³³⁶ UN Recommended Principles and Guidelines on Human Rights and Human Trafficking (UN Doc E/2002/68). These are regarded as soft law and are not binding upon any State. However, they do provide guidance for States to consider when looking at promoting and integrating human rights into policies and anti-human trafficking laws.

³³⁷ UN Recommended Principles and Guidelines on Human Rights and Human Trafficking (UN Doc E/2002/68) at Principle 7.

³³⁸ The UNODC Model Law against Trafficking in Persons was developed by the United Nations Office on Drugs and Crime (UNODC) in response to the request of the General Assembly to the Secretary-General to promote and assist the efforts of Member States to implement the United Nations Convention against Transnational Organized Crime and the Protocols. It was also developed to assist States in implementing the provisions contained in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing that Convention.

criminal offences victims may be involved in but also aims to protect trafficked victims by ensuring that they:

“...are not prosecuted or otherwise held responsible for offences, be it criminal or other, committed by them as part of the crime of trafficking, such as working in or violating regulations on prostitution, illegally crossing borders, the use of fraudulent documents and so on.”³³⁹

We can clearly see how the victim centred approach is recognised by the UN. Furthermore, the Organisation for Security and Co-operation in Europe³⁴⁰ (OSCE) advocates that “such legislation should take into account a human rights approach to the problem of human trafficking, and include a provision for the protection of the human rights of victims, ensuring that victims of trafficking do not face prosecution solely because they have been trafficked.”³⁴¹ Nevertheless, States continue to hold the power as to whether they take a punishable view against migrants who may be trafficked or choose to take moral responsibility to identify them.

B. The Council of Europe

In 2005, the Council of Europe (CofE) introduced the *Convention on Action against Trafficking in Human Beings*,³⁴² which protects victims by explicitly addressing the complex issue of non-criminalisation of victims. Article 26 states:

³³⁹ Article 10 Model Law against Trafficking in Persons.

³⁴⁰ The OSCE is an intergovernmental organisation created in the 1950s with 57 participating States to combat security concerns via decision making bodies. See <https://www.osce.org/>

³⁴¹ OSCE Ministerial Council, Decision No1, Enhancing the OSCE’s Efforts to Combat Trafficking in Human Beings, MC (8) DEC/1 (Vienna 28 Nov 2000) at para 9.

³⁴² The Council of Europe Convention on Action against Trafficking in Human Beings was adopted by the Committee of Ministers of the Council of Europe on 3 May 2005, to help combat trafficking in human beings by seeking to strengthen protection by considering the human rights perspective. For further information, see <https://www.coe.int/en/web/anti-human-trafficking/about-the-convention>.

“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.”³⁴³

The non-prosecution principle is complex because “States have discretion in as much as it does not stipulate that States must not impose penalties.”³⁴⁴ It has been argued that the “non-punishment of victims for offences they have committed as a consequence, or in the course, of being trafficked is an essential element of such a human rights approach.”³⁴⁵ However, the provision in Article 26 makes reference to ‘penalties’ but the term has not been defined. It is not clear as to what these penalties are or what they are referring to. Article 26 neither distinguishes between the terms of non-punishment and non-criminalisation. What is clear in terms of its effect is that there is no presumption of immunity from prosecution, as stated in *R v LM, MB, DG, Betti Tabot and Yutunde Tijani*,³⁴⁶ which clarified Article 26:

“It does not say that no trafficked victim should be prosecuted, whatever offence has been committed. What it says is no more, but no less, than that careful consideration must be given to whether public policy calls for a prosecution and punishment when the defendant is a trafficked victim and the crime has been committed when he or she was in some manner compelled to (in the broad sense) to commit it. Article 26 does not require a blanket immunity from prosecution for trafficked victims.”³⁴⁷

It has been argued that “police investigators need to ensure that when they identify potential victims they should take a victim centred approach and start with the premise that the person

³⁴³ Article 26 Council of Europe Convention on Action against Trafficking in Human Beings, 16 May 2005.

³⁴⁴ OSCE Policy and Legislative Recommendations towards the effective implementation of the non-punishment provision, in consultation with the Alliance against Trafficking in Persons Expert Co-ordination Team, Vienna, 2013 at 12.

³⁴⁵ OSCE’s Efforts to Combat Trafficking in Human Beings, MC(8). Dec/1 (Vienna, 28 Nov 2000) at para 9.

³⁴⁶ *R v LM, MB, DG, Betti Tabot and Yutunde Tijani* [2010] EWCA Crim 2327.

³⁴⁷ *R v LM, MB, DG, Betti Tabot and Yutunde Tijani* [2010] EWCA Crim 2327 at para 13.

in the exploitative situation is a potential victim and not a criminal.”³⁴⁸ Furthermore, if a risk of prosecution remains, it may prevent other potential victims from coming forward to cooperate with authorities.³⁴⁹

Regrettably, whilst it does not define ‘penalties,’ the possibility of a prosecution taking place exists.³⁵⁰ It would have been more useful to determine what is meant by penalties and this could have been done within the explanatory notes to the Convention. However, Article 26 does recognise that trafficked victims are often compelled to commit criminal offences.

C. The European Union

Two years after the UN Protocol was drafted, the European Union (EU) drafted their first legislation on combatting trafficking. The Framework Decision on Combatting Trafficking in Human Beings,³⁵¹ focussed on addressing the seriousness of the crime of human trafficking by obligating States to impose sanctions on offenders.³⁵² This Directive was criticised for not providing effective cooperation between States and agencies, and was subsequently replaced by *Directive 2011/36/EU in 2011 on preventing and combatting trafficking in human beings and protecting victims*. Article 8 of this Directive (which is currently binding in UK law) imposes a specific obligation not to prosecute or impose penalties on victims. Article 8 further states:

³⁴⁸ OSCE Resource Police Training Guide: Trafficking in Human Beings, TNTD/SPMU Publication Series Vol 12, Vienna, July 2013 at 126.

³⁴⁹ OSCE Policy and Legislative Recommendations towards the effective implementation of the non-punishment provision, in consultation with the Alliance against Trafficking in Persons Expert Co-ordination Team, Vienna, 2013 at 12.

³⁵⁰ The Council of Europe Explanatory Report at para 274 states that “Each Party can comply with the obligation established in Article 26, by providing for a substantive criminal or procedural criminal law provision, or any other measure, allowing for the possibility of not punishing victims when the legal requirements are met.”

³⁵¹ Council Framework Decision 2002/629/JHA.

³⁵² “EU urges higher priority on Trafficking in Women and Children” Europa Press Release IP/01/325, March 7 2001.

“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.”³⁵³

In contrast to the CofE Convention, the EU Directive does distinguish the two issues of non-prosecution and penalties, and required victims to be protected by the Member State:

“Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking. The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators.”³⁵⁴

It also recognises that victims should not be prosecuted for offences committed under duress. However it does not compel non-prosecution, but rather requires that non-prosecution, or the non-imposition of penalties is an option available to the relevant authorities. It has been argued that “the obligation of non-punishment is therefore ultimately tied to the State’s obligation to identify, protect and assist victims of trafficking,”³⁵⁵ which can be seen from the case of

³⁵³ Article 8 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

³⁵⁴ European Recital to Directive 2011/36/EU, European Union, Op.Cit at para 14.

³⁵⁵ OSCE Policy and Legislative Recommendations towards the effective implementation of the non-punishment provision, in consultation with the Alliance against Trafficking in Persons Expert Co-ordination Team, Vienna, 2013 at 15.

*Rantsev v Cyprus and Russia*³⁵⁶ where “the State’s human rights obligation includes having in place legislation adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking.”³⁵⁷

Conclusion

As it has been seen from the discussion of the international legislation above, there is a lack of consistency between each legal instrument on this issue, making the term non-criminalisation less transparent and indistinguishable from similar issues of non-punishment and non-prosecution. This contributes to a lack of clarity. The UN Protocol obligates each State to criminalise the act of human trafficking, but does not obligate each State to legislate for the non-prosecution of trafficked victims. Soft law evidenced from the Recommended Guidelines and Principles and the Model Law on Human Trafficking offer victims stronger protection from prosecution if States choose to adopt this guidance. The CofE offers a more victim centred approach to combatting human trafficking and explicitly provides for the obligation of each State to offer protection from punishment and not imposing penalties on trafficked victims. However, understanding what amounts to non-punishment remains problematic. The confusion leads to a lack of distinction between what is meant by non-punishment and how non-prosecution fits in with the CofE’s intent. In contrast, the approach seen from the EU Directive is more explicit in their protection of trafficked victims from prosecution, and punishment, but even this measure does not prohibit prosecution or the imposition of penalties.

As far as international law obligations are concerned then it will be appreciated that the relevant measures do not provide a uniform approach, and at best they require the possibility of non-

³⁵⁶ *Rantsev v Cyprus and Russia*, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010.

³⁵⁷ *Rantsev v Cyprus and Russia*, Application no. 25965/04, Council of Europe: European Court of Human Rights, 7 January 2010 at para 284.

prosecution or the non-imposition of penalties being available. At present, there is a need for “clear and specific legislation and policy guidance to support full and effective implementation of the non-punishment principle.”³⁵⁸ Consequently, there is plenty of room for manoeuvre for States with a large degree of discretion to draft their own domestic laws whilst still being compliant with their obligations. Thus, a State would be in compliance with its obligations in international law and EU law in any of the following situations, when a potential trafficked victim comes to the attention of the State. It then has the following options. Firstly, the State can choose not to prosecute a victim. Secondly, they can choose to prosecute and make defences available which may help trafficked persons secure an acquittal. Thirdly, a state could prosecute the person, and upon a finding of guilt, may permit the trafficking context to be taken into account for the purposes of sentencing so as to reduce or negate any punishment which would ordinarily be applied if that context did not exist.

The next part of this chapter will examine how the international legal obligations have been incorporated differently in the UK, looking at the jurisdictions of England and Wales, Scotland and Northern Ireland.

D. The Implementation of International Obligations into Domestic Law within the UK

This section will examine how the obligations discussed above have been incorporated into domestic law by each of the countries within the UK. Unfortunately, the inconsistencies seen at the international level mirror those seen within how the international obligations have been incorporated into within legislation and policy in Scotland, England & Wales and Northern Ireland.

³⁵⁸ OSCE Policy and Legislative Recommendations towards the effective implementation of the non-punishment provision, in consultation with the Alliance against Trafficking in Persons Expert Co-ordination Team, Vienna, 2013 at 29.

Despite the NRM being a UK wide mechanism, the law on defences differs according to where in the UK the trafficked victim commits a crime. This will affect how the authorities will treat a potential victim from a criminal law perspective. There is an inconsistency as to how trafficked victims may or may not be prosecuted for offences, depending upon the part of the UK the offence has been committed in.

(i) **Scotland**

Scotland has a presumption against prosecution, as seen from Section 8 of the *Human Trafficking and Exploitation (Scotland) Act 2015* which requires “the publication of guidelines for prosecutors as to the prosecution of trafficking victims for offences resulting from their exploitation.”³⁵⁹ This approach meets with what the OSCE advocate requiring “States with systems of mandatory prosecution must amend their laws and introduce a specific non-punishment provision to enable the non-prosecution of victims, or the termination of prosecution at an early stage.”³⁶⁰ The Lord Advocate has the obligation to produce such guidelines and has set out the Instructions for Prosecutors when Considering the Prosecution of Victims of Human Trafficking and Exploitation:

“These set out that if there is sufficient evidence that a person aged 18 or over has committed an offence and there is credible and reliable information to support the fact that the person a) is a victim of human trafficking or exploitation; b) has been compelled to carry out the offence; and, c) the compulsion is directly attributable to being the

³⁵⁹ <http://www.gov.scot/Topics/Justice/policies/reducing-crime/human-trafficking/HumanTraffickingandExploitationScotlandAct2015>.

³⁶⁰ OSCE Policy and Legislative Recommendations towards the effective implementation of the non-punishment provision, in consultation with the Alliance against Trafficking in Persons Expert Co-ordination Team, Vienna, 2013 at 32.

victim of human trafficking or exploitation, then there is a strong presumption against prosecution of that person for that offence.”³⁶¹

The Human Trafficking and Exploitation (Scotland) Act 2015 was unanimously passed by the Scottish Parliament in October 2015 and received Royal Assent in November 2015. The recognition that some trafficked victims may also be offenders was explicitly highlighted within the preamble which acknowledges that:

“the list of offences which victims of human trafficking or exploitation may commit is constantly evolving. The most common types of offences which victims commit in the process of trafficking or exploitation include immigration offences and possession of false identity documents. Prosecutors should also be alert to the fact that victims of human trafficking or exploitation may themselves commit human trafficking or exploitation offences in relation to other individuals.”³⁶²

There is no statutory defence for trafficked victims to rely upon here as there is a presumption against prosecution if it can be established that the individual has been trafficked and compelled to commit criminal acts.

Therefore, if there is enough evidence to establish that the person is a victim of trafficking and has been compelled to commit an offence, attributable to being a victim, then there is a strong possibility that the person will not be prosecuted for this offence in Scotland.

(ii) Northern Ireland

The legislation relating to the issue of human trafficking can be found from the *Northern Ireland Human Trafficking and Exploitation (Criminal Justice & Support for Victims) Act*

³⁶¹ Lord Advocate’s Instructions for Prosecutors when considering Prosecution of Victims of Human Trafficking and Exploitation at para 8.

³⁶² Preamble to the Human Trafficking & Exploitation (Scotland) Act 2015 at paragraph 4.

2015. In contrast to the Scottish legislation, there is a statutory defence available for victims of slavery or human trafficking victims. Where adults seek to rely upon a defence under Section 22, the defence is available where:

“The victim is compelled to do the act which amounts to an offence, that compulsion is attributable to slavery or exploitation, and a reasonable person in the victim’s situation and with the same characteristics as the victim would have no realistic alternative to doing the act.”³⁶³

The existence of a defence, in contrast to the Scottish omission, is that the circumstances of why the act was committed is adopted. The approach is more subjective in the fact that the focus is on the victim, not whether they should be prosecuted or not, but what the reasons are to excuse such an offence being committed. Therefore, if victims are charged with an offence and is proceeding to trial, there is a defence available for victims.

(iii) **England & Wales**

Also in contrast to Scotland, there are both prosecution guidelines for human trafficking and a specific defence available for victims found in England & Wales. *The Modern Slavery Act 2015*, provides that:

“A person is not guilty of an offence if—

(a) the person is under the age of 18 when the person does the act which constitutes the offence,

³⁶³ Section 22 Northern Ireland Human Trafficking & Exploitation Act 2015.

(b) the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation, and

(c) a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act.”³⁶⁴

The statutory defence is a non-punishment provision and has been raised in the case of *Gega v Regina*.³⁶⁵ The remaining focus will be on the situation in England and Wales on the basis that they have both prosecution guidance (through the Crown Prosecution Service) (CPS) and a statutory defence contained within Section 45 of the *Modern Slavery Act*. A further detailed examination of the approaches from each jurisdiction and the relevant legislation to assess its effectiveness for trafficked victims to rely upon defences will take place shortly.

Conclusion

As we have seen, there are inconsistencies as to how the legal obligations have been incorporated domestically within the UK offering different legislation and guidelines for trafficked victims found within England and Wales, Scotland and Northern Ireland.

The approach in Scotland emphasises a strong presumption against prosecution without the need to legislate for a specific legal defence. This is in contrast with the path Northern Ireland, and England and Wales have taken has taken by specifically creating a statutory defence in addition to the decision to prosecute. The way in which victims will be treated by each country

³⁶⁴ Section 45(4) Modern Slavery Act 2015.

³⁶⁵ *Gega v Regina* [2018] EWCA Crim 667. See this judgment regard the burden of proof required to be satisfied when using the statutory defence. The defendant will raise the evidential burden and it is for the prosecution to disprove it.

remains a matter of luck if a victim comes to the attention of an authority in Scotland which offers a greater deal of protection, rather than a victim found elsewhere.

From a victim's perspective, a victim who has been arrested in Scotland may feel reassured about the presumption against prosecution but, on the other hand, there will be victims who end up in a situation where they are still prosecuted. In these situations, victims in all parts of the UK will benefit from defences when a decision to prosecute is taken. Nevertheless, my argument is that victims should not be prosecuted and consequently should not need to rely on a statutory or common law defences, because victims are not morally culpable for their action because they are acting under duress. In any case, victims should be referred to the NRM, as a diversion away from prosecution.

The contrast in approach between jurisdictions mirrors the inconsistencies at the international level and highlights the wide discretion, varying interpretations and practical approaches and defences that each jurisdiction has when dealing with this complex issue of non-punishment and taking a decision to prosecute or not.

There is disparity between victims committing offences under duress in Scotland and the rest of the UK. In jurisdictions where no presumption against non-prosecution exists, it is not fair for victims to be prosecuted. It poses a wider question of having a UK wide NRM which makes no distinction between countries, but the issue of prosecuting victims is a matter of policy decided by each jurisdiction, with some victims protected more than in other areas.

The next part of this chapter will look at whether it is right to prosecute trafficked victims for offences committed under duress, before looking at the effectiveness of legal defences available to trafficked victims in situations where they are compelled to commit criminal acts.

III. THE ILLEGITIMACY OF PROSECUTING TRAFFICKED VICTIMS

The previous section examined the international obligations regards non-prosecution of trafficked victims, and how each country has a different approach to prosecuting victims. This section will examine the illegitimacy of prosecuting trafficked victims to the extent that there has been “a failure to identify a person who has committed a criminal offence as a trafficked victim, which is likely to result in the victim being treated as a normal offender, one who would normally be required to take full legal responsibility, including being sanctioned for their acts.”³⁶⁶ The moral issue of whether trafficked victims should be prosecuted in the first place is an important question to answer. Where the State wrongly prosecutes victims, it exposes victims to the criminal law which illustrates an approach far from the victim centred one this thesis advocates. Where victims are prosecuted, it deprives them of the opportunity to be identified as a victim of trafficking and to be protected as a victim of crime. Consequently, victims are left without the help and support which may empower them to come to terms with their ordeal. The UK thus fails to in any way adequately satisfy its commitment to victims or to fulfil the moral obligation it has towards human trafficking victims in particular.

A strong argument can be made that trafficked victims should not be prosecuted in any circumstances. This is based on the following reasons:

- 1) I do not accept that trafficked victims are morally culpable for any type of offence, because of how the high degree of pressure placed upon the victim.³⁶⁷ Coercion and

³⁶⁶ OSCE Policy and Legislative Recommendations towards the effective implementation of the non-punishment provision, in consultation with the Alliance against Trafficking in Persons Expert Co-ordination Team, Vienna, 2013 at 16.

³⁶⁷ As the OSCE Policy and Legislative Recommendations report above states at 125, “it is often a deliberate strategy of the traffickers to expose victims to the risk of criminalisation and to manipulate and exploit them for criminal activities.”

control methods used by the trafficker may prevent the victim from having free will.

These liberties may have been taken away from the victim by the trafficker.³⁶⁸

- 2) I accept that in some cases there will be an innocent victim who may be affected by the actions of the trafficked victim. Notwithstanding the rights of the victim suffering such a crime, we should not be distracted from the fact that the trafficked victim has been deceived or coerced into that situation meaning that the real wrongdoer remains the trafficker.³⁶⁹
- 3) Trafficked victims are often punished by traffickers if they do not consent to being exploited. I do not want the trafficked victim to be sanctioned by the State through the criminal justice system as I believe that this process amounts to secondary punishment.
- 4) The criminal justice system should spend more time and allocate more resources to prosecuting traffickers, so that the victim can play a significant role in helping the police.
- 5) The defences available to trafficked victims to excuse their liability do not protect victims adequately.

There are many types of situations in which trafficked victims will find themselves being exploited which can result in them being compelled to commit additional criminal offences:

³⁶⁸ Also, “the rationale for non-punishment is that whilst on the face of it a victim may have committed an offence, the reality is that the trafficked person acts without real autonomy.” OSCE Policy and Legislative Recommendations towards the effective implementation of the non-punishment provision, in consultation with the Alliance against Trafficking in Persons Expert Co-ordination Team, Vienna, 2013 at 10.

³⁶⁹ See OSCE Policy and Legislative Recommendations towards the effective implementation of the non-punishment provision, in consultation with the Alliance against Trafficking in Persons Expert Co-ordination Team, Vienna, 2013 at 10 which argues that whilst victims are prosecuted, the traffickers act with impunity.

“The increasing global prevalence of human trafficking for enforced criminality can expose victims of trafficking to committing a multitude of offences such as, but not limited to theft, pick-pocketing, drug trafficking, cannabis cultivation and fraud.”³⁷⁰

Some of the offences will be the same as for the reason that they have been trafficked, whilst other offences which trafficked victims are compelled to do may be different to their original purpose of exploitation. Many of these offences will be less serious in nature, such as cultivating cannabis and obtaining false documents. These offences are often victimless crimes which result in the trafficker benefiting from the crime whilst exposing the victim to an arrest and prosecution. For instance, a victim may have been deceived into taking work in the UK, only to find that they are being exploited and forced to work to cultivate cannabis. In these situations where the offence is less serious and is victimless, and as long as there is a direct link between the purpose of exploitation and the coercion placed upon the victim, I do not believe that in these circumstances, victims should be prosecuted, and all opportunities to divert from prosecution should be taken. Consequently, in my opinion, a presumption against prosecution, as seen in Scotland must therefore be adopted. Furthermore, I believe that more time and resources should be spent on investigating and tracking down the traffickers as opposed to prosecuting and punishing victims for less serious offences.

In contrast to offences committed as the main purpose of their exploitation, there may be circumstances where trafficked victims in addition to the offences committed as part of their exploitation are then coerced and compelled into committing more serious crimes. In these cases, I argue that it would not be justified for them to be prosecuted even though there is an issue of public interest attached to serious crimes. This view is taken for four reasons.

³⁷⁰ OSCE Resource Police Training Guide: Trafficking in Human Beings, TNTD/SPMU Publication Series, Vol 12 at 125.

The first reason is that a trafficked victim cannot be held to be morally culpable for the offences that they commit under duress. John Robinson understands culpability to mean:

“...blameworthiness, and I understand culpability to operate in two distinct, if intimately related, spheres: the moral and the legal. In both spheres paradigmatic culpability involves three elements: wrongful conduct, actual or constructive awareness of its wrongfulness, and a reasonable level of control over one's own conduct.”³⁷¹

Where serious and less serious crimes are committed by trafficked victims, there will often be coercion from traffickers. In any case, where there is coercion, a trafficked victim cannot be held morally culpable. In parallels drawn in cases of domestic violence, the external factor can be the slow burn of violence which victims experience before the victim retaliates which appears to be seen as a sudden loss of control. Consequently, it will be unfair to judge that the moral culpability of a trafficked victim will be determined by the type of criminal act which is committed.

Secondly, the safety of the trafficked victim needs to be guaranteed as a trial may expose the trafficked victim to relive the ordeal that has been endured. It would make the threat of reprisals from the trafficker more likely if the victim were to disclose who was compelling the victim to commit the offences. Greater forms of protection will be required for the trafficked victim but this is a paradoxical situation, because the State views the victim as an offender. This is a complicated issue because many trafficked victims do not trust authorities or do not know where to access services.³⁷² This also adds urgency to the need to correctly identify trafficking

³⁷¹ J. Robinson, “Crime, Culpability & Excuses,” (2012) *Notre Dame Journal of Law, Ethics and Public Policy*, Volume 2, Issue 1 at 2.

³⁷² See C. Rijken, Jan van Dijk & F. Klerx-van Mierlo, “Trafficking Victims in The Netherlands An exploratory study,” (2013), International Victimology Institute, Tilburg University.

victims as the criminal justice system is recognised as bad at recognising the vulnerabilities of perpetrators.³⁷³

Thirdly, the issue of how traffickers use coercion and control tactics to make victims commit offences by traffickers and the effects this has on victims has been examined earlier in the thesis. These tactics need to be reconsidered here too in light of the defences which are available to victims. If the circumstances are that the victim has been exposed to lengthy and systematic forms of abuse during exploitation, it will be unfair for victims to be punished a second time, this time, by the State prosecuting them. It has been argued that it is vital that the State recognises the individual as a victim instead of sanctioning the victim:

“The criminalisation of trafficked victims may be tantamount to persecution of victims by the State: it fails to recognise trafficked victims s victims and witnesses of those serious crimes and exacerbates their victimisation and/or trauma by imposing on such persons State-imposed, unjust punishment.”³⁷⁴

Fourthly, I believe that despite the State arguing that there are sufficient defences available to trafficked victims, it will be shown that the present range of defences do not offer enough protection from the criminal law. It will be shown that the common law is not specific enough when discussing its effectiveness to victims seeking to rely it. The statutory defence in England & Wales is not broad enough to rely upon because it has limitations in circumstances which victims finds themselves in. It will be shown that the present legal defences place victims at a

³⁷³ For example, see S. Fairclough, “Barriers to vulnerable defendants giving evidence by live link in Crown Court trials,” *The International Journal of Evidence and Proof* (2017), 21(3) 209.

³⁷⁴ OSCE Policy and Legislative Recommendations towards the effective implementation of the non-punishment provision, in consultation with the Alliance against Trafficking in Persons Expert Co-ordination Team, Vienna, 2013 at 10.

distinct disadvantage within the criminal justice system. As the next section will illustrate they presently offer challenges, not possibilities.

In summary, I have argued that a position where trafficked victims are not culpable, criminal liability should not follow.³⁷⁵

Lord Thomas states that trafficked victims can be excused for their criminal actions whilst being exploited in three ways which are “through the common law of duress, prosecution guidelines; and the power of the court to stay a prosecution for an abuse of process.”³⁷⁶ Additionally, for trafficked victims identified in England and Wales and Northern Ireland, there is a fourth way that victims can pursue if prosecuted and this is the possibility of using the statutory defence.³⁷⁷ The next section will examine the current legal defences available to trafficked victims in various situations who are prosecuted, including the statutory defence which is problematic.

IV. DEFENCES – THE PRESENT SITUATION

I have advocated my view that trafficked victims should not be prosecuted because the defences do not provide enough protection for victims. In this section, I will defend this argument which can be justified by showing that the defences do not sufficiently appreciate the psychological harm victims are subjected to from being coerced and controlled. Neither do they acknowledge the role which mental health conditions play in understanding how they affect the culpability of the victim.

³⁷⁵ It may be the case that we have to look into circumstances of every given crime and decide to what extent how much of the victims’ free will was undermined. There are difficulties where deception, coercion and control are minor, but still result in crimes being committed. This is why examining the circumstances of every crime is required.

³⁷⁶ *R v Joseph* [2017] 1 Cr App R 33 486 at para 20(i).

³⁷⁷ For England & Wales, see Section 45 Modern Slavery Act 2015 and for Northern Ireland, see Section 22 Northern Ireland Trafficking & Exploitation Act 2015.

A. Serious Offences which involve Murder or Serious Harm to Another Person

The nature of being exploited means that trafficked victims will often find themselves in precarious situations.³⁷⁸ These circumstances are similar to those situations where victims of domestic violence experience prolonged abuse, or in a moment of rage the victim takes action against their aggressor. One such example is the recent case in the US where a trafficked victim, Cyntoia Brown was convicted after killing a man who paid her for sex when she was 15 years old.³⁷⁹

Where murder is committed, the trafficked victim will be able to rely on partial defences³⁸⁰ to excuse the act in question.

There are three partial defences in UK law. The first is loss of self-control, the second is diminished responsibility and the third is a suicide pact where one person agrees to kill another on the agreement that they will both die together.³⁸¹ Success in raising a partial defence will reduce the charge from murder to manslaughter. Only the first two partial defences are relevant from the perspective of trafficked victims.

(i) Provocation and a Loss of Control

The law on provocation³⁸² was replaced with the law on loss of control in 2009. A Loss of Control has been defined in Section 54 of the Coroners and Justice Act 2009 which states:

³⁷⁸ Abuse of this nature will include physical, sexual and psychological abuse.

³⁷⁹ S. Raphelson, National Public Radio <https://www.npr.org/2017/12/01/567789605/cyntoia-brown-case-highlights-how-child-sex-trafficking-victims-are-prosecuted>.

³⁸⁰ A partial defence is a defence which does not excuse the defendant's action entirely and when pleaded successfully will reduce a conviction, ie from murder to manslaughter.

³⁸¹ Section 4 Homicide Act 1957.

³⁸² The old law on provocation can be found in Section 3 Homicide Act 1957.

“(1) Where a person (“D”) kills or is a party to the killing of another (“V”), D is not to be convicted of murder if—

(a) D's acts and omissions in doing or being a party to the killing resulted from D's loss of self-control,

(b) the loss of self-control had a qualifying trigger, and

(c) a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.”³⁸³

Where the defence raises this defence, it will be for the prosecution to prove beyond reasonable doubt that one of the elements above is absent. Within this defence, there is a subjective and an objective test which must both be satisfied. The subjective test can be satisfied where the defence submits evidence to prove that there was provocation which led to the loss of control. This is known as a qualifying trigger. Section 55 states two qualifying triggers, one from Section 55(3) and the other in Section 55(4). Either can be advanced by the defence:

“(3) This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.

(4) This subsection applies if D's loss of self-control was attributable to a thing or things or said (or both) which—

(a) constituted circumstances of an extremely grave character, and

(b) caused D to have a justifiable sense of being seriously wronged.”

³⁸³ Section 54 Coroners and Justice Act 2009.

The first trigger in Section 55(3) comprises a subjective requirement, where the D must show that there was a fear of serious violence, resulting in serious bodily harm which made the person lose self-control. Section 55(3) is helpful to trafficked victims who particularly are experiencing sexual exploitation as this “is intended to be employed in the context of abused women who kill their abusers in fear of future violence.” The case of *R v Ahluwalia*³⁸⁴ illustrated that the jury was able to take into account the past history of the violent relationship in order to put into context the acts committed by the abused person, which led to the abused killing the abuser. Moreover, testimony suggest that most trafficked victims live in fear of being hurt if they do not comply with traffickers demands.³⁸⁵ To rely on this trigger, evidence of past history of violence or fear of violence is required.

The second qualifying trigger in Section 55(4) is specifically showing that actions and words said to the abused person has resulted in a loss of control on the basis that the person has felt wronged. This is an objective test, meaning that it must have been justifiable to respond in such a way. A trafficked victim (due to the nature of repeated abuse) will feel particularly wronged by the way in which they are being treated, and the person or jury objectively analysing their behaviour would need to consider whether the victim has reasonable cause for behaving the way the victim did. It may be more difficult to rely on such a trigger because of the objective element which juries may not consider the actions of the victim appropriate, especially if they cannot understand or empathise with the victim’s situation. An awareness of human trafficking and the impact which slavery has on the behaviour and health of victims is crucial for those working in the criminal justice system. This would apply to juries too.

³⁸⁴ *R v Ahluwalia* (1993) 96 Cr App R 133.

³⁸⁵ H. Easton & R. Matthews, “Investigating the experiences of people trafficked into commercial sexual exploitation in Scotland,” Equality and Human Rights Commission Research Report, January 2012 at 40.

Of the two qualifying triggers listed above, the most viable partial defence a trafficked victim can rely upon is the fear of serious violence in Section 55(3). The trafficked victim is more likely to rely on the subjective element which is a fear of violence, rather than the objective element associated with the second trigger in Section 55(4).

As part of the objective test, it is for the jury to decide upon as to whether “the provocation in question was enough to make a reasonable man who had lost self-control do as D did.”³⁸⁶ A problem for trafficked victims here is that there may be a period of time where the victim will be subjected to systematic cycles of abuse, but enduring it, but simultaneously planning to attack the trafficker in the future. The ‘planning to act’ is problematic as the case of *Jewell*³⁸⁷ showed. It stated that “the planning that preceded the killing undermined a claim of loss of self-control.”³⁸⁸ To satisfy the test, the act must be spontaneous, as opposed to having a degree of planning associated to it. This type of situation is similar to situations of domestic violence, where victims are broken down psychologically and learn to accept the abuse. This type of abuse can be repeated for months, even years before the victim eventually attacks the perpetrator,³⁸⁹ but the success of using the defence will be determined by how much planning there is in the attack.

(ii) **Diminished Responsibility**

A second partial defence available to trafficked victims who may murder or inflict serious harm on their trafficker is the defence of diminished responsibility. Where the defence of loss of control looks at the reasonable person, this defence essentially looks at whether “the person

³⁸⁶ J. Horder, “Ashworth’s Criminal Law,” (8th Edition, Oxford University Press, 2016) at 259.

³⁸⁷ *R v Jewell* [2014] EWCA Crim 414.

³⁸⁸ See *R v Jewell* [2014] EWCA Crim 414.

³⁸⁹ This defence is often referred to as ‘Battered Woman Syndrome’ and can be found in *R v Ahluwalia* (1992) 4 AER 889, *R v Thornton* (No2) (1996) 2 AER 1023 and *R v Charlton* (2003) EWCA Crim 415.

should not be held to the standard of a normal person because of a medical condition.”³⁹⁰ This defence is available if the victim was suffering from a mental illness at the time of committing a serious harm against their trafficker. As was examined earlier in the thesis, trafficked victims are at a considerable or even high risk of developing a mental health condition as a result of being a victim of human trafficking. The current law³⁹¹ on diminished responsibility acknowledges mental health conditions which excuse liability. Section 52 *Coroners and Justice Act 2009* states that:

“(1) A person (“D”) who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—

(a) arose from a recognised medical condition,

(b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and

(c) provides an explanation for D's acts and omissions in doing or being a party to the killing.

(1A) Those things are—

(a) to understand the nature of D's conduct;

(b) to form a rational judgment;

(c) to exercise self-control.

³⁹⁰ J. Child and D. Ormerod, “Smith & Hogan’s Essentials of Criminal Law,” (Oxford University Press, 2015) at 175.

³⁹¹ The old law on provocation found from Section 2 Homicide Act 1957 was amended by the Coroners and Justice Act 2009.

(1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.”³⁹²

In contrast to the defence of loss of control, the burden is on the trafficked victim to prove on a balance of probabilities that the victim was suffering from diminished responsibility at the time of the offence. For the defence to be successful, the victim must prove all of the following requirements to use the defence listed in subsection a – c, and also section 1B where the abnormality of mental functioning provides an explanation (or significant contributing) factor for the victim’s conduct. There are four issues challenges when this defence if trafficked victims are seeking to rely upon this.

The first difficulty is proving that there is an abnormality of mental functioning.³⁹³ The term has not been defined and remains vague. In the case of *R v Byrne*³⁹⁴ where it was described it as “a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal.”³⁹⁵ It is an objective test which poses a difficult task for the trafficked victim because their acts are judged on what a reasonable person’s mind would be, not from the perspective of the trafficked victim. It also fails to look at the effect of mental health conditions have on the trafficked victims’ state of mind and behaviour.

Secondly, a trafficked victim would need to prove that the abnormality has arisen from a recognised medical condition. Conditions such as anxiety, depression and Post Traumatic Stress Disorder would be included within the recognised conditions listed in the Diagnostic

³⁹² Section 52 Coroners and Justice Act 2009.

³⁹³ Section 52(1) Coroners and Justice Act 2009.

³⁹⁴ *R v Byrne* [1960] 2 QB 396. This case was heard before the amended law was passed.

³⁹⁵ *R v Byrne* [1960] 2 QB 396 at 403.

and Statistical Manual of Mental Disorders (DSM -4).³⁹⁶ It would require a formal diagnosis from a medical professional which may be difficult to obtain before a trial, especially if this is the first contact with the outside world since being held captive, with no access to medical help, or has not gone through the NRM. Whether a person is suffering from a recognised medical condition is a question for experts, not for the jury to consider, and therefore the defence would require the instruction of a mental health professional to diagnose the trafficked victim with a mental health condition, but this is not always practically possible.

Thirdly, it is difficult to show that the abnormality substantially impaired the person's ability to understand their conduct or form a rational judgment or exercise self-control. What is regarded as 'substantial' remains a contentious issue. It has been held to mean more than not just something trivial but something having a greater impact.³⁹⁷ As in the position in Scotland, it will be for the jury to decide this issue, not for an expert. As stated in *Galbraith*³⁹⁸ it must mean that "the court must be satisfied that there is evidence that, at the relevant time, the accused was suffering from an abnormality of mind, which substantially impaired the ability of the accused, as compared with a normal person, to determine or control his acts."³⁹⁹ A further clarification of what is meant by substantial would help juries be directed more clearly. I believe that the expert should also express his view to any jury on this issue as to how the medical condition may have been substantially impaired the trafficked victim, on the basis that the expert would not only know the specific medical condition, but also know how the condition affects the person's cognition and behaviour.

³⁹⁶ Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Edited by American Psychiatric Association.

³⁹⁷ See *R* [2010] EWCA Crim 194 at para 15.

³⁹⁸ *Galbraith v HMA* 2001 SCCR 551.

³⁹⁹ N. Hodelet; R. Darjee, *The Galbraith Judgment and the Defence of Diminished Responsibility in Scotland*, 45 *Med. Sci. & L.* (2005) at 297.

Finally, the victim must prove that the abnormality provides an explanation or cause for the killing. In other words, there must be a causal link between the act committed, and the abnormality of mind. This poses a difficult challenge because the abnormality does not cause the act, it is the impairment of a rational mind which affects the victim's behaviour.⁴⁰⁰ This is a difficult element to prove because it is often the act that is seen, not the abnormality of the mind. The experiences of trafficked victims mirroring those of domestic violence victims who are broken down emotionally over a period of time, leading victims to becoming complicit in their own wrongdoing. They may often not see that there is an alternative to escape the physical, sexual and psychological abuse, because of any trauma bonding which has taken place. As previously discussed, victims may inflict serious harm or death against their abuser, through a lack of control which has manifested itself.

Presently, due to the technicality of the defence and the vagueness of abnormality of mentally functioning, it is not a widely used defence and Horder acknowledges that "the numbers have fallen from eighty per year in the early 1990s to around twenty per year."⁴⁰¹ If argued and satisfied, the result will be a reduced prison term for the victim if involved in murder from that charge to manslaughter, or a hospital order being imposed, but it would be very difficult for any trafficked victim to use this defence due to the difficulties explained above.

Analysis

As we have seen, despite the amendments to the existing law on provocation and diminished responsibility, it is still unclear as to whether the defence can be successfully used consistently where trafficked victims are concerned.

⁴⁰⁰ For further analysis on this issue in Scotland, see V. Tadros, "The Structure of Defences in Scots Criminal Law," 7 *Edinburgh L. Rev* (2003) at 66.

⁴⁰¹ J. Horder, "Ashworth's Criminal Law," (8th Edition, Oxford University Press, 2016) at 274.

The loss of control defence found in Section 55 may be more viable for victims because of the fear of serious violence which trafficked victims may be exposed to during exploitation. Of the two qualifying triggers, Section 55(3) is a better option for the trafficked victim to pursue, because the victim would be able to connect the loss of control with the fear of serious violence.

As I have shown, if mental health conditions have not been diagnosed at the time of the trial, and because of the difficulties of self-identification (which were examined in Chapter 2), the victim will be unable to prove a causal link between the condition and the way the victim acted. The advantage of using the diminished responsibility is that the burden is on the defence on a lower threshold on a balance of probabilities. However, the disadvantage is that all the elements must be proved, and the existing case law shows that the law remains vague. The main problem with using diminished responsibility is that that an abnormality of mind is not directly linked to the criminal act. As discussed, a mental health condition which a trafficked victim has is not the reason why the victim acts. The victim will act due to the coercion and repeated cycle of harm inflicted upon the victim over a period of time which builds up and then leads to an act such as killing or seriously injuring someone else.

I will now examine the circumstances where trafficked victims have been compelled or coerced to commit less serious criminal acts under duress to see the viability of relying on the common law as a defence.

B. Less Serious Offences and the use of the Common Law of Duress

There are two types of situation in which duress may occur, firstly ‘duress by threat,’⁴⁰² and secondly ‘duress by circumstance.’⁴⁰³ Trafficked victims will often be subjected to one or both

⁴⁰² Duress by threat occurs where an act is committed to avoid a threat from another person taking place.

⁴⁰³ Duress by circumstance occurs where a person has no choice but to commit an offence due to the circumstances which the person finds themselves in.

of these, because of their vulnerability and they are often at the control of their traffickers who both threaten violence and compel victims to commit criminal acts. A specific defence should be available to trafficked victims placed in this situation by their traffickers who exert their control over them. Often, victims act in a way which the trafficker wants that person to act without the trafficker expressly threatening that person. This is a form of manipulation and psychological control, justifying the non-prosecution of trafficked victims for offences committed under duress.

Despite efforts by Anti-Slavery International,⁴⁰⁴ which has argued for the common law of duress to be redefined to bring it in line with the *Modern Slavery Act 2015*,⁴⁰⁵ (which will be discussed later), the common law continues to be very narrowly applied to prevent the potential misuse by ‘real’ offenders who are not victims pleading that they have been coerced, and subsequently getting away with wrongdoing.⁴⁰⁶

Less serious crimes committed by victims under duress are usually either labour exploitation cases such as being forced to cultivate cannabis,⁴⁰⁷ having possession of a false ID card to use as their own for the financial benefit of themselves or others, attempt to traffic drugs,⁴⁰⁸ or sexual offences involving prostitution for the gain of themselves or others.⁴⁰⁹

⁴⁰⁴ Anti-Slavery International <https://www.antislavery.org/>.

⁴⁰⁵ Their view was that the common law should reflect the international obligations of the UK and that victims should be placed on an equal footing as those victims after the statutory defence was enacted in the Modern Slavery Act to encourage more historical victims to come forward. The Court in *R v Joseph* clarified this issue by stating the present law is clear, and that there is no evidence that making it retrospective would increase the number so of victims coming forward and that all previous cases were heard obeying the international obligations placed upon them under Article 26 Council of Europe Convention which states that all relevant factors should be considered before prosecution – see *R v Joseph & Others* [2017] EWCA Crim 36 at para 28.

⁴⁰⁶ See *R v Dao* [2012] EWCA Crim 1717 at para 47 which outlined the court’s concerns about broadening the use of the defence.

⁴⁰⁷ See the cases of *R v L* [2013] EWCA Crim 991, and *R v N* [2012] EWCA Crim 189.

⁴⁰⁸ See the case of *R v O* [2008] EWCA Crim 2835.

⁴⁰⁹ See case of *LM, DG & MB* [2010] EWCA Crim 2327.

In criminal law cases in England, Northern Ireland and Wales, the defence would raise this defence as an evidential burden and the prosecution has the legal burden of disproving beyond reasonable doubt. In *Sheldrake v DPP; Attorney-General's Reference*⁴¹⁰ Lord Bingham explained that:

"An evidential burden is not a burden of proof. It is a burden of raising, on the evidence in the case, an issue as to the matter in question fit for consideration by the tribunal of fact. If an issue is properly raised, it is for the prosecutor to prove, beyond reasonable doubt, that that ground of exoneration does not avail the defendant."⁴¹¹

In Scotland, the law is:

"where a person has a real, a genuine, a justifiable fear that if he does not act in accordance with the orders of another person, that other person will use life threatening violence against him, and if as a result of that fear and for no other reason he carries out acts which have all the typical external characteristics of criminal acts, then in that situation he cannot be said to have the evil intention which the law requires."⁴¹²

The legal and evidential burden is the same in Scotland as England and Wales. Northern Ireland is also a different jurisdiction for criminal law purposes, but the underlying general criminal law principles are the same in NI, as they are in England & Wales, but Scotland is different.

The trafficked victim must show that the criminal acts were committed out of fear of serious harm and injury to themselves. In cases not involving human trafficking such as *R v Graham*,⁴¹³ it was held that the common law required that "the defendant was (or may have been) impelled

⁴¹⁰ *Sheldrake v DPP, Attorney-General's Reference* (No 4 of 2002).

⁴¹¹ *Sheldrake v DPP, Attorney-General's Reference* (No 4 of 2002) (2005) at 289.

⁴¹² *HM Advocate v Raiker* 1989 SCCR 149 at para 154.

⁴¹³ *R v Graham* [1982] 1 All ER 801.

to act by a reasonable belief that the coercer would kill or cause serious injury to the defendant if he or she did not commit the act; and a sober person of reasonable firmness sharing relevant characteristics of the defendant would have responded in the same way.”⁴¹⁴ The harm that is threatened must be serious enough relating to physical harm, and must be unavoidable.⁴¹⁵ The physical harm must be severe enough where the “threat is to inflict immediate or almost immediate death or serious bodily harm, or rape.”⁴¹⁶ The threat of physical harm being present was reinforced in *R v Baker*⁴¹⁷ where the Court of Appeal insisted that in the context of the defence of duress, a threat of physical harm was required.⁴¹⁸ From case law, there has not been any mention of psychological harm, just harm of a physical nature.⁴¹⁹ The reason why I consider that the defence is narrow is because its use is limited to physical harm. We know that the way the harm of trafficking is inflicted is not just physical in nature, but can take various other forms including emotional, psychological and financial abuse where individuals are controlled by abusers using different control methods. The present law has been slow to acknowledge this.⁴²⁰ The current situation justifies an advocate who understands what the impact coercion and control has on victims who can assist the prosecutor during the time the decision to prosecute is made, and providing additional information as to whether the defences will be successful or not. Based upon the type of abuse suffered, the advocate will be able to

⁴¹⁴ *R v Graham* [1982] 1 All ER 801 at 805 – 806.

⁴¹⁵ See *Sharpe* [1987] QB 853 at 857.

⁴¹⁶ *Hasan* [2005] UKHL 22 for death and serious harm – CS [2012] EWCA Crim 389, a principle of rape could raise the defence as cited in A P Simester, J R Spencer, G R Sullivan & G J Virgo, “Simester and Sullivan’s Criminal Law Theory and Doctrine,” (5th Edition, Hart Publishing, 2013) at 741.

⁴¹⁷ *R v Baker* [1997] Crim LR 497 (CA).

⁴¹⁸ *R v Baker* [1997] Crim LR 497 (CA).

⁴¹⁹ This can include the threat of rape, see the case of *Ashley* [2012] EWCA Crim 434.

⁴²⁰ The introduction of the new statutory defence does not specifically acknowledge that harm can be both psychological as well as physical. A potential reason for this is to prevent a floodgate argument being used by victims of less merit seeking to rely on this and taking advantage of knowing that it would be difficult for a prosecutor to rebut if a victim frames it in a certain way.

look at the exploitation suffered by the victim, to assess the vulnerability of the victim at the time of the offence.

In subsection (i) I will summarise the common law of duress before outlining two challenges for victims of trafficking to overcome if they are to be successful in using this defence. The first is how the trafficked victim is judged objectively on the threats imposed upon the victim by the trafficker, and secondly, understanding how difficult it is for victims to pursue a realistic alternative to committing a crime because of coercion and compulsion.

(i) The Objective Test in cases of using Duress

A jury will assess the actions of the individual seeking to rely on a defence of duress objectively. The honest belief of the person will not be sufficient as this is a subjective narrative which is excluded from the test. The law requires the objective test to establish whether the reasonable person in the trafficked victim's position would believe that there was a serious threat which was imminent and acted in a manner consistent with the same characteristics. The position in Scotland is similar in establishing whether "the will of the accused is overcome, and the threat must have been such that an ordinary sober person of reasonable firmness, sharing the characteristics of the accused, would have responded as the accused did."⁴²¹ The threat must also be an imminent one. The case of *Hudson and Taylor*⁴²² held "that it is not necessary that the threat would be carried out immediately, so long as its implementation was imminent,"⁴²³ which concurs with the judgment from *R v Abdul-Hussain*,⁴²⁴ which stated that "imminence is sufficient and that the execution of the threat need not be immediately in prospect."⁴²⁵ The imminence requirement "enhances the likelihood that the fear caused by the

⁴²¹ *Cochrane v HM Advocate* 2001 SCCR 655 at para 29.

⁴²² *Hudson and Taylor* [1971] 2 QB 202.

⁴²³ J. Horder, "Ashworth's Principles of Criminal Law," (Oxford University Press, 2016) at 231.

⁴²⁴ *R v Abdul-Hussain* [1999] Crim LR 570.

⁴²⁵ J. Horder, "Ashworth's Principles of Criminal Law," (Oxford University Press, 2016) at 231.

threat is operating on the mind of the actor at the time of the criminal conduct, thereby satisfying the requirement of a causal connection between the threat and the criminal act.”⁴²⁶

This may not always be evident because in some cases the threat may be directed not only towards the victim but also to the victim’s family or friends as a method to keeping the victim exploited in the same environment and to compel the victim to commit criminal acts. This connection between the trafficking act and the committing of a criminal act is often called the ‘nexus,’ which will be referred to again in the following pages.

Another problem with the objective standard is that it does not acknowledge that trafficked victims in confined, exploitative environments will be suffering from mental health conditions such as anxiety, depression with symptoms of fear, trauma and psychological harm. Therefore, what is suggested is allowing adjusting the objective test “to allow such a condition to be attributed if a woman of reasonable firmness would have been afflicted with learned helplessness had she been subjected to the same experiences as D”⁴²⁷ It is not fair to judge the reasonable woman in this case without acknowledging all of the given circumstances of the case, such as the psychological harm inflicted on the victims keeping them in a controlled environment where they have little option but to carry out illegal activities. What is required by juries is to consider expert evidence from a medical professional to inform them as to the types of behaviour of a person with mental health issues may engage in, when judging a trafficked victim’s action under the objective test. As pointed out earlier, this may be the first time a victim has come into contact with authorities and no mental health assessment would have taken place. This can disadvantage vulnerable trafficked victims, who have traffickers

⁴²⁶ J. Dressler, edited by J. Deigh and D. Dolinko, “The Oxford Handbook of Philosophy of Criminal Law,” (Oxford University Press, 2015) at 271.

⁴²⁷ A P Simester, J R Spencer, G R Sullivan & G J Virgo, “Simester and Sullivan’s Criminal Law Theory and Doctrine,” (5th Edition, Hart Publishing, 2013) at 745.

who control them by giving alcohol or drugs, making them become addicts themselves and making it easier for traffickers to compel victims to commit crimes without much effort.

Numerous factors which can be taken into account include a person's "age, sex, pregnancy, serious physical disability, or recognised psychiatric condition."⁴²⁸ It was held in *R v Bowen*⁴²⁹ that the "court should not admit evidence that D was more pliable, vulnerable, timid, or susceptible to threats than a normal person, and characteristics due to self-abuse (alcohol, drugs) should also be left out of account."⁴³⁰ The fact that a perpetrator may be under the influence of drugs or alcohol is not taken into consideration when objectively looking at their behaviour which will be a disadvantage for trafficked victims as no consideration of this behaviour is taken into account.

Persons cannot rely on the duress defence in circumstances where "D voluntarily associated with X in circumstances where a reasonable person would have foreseen a risk of future coercion. This foresight of coercion need not even be specific in nature, and not even require foresight of coercion to commit a crime."⁴³¹ The problem with this scenario is that many victims may not often foresee a risk of taking a job in a different country which could lead to forced prostitution. If they could foresee the exploitation, less trafficking would occur in the first place as some individuals may be deterred. One of the main consequences for vulnerable or naive individuals is that one poor choice can lead to unforeseen negative consequences where the victim is taken advantage of, exploited and trapped in a cycle of criminality. The case of *R v Hasan*⁴³² highlighted that where persons continue to stay in a situation where criminality takes place, the duress defence cannot be used as Lord Bingham stated:

⁴²⁸ J. Horder, "Ashworth's Principles of Criminal Law," (Oxford University Press, 2016) at 230.

⁴²⁹ *R v Bowen* [1996] 2 Cr App R 157.

⁴³⁰ J. Horder, "Ashworth's Principles of Criminal Law," (Oxford University Press, 2016) at 230.

⁴³¹ J. Child & D. Ormerod, "Smith & Hogan's Essentials of Criminal Law," (Oxford University Press, 2015) at 575.

⁴³² *R v Hasan* [2005] UKHL 22.

“If a person voluntarily becomes or remains associated with other engaged in criminal activity in a situation where he knows or ought reasonably to know that he may be the subject of compulsion by them or their associates, he cannot rely on the defence of duress to excuse any act which he is thereafter compelled to do by them.”⁴³³

From the victims’ perspective, it is often difficult to escape the exploitative situation which they find themselves in. So in the interests of justice it is vital that a thorough examination of these circumstances is undertaken, with due regard to the particular experiences of a trafficked victim when facing the criminal justice system as a suspected offender. Furthermore, it is unlikely that they would know what the end consequences would be for the decisions they made in good faith, and of course victims would not reasonably know that they would eventually be compelled to commit offences. It would be unfair for victims to not have the opportunity of raising a defence because of the unrealistic foresight of what may happen in the future.

(ii) **The Issue of Coercion and Compulsion**

Under present CPS guidelines on Human Trafficking, Smuggling and Slavery, prosecutors should consider “whether the offence committed was a direct consequence of, or in the course of trafficking/slavery, and whether the criminality is significantly diminished or effectively extinguished because no realistic alternative was available but to comply with the dominant force of another.”⁴³⁴ If no realistic alternative could be evidenced, then this may extinguish the liability of the trafficked victim. The wording of the guidance does not explicitly request them to consider the effect of coercion and compulsion on the trafficked victim. The main problem with adopting an objective approach is that it requires the victim to be judged on his or her

⁴³³ *R v Hasan* [2005] UKHL 22 at 38.

⁴³⁴ CPS Human Trafficking, Smuggling and Slavery Legal Guidance, found at http://cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a20.

actions as freely consenting adults, as opposed to acknowledging the difficulty of being manipulated and controlled by traffickers, preventing victims from not being able to act freely. The fact that a victim will be psychologically controlled restricting their escape is significant because it is not so much as what the victim has done in terms of committing a certain criminal act, it is rather the circumstances around why the person acted based on the pressures placed upon the victim in the first place. The objective test does not easily accommodate a coercion and control dynamic between the trafficker and the victim.

A far more beneficial criterion to establish whether there is a present threat and a fairer method to judge a trafficked victim's conduct can be found from the human trafficking case of *R v Dao*,⁴³⁵ where the judge requested that the following questions required answering:

- “1) Whether the accused whose case they were considering had been threatened by someone with death or serious injury if he/she did not cultivate the cannabis plants?
- 2) Whether the accused in question reasonably believed that the threat would be carried out imminently if he/she did not comply?
- 3) Whether the threat endured throughout the accused's participation and was it reinforced by incarceration?
- 4) Whether the threat was the direct cause of that accused's decision to stay?
- 5) Whether a reasonable person with the characteristics of the accused would have been driven to act as the accused did, considering the opportunities that the accused had to escape?”⁴³⁶

⁴³⁵ *R v Van Dao* [2012] EWCA Crim 1717.

⁴³⁶ *R v Van Dao* [2012] EWCA Crim 1717 at 18.

These questions are broader in scope. The first two questions benefit a trafficked victim who wishes to rely upon a defence of duress, because they are more subjective to a victim's thoughts and how they translate into actions as a result of the threats by traffickers, rather than the objective test. The questions also delve deeper into the subjective nature of the victim's circumstances which provides the opportunity for more evidence from the victim to be submitted to justify why the defence should be used. These questions can be used by the CPS at the time when they are evaluating whether a defence is likely to succeed at trial. As far as the question 3 is concerned however, the threat may not always be present and a constant one. The victim may, for example have been threatened once, but will still experience a psychological threat knowing that if the victim does not participate the physical threats will start again, placing the victim in a prolonged state of fear which compels them to continue committing criminal acts. Question 4 regarding whether the threat is the decision that the victim will stay, implies that there is sufficient evidence to prove that there was compulsion. However, the objective nature of question 5 simplifies the harmful psychological experience of a trafficked victim where there are 'invisible chains' preventing victims from escaping due to the exposure of contact with authorities which victims may not trust, preventing them from escaping. The main issue is the degree of threats which preclude the victim from leaving because the alternative would be to be at the mercy of authorities who may misidentify them as another group of migrant. In summary, the questions asked in the *Dao* case should be ones which the prosecutor should ask themselves before a decision to prosecute takes place. If the questions can be answered in the affirmative, then no prosecution should take place.

The present situation is too concerned with the level of coercion placed on the victim to determine whether the criminality can be diminished. As seen in the case of *R v Verna*

Sermanfure,⁴³⁷ the Crown Prosecution Service (CPS) decided that there was insufficient evidence of compulsion which would significantly diminish the criminality of the applicant, as opposed to looking at how the possibility of coercion affected the ability to resisting the act of smuggling drugs. The CPS continued the prosecution because “it was in the public interest to do so given the high level of criminality in smuggling a quantity of cocaine.”⁴³⁸ Even in cases where compulsion has been found to exist, this is often not enough for a prosecution to not take place, and the emphasis has been to look at the reason why the victim was trafficked and the criminal act the victim was involved in. If both are the same, it will more likely that the victim’s culpability will be diminished.

The present situation is also focussed on whether the offence committed by the victim is different to the one which resulted in the victim being trafficked in the first place. For culpability of the victim to be diminished, there must be evidence that there is a connection between the trafficking of the victim and the next criminal offence taking place.⁴³⁹ In the case of *R v NTN*⁴⁴⁰ the Court found that the victim’s “culpability was significantly diminished if not extinguished by the direct nexus between the trafficking and the offence whereby it would not have been in the public interest to prosecute him or maintain the prosecution against him.”⁴⁴¹ Similarly, the applicant in the case of *Dong Nguyen*⁴⁴² argued that he had been brought to the UK to work and it turned out that his employment was at a cannabis factory. It was held that “the offence was committed as a result of compulsion arising from being trafficked into the

⁴³⁷ *R v Verna Sermanfure* as part of 5 other appeals heard within *R v Joseph* [2017] 1 Cr App R 33 486.

⁴³⁸ *R v Verna Sermanfure* as part of 5 other appeals heard within *R v Joseph* [2017] 1 Cr App R 33 486 at para 60.

⁴³⁹ See *R v NTN* as part of 5 other appeals heard within *R v Joseph* [2017] 1 Cr App R 33 486 at para 21 where it was held that “it is necessary to assess whether the defendant had been compelled to commit the crime by considering whether the offence was a direct consequence of, or in the course of trafficking/slavery and whether the criminality is significantly diminished or effectively extinguished because there is no realistic alternative but to comply with the dominant force of another.”

⁴⁴⁰ *R v NTN* as part of 5 other appeals heard within *R v Joseph* [2017] 1 Cr App R 33 486.

⁴⁴¹ *R v NTN* as part of 5 other appeals heard within *R v Joseph* [2017] 1 Cr App R 33 486 at 135.

⁴⁴² *Dong Nguyen*, as part of 5 other appeals heard within *R v Joseph* [2017] 1 Cr App R 33 486.

UK and then re-trafficked internally at such a level that his culpability for his offending was extinguished.”⁴⁴³ However, the victim went missing which prevented the Court from making a judgment on this appeal. This highlights the importance of ensuring that when police intervene and remove the victim from the exploitation, victims are protected adequately and not exposed to the risk of being re-trafficked. In some cases, a trafficked victim may be initially trafficked for one type of exploitation such as labour, but then at a later time becomes exploited for another purpose, such as prostitution.

The present situation looks at the degree of resistance from the trafficked victim to determine whether there was a realistic alternative for the victim to committing the criminal act. In the case of *R v Howe* [1987] AC 417 it was found that despite duress being used by a person, more is expected of the person committing the act to resist committing it:

“A balancing act must be done on each occasion between the threat and the crime that X requires D to commit. The more serious the offence and the greater its impact on innocent third parties, the more that is to be expected of D by way of resistance.”⁴⁴⁴

However, this ideal standard that a trafficked victim under duress must adhere to is unfair and is unrealistic, given the exploitative circumstances which victims are placed in. If there is a chance of escape, there may be a continued fear of trusting authorities and challenges to being believed as trafficked. A better standard may be to adopt the one seen in the case of *R v Abbott*⁴⁴⁵ in situations where “the more dreadful the circumstances of the crime, the stronger and more irresistible the duress needed before it could be regarded as affording any defence.”⁴⁴⁶

This switches the standard from *Howe* upside down by looking at the nature of the crime

⁴⁴³ *Dong Nguyen*, as part of 5 other appeals heard within *R v Joseph* [2017] 1 Cr App R 33 486 at 142.

⁴⁴⁴ A P Simester, J R Spencer, G R Sullivan & G J Virgo, “Simester and Sullivan’s Criminal Law Theory and Doctrine,” (5th Edition, Hart Publishing, 2013) at 744.

⁴⁴⁵ *R v Abbott* [1976] 3 All ER 140.

⁴⁴⁶ *R v Abbott* [1976] 3 All ER 140 at 152.

committed under duress. The danger is that when a judgment is made about resistance, a moral standard is adopted in cases such as sexual exploitation which can produce a moral outrage and promote more sympathy towards victims of this offence, rather than to victims who have been compelled, or have been compelled to commit crimes such as forging identity documents and passports or trafficking drugs.⁴⁴⁷

Moreover, people will have differing opinions on whether the victim had a reasonable alternative to committing the criminal act or not. Some may hold the view that a realistic alternative will be to alert authorities or escape from the environment which victims are placed in. However, as Wake advocates, “what may be regarded as a ‘realistic alternative’ to a juror may appear entirely counterintuitive to a victim of slavery.”⁴⁴⁸ Wake notes the challenges for trafficked victims also mirror those of similar victims “like a domestic violence victim, the trafficked victim may fear that alerting the authorities attempting to escape or trying to avoid the situation will put them or their families in great danger.”⁴⁴⁹ The consequences for victims carrying out a realistic alternative must be weighed against the benefit of staying in the same exploitative position, hidden from view but not exposed to prosecution from authorities. Therefore, understanding the complexities of this issue is vital to acknowledging the trafficked victim’s perspective, and ensuring it is appropriately considered during criminal processes.

Analysis

It has been seen demonstrated that there are significant difficulties for trafficked victims to rely on the common law defence of duress. There is a reliance on a fear of serious harm, but no

⁴⁴⁷ As discussed in the cases of *R v Verna Sermanfure*, *R v Alexandra Dorina Craciunescu*, *R v NTN*, the cases of *AA* and *Dong Nguyen* as part of 5 other appeals heard within *R v Joseph* [2017] 1 Cr App R 33 486.

⁴⁴⁸ N. Wake, “Human Trafficking and Modern Day Slavery: When Victims Kill,” (2017) *Criminal Law Review*, 658 at 674.

⁴⁴⁹ N. Wake, “Human Trafficking and Modern Day Slavery: When Victims Kill,” (2017) *Criminal Law Review*, 658 at 674.

appreciation of how psychological harm such as the trafficker going to the police, increasing the risk of the victim being exposed to deportation. Additionally, the fear of family members being attacked in reprisal if victims do not comply with the trafficker's demands affects the victim's autonomy. There is still a presumption that a victim can choose whether to commit a crime or not, which is not the case in all circumstances. The choice of the victim is restricted by the threats from the trafficker, both of which are of a physical and psychological nature.

The emphasis of judging the acts of trafficked victims who have committed criminal acts remains on the objective test through what the 'reasonable man' would do in the same set of circumstances.

Even in cases where physical harm is threatened, the objective test judged by the jury places the trafficked victim at a disadvantage if the jury is unaware of how trafficked victims are manipulated. Duress does not specifically address the coercion and control dynamic exerted by the trafficker onto the victim. The notion of a 'reasonable person' does not reflect the fact that trafficked victims may be suffering from mental health conditions. There is no appreciation of the effect of drugs or alcohol has on victims either, which helps traffickers manipulate victims into committing criminal offences for the traffickers gain. Again, this it affects their free will and autonomy. It is unreasonable for victims to be blamed for situations they find themselves in, because often victims are unaware that they are being exploited because of the emotional attachment that traffickers build with victims in order to manipulate and exploit later.

This test shows that it may be outdated and the law has not modernised to reflect the realities for victims of human trafficking. The law continues to overlook vulnerabilities to drug and alcohol dependency orchestrated by traffickers, manipulating victims to commit further offences. The existence of mental health conditions within victims affect their ability to escape the situation, leaving them powerless and more likely to accept their exploitative situation.

However, the questions asked during the *R v Dao* case provide a jury with more evidence and knowledge surrounding the circumstances of how and why they committed a criminal offence under duress.

These are more specific to a trafficked victim's situation and give a clear understanding as to what the victim was experiencing during the time. However, they still do not acknowledge the psychological harm which is placed upon the victim to stay in the same exploitative environment, making it easier for the trafficker to coerce and control the victim to commit criminal acts.

On the whole, the questions in the *Dao* case provide a more appropriate and modern approach to this issue, as opposed to the reliance on the objective test, seen from the common law.

As a result of being subjected to repeated abuse, intimidation and violence it is difficult for victims to resist, and not comply with the traffickers demands to commit crimes. In situations where victims have been broken down emotionally, they may be more likely to accept the situation. Furthermore, the opportunity to inform authorities is not always available and in cases where they might factually be able to alert authorities, victims may often be held back by a strong mistrust of authorities.⁴⁵⁰ In conclusion, the common law of duress defence is not a strong legal tool for victims to use to excuse their criminality due to its reliance on the objective test which negates the perspective of a trafficked victim. The questions posed in the *Dao* case provide sufficient progress to be applied in more cases specific to human trafficking where victims can often be perceived as offenders and these provide a distinction between the statuses of the individuals in situations in which they can easily become confused.

⁴⁵⁰ New European Crimes and Trust-based Policy (FIDUCIA), "Policy Brief on the Findings on Human Trafficking," European Commission, February 2015 at 1 found at https://ec.europa.eu/research/social-sciences/pdf/policy_briefs/policy-briefs-fiducia-02-2015_en.pdf.

The next section will examine statutory defences presently in force within the UK⁴⁵¹ to establish whether they provide effective safeguards for trafficked victims to rely upon during a criminal prosecution.

C. The Use of a Statutory Defence

The previous section discussed the common law defence of duress. This section will examine another defence available to trafficked victims in England and Wales, and Northern Ireland, which is a statutory defence. The purpose of this section is to analyse some of the issues trafficked victims will have in attempting to rely upon the statutory defence when a decision to prosecute by the Crown Prosecution Service (CPS) has been taken. This will be done by unpacking definitional issues contained within the provision which create obstacles for trafficked victims to convince a jury that because of compulsion, their liability should be limited.

In England and Wales, under Section 45(1) a person is not guilty of an offence if the act is performed under duress as part of their exploitation as long as:

- “(a) the person is aged 18 or over when the person does the act which constitutes the offence,
- (b) the person does that act because the person is compelled to do it,
- (c) the compulsion is attributable to slavery or to relevant exploitation, and

⁴⁵¹ In England and Wales this is the Modern Slavery Act 2015 and in Northern Ireland it is the Human Trafficking & Exploitation (Criminal Justice and Support for Victims) Act 2015.

(d) a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.”⁴⁵²

In Northern Ireland, section 22 of the *Human Trafficking & Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015* provides for the same provision. The defence would raise this defence in circumstances when the trafficked victim is “compelled to commit an unlawful activity,⁴⁵³ the compulsion alleged is attributable to slavery or to other relevant forms of exploitation,⁴⁵⁴ and that a reasonable person in the same situation and having the accused's relevant characteristics, such as his/her age, sex and physical or mental illness or disability,⁴⁵⁵ or other personal circumstance⁴⁵⁶ would have no realistic alternative to doing the unlawful activity.”⁴⁵⁷ Unfortunately, the statutory defence is extremely rigid as to when it can be applied. Neither statutory defence can be used if the offence committed falls within one of the excluded offences. Schedule 4 of the *Modern Slavery Act 2015* lists about 100 offences which are excluded,⁴⁵⁸ and in Northern Ireland, section 22(9) lists offences which carry more than 5 years which are to be excluded.⁴⁵⁹ The problem with this rationale is that often the criminal offences that victims are compelled to commit are of a serious nature,⁴⁶⁰ and consequently “the statutory defence has the potential to undermine the effectiveness of the defence.”⁴⁶¹ In addition, the following sub-sections examine 4 key criteria which trafficked

⁴⁵² Section 45(1) Modern Slavery Act 2015.

⁴⁵³ Section 45(1)(b) Modern Slavery Act 2015.

⁴⁵⁴ Section 45(1)(c) Modern Slavery Act 2015.

⁴⁵⁵ Section 45(5) Modern Slavery Act 2015.

⁴⁵⁶ Section 45(2) Modern Slavery Act 2015.

⁴⁵⁷ Section 45(1)(d) Modern Slavery Act 2015.

⁴⁵⁸ These include Offences against the Person Act 1861, the Sexual Offences Act 2003 (c.42), Domestic Violence, Crime and Victims Act 2004 (c.28) and Anti-terrorism, Crime and Security Act 2001 (c.24) and Terrorism Act 2006 (c.11).

⁴⁵⁹ These are drug offences (s22(9)(a)(i), immigration offences s22(9)(b), forgery of identification documents s22(9)(c) and asylum offences s22(9)(d).

⁴⁶⁰ These are usually offences associated with drugs and sexual offences.

⁴⁶¹ K. Laird, “Evaluating the relationship between Section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?” (2016) *Criminal Law Review*, 395 at 396.

victims must satisfy so that a defence can be relied upon successfully. As we shall see, significant terms within the legislation remain undefined.

(i) **The Issue of Compulsion**

Section 45(1)(b) offers protection to victims from prosecution by ensuring that a victim will not be found guilty in circumstances in which the victim commits an act where the victim was under compulsion. The term ‘compulsion’ remains undefined, but despite this, it was stated during the Modern Slavery Bill debate,⁴⁶² that “compulsion is a subjective test that does not require evidence of threats, force or any other type of outward action, and that it is submitted that compulsion is intended to be understood broadly.”⁴⁶³ However, as Laird points out, “the breadth of this approach does not sit well with the restrictive nature of the subsequent elements of the defence.”⁴⁶⁴ As explained above, the common law of duress requires the person relying on it to be threatened with death or really serious harm, but here “by accepting that compulsion is un-evidenced from a threat of death or serious harm, the new defence constitutes a significant departure from the common law.”⁴⁶⁵ The broadness of the new defence benefits the victim more than relying upon the common law. The Northern Ireland legislation⁴⁶⁶ makes reference to compulsion by threat from another person and compelled by circumstances that trafficked victims find themselves in, which the Modern Slavery Act does not specifically recognise. The closest it goes to recognise duress by circumstance is found in Section 45(3)(b) which states that:

⁴⁶² Modern Slavery Bill Debate, col 367 (11 Sep 2014).

⁴⁶³ Modern Slavery Bill Debate, col 367 (11 Sep 2014).

⁴⁶⁴ K. Laird, “Evaluating the relationship between Section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?” (2016) *Criminal Law Review*, 395 at 398.

⁴⁶⁵ K. Laird, “Evaluating the relationship between Section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?” (2016) *Criminal Law Review*, 395 at 403.

⁴⁶⁶ Section 22(3) Northern Ireland Trafficking and Exploitation Act 2015 which states that a person may be compelled to do something by another person, or by the person’s circumstances.

“Compulsion is attributable to slavery or to relevant exploitation only if it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation.”⁴⁶⁷

Neither does the Act define the term ‘direct consequence’ used in Section 45(3)(b). This was raised as part of the Modern Slavery Act review, which also questioned whether the statutory defence is consistent with Article 8 of the Trafficking Directive. The Modern Slavery Act review recommended that:

“In respect of s45 of the Modern Slavery Act, which provides for a defence for slavery or trafficking victims who commit an offence, consideration should be given to clarifying and/ or enhancing the term ‘direct consequence’, and to clarifying the process by which s45 is raised and applied.”⁴⁶⁸

Whilst some terms have remained undefined, the fact that a trafficked victim may have been compelled to commit criminal acts has been recognised. This view has been endorsed by Jason Haynes, who states that “courts are now more empowered to take account of the fact that victims may have been compelled to commit unlawful activities by virtue of their own personal circumstances,”⁴⁶⁹ and the legislation has at least acknowledged the trafficked victim’s personal circumstances. Nevertheless, the issue remains whether there is enough evidence from the victim to show they were compelled to commit the act.

Having established that showing compulsion is important, the question of what the victim’s personal circumstances are is the next issue. Under section 45(1)(d) a person will not be guilty

⁴⁶⁷ Section 45(3)(b) Modern Slavery Act 2015 and Section 22(4)(b) Northern Ireland Trafficking and Exploitation Act 2015.

⁴⁶⁸ Recommendation 25 Modern Slavery Act Review, published in July 2016.

⁴⁶⁹ J. Haynes, “The Modern Slavery Act (2015): A Legislative Commentary,” (2015) Statute Law Review Vol 37, Issue 1, at 16.

as long as a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to committing that act. The three issues consist of 1) 'a reasonable person in the same situation as the person,' 2) 'the person's relevant characteristics,' and 3) 'no realistic alternative to doing that act.' These will be examined separately.

(ii) **'A Reasonable Person in the Same Situation as the Person'**

A person will not be guilty if a reasonable person in the same situation as the person and having the person's relevant characteristics would undertake that act. A subjective approach has been discouraged in favour of an objective test being used by looking at what the reasonable person would do. This was justified on the basis that "a purely subjective test would allow the defence to be raised in tenuous circumstances because the defendant could argue that they felt compelled by circumstances."⁴⁷⁰ The concern was that serious criminals would take advantage of using the statutory defence. During the debates in Parliament, the victim centred approach appears to have been overlooked in favour of ensuring that offenders cannot take advantage of the law, simply by relying on it to escape liability:

"The reasonable person test provides an important safeguard against this defence being abused and allows all the circumstances of the case to be carefully considered."⁴⁷¹

Effectively, it is now more difficult for trafficked victims to rely solely on the objective test. However, the provision in section 45(1) (d) is a subjective element, which is that the jury must consider 'the same situation as the person,' and 'having the person's relevant characteristics.' These must all be considered together, creating both an objective and subjective test. The effect

⁴⁷⁰ Modern Slavery Bill debate, col 369 (11 Sep 2014).

⁴⁷¹ Modern Slavery Act, col 371 (11 Sep 2014).

is that this will not disadvantage the trafficked victim from relying on the defence, as the Immigration Law Practitioners Association (ILPA) explains:

“This part of the test is an attempt to import an objective element, that of the “reasonable person”, but with a subjective twist – the reasonable person must have the same characteristics as the victim in question.... It would require a member of the jury to attempt to imagine what s/he would have done, if s/he had exactly the same personal circumstances and background as the person in question, and were placed in the same situation. The purported objective test is thus a hybrid: it is so subjective (by importing the need for the ‘reasonable person’ to be, in effect, the same person as the victim, and in the same situation) that it is unable to achieve the intended objectivity. A judge would have real difficulty in directing any jury as to the correct approach as a result.’ The use of the statutory defence needs to be carefully monitored to ascertain whether the inclusion of the ‘reasonable person test’ forms a barrier to victims accessing protection from unnecessary punishment and prosecution.”⁴⁷²

This is where a further justification for an advocate would be useful when using the objective test, so that the jury would have the evidence and outline the circumstances that the victim had gone through so that they can further examine the subjective element.

(iii) Having the ‘same relevant characteristics’

The subjective element is ‘having the same relevant characteristics’ as the defendant. In section 1(4)(a) “regard may be had to any of the person’s personal circumstances (such as the person being a child, the person’s family relationships, and any mental or physical illness) which may

⁴⁷² C. Beddoe & V. Brotherton, Anti Trafficking Monitoring Group, “Class Acts: Examining Modern Slavery legislation in the UK,” October 2016, http://www.kalayaan.org.uk/wp-content/uploads/2014/09/atmg_class_acts_report_web_final.pdf, at 68.

make the person more vulnerable than other persons.”⁴⁷³ As discussed in Chapter 2, a trafficked victim may become vulnerable as a result of experiencing numerous mental health issues which affect their ability to be coerced to commit other acts due to a decrease in being able to function and make choices and decisions. They will be more vulnerable and more easily compelled to commit other crimes because of the fear that they may feel, and believe that they have no other choice but to consent. Victims may often be broken down emotionally, and classed as having a ‘learned helplessness’ status attached to them. Learned helplessness is a type of characteristic which trafficked victims will experience as part of their exploitation. In the case of *R v GAC*,⁴⁷⁴ it was defined as:

“the reaction of a victim to chronic and repeated abuse. They have no way of physically or emotionally breaking free from their abuser and the abuse. They cannot extricate themselves from the violent situation no matter how many cries for help they make. They become increasingly passive.”⁴⁷⁵

Learned helplessness essentially captures the powerlessness of the trafficked victim and the situation which they find themselves in. Despite the characteristic being recognised, it is not consistently applied. It has a very narrow application as seen in *R v Hurst*⁴⁷⁶ where it was held that “it is hard to see how the person of reasonable firmness can be invested with the characteristics of a personality that lacks reasonable firmness.”⁴⁷⁷ This affirms a reasonable firmness test is more consistently applied without considering learned helplessness. The law does need to recognise the effect that the harm suffered as a result of being exploited and

⁴⁷³ Section 1(4)(a) Modern Slavery Act 2015. See Section 1(4)(a)) Northern Ireland Trafficking and Exploitation Act 2015 where the regard for an adult who may be vulnerable should be considered when assessing whether an offence has been committed.

⁴⁷⁴ *R v GAC* [2013] EWCA Crim 1472.

⁴⁷⁵ *R v GAC* [2013] EWCA Crim 1472 at 26.

⁴⁷⁶ *R v Hurst* [1995] 1 Cr App R 82.

⁴⁷⁷ *R v Hurst* [1995] 1 Cr App R 82 at 90.

compelled to commit offences, because at present it prevents trafficked victims from being able to demonstrate the context in which they may commit offences under compulsion. The present position restricting learned helplessness contradicts section 1(4)(a) which does state that with regard to other issues which makes people vulnerable, learned helplessness is a factor which makes victims more vulnerable than others, and is a main characteristic of being a trafficked victim.

An advocate should be allowed to participate in such a process where they can obtain more victim testimony in order to establish the facts and circumstances to their case, and present them in court. Victims may be reluctant to speak with authorities and therefore, advocates with knowledge of what trafficked victims experience may have an opportunity to obtain information from victims who would otherwise will remain silent.

(iv) ‘No realistic alternative to committing the act’

The final element is whether the defendant had a realistic alternative to committing the offence. Section 45(1)(d) states that a victim will not be guilty if the person had no realistic alternative to committing the act.

Laird states that the “question is whether a reasonable person of D’s age, sex and any physical or mental illness or disability would have thought so, not whether the defendant thought about running away was a realistic alternative.”⁴⁷⁸ The previous mentioned case of *R v Van Dao*,⁴⁷⁹ discussed where the victim in this case had a means of escape, but did not do so because of the exploitative situation which prevented her from doing so. It must be acknowledged that the fear of escaping can be a reason for not leaving an exploitative situation, but in this case, the focus

⁴⁷⁸ K. Laird, “Evaluating the relationship between Section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?” (2016) *Criminal Law Review*, 395 at 402.

⁴⁷⁹ See the case of *R v Dao* [2012] EWCA Crim 1717.

was on the means of a possible escape. The case failed to see the victims are fearful of being punished if an escape fails or do not know where to access help if they do escape.

The test to be applied under s45(1)(d) is an objective one as confirmed during the Modern Slavery Debate,⁴⁸⁰ but this approach ignores the fear of victims in deciding whether to escape. If a jury does not fully understand the reasons as to why some trafficked victims feel as if they cannot escape, it is more likely to be perceived that it is an easy form of action to take than what the reality may be. Many illegal immigrants may know that they are particularly at risk of being detained, providing another reason why they cannot leave an exploitative situation.

Analysis

In summary, despite there being a statutory defence which is well intentioned and appears to offer a degree of protection, in practice it offers very little.

The introduction of the statutory defences outlined above from the *Modern Slavery Act 2015* and the *Human Trafficking Exploitation Act 2015* should (in theory) provide additional security and protection from the criminal law. The main problem with the statutory defences is that they are both extremely restrictive as to when they can be used. This is because of the large amount of offences excluded, as set out in Schedule 4 of the Modern Slavery Act 2015, and the type of offences which trafficked victims are compelled to undertake within Section 22 of the *Human Trafficking and Exploitation Act 2015*. Despite statutory defences being introduced, the approach behind the restrictive nature appears to have been the concern that criminals could take advantage by using the defence, rather than adopting an approach which properly gives priority to the position and interests of that of genuine trafficked victims. As long as this concern continues, there is less chance of trafficked victims being able to rely upon statutory

⁴⁸⁰ Modern Slavery Bill Debate, col 373 (11 Sep 2014).

defences which defeats the introduction of a statutory defence being available to trafficked victims in the first place. However, it is acknowledged that:

“...the CPS is still able to decide not to prosecute if it would not be in the public interest to do so, and the court will also be able to stop an inappropriate prosecution of a victim if the prosecution is found to be an abuse of process.”⁴⁸¹

Additionally, “if new evidence or information supports the fact that the suspect has been trafficked and committed the offence whilst in a coerced situation, there is a strong public interest to stop the prosecution.”⁴⁸² Therefore, it would be up to the CPS to consider other evidence as to how the suspect came to be arrested,⁴⁸³ but could be complicated by the fact that the person may be scared by authorities and reluctant to disclose information.⁴⁸⁴

There are also issues within the text which make it difficult for victims to rely on the defence. The objective test of relating to the reasonable man and the subjective test of having the same characteristics further disadvantage the trafficked victim. The effect is that the onset of mental health issues during their exploitation leaves trafficked victims vulnerable and the term ‘learned helplessness’ remains unable to be advanced. Furthermore, the law expects trafficked victims to leave exploitative situations where there is a perceived opportunity of doing so. This is unfair on victims. This is why more evidence from the victim is required to explain what the

⁴⁸¹ Greta Group of Experts on Action Against Trafficking in Human Beings, “Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom,” 2nd Evaluation Round, Council of Europe, 2016 at para 287.

⁴⁸² OSCE Resource Police Training Guide: Trafficking in Human Beings, TNTD/SPMU Publication Series Vol 12, Vienna, July 2013 at 126.

⁴⁸³ The OSCE states from the report above at 126 that “CPS guidance advises prosecutors to obtain further information from non-government organisations that supports trafficked victims.”

⁴⁸⁴ As the OSCE acknowledge, the CPS may be “dealing with a traumatised victim, whose story might change frequently and may not be assessed as credible by the prosecution.” OSCE Policy and Legislative Recommendations towards the effective implementation of the non-punishment provision, in consultation with the Alliance against Trafficking in Persons Expert Co-ordination Team, Vienna, 2013 at 29.

challenges associated with escaping are. These will usually be the threat of further violence and the fear of the unknown if an escape was unsuccessful.

Unfortunately, the statutory defence does not offer a sufficient degree of protection for offences committed under compulsion. Due to the weakness of both the common law and statutory defence, to protect victims effectively, they need to be offered adequate defences. The statutory defence requires changing to reflect how the means of the offence restricts the free will of victim to resist committing criminal offences. The defence is a good idea, but the execution remains very weak. It is arguable that because the defences fail properly to protect victims of trafficking, there is a strong case against the prosecution of victims of trafficking in the first place.

In summary, the defences are inadequate and therefore there should be no prosecution of trafficked victims. If there is to be a prosecution, then the defences should be changed as explained above. If neither of the approaches above are taken, then at the very least the approach adopted in the *Dao* case should be adopted, since this is an approach which better seeks fairly to assess their moral culpability in a holistic sense, albeit still operating within the limitations of existing law as explained above.

The next section will examine this in greater detail to see how the issue of identification can often be overlooked at the time where a decision to prosecute is taken, or during a criminal trial.

V. THE PROCESS AND MECHANISMS LEADING TO TRAFFICKED VICTIMS BEING PROSECUTED

The previous part of this chapter examined the difficulties of relying on available defences for trafficked victims if prosecuted for offences committed under duress. I have argued that

trafficked victims should not be prosecuted, because the present legal defences do not adequately protect trafficked victims from prosecution, and the law should be amended to reflect the modern realities that trafficked victims experience resisting demands from traffickers. Due to this current situation, the question of whether there are suitable defences available to victim is not the right question to pose. The question to ask is whether there are adequate mechanisms in place for prosecutors to decide whether a prosecution should take place or not. The evidence presented below indicates that they may not be. Although an argument can be made that, where a prosecution does take place, there is the safeguard of the statutory defence, I have already argued that the present defences are not strong enough. Consequently, the decision to prosecute is more important than simply allowing victims to rely solely on the statutory defence which in practice does not protect them. I will show that where victims have not been identified the decision to prosecute has still taken place, exposing victims to criminal trials and convictions. To justify this view, I will examine the role and responsibilities of the prosecutor and the defence who have contributed to the suffering of victims because they have not considered whether the individual is a trafficked victim. I will also show how they rely on TSOs to help victim recognition and referral to the NRM.

For prosecutors to come to an informed decision, a more detailed history on how the trafficked victim became exploited and committed the crimes must be provided and considered. This could be facilitated through the introduction of a trafficking advocate who would have the ability to obtain and submit evidence from victims. This procedural mechanism is required which would help trafficked victims in the short term to potentially divert them away from prosecution and referred to the NRM.

This section will examine the present guidance and the responsibilities of prosecutors deciding whether to prosecute trafficked victims, taking into account the potential success of the

individual raising a defence to the acts committed, or the significance of the individual being recognised as a trafficked victim by having a Conclusive Grounds Decision (CGD) from the National Referral Mechanism (NRM), and whether the issue of a formal NRM identification has taken place.

Defence representatives also have an important role in ensuring that individuals who they represent are not prosecuted because of a lack of awareness of human trafficking. It will become clear that an advocate could be introduced to assist in the current decision making process, meeting the needs of genuine trafficked victims who should be recognised as victims, not offenders, to ensure and protect the interests and rights of trafficked victims.

A. The Responsibility Of The Prosecutor

As Beddoe and Brotherton rightly point out, “the Modern Slavery Act does not make it a statutory duty for prosecutors to identify victims, and does not direct that all such cases where suspects may be victims must be referred to a single lead prosecutor.”⁴⁸⁵ The CPS has issued guidance to prosecutors on their responsibilities in deciding whether to prosecute a trafficked victim. Three main issues will now be discussed which the prosecutor which will need to consider when deciding whether to prosecute a trafficked victim or not.

(i) The Identification of the Individual as a Trafficked Victim

Where there is a suspicion that a person may be a victim of trafficking, “prosecutors should have regard to the duty of the prosecutor to make proper enquiries in criminal prosecutions involving individuals who may be victims of trafficking or slavery.”⁴⁸⁶ As the CofE

⁴⁸⁵ C. Beddoe & V. Brotherton, Anti Trafficking Monitoring Group, “Class Acts: Examining Modern Slavery legislation in the UK,” October 2016, http://www.kalayaan.org.uk/wp-content/uploads/2014/09/atmg_class_acts_report_web_final.pdf, at 70.

⁴⁸⁶ CPS guidance on human trafficking http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a23.

Explanatory Report⁴⁸⁷ notes, “a failure to identify a trafficking victim correctly will probably mean that a victim continues 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.”⁴⁸⁸ Therefore, it is an important decision for prosecutors to decide to pursue a prosecution or not against an individual. Any decision should be taken after the issue of identification has taken place to ensure that there is no failure or breach of duty of the PA to investigate.

Prosecutors will be required to find evidence to establish whether an individual has been referred to the NRM. However, as seen in the case of *R v Joseph*,⁴⁸⁹ there is no clear guidance on the cooperation between authorities in terms of accessing documents and statements from victims to evidence that they have been trafficked and it is imperative for processes and guidance to be drawn up to facilitate this.⁴⁹⁰ Again, an advocate could complete this work and report back to prosecutors.

In cases where potential victims have not been referred to the NRM, there is a duty upon the prosecutor to advise law enforcement of the need for the individual to be referred to the NRM.⁴⁹¹ The CPS guidance relies heavily on the prosecutor being presented with evidence about the specific trafficking and exploitation situation from either the police, or the NRM.

⁴⁸⁷ Council of Europe Convention on Action against Trafficking in Human Beings Explanatory Report.

⁴⁸⁸ Council of Europe Convention on Action against Trafficking in Human Beings Explanatory Report at para 127.

⁴⁸⁹ *R v Joseph & Others* [2017] EWCA Crim 36.

⁴⁹⁰ *R v Joseph & Others* [2017] EWCA Crim 36 at para 40.

⁴⁹¹ CPS Human Trafficking, Smuggling and Slavery Legal Guidance, found at http://cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a20.

Once the evidence has been collated the CPS Full Test Code is applied which is a set of guidelines applied by a prosecutor when determining whether an offender is to be charged with an offence.⁴⁹² The prosecutors must then arrive at a decision after considering the following:

“Is there a reason to believe that the person has been trafficked? If so, if there is clear evidence of a credible common law defence of duress, the case should be discontinued on evidential grounds; but even where there is no clear evidence of duress, but the offence may have been committed as a result of compulsion arising from trafficking, prosecutors should consider whether the public interest lies in proceeding to prosecute or not. (See the judgment in *LM & Ors* [2010] EWCA Crim 2327)”⁴⁹³

My argument is that the question of whether to prosecute by answering the questions posed in the CPS guidance cannot be answered before the question of whether the individual is a trafficked person or not has been established first. Due to the lack of cooperation between the NRM, the police and prosecutors, a decision to prosecute is going to overlook whether the suspect may be a trafficked victim or not. If there is any suggestion of compulsion, then in line with CPS guidelines, no prosecution should take place.

(ii) The consideration of a relevant defence by the CPS

Wake reinforces the point that where there is clear and credible evidence of duress, a prosecution should not take place.⁴⁹⁴ Evidence to determine duress is vital so that a decision can be made. There is guidance for prosecutors provided by the CPS on the use the Statutory Defence under Section 45, and there is further guidance regarding when a prosecutor should

⁴⁹² The CPS Full Test Code are a set of guidelines applied by a prosecutor when determining whether an offender is to be charged with an offence. It has two stages, the evidential stage, followed by the public interest stage. These can be found at

https://www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html.

⁴⁹³ http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/.

⁴⁹⁴ N. Wake, “Human Trafficking and Modern Day Slavery: When Victims Kill,” (2017) *Criminal Law Review*, 658.

use the discretionary ‘Public Interest’ test in human trafficking and exploitation cases. The Full Test Code can be found in the guidance issued by the CPS.⁴⁹⁵ Under section 4.4, prosecutors must be satisfied that there is sufficient evidence to provide ‘a realistic prospect of conviction’ against each suspect on each charge. They must consider what the defence case may be, and how it is likely to affect the prospects of conviction. As the guidance states:

“Prosecutors should consider whether or not there is clear evidence of a credible common law defence of duress, as required in the second stage of the assessment. If so the case should not be charged and be discontinued on evidential grounds.”⁴⁹⁶ This approach was also confirmed in the case of *R v LM, MB, DG, Betti Tabot and Yutunde Tijani*.⁴⁹⁷

A case which “does not pass the evidential stage must not proceed, no matter how serious or sensitive it may be.”⁴⁹⁸ The prosecutor must decide at this stage the likelihood that the defence used by the victim will be successful or not. If it is judged to having a high chance of success, a prosecution will not take place. Presently, there is no central database to establish the number of cases where the statutory defences have been raised, and the position in Northern Ireland remains vague as there is no current policy guidance on the effect of their statutory defence.

(iii) **The significance of a NRM decision**

In deciding whether to prosecute a trafficked victim, the current CPS guidance states that: ‘if there is a conclusive grounds decision under the NRM that a suspect is a victim of trafficking or slavery; and there is evidence that proves on a balance of probabilities that the other

⁴⁹⁵ CPS Full Test Code found at

https://www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html.

⁴⁹⁶ CPS guidance on human trafficking

http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a23.

⁴⁹⁷ *R v LM, MB, DG, Betti Tabot and Yutunde Tijani* [2010] EWCA Crim 2327 at para 9.

⁴⁹⁸ Section 4.4 CPS Full Test Code.

conditions in section 45 are met, relevant to whether the suspect is an adult or child; and the offence is not an excluded offence under schedule 4 of the Act, then no charges should be brought.”⁴⁹⁹ The existence of a CGD decision on its own, obtained through the NRM is not sufficient to divert a prosecution. Wake correctly argues that “given prior victim status must be established for the purposes of the partial defence, and the CA and the CPS are already charged with making such determinations.”⁵⁰⁰ The problem is this. Whilst the decision from the CA is not binding upon any Court, there is a risk that the NRM decision is not being taken into account. To prevent such risk, it would be useful for the weight of a CGD to be given a greater significant status by becoming a binding decision, on the basis that the decision has been made by an authority of the State. It does appear to be wrong for a decision to be made, but has no relevance by the CPS. The guidance further states that “if there is to be a delay, then prosecutors can take account of the reasonable grounds decision of the suspect but should additionally consider other evidence and the seriousness of the offence when considering the decision to prosecute.”⁵⁰¹ Where there is a RGD only, the CPS guidance states that prosecutors should make enquiries about when a CGD is likely to be made which seems reasonable. I believe that the responsibility to follow up the NRM decisions would fall within a remit of an advocate. It is in the interest of the trafficked victim to have a decision made as soon as possible, and for prosecutors to facilitate swifter decisions.

In circumstances where there is no CGD from the NRM, but that there are “other available evidence shows that on the balance of probabilities the suspect is a victim; that is, it is more likely than not that they are a victim of trafficking or slavery, this will satisfy the evidential stage of victim status.”⁵⁰² This situation may also justify the need for an advocate to act in the

⁴⁹⁹ Human Trafficking, Smuggling and Slavery: Legal Guidance: Crown Prosecution Service.

⁵⁰⁰ N. Wake, “Human Trafficking and Modern Day Slavery: When Victims Kill,” (2017) Criminal Law Review, 658 at 677.

⁵⁰¹ Human Trafficking, Smuggling and Slavery: Legal Guidance: Crown Prosecution Service.

⁵⁰² Human Trafficking, Smuggling and Slavery: Legal Guidance: Crown Prosecution Service.

best interests of the trafficked victim to establish this evidence to present to the decision maker, and be diverted from prosecution to the NRM to become potentially given a RGD and then a CGD.

B. The Role of the Defence Counsel representing Trafficked Victims

This section examines the role of defence lawyers play an influential role in identifying trafficked victims and the difficulties that they have in doing so because the issue of identification can be overlooked.

(i) The failure to identify their client as a Trafficked Victim

The case of *R v O*⁵⁰³ showed how defence solicitors failed to consider whether an individual who they were representing had been trafficked. The case concerned a woman from Nigeria who had been arrested for producing false identity documents at French passport control in the UK. The appellant was convicted, but appealed on the grounds that the appellant was a trafficked victim, at risk of physical violence and therefore able to rely upon the defence of duress. The identification issue was overlooked which was acknowledged by the court and “this possibility should have been investigated by the appellant lawyers”⁵⁰⁴ in greater detail, and should have been raised earlier during legal proceedings.

Additionally, the issue of whether the individual may have been trafficked or not was ignored by the defence lawyers during the trial, showing that the quality of representation for the appellant in this case had “fallen below any acceptable standard of competence and well below any satisfactory standard of procedural protection.”⁵⁰⁵ More specific awareness of human trafficking has become vital, especially when cases have come to court. As Jessica Elliott⁵⁰⁶

⁵⁰³ *R v O* [2008] EWCA Crim 2835.

⁵⁰⁴ *R v O* [2008] EWCA Crim 2835 at para 17.

⁵⁰⁵ *R v O* [2008] EWCA Crim 2835 at para 26.

⁵⁰⁶ Jessica Elliott, Senior Lecturer: Law at University of West England.

points out, there is “the need for training for those who may come into contact with victims of trafficking such as legal representatives.”⁵⁰⁷ Anti-trafficking organisations, such as the Poppy Project⁵⁰⁸ who provide support, advocacy and accommodation to trafficked women have also played an increasing role in advocating the rights of trafficked victims by obtaining supporting information concerning the circumstances which led to their trafficking and exploitation. Commonly, they have achieved this by submitting evidence to courts, evidencing that the appellant was indeed a victim of human trafficking. After obtaining information from the appellant in the *R v O* case, the following evidence provided that:

“...after the trial date of 17 March, the appellant was assessed by a senior outreach worker and was deemed to be a victim of trafficking. A detailed history included showed that she was held in debt bondage, raped and forced to work as a prostitute until she escaped later.”⁵⁰⁹

The intervention of the Poppy Project on appeal was instrumental, because the victim because was able to be referred to the NRM and access her rights as a trafficked victim. During the case of *R v O*, defence solicitors were asked by the Court to “make enquiries to establish whether their client is a victim of human trafficking.”⁵¹⁰ Without adequate training and awareness of human trafficking, this may be difficult for the defence and places a pressure of resources and time to find this evidence. A failure to be identified represents a missed opportunity for the victim to be diverted away from prosecution which increases the trauma and suffering

⁵⁰⁷ J. Elliott, “Misidentification of Victims of Human Trafficking: The Case of *R v O*,” (2009) *International Journal of Refugee Law*, 21(4): 727 at 731.

⁵⁰⁸ The Poppy Project ran outreaches to prisons to help and advocate for trafficked women. The project started to provide the CPS with information from those in prison as part of their appeals. For more information about the work that Poppy Project does, see <http://www.eavesforwomen.org.uk/about-eaves/our-projects/the-poppy-project/>.

⁵⁰⁹ J. Elliott, “Misidentification of Victims of Human Trafficking: The Case of *R v O*,” (Oxford University Press, 2009) at 731.

⁵¹⁰ *R v O* [2008] EWCA Crim 2835 at para 26.

experienced. If it was not for victims coming into contact with the criminal justice system, victims would not have the opportunity of being identified. The important not is that potential victims are treated as victims, not as offenders, especially where the real wrongdoers (the traffickers) remain free and consequently not held accountable. The advocacy of the Poppy Project illustrated the positive role that TSOs can play in filling the gap between the interests of the State to prosecute, with the rights of individuals to be recognised as trafficked victims and protected from prosecution. It is common practice for a third party to be involved in this process. Therefore, without such an opportunity of third parties being involved demonstrates an inconsistent procedure and ad hoc nature. Presently, those victims fortunate enough to have the help of anti-trafficking organisations will benefit from the possibility of being referred to the NRM, whilst victims without support are exposed to prosecution.

The Poppy Project conducted their own investigations into a woman from Uganda who may have been trafficked but instead was prosecuted, convicted and sentenced to six months imprisonment for producing a forged passport when she applied for a National Insurance Number. This was the case of *R v L and other appeals*.⁵¹¹ Whilst the woman was in custody, the Poppy Project enlisted the help of a consultant psychiatrist, Dr Zapata-Bravo who concluded that “there is powerful evidence that the appellant fell to be treated as a victim of international trafficking for sexual exploitation in forced prostitution. She was suffering from complex post-traumatic stress disorder with severe trauma.”⁵¹² No previous attempt had been made by her solicitor at the time of the trial to refer her to the NRM. When evidence came to light, she was eventually referred, and the UK Border Agency (UKBA) found “conclusive grounds for believing that she had indeed been trafficked.”⁵¹³ On appeal, it was held that “if

⁵¹¹ *R v L and other appeals* [2013] EWCA Crim 991.

⁵¹² *R v L and other appeals* [2013] EWCA Crim 991 at para 74.

⁵¹³ *R v L and other appeals* [2013] EWCA Crim 991 at para 74.

the actual facts had been known at the time when the decision to prosecute had been made, the case would not have proceeded.”⁵¹⁴ The same determination was made in two further cases, firstly in the case of *R v THN*⁵¹⁵ where the “Crown accepted that had the evidence which was available at the time when the original decision to prosecute was made, on the basis of the public interest test, there would have been no prosecution,”⁵¹⁶ and secondly in the case of *R v T*,⁵¹⁷ where the National Society for the Prevention of Cruelty to Children (NSPCC) provided the court with a letter indicating that the individual charged with cultivating cannabis, contrary to s6(2) of the *Misuse of Drugs Act 1971* may be a victim of trafficking. It later transpired that the defendant admitted that he had been trafficked a day before, but this was not disclosed during the trial. The CA (in this case the UKBA) concluded that he was a victim of trafficking but “this decision was not provided to the Crown by those representing the appellant”⁵¹⁸ until later in the proceedings.

The issue of whether the accused has been identified as a trafficked victim can arise very late in the criminal justice process. Often, cases are heard on appeal before the issue of identification is raised. Commonly, it has been held that “had these facts been known at the time when the decision to prosecute was made, the appellant would not have been prosecuted.”⁵¹⁹ The appropriate time of raising the identification issue is at the decision to prosecute, not on appeal of a conviction. Cooperation is required between judges, prosecutors and defence lawyers who must be informed swiftly of NRM decisions. The failure in

⁵¹⁴ *R v L and other appeals* [2013] EWCA Crim 991 at para 74.

⁵¹⁵ *R v THN* [2014] 1 All ER.

⁵¹⁶ *R v THN* [2014] 1 All ER at para 45.

⁵¹⁷ *R v T from R v L and other appeals* [2013] EWCA Crim 991.

⁵¹⁸ *R v T from R v L and other appeals* [2013] EWCA Crim 991 at para 54.

⁵¹⁹ *R v T from R v L and other appeals* [2013] EWCA Crim 991 at para 54.

communication was evident in *R v HVN*,⁵²⁰ where it was found that the UKBA made a RGD, but this was not communicated to the Court.

The above cases provide a basis for arguing that what is needed is a formal system where third parties with knowledge of human trafficking submit evidence on the victim's behalf to divert a prosecution so that they can be identified as victims of human trafficking. The cases above and the case of *R v N & LE*⁵²¹ highlight the importance of the prosecution being made aware that an individual may be a victim of human trafficking and further investigation is required.⁵²² An advocate at an earlier stage may have prevented victims from being prosecuted and convicted for offences. Disappointingly, it took another organisation to inform the Court of the past circumstances of an individual to suggest that the defendant was a potential trafficked person. Imogen Chapman from National Society for the Prevention of Cruelty to Children (NSPCC) saw the defendant with an interpreter. It was found that there were "reasonable grounds for believing that he was a victim of international child trafficking for exploitative work in a cannabis farm."⁵²³ The point is that it took a third party, who were not part of the criminal justice system to educate and inform those within the system (lawyers and judges) of the defendant's past and as a trafficked victim. It is something which should have been investigated by public authorities when the trafficked victim came to the attention of public authorities such as the police and duty solicitor at a much earlier stage. An advocate may minimise the risk of the more trafficked victims being prosecuted in the first place by at least submitting all relevant information to prosecutors.

Where the police make initial investigations about whether individuals who have been arrested could be trafficked victims sometimes, further criminal proceedings continued to take place.

⁵²⁰ *R v HVN from R v L and other appeals* [2013] EWCA Crim 991.

⁵²¹ *R v N & LE* [2012] EWCA Crim 189.

⁵²² *R v N & LE* [2012] EWCA Crim 189 at para 42.

⁵²³ *R v N & LE* [2012] EWCA Crim 189 at para 72.

The case of *R v LM, MB, DG, Betti Tabot and Yutunde Tijani*⁵²⁴ involved three women (LM, MB and DG) were charged, prosecuted and convicted of offences of controlling prostitution under s53 *Sexual Offences Act 2003*. Despite the concerns from the police that they may have been trafficked, they were not referred to the NRM. This was argued by defence lawyers to have been a violation of Article 10 CofE which requires States to provide means by which trained personnel are made available to identify and assist victims. However, this argument was rejected by the Court as “a breach of Article 10 does not, by itself render a prosecution unlawful.”⁵²⁵ It was held that the women “ought to have been referred to the identification agencies because other possible measures apart from prosecutions might follow.”⁵²⁶ If this happened, the prosecution would not have occurred and the victims would have been diverted from prosecution to the NRM.

If facts pertinent to an individual’s case were presented at an earlier stage, the individual would not be exposed to prosecution proceedings. In the case of *R v N & LE*⁵²⁷, defence lawyers were quick to point out that “if the facts had been properly investigated, there would have been, or now following proper investigation after conviction, it has become apparent that there should never have been a prosecution.”⁵²⁸ This illustrates that the correct path for the victim to be guided towards is via the NRM framework at an earlier stage, instead of the victim being taken down the prosecution route, which costs more money, time and resources for the State.

Analysis

As we have seen, the prosecutor and the defence lawyers have responsibilities in establishing whether an individual is a victim of trafficking or not. The prosecutor has the responsibility of

⁵²⁴ *R v LM, MB, DG, Betti Tabot and Yutunde Tijani* [2010] EWCA Crim 2327.

⁵²⁵ *R v LM, MB, DG, Betti Tabot and Yutunde Tijani* [2010] EWCA Crim 2327 at 32.

⁵²⁶ *R v LM, MB, DG, Betti Tabot and Yutunde Tijani* [2010] EWCA Crim 2327 at 32.

⁵²⁷ *R v N & LE* [2012] EWCA Crim 189.

⁵²⁸ *R v N & LE* [2012] EWCA Crim 189 at para 10.

ensuring that a referral to the NRM has been made. Proper inquiries should be made before a decision to prosecute takes place. As it has been seen, the question of whether the accused is a trafficked victim has arisen much later in criminal proceedings, after the decision to prosecute has been taken. In some cases, it has been raised during appeals by third parties. An advocate should be introduced to assist prosecutors in making a decision to prosecute, based upon the circumstances of victims, assessing viable defences, and questioning whether they should be referred to the NRM, diverting them away from prosecution. Advocates could also work with victims to obtain information to give to the police so that prosecutors can be prosecuted which is in both interests of the victim and the State. Advocates, used within TSOs could also work more closely with defence lawyers to advise and support the victim during any proceedings to alleviate concerns and anxieties which victims will have.

A trafficked victim may have more trust in someone involved in the process but not a person in authority given their reluctance to trust authorities. The third party has more knowledge of human trafficking and understand the vulnerability of victims. The prosecutor would have more time to complete other tasks and the delegation of this task to an advocate who can liaise with all relevant agencies will enhance the robustness of the process and protect victims from prosecution.

The defence representatives also have responsibilities, but have failed in some cases where individuals have not been referred to the NRM when they should have been. A vulnerable trafficked victim heavily relies on a third party to assist them later in the proceedings. In most cases, a third party has had to raise the issue of identification usually during appeal hearings which highlights the missed opportunities to identify earlier in the process. Missed opportunities in the procedure further justifies the need for an advocate to be instructed at an earlier stage before the decision to prosecute is. The advocate would represent the view that a

prosecution should be avoided on the basis that there is evidence that the individual is trafficked and as a victim of this kind cannot be held morally culpable.

CONCLUSION

This chapter has outlined many different issues and themes relating to the issue of the criminalisation of trafficked victims. The chapter began by discussing how the international legislation from the UN, the Council of Europe, and the European Union obligates States not to prosecute, criminalise and punish trafficked victims. As I have demonstrated, the international obligations serve a purpose of establishing a basic minimum standard in terms of protecting trafficked victims from prosecution. The legal obligations remain unclear and each State party to each legal instrument continues to have discretion on how to implement the obligations. The lack of clarity gives States wider discretion to decide how to criminalise offenders who may have been trafficked. As it has also been seen, the inconsistencies seen at the international level have filtered down to the domestic sphere. There is a lack of consistency with how Scotland, Northern Ireland and England & Wales have implemented the international obligations with a presumption against prosecution being the favoured approach in Scotland, while England and Wales and Northern Ireland continue with prosecution guidelines, common law and introducing statutory defences within modern anti-trafficking legislation. The degree of protection afforded to trafficked victims continues to depend upon which part of the UK the victim is found in. This will mean that trafficked victims will be treated differently, depending upon where they have been found to commit offences.

The chapter discussed the available defences which trafficked victims can rely upon. I have argued that the present defences are not sufficient, and do not provide enough protection from the criminal law. The defence of loss of control may be a favourable defence because the qualifying trigger resulting in a loss of control from a fear of serious violence favours a

trafficked victim due to the nature of the harm caused and the parallel with domestic violence victims. The disadvantage of relying on diminished responsibility is that there are too many definitional issues such as ‘substantially impaired’ and ‘abnormality of mental functioning.’ This lack of clarity prevents the effective use of this defence, and the commission of criminal acts are not due to the existence of a victim having a mental health issue. It may be beneficial for decision makers and juries to understand the effect of the mental health conditions have on the victim which can affect their behaviour, but more importantly understand the roles of coercion and manipulation play which gives the trafficker control over the victim to commit offences. As examined above, there were numerous challenges for victims using each type of defence. The common law defence is applied very narrowly, and courts have been slow to modernise its use to cover situations involving trafficked victims. The reliance on the objective test without considering all relevant circumstances, particularly learned helplessness, renders this defence one which a trafficked victim cannot expect to succeed with.

As we have also seen, the statutory defences introduced in England and Wales and Northern Ireland are restricted in nature, preventing many trafficked victims from relying upon them. It remains to be seen whether more victims will self-identify themselves as the legislation proposes. Until the defences are more victim centred, and framed around the genuine trafficked victim (to appreciate their situation which for example, prevents escape), it remains unclear as to whether more victims will be persuaded to be identified without fear of prosecution without the help of a third party.

A means to safeguard the interests and rights of trafficked victims, ensuring they are not prosecuted in the first place instead of relying on defences, would seem appropriate. This may involve trained trafficking advocates working within the process, crucially at the point of the proceedings where a decision to prosecute will take place. An advocate could be instructed to

assist in the process at this point where the opportunity to refer to the NRM can be taken. We have seen that the present responsibilities of the prosecutor to consider whether a suspect should be referred to the NRM have not been met. I have also explained how anti-trafficking organisations have had to intervene to make the victim's defence aware that their client is a trafficked victim, meaning that victims have been punished unnecessarily because they had not been identified earlier in the process.

Often, where defence solicitors and the CPS have allowed a prosecution of trafficked victims to take place, it has meant a missed opportunity for trafficked victims to be referred to the NRM. This has produced a cost to the taxpayer by the continuation of prosecutions when more resources could be used to investigate, charge and prosecute traffickers with a view to assisting trafficked victims give evidence to help convict more offenders.

Where individuals are incorrectly treated as offenders, rather than victims, it presents gaps in protection for trafficked victims within the criminal justice system, creating barriers for more potential victims to come forward to self-identify. The current system may make victims reluctant to participate in police investigations due to the fear of being prosecuted, rather than being referred and identified.

The challenges for individuals when appearing at immigration tribunals will be the final challenge examined in this thesis. These present a different set of challenges for victims wanting to be recognised as trafficked victims.

CHAPTER 5:

THE ISSUES AND CHALLENGES FOR TRAFFICKED

VICTIMS TO REGULARISE THEIR IMMIGRATION

STATUS DURING IMMIGRATION PROCEEDINGS

I. INTRODUCTION

This chapter is about the challenges foreign trafficked victims (those from outside the EU) face regularising their immigration status in circumstances where they have, or have not been referred to the NRM. For those from EU Member States, this is not generally a problem anyway.

Trafficked victims should be able to remain in the territory of a destination country if the origin country poses a risk for the person to be trafficked again. Due to the organised crime element combined with the transnational aspect of trafficking, it is not beneficial for the State to remove the victim knowing that the person will be at risk of being re-trafficked again and re-entering the country. Instead, it is more practical to protect the victim from the risk of this cyclical harm by helping to encourage the victim to cooperate in investigations to prosecute more traffickers. This approach would facilitate a crime control approach more effectively. I will advance further justifications as to why trafficked victims should be allowed to stay in the UK. These relate to specific risks to victims if deported and the stigmas attached to victims who have been trafficked and exploited. These arguments are important as they illustrate justifiable reasons as to why trafficked victims should be protected in the UK, so victims can access help and support.

This chapter will also argue that it is crucial for States to honour their international obligations to protecting foreign victims, regardless of their nationality. Allowing victims to stay communicates a broader message on how the UK could positively protect non-nationals. By regularising more trafficked victims after identification, it provides an opportunity for the UK to demonstrate their moral obligations from their legal commitments by recognising and helping more trafficked victims to recover from their ordeal by protecting them from the fear of discrimination and ostracism if removed from the UK, rather than returning victims to their own countries.

From the victims' perspective, regularising their status gives reassurance that they cannot be deported and exposed to a risk of being re-trafficked in the future. The question is, what is the best way to facilitate this? There are two routes which are available to victims. Deciding on the most relevant route depends on whether they have been referred to the NRM or not.

The first route is for victims is seeking asylum on the basis that they have been trafficked. The difficulties claiming asylum is the reluctance of many States to admit foreign nationals characterised in the UK by the 'hostile environment' policy towards immigration, reducing the chances of victims being recognised and protected.

The second route is where the victim has been identified by the NRM and is looking to claim Discretionary Leave to Remain (DLR), which allows a person to stay in the UK for a specific period of time. Both routes will be looked at in this chapter. I will be arguing and justifying that the latter route of claiming DLR is the preferred route, and an advocate may be able to assist the victim here by providing support.

By the end of this chapter, it will be clear how it is in the interests of trafficked victims to be positively identified by the NRM so that they have the opportunity to regularise their immigration status.

II. CHALLENGES FOR TRAFFICKED VICTIMS WHO HAVE NOT YET BEEN IDENTIFIED, BUT ARE ATTEMPTING TO CLAIM ASYLUM

It is conceivable that in some cases potential victims will attempt to claim asylum before being referred to the NRM. Therefore, it is important to examine the difficulties in claiming asylum without firstly being recognised as a trafficked victim, because this will be the first time that the issue of a person who has potentially been trafficked has come to the attention of the State. Engagement with the issue of asylum is necessary here because asylum provides individuals with a specific form of recognition and identification as a trafficking victim who requires protection. Some foreign victims who have not been identified or proceeded down the NRM route may choose to claim asylum as they have a fear of being persecuted and have presented arguments that their exploitation forms part of a particular social group. However, when an individual has been identified, international law does not guarantee the right for the trafficked victim to stay in that State. The *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* does not specifically protect trafficked victims from being returned to the State that they have come from, except for a discretion under Article 7 which allows a State to “consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.”⁵²⁹ This discretion offers States with the opportunity (if it wishes to) to offer

⁵²⁹ Article 7(1) UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Organised Crime, 2000.

stay to victims who may have been refugees or economic migrants when they first entered the country, but have since been exploited during their time in the country. States have a wide discretion in meeting their political aims by advocating and implementing anti-immigration policies which satisfy part of a growing hostile electorate towards immigration.⁵³⁰

Refugees are protected by the 1951 UN Convention relating to the status of refugees and its 1967 Protocol, (otherwise known as the Refugee Convention).⁵³¹ States satisfy their legal obligations by protecting individuals through the *UN Convention on Refugees*⁵³² by granting asylum to displaced people who are fleeing war and conflict. The definition of a refugee can be found from Article 1A (2) which states that a refugee:

“shall apply to any person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”⁵³³

In other words, a refugee is someone who is unable or unwilling to return to their home country on the basis that they have a well-founded fear of persecution and unable to rely on the

⁵³⁰ See how politicians have been expected to reduce levels of immigration to the UK from J. Gross, “UK’s Immigration Statistics Gap Explained by Short Term Stays,” Wall Street Journal Online, 12 May 2016.

⁵³¹ The purpose of the 1967 Protocol was to give the Convention universal coverage as the 1951 Convention was drafted in relation to the large number of refugees within Europe, and guaranteeing protection to many displaced people after the Second World War.

⁵³² UN Convention relating to the Status of Refugees 1951 as amended by the 1961 Protocol Relating to the Status of Refugees

⁵³³ Article 1A (2) Convention relating to the Status of Refugees 1951 as amended by the 1961 Protocol Relating to the Status of Refugees.

protection of their State. To be successfully recognised as a refugee under the Refugee Convention, a victim of trafficking would need to prove the following:

- 1) They must have a well-founded fear of persecution;
- 2) That fear is the reason why they are outside their own country; and
- 3) They are unable or unwilling to return to their country because of that fear.⁵³⁴

Individuals can have their immigration status regularised by “potentially applying for asylum on the basis of being trafficked.”⁵³⁵ Under the UNHCR human trafficking guidelines, a trafficked victim has a valid claim for asylum where one of the following circumstances exist:

- “1) The victim may have been trafficked abroad, may have escaped her or his traffickers and may seek the protection of the State where he or she now is;
- 2) The victim may have been trafficked within national territory, may have escaped from his or her traffickers and have fled abroad in search of international protection;
- 3) The individual concerned may not have been trafficked but may fear becoming a victim of trafficking and may have fled abroad in search of international protection.”⁵³⁶

However, there are difficulties to successfully claiming asylum. The first challenge is for a trafficked victim to successfully argue that they form ‘part of a particular social group.’

⁵³⁴ R. Piotrowicz, “Victims of People Trafficking and Entitlement to International Protection,” (2005) Australian Year Book of International Law, Vol 24, 159 at 162.

⁵³⁵ C. Beddoe, L. Bundock & T. Jordan, “Life beyond the Safe House for Survivors of Modern Slavery in London, Gaps and Options Review,” Human Trafficking Foundation, July 2015 at 14.

⁵³⁶ UNHCR Guidelines on International Protection: Protocol relating to the Status of the Status of Refugees to victims of trafficking and persons at risk of being trafficked, HCR/GIP/06/07, 7 April 2006 at para 13.

A. Relevant Factors Assessing Trafficked Persons Circumstances ‘as part of a particular social group.’

The previous section discussed what the criteria is for refugees to be granted protection by States, and which also fulfils a State’s obligation to non-refoulement. Under the principle of non-refoulement, a State is under a duty to protect the person from further harm by not returning the individual to the place where the individual was experiencing harm. The UNHCR considers that “the prohibition of refoulement of refugees constitutes a rule of customary international law. As such it is binding on all States, regardless of whether they have acceded to the 1951 Convention or the 1967 Protocol.”⁵³⁷ Under Article 33, of the Refugee Convention:

“no Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁵³⁸

Under Article 1(A)(2) of the Refugee Convention, “a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.”⁵³⁹ Obstacles and challenges presently stand in the way of trafficked victims meeting this criterion of a particular social group. I will demonstrate (i) how nationality plays a significant role in the way in which trafficked victims from one country are treated

⁵³⁷ Office of UN High Commission for Refugees, “Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol,” (2007) *European Human Rights Law Review*, 484 at 490.

⁵³⁸ Article 33 Refugee Convention.

⁵³⁹ Article 1(A)(2) Refugee Convention.

differently to those from another State, (ii) demonstrate that the continuing discrimination of women seen through sexual exploitation have been recognised, and (iii) explore the role persecution plays in order to determine whether a trafficked victim is seen as being part of a particular social group.

(i) **How Nationality affects whether Victims are seen as ‘part of a particular social group’**

The *Refugee or Person in Need of International Protection (Qualification) Regulations 2006* states the factors which should be considered to establish whether an individual or group should be regarded as part of a particular social group. It states that:

“(i) Members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.”⁵⁴⁰

Therefore, the traits of that group must be identifiable to that region or country and the characteristic must be what separates that country from another. In terms of human trafficking, victims from host countries which have significant problems with trafficking can be argued as having a common characteristic, which distinguishes trafficked victims from other victims from other countries.

A difficulty arises when making assumptions about whether a person is a trafficked victim or not based on the person’s nationality. For example, a trafficked individual from Thailand may

⁵⁴⁰ Article 6(d)(i) The Refugee or person in Need of International Protection (Qualification) Regulations 2006.

not be identified as being part of a particular social group whereas a victim from Moldova or Albania will be. This is because there is a perception that trafficking is more prevalent in certain countries and various social cultures associated with that State can make it difficult for trafficked victims to be reintegrated back into a society. Relying on nationality illustrates a generalist approach to identifying victims, and does not consider each individual on their own circumstances.

Assessing the level of discrimination against the victim remains an important factor in evaluating the risk of being re-trafficked. In Moldova, trafficking into prostitution appears to be widespread. It has been seen that Moldova “is a major source country where victims are trafficked throughout Europe and the Middle East, increasingly to Turkey, Israel, the U.A.E and Russia.”⁵⁴¹ In terms of the general population of victims, Moldova has a significantly higher number of victims than Ukraine:

“If the estimated numbers of trafficking victims are expressed as percentages, the figure for Moldova is five times that for the Ukraine.”⁵⁴²

The case law on this area relates to the factors and characteristics which exist, distinguishing whether a victim from Ukraine, Albania or Moldova is regarded as being part of a particular social group, rather than a victim from the far-east, such as Thailand.

While assessing whether victims of trafficking from Thailand could be identified as being members of a particular social group in the case of *AZ (Trafficked Women) Thailand CG*⁵⁴³ there was an acknowledgement that not all individuals will be at risk of serious harm and will

⁵⁴¹ *SB (PSG- Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002 Asylum & Immigration Tribunal 26th April 2007 at para 30.

⁵⁴² *SB (PSG- Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002 Asylum & Immigration Tribunal 26th April 2007 at para 95.

⁵⁴³ *AZ (Trafficked Women) Thailand CG* [2010] UKUT 118.

become re-trafficked. The risk to the trafficked victim will always be dependent upon the following factors, assessed by merit on a case by case basis:

“Relevant factors will include the age, marital status, domestic background, educational level, qualifications and work experience of the appellant. The availability of employment and a familial or other support network will also be significant factors.”⁵⁴⁴

Whilst the *AZ* case was not specific to victims from Thailand, the case of *AM and BM (Trafficked women) Albania CG*⁵⁴⁵ showed that trafficked victims from Albania were more likely to be seen to be a part of a social group than women from Thailand. The reasoning given for this is the existing cultural characteristics in Albania which places them more at risk.⁵⁴⁶

Consequently, trafficked women can be distinguishable from other groups of women in society and from a nationality perspective, it is accepted that “Albanian women stand as a particular social group of their own,”⁵⁴⁷ because of their association with being vulnerable to trafficking. In addition to the factors which should be considered in the *AZ Thailand* case, there are six factors a decision maker should also consider which are:

“1) The social status and economic standing of the trafficked woman’s family, 2) The level of education of the trafficked woman or her family, 3) The trafficked woman’s state of health, particularly her mental health, 4) The presence of an illegitimate child, 5) The area of origin of the trafficked woman’s family, and 6) The trafficked woman’s age.”⁵⁴⁸

⁵⁴⁴ *AZ (Trafficked Women) Thailand CG* [2010] UKUT 118 at 1-2.

⁵⁴⁵ *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC).

⁵⁴⁶ See how Albanian women have trouble being reintegrated back into society because of strict code of honour from *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 at 2.

⁵⁴⁷ *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 at 2.

⁵⁴⁸ *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC) at 2.

The case of *Moldova CG*⁵⁴⁹ identified three social groups in Moldova who are at risk of human trafficking or at risk of being re-trafficked. These are “(i) women in Moldova, (ii) former victims of trafficking in Moldova; and (iii) victims of trafficking for the purposes of sexual exploitation.”⁵⁵⁰ Trafficked victims from Moldova are distinguishable as a ‘stand-alone’ group and form part of a particular social group which deserve specific protection under the Refugee Convention.

Unfortunately, the possibility that a trafficked victim will be identified as part of a particular social group may vary depending upon the nationality of the victim. The prevalence of human trafficking occurring in a country which involves ‘certain types of women,’ makes victims appear more deserving of victim status than other women in similar exploitative situations but originate from other countries which are perceived to have a lesser problem of human trafficking. In addition to human trafficking, women are sexually exploited as a form of persecution against them. If proven that they experience this type of discrimination, they can be classed as being part of a particular social group too. However, the UK is one of 14 EU Member States who has produced a national list of safe countries or origin to address the increase of asylum seekers. Presently, the UK has a list of 24 countries⁵⁵¹ who are regarded as safe. This list is compiled by the Home Office with “the list enacted in the law, and can be added to or subtracted from by the Secretary of State.”⁵⁵² The discretion awarded to Member States is broad with some States making specific determinations regarding countries relating

⁵⁴⁹ *SB (PSG- Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002 Asylum & Immigration Tribunal 26th April 2007.

⁵⁵⁰ *SB (PSG- Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002 Asylum & Immigration Tribunal 26th April 2007 at para 12.

⁵⁵¹ See s94(4) Nationality, Immigration & Asylum Act 2002 for a full list of these countries.

⁵⁵² European Commission Migration & Affairs, “Safe Countries of Origin,” European Migration Network (2018) at 7. See s94(5) Nationality, Immigration & Asylum Act 2002 which provides for the UK to alter this list.

to minorities, men and women.⁵⁵³ In a recent case regarding Jamaica,⁵⁵⁴ the inclusion of Jamaica among the states designated in the Nationality, Immigration and Asylum Act 2002 s.94(4) as generally not presenting any serious risk of persecution to those entitled to reside was judged to be unlawful on the basis that although Jamaica could be identified as generally safe, it was not safe for members of the LGBT community.⁵⁵⁵

(ii) **Identifying Sexual Exploitation as a means of discriminating against Women in order to satisfy being ‘part of a particular social group’**

A common theme associated with the exploitation and trafficked victims engaged in the sex trade is sexual violence. The discrimination of women is often operationalised into how traffickers viewing women as commodities. Traffickers often inflict sexual violence against women. Victims who disclose this type of historical sexual abuse to advocates and provide details of their exploitation is vital, because it will justify that they are part of a particular social group.

Evidence of sexual violence has been accepted as satisfying being part of a particular social group by Baroness Hale of Richmond in the case of *ex parte Hoxha*.⁵⁵⁶

“Women who have been victims of sexual violence in the past are linked by an immutable characteristic which is at once independent of and the cause of their current ill-treatment.”⁵⁵⁷

⁵⁵³ See European Commission Migration & Affairs, “Safe Countries of Origin,” European Migration Network (2018) at 6 for examples of countries the UK and other countries have determined safe for specific groups.

⁵⁵⁴ *R. (on the application of Brown) v Secretary of State for the Home Department* [2015] UKSC 8.

⁵⁵⁵ See European Commission Migration & Affairs, “Safe Countries of Origin,” European Migration Network (2018) at 8.

⁵⁵⁶ *Ex parte Hoxha* [2005] UKHL 19.

⁵⁵⁷ *Ex parte Hoxha* [2005] UKHL 19 at para 37.

What is required is a shared characteristic which links all the individuals in that group together. The *AZ Thailand* case held that “the victim falls into a narrow social group; that of young females who have been victims of trafficking for sexual exploitation.”⁵⁵⁸ Trafficked women from Thailand are required to prove that they have experienced the same sexual violence as a victim from some parts of Eastern Europe,⁵⁵⁹ because the position taken in the *Hoxha* case showed where there is existence of sexual violence, this connects all of the individuals together as a group:

“We find that the shared past experience of being trafficked for sexual exploitation amounts to a common, immutable characteristic.”⁵⁶⁰

Hoxha remains the leading authority to evaluate how a certain characteristic shared by individuals constitutes a particular social group. Furthermore, it can be argued that women of sexual violence “would clearly fall within the definition of refugee because the persecution is against them specifically as women (of sexual violence) but driven by their nationality, religion or political opinion.”⁵⁶¹ The case of *AM* and *BM* continued to follow the *AZ Thailand* case of concurring with *Hoxha*, showing how vital for victims to show evidence of sexual violence:

⁵⁵⁸ *AZ (Trafficked Women) Thailand CG* [2010] UKUT 118 at para 140.

⁵⁵⁹ See Greta Group of Experts on Action against Trafficking in Human Beings, “Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom,” Second Evaluation Round, 2016 at para 305, para 318 and para 329 which explains how the Home Office and National Crime Agency have been working as part of Joint Investigation Teams in Bulgaria, Poland, Hungary, Romania and the Slovak Republic to prevent trafficking and provide greater support to victims wishing to return back to Poland.

⁵⁶⁰ *AZ (Trafficked Women) Thailand CG* [2010] UKUT 118 at para 141.

⁵⁶¹ R. Piotrowicz, 2Victims of People Trafficking and Entitlement to International Protection,” (2005) 24 Aust, YBIL, 159, at 168-169.

“We conclude that just as trafficked women would be considered to be members of a particular social group in Moldova victims of trafficking in Albania would, applying the dicta of Baroness Hale in *Hoxha* would be members of a particular social group.”⁵⁶²

It has been acknowledged that the size and numbers of the group are not relevant, meaning that there could be 2 or 10,000 victims with the same characteristics. The Refugee Convention Guidelines reinforces this:

“The size of the purported social group is not a relevant criterion in determining whether a social group exists. While the claimant must still demonstrate a well-founded fear of being persecuted based on his or her membership of the particular social group, she or he need not demonstrate that all members of the group are at risk of persecution in order to establish the existence of the group.”⁵⁶³

Victims who have an advocate who they can develop trust in to disclose evidence of sexual exploitation to will be better placed to represent this to immigration authorities, and enhance their chances of being categorised as being part of a particular social group. The importance of stating that the victim has been a victim of sexual violence is crucial in succeeding under a claim for asylum.

(iii) **The role of Persecution in establishing whether a Trafficked Victim is ‘part of a particular social group’**

Trafficked victims may have been deceived or coerced into leaving their country, rather than often leaving because of a fear of persecution. However, victims may have a fear of persecution

⁵⁶² *AM and BM (Trafficked Women) Albania CG* [2010] UKUT 80 (IAC) at para 166.

⁵⁶³ UNHCR on Guidelines International Protection (HCR/GIP/06/07) 7 April 2006 at para 37, found at *AZ (Trafficked Women) Thailand CG* [2010] UKUT 118 at para 141.

of returning. The harm inflicted on victims is done by non-state actors and therefore their home State has the obligation to take action against traffickers. In circumstances where a State does not do this, it will be easier for victims to claim asylum in another country. Trafficked victims within the group must also show that they are at risk of being persecuted in order to be regarded as requiring protection. It has been acknowledged that persecution is a broad term in terms of definition:

“The notion is flexible but clearly requires that the treatment feared must be a serious interference with basic rights, such as a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group.”⁵⁶⁴

It has been accepted that persecution may be carried out by non-state actors, especially when the State is unable or unwilling to offer protection.⁵⁶⁵ The significance of the non-refoulement principle shows that “it has been accepted that an obligation of States to respect this principle extends to cases where persecution is attributed to non-State actors.”⁵⁶⁶ Without the risk of persecution, victims cannot qualify. Previous persecution experienced by victims may be evidence of future risks or threats which may entitle victims to protection from removal from the destination to their home State. Therefore, what is required is that “the woman is being persecuted because she is a member of a particular social group.”⁵⁶⁷ The case of *Shah and*

⁵⁶⁴ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1992) at 51. Also see, R. Piotrowicz, “Victims of People Trafficking and Entitlement to International Protection,” (2005) 24 Aust. YBIL, 159 at 166.

⁵⁶⁵ See R. Piotrowicz, “Victims of People Trafficking and Entitlement to International Protection,” (2005) 24 Aust. YBIL, 159 at 166.

⁵⁶⁶ T. Obokata, “Trafficking of Human Beings from a human rights perspective: Towards a more holistic approach,” (Martinus Nijhoff Publishers, 2006), at 155.

⁵⁶⁷ R. Piotrowicz, “Victims of People Trafficking and Entitlement to International Protection,” (2005) 24 Aust. YBIL, 159 at 167.

Islam,⁵⁶⁸ used the case of *Re Acosta*⁵⁶⁹ to define persecution of a particular social group. It stated that:

“Persecution on account of membership of a particular social group to mean persecution that is directed towards an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, colour, or kinship ties, in some circumstances it might be a shared experience...The particular kind of group of characteristic that will qualify remains to be determined on a case by case basis.”⁵⁷⁰

To rely on evidence of persecution, the case of *R v Home Secretary, ex parte Sivakumaran*,⁵⁷¹ held that the “appropriate test was whether there was a serious possibility or reasonable likelihood of persecution in the future.”⁵⁷² It can be assumed that past persecution does not need to have taken place. Evidence of past persecution would be advantageous rather than relying on the possibility of future persecution. Past evidence of ill treatment will be justifiable to seek the non-return of the person, because it indicates the risk of further harm, as stated in the case of *Adan*⁵⁷³ during the judgment of *Demirkaya v SSHD*⁵⁷⁴:

⁵⁶⁸ *Islam v SSHD* (United Nations High Comr for Refugees Intervening) [1999] 2 AC 629.

⁵⁶⁹ *Re Acosta* (1985) 19i & N.211.

⁵⁷⁰ *Re Acosta* (1985) 19i & N.211 found in P. Chandran, “Human Trafficking Handbook: Recognising Trafficking & Modern-Day Slavery in the UK,” (Lexis Nexis, 2011) at 261.

⁵⁷¹ *R v Home Secretary, ex parte Sivakumaran* [1988] AC 958.

⁵⁷² P. Chandran, “Human Trafficking Handbook: Recognising Trafficking & Modern-Day Slavery in the UK,” (Lexis Nexis, 2011) at 255.

⁵⁷³ *Adan* [1999] 1 AC 293.

⁵⁷⁴ *Demirkaya v Secretary of State for the Home Department* [1999] Imm AR 498, CA.

“The Court held that the treatment a person had been subjected to before leaving his country of origin was very relevant to the question of whether that person had a well-founded fear of persecution on his return.”⁵⁷⁵

Therefore, establishing the risk of persecution “would require an assessment of the conditions in which traffickers operate, as well as the ability, and the will of the national authorities to act against traffickers.”⁵⁷⁶ It is clear from the *AM and BM (Trafficked women) Albania CG case*⁵⁷⁷ that being a member of a social group will not satisfy the criteria and what is required is evidence of persecution. Even in cases where trafficking is common, for example Moldova and Albania, individuals belonging to a particular social group must demonstrate that they have been trafficked for this purpose and be persecuted because of being part of a particular social group:

“It does not mean that establishing such membership will be sufficient to make out a case to be recognised as a refugee. The question to be addressed in each case will be a particular appellant will face a real risk of persecution on account of her membership of such a group.”⁵⁷⁸

Consequently, any assessment will examine the extent to which traffickers can operate without the interference from the authorities, and “it will be easier to establish that there is no effective protection available in the victim’s home state. This will be relevant to assessing the validity

⁵⁷⁵ P. Chandran, “Human Trafficking Handbook: Recognising Trafficking & Modern-Day Slavery in the UK,” (Lexis Nexis, 2011) at 255.

⁵⁷⁶ R. Piotrowicz, “Victims of People Trafficking and Entitlement to International Protection,” (2005) 24 Aust. YBIL, 159 at 166.

⁵⁷⁷ *AM and BM (Trafficked Women) Albania CG* [2010] UKUT 80 (IAC).

⁵⁷⁸ *AM and BM (Trafficked Women) Albania CG* [2010] UKUT 80 (IAC) at 219.

of the fear of persecution.”⁵⁷⁹ The Special Adjudicator in the *Lyudmyla Dzhygun* case,⁵⁸⁰ found “that there is a particular social group, which consists of women in the Ukraine who are forced into prostitution against their will. The unifying factors of such a group are their gender, coercion, prostitution, societal recognition, persecution and the lack of State protection.”⁵⁸¹ It can be seen how victims engaged in sexual exploitation who are regarded as prostitutes exposes them to the risk of persecution. In a case involving a Moldovan national, it was held that “the applicant must be the subject of attack because he or she is one of those jointly condemned in the eyes of their prosecutors for possession of the characteristic which is common to the group.”⁵⁸² The importance of establishing what the particular social group is must be followed by establishing what the persecution is. This is why it is necessary to identify victims and have an advocate who can uncover the past persecution and circumstances of victims to increase the likelihood of meeting the criteria.

As it has been seen, “the principal hurdles for asylum are establishing that the women has a well-founded fear of persecution with regard to her home State even though she has been trafficked to another and that she is a member of a particular social group.”⁵⁸³ Nevertheless, in situations where the Refugee Convention does not recognise individuals who are suffering from serious violations of human rights, the role of the Destination State is to “regulate the status and presence of such non-Convention refugees.”⁵⁸⁴ Recognition has been developed

⁵⁷⁹ R. Piotrowicz, “Victims of People Trafficking and Entitlement to International Protection,” (2005) 24 Aust. YBIL, 159 at 166.

⁵⁸⁰ *Secretary of State for the Home Department v Lyudmyla Dzhygun* (Immigration Appeals Tribunal), Appeal No: CC-50627-99 (00TH00728), April 13, 2000.

⁵⁸¹ *Secretary of State for the Home Department v Lyudmyla Dzhygun* (Immigration Appeals Tribunal), Appeal No: CC-50627-99 (00TH00728), April 13, 2000 at para 28-29.

⁵⁸² *SB (PSG- Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002 Asylum & Immigration Tribunal 26th April 2007 at para 25.

⁵⁸³ R. Piotrowicz, “Victims of People Trafficking and Entitlement to International Protection,” (2005) 24 Aust. YBIL, 159 at 178.

⁵⁸⁴ R. Piotrowicz, “Victims of People Trafficking and Entitlement to International Protection,” (2005) 24 Aust. YBIL, 159 at 176.

through “the principle of subsidiary protection as a safety net for those who fail to qualify as refugees under the Refugee Convention, but who are nevertheless recognised to be in need of international protection.”⁵⁸⁵ Article 2(f) *Directive 2011/95/EU*⁵⁸⁶ defines subsidiary protection as:

“a third country national or a stateless person who does not qualify as a refugee, but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm.”⁵⁸⁷

To benefit from subsidiary protection, Piotrowicz states that trafficked victims would need to show a risk of experiencing serious harm,⁵⁸⁸ which would encompass a fear of “being subjected to torture or inhuman and degrading treatment at the hands of persons in her own country, that is the one from which she was trafficked.”⁵⁸⁹ In contrast to satisfying the criteria in the Refugee Convention regarding being seen as part of a particular social group, trafficked victims who are seeking subsidiary protection “on the existence of a well –founded fear of being subjected to serious and unjustified harm in the form of torture or inhuman and degrading treatment or

⁵⁸⁵ R. Piotrowicz & Dr C. van Eck, “Subsidiary Protection and Primary Rights,” (2004) ICLQ, Vol 53, 107 at 108.

⁵⁸⁶ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

⁵⁸⁷ Article 2(f) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

⁵⁸⁸ Serious harm is defined in Article 15 as consisting of the death penalty or execution; or torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

⁵⁸⁹ R. Piotrowicz, “Victims of People Trafficking and Entitlement to International Protection,” (2005) 24 YBIL, 159 at 178.

punishment”⁵⁹⁰ which is more realistic than claiming for protection under the Refugee Convention. Having said that, the fact that States have signed the Refugee Convention and (as we shall see shortly from case law), tribunals have accepted that trafficked victims do form part of a particular social group, distinct from other types of vulnerable persons who have been persecuted and are likely to face discrimination back in their own country creates a responsibility to commit to the protection of victims by offering them asylum and recognising victims of trafficking as their own distinct group of victim, different from other types of migrant. Therefore, subsidiary protection offers a fall-back position for victims if asylum fails. The priority must be for States to honour their commitments to the Refugee Convention first before victims attempt to rely on subsidiary protection, with States recognising that individuals of trafficking form part of a particular social group. By disregarding the Refugee Convention, it would diminish what the Convention stands for in terms of protecting vulnerable individuals regardless of where in the world refugees find themselves in, with every signatory State being held accountable to protecting refugees in the same way.

Hence the reasons why States should offer trafficked victims the opportunity to have permanent residence. Firstly, trafficked victims have been subjected to a violation of their human rights in the State in which they have been found and identified. Therefore, the question is what States should do in terms of their responsibilities towards victims. Violations of their human rights have been recognised under the Human Rights Act 1998.⁵⁹¹ States offering safe sanctuary to victims demonstrates a humanitarian and victim centred approach which States are under a moral obligation to adopt, even if States are not showing this at present. Many victims would have been physically and psychologically hurt as a result of their exploitation. Consequently,

⁵⁹⁰ R. Piotrowicz, “Victims of People Trafficking and Entitlement to International Protection,” (2005) 24 YBIL, 159 at 179.

⁵⁹¹ See Human Rights Act 1998. Article 3 on the prohibition on torture and inhuman and degrading treatment or punishment and Article 4 which protects individuals from being held in slavery or servitude.

many who have been referred and having their cases dealt with through the NRM are accessing and having medical support. Due to the complex mental health issues many victims experience during and after their trafficking ordeal, the length of recovery for each victim will vary dependent upon their own exploitative experience. Therefore, it is unfair for a State to adopt a position whereby victims should be sent back to the country where they came from if it is unsafe for them to be returned back to⁵⁹² or if they cannot access the same type of medical support.⁵⁹³ It is clear that this issue of permanent residency is a complex one. What is required is a bespoke response from the government to each victim in terms of whether it is appropriate for a victim to be removed, or be allowed to remain. This type of approach to decision making constitutes a form of individualised justice for each victim. The consequences are that there may not be a degree of consistency in terms of decisions made, but on the other hand, victims will know that their decision has been made bona fide. After all, each case is different and the facts and circumstances vary behind why a victim was trafficked and the harm which has been inflicted on them during their exploitation.

However, from a broader political perspective of adhering to international obligations States may adopt an anti-immigration approach to combatting the issue of migration. Where this occurs it is more difficult for trafficked victims to be distinguishable from other groups of migrants, such as economic migrants. As Dina Hayes identifies, “the most serious obstacle to extending asylum to trafficking lies in the State’s fundamental right to preserve its own gatekeeping power.”⁵⁹⁴ The present weakness associated with current international obligations of refugee law illustrate that although there are duties upon States to protect individuals, these

⁵⁹² See Part III of this chapter where arguments are made against the removal of trafficked victims.

⁵⁹³ See later in this chapter which discusses how reasonable it is for a State who identified the victim to remove that trafficked victim who is having medical treatment but the same treatment is not available in the victim’s home country.

⁵⁹⁴ D. Haynes, “Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers,” *Human Rights Quarterly* (2004) Vol 26, 221 at 266.

obligations can be disregarded by the principle of national sovereignty and the right for the State to govern as they so wish, within their own borders. This includes the right to advance nationalistic policies under the principle of sovereignty.

Where this happens, victims are exposed to the risk of harm, often compounded by anti-immigration policies where the State should be providing protection to vulnerable people. The rights of an individual to be protected under international law can sometimes be in conflict with a reluctance of a State to meet their international obligations to the individual. This situation may often leave the victims at an increased risk of further harm from non-state actors such as organised criminal groups. States often use international obligations for their own political advantage. Neil Boister believes that where this happens in terms of fighting transnational organised crime,⁵⁹⁵ individuals will stand to lose in terms of their human rights:

“The conventions encourage a ‘law and order’ attitude from state parties which may cause them to go further than strictly obliged to, with negative consequences for individual rights.”⁵⁹⁶

The importance of acknowledging and respecting the circumstances of how the victim arrived in the UK, the extent of the harm and suffering that they have experienced in the UK, and the dangers and risks of returning the individual to their home country should be understood and considered appropriately by immigration tribunals when making a decision on a trafficked victim claiming asylum.

⁵⁹⁵ See UN Transnational Organised Crime Convention, which was adopted by resolution A/RES/55/25 of 15 November 2000.

⁵⁹⁶ N. Boister, “Transnational Criminal Law?” (2003) *European Journal of International Law*, 953 at 959.

Conclusion

As we have seen, victims seeking to apply for asylum will encounter challenges. There are three main issues when discussing whether a victim of trafficking is regarded to be part of a particular social group. I have discussed the issue of nationality which has been important because victims from countries which have a well-known history of human trafficking are regarded to have been given victim status rather than a trafficked victim from less known source countries. Asylum can be more difficult to claim, satisfying the ‘part of a particular social group’ element, but has been increasingly recognised by tribunals. It is important that where refugees come into contact with TSO, the issue of whether they have been trafficked must be established and guide the potential victim through the referral route, rather than the asylum procedure.

I have also highlighted the important issue of establishing sexual violence evidence from a victim which has been recognised as a main characteristic of establishing a particular social group. Additionally, I have discussed the issue of persecution which is required to be established for a victim to be regarded as part of a particular social group. Persecution is also important to establish what socioeconomic circumstances have given rise for the facilitation of trafficking in the first place along with the risk of future persecution if deported. It has been accepted that evidence of past persecution can be used as evidence as to the risk of future persecution if an individual is returned back to their home country. However, trafficked victims are more likely to succeed in a claim for subsidiary protection, rather than asylum under the Refugee Convention on the basis that they are at risk of experiencing serious harm, rather than trying to justify that trafficked victims form part of a particular social group.

III. THE ARGUMENT AGAINST THE DEPORTATION OF TRAFFICKED VICTIMS

We now move to the specific arguments as to why trafficked victims should be awarded protection from the State in the form of asylum. As discussed in the previous section, there are challenges for victims successfully applying for asylum. However, in circumstances where vulnerable foreign victims who have been applying for asylum on the basis of them being trafficked are not successful, victims will be exposed to a number of risks. There are three risks which victims will be exposed to if they were to be deported. These are:

- a) The risk of the victim being persecuted and subsequently re-trafficked if returned back to their home State;
- b) The risk of being subjected to discrimination in their home State as a result of being involved in trafficking; and
- c) The risk of being stigmatised and ostracised by their community due to being trafficked.

All the above risks overlap and are inter-related which present significant challenges for the victim. The risks will now be examined separately below.

A. The Risk To The Victim Of Being Re-trafficked If Returned Back To Their Home State

The first risk for any trafficked victim who is returned back by a State to another country (especially if the State is a 'source' country of trafficking) is the risk of being re-trafficked in

the future. If the victim is deported to a State which cannot guarantee their protection, the victim will be at risk of persecution. This would violate the non-refoulement principle.⁵⁹⁷

(i) The risk of Persecution in the victim's home State

In the case of *Haci Demirkaya v Secretary of State for Home Department*⁵⁹⁸ it was held that “whether an asylum applicant had a well-founded fear of persecution if he returned home, it is always a question of fact and degree, and could not be made a question of law.”⁵⁹⁹ The test of a ‘well-founded fear of persecution’ comes from Article 1A(2) of the Refugee Convention.⁶⁰⁰ As each case is different, it stresses the importance of making decisions based on the merits of a victim's circumstances. In the *Lyudmyla Dzhygun* case,⁶⁰¹ a Ukrainian female citizen, had been tricked by sex traffickers into travelling abroad where she was held against her will, raped, sexually assaulted and forced into prostitution. After escaping back to the Ukraine she again left that country and came to the UK, and applied for asylum.

The question was whether the victim had a well-founded fear of persecution by applying the Refugee Convention.⁶⁰² To establish whether she could be sent back to the Ukraine, her past circumstances were investigated by the Special Adjudicator who found that:

⁵⁹⁷ The Non-Refoulement Principle has been discussed earlier in this chapter. Basically, under the principle of non-refoulement, the State is under a duty to protect the person from further harm by not returning the individual to the place where the individual was experiencing harm from.

⁵⁹⁸ *Haci Demirkaya v Secretary of State for Home Department* [1999] EWCA Civ 1654.

⁵⁹⁹ *Haci Demirkaya v Secretary of State for Home Department* [1999] EWCA Civ 1654 found at 1.

⁶⁰⁰ Article 1A(2) of the Convention provides, that a refugee is someone who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

⁶⁰¹ *Secretary of State for the Home Department v Lyudmyla Dzhygun* (Immigration Appeals Tribunal), Appeal No: CC-50627-99 (00TH00728), April 13, 2000.

⁶⁰² UN Convention relating to the Status of Refugees 1951 as amended by the 1961 Protocol Relating to the Status of Refugees.

“The respondent had been persecuted by criminal elements in the Ukraine. The Mafia in the Ukraine was looking for her. She feared that if they found her she would be killed. The Special Adjudicator accepted this and that the authorities in the Ukraine could not provide her with a sufficiency of protection. She concluded that the respondent had a well-founded fear of persecution for a Convention reason.”⁶⁰³

This opinion was later supported in the case of *Moldova CG*⁶⁰⁴ where it was held that:

“The Appellant’s gender and the fact that she had been trafficked places her in her current position of having a well-founded fear of future persecution. The Appellant would also be at real risk of being re-trafficked, because she would stand out as an unprotected member of society as a person who has been trafficked.”⁶⁰⁵

Where authorities are having to combat organised crime, a victim’s claim for asylum may be strengthened because the State (who is returning the individual) must consider whether the home country is able to protect the victim from persecution. In this case, it was held the home country could not and if the host State returned the victim, this would have violated the non-refoulement principle.

A returning State would then need to enquire whether the victim could be relocated elsewhere in the country. Internal relocation of a trafficked victim takes place where the victim is returned back to the home country, but settled in a different region or in a different community. For a number of reasons this issue also presents its own set of challenges to trafficked victims.

⁶⁰³ *Secretary of State for the Home Department v Lyudmyla Dzhygun* (Immigration Appeals Tribunal), Appeal No: CC-50627-99 (00TH00728), April 13, 2000 at para 22.

⁶⁰⁴ *SB (PSG- Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002 Asylum & Immigration Tribunal 26th April 2007.

⁶⁰⁵ *SB (PSG- Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002 Asylum & Immigration Tribunal 26th April 2007 at para 34.

(ii) **The difficulties associated with the internal relocation of a Trafficked Victim**

Internal relocation is required to be considered by the Tribunal as to whether it would be safe under the Refugee Convention⁶⁰⁶ for the victim to return to a different region of the country.

In cases such as this:

“A person is not entitled to protection of the Convention if there is a part of her country of origin where she would not have a well-founded fear of being persecuted and if she can reasonably be expected to stay in that part of the country.”⁶⁰⁷

In some cases it may not be appropriate to deport and internally relocate the trafficked victim, because of an unfamiliarity with that area. This makes internal relocation difficult. In the case of *AM and BM (Trafficked women) Albania*,⁶⁰⁸ it has been held that:

“Particular weight must be given to the mental state of a victim of trafficking not only when considering whether or not a victim of trafficking might face persecution in her home area but also when considering issues such as internal relocation.”⁶⁰⁹

In the case of *Januzi v SSHD*,⁶¹⁰ it was held that where an individual is to be resettled, “the enquiry must be directed to the situation of the particular appellant, whose age, gender, experience, health, skills and family ties may all be very relevant.”⁶¹¹ The level of protection that the State could offer to the trafficked victim upon their return to the country is relevant, but the victim has the burden of showing what the risks are. In *PO (Trafficked Victim)*

⁶⁰⁶ UN Convention relating to the Status of Refugees 1951 as amended by the 1961 Protocol Relating to the Status of Refugees.

⁶⁰⁷ *PO (Trafficked Victim) Nigeria* [2009] UKAIT 00046 at para 203.

⁶⁰⁸ *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC).

⁶⁰⁹ *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC) at para 150.

⁶¹⁰ *Januzi v SSHD* [2006] UKHL, 5.

⁶¹¹ *Januzi v SSHD* [2006] UKHL, 5 at para 5.

Nigeria,⁶¹² the claimant was refused asylum on the basis that the victim could be internally relocated. However, the Tribunal acknowledged that:

“The victim will have a well-founded fear of persecution if she can show that the Nigerian authorities know or ought to know of circumstances particular to her case giving rise to his fear, but are unlikely to provide the additional protection her particular circumstances reasonably require.”⁶¹³

Positively, the guidance in the *PO Nigeria* case of 2009 where the “claimant may still have a well-founded fear of persecution if she can show that the Nigerian authorities know or ought to know of circumstances particular to her case giving rise to her fear”⁶¹⁴ is no longer to be followed on the general assumption that women from Nigeria trafficked to the UK would face the risk of being re-trafficked if returned back to Nigeria. This position was confirmed after the case of *HD (Trafficked Women) Nigeria CG*,⁶¹⁵ where it was stated that although the Nigerian Government “recognises that the trafficking of women both internally and internationally, it is a significant problem which needs to be addressed.”⁶¹⁶ Crucially, this approach switches from proving the merits of an asylum claim based on the level of risk to the trafficked victim proving that the State should know about the risks that the victim may be exposed to, to establishing the merits of the asylum claim based upon the level of risk to the trafficked victim.

Therefore, a more detailed assessment to establish the victim’s personal circumstances may need to take place. This was acknowledged in the *AZ Thailand* case which highlighted factors which are to be taken into consideration before deciding upon an asylum claim. Establishing

⁶¹² *PO (Trafficked Victim) Nigeria* [2009] UKAIT 00046.

⁶¹³ *PO (Trafficked Victim) Nigeria* [2009] UKAIT 00046 at para 192.

⁶¹⁴ *PO (Trafficked Victim) Nigeria* [2009] UKAIT 00046 at para 192.

⁶¹⁵ *HD (Trafficked Women) Nigeria CG* [2016] UKUT 00454 (IAC).

⁶¹⁶ *HD (Trafficked Women) Nigeria CG* [2016] UKUT 00454 (IAC) at para 188.

the victim's mental health needs is one of the issues which need to be considered.⁶¹⁷ An assessment as to what medical and accommodation services were available to the trafficked victim to ensure that the State could afford her effective protection is another.⁶¹⁸ The asylum claim failed because the State could afford her the effective protection in that State by providing the necessary medical treatment if the victim were internally relocated. To arrive at such a conclusion, the Tribunal benefited from research and the help of an advocate who advised as to the risks for the victim if such services are not available to guarantee safety, which posed a heightened risk of being re-trafficked because of this vulnerability.

The *HD Nigeria* case introduced a criteria to assess whether there would be an enhanced risk of being re-trafficked if returned back. The factors depended upon the individual's personal circumstances which include:

- “a) The absence of a supportive family willing to take the victim back into the family unit;
- b) Visible or discernible characteristics of vulnerability, such as having no social support network to assist, no or little education or vocational skills, mental health conditions, which may well have been caused by experiences of abuse when originally trafficked, material and financial deprivation such as to meant the victim will be living in poverty or in conditions of destitution;

⁶¹⁷ *AZ (Trafficked Women) Thailand CG* [2010] UKUT 118 at 1-2.

⁶¹⁸ *PO (Trafficked Victim) Nigeria* [2009] UKAIT 00046 at para 203.

c) The fact that a woman was previously trafficked is likely to mean that she was then identified by the traffickers as someone disclosing characteristics of vulnerability such as to give rise to a real risk of being trafficked.”⁶¹⁹

The evidence suggested that the individual would fall into the heightened risk category for the following three reasons.

Firstly, the victim did not have a supportive family and there was evidence that “she was beaten and severely maltreated as a child by her father and her father was complicit in her trafficking. He would continue to ill-treat the appellant if she returned to him. She would be unable to live in her village or community without being found by her father.”⁶²⁰ The Tribunal was satisfied that “to return her to her father would be to place her in the position either of him being complicit in her trafficking or subjected to serious physical abuse.”⁶²¹ The evidence collated proved to satisfy that the victim did not have the sufficient family support network. This ties in with the situation where some victims have experienced historical abuse when they were younger. If victims are subjected to further harm because of a poor family support structure, it may be unsafe for the victim to return.

Secondly, the victim had little education and did not have the supportive networks around her to keep her safe. It was evidence that “the appellant is a young, ill-educated single woman with no social skills. Her family were complicit in her trafficking and she has no financial support. She has been taunted, bullied, beaten and exploited by various perpetrators including her father. She was sexually exploited by men who claimed to be assisting her.”⁶²² Consequently, she

⁶¹⁹ *HD (Trafficked Women) Nigeria CG* [2016] UKUT 00454 (IAC) at para 190.

⁶²⁰ *HD (Trafficked Women) Nigeria CG* [2016] UKUT 00454 (IAC) at para 213.

⁶²¹ *HD (Trafficked Women) Nigeria CG* [2016] UKUT 00454 (IAC) at para 218.

⁶²² *HD (Trafficked Women) Nigeria CG* [2016] UKUT 00454 (IAC) at para 207.

would be at continued risk of further harm and likely events of being re-trafficked and subjected to similar exploitation because of the negative environment she would be involved in.

Thirdly, the effect of her experiencing exploitation and the harm she suffered because her trafficking experience meant that she is vulnerable. Her vulnerability would be taken advantage of by other traffickers and places her at potential risk. It was acknowledged that “the appellant’s persistent pattern of dissociative behaviour makes her clearly visible to potential abusers. She cannot support herself or function. The abusive sexual activity is not an indication of trafficking, but an indicator of vulnerability.”⁶²³ In addition, it was stated that:

“Her vulnerability to abuse would be manifest and enhanced because of tribal, language and isolation issues. She has no skills other than domestic skills. Given the appellant’s vulnerabilities, we have no doubt that her return and relocation elsewhere than her home region would be unduly harsh and she would remain at real risk of being trafficked.”⁶²⁴

All the evidence above satisfied the Tribunal that it would not be appropriate for the victim to return to Nigeria or be relocated. A Tribunal may be inclined to look at the following factors indicating a lower risk of being trafficked. These include but are not limited to:

- “a) The availability of a supportive family willing to take the woman back into the family unit;
- b) The fact that the woman has acquired skills and experiences since leaving Nigeria that better equip her to have access to a livelihood on return to Nigeria, thus enabling her to provide for herself.”⁶²⁵

⁶²³ *HD (Trafficked Women) Nigeria CG* [2016] UKUT 00454 (IAC) at para 208.

⁶²⁴ *HD (Trafficked Women) Nigeria CG* [2016] UKUT 00454 (IAC) at para 224.

⁶²⁵ *HD (Trafficked Women) Nigeria CG* [2016] UKUT 00454 (IAC) at para 191.

Both assessment criteria are beneficial to the trafficked victim because they are more subjective to the trafficked victim. It is a better assessment, rather than the burden of proving the State should have known about facts which give rise to the fear of persecution (as seen in the *PO Nigeria* case). Evaluating the criteria shows how each case will be judged upon its own merits and stresses the importance of understanding and acknowledging the personal circumstances of the victim on how they originally became trafficked in the first place and whether the environment the victim may be exposed to on return may increase the likelihood of re-trafficking. The lack of socioeconomic opportunities force many individuals into precarious situations, making them exposed to traffickers in the first place. The stigma surrounding human trafficking can lead to further challenges that victims face after the trafficking experience and exploitation has ended. Consequently, the role which discrimination plays becomes relevant.

B. The Risk of Victims being Subjected to Discrimination in their home State as a Result of being Involved in Trafficking

The second risk for a trafficked victim if returned is being discriminated against when accessing support services opportunities in their home country, especially where they have been involved in sexual exploitation.

The existence of discrimination towards trafficked victims will have a negative impact on the victim being able to recover and become re-integrated back into society. Discrimination against prostitutes in Ukraine, for example plays a significant part in the victim not being protected by the Ukrainian State. It has been acknowledged that “prostitution is socially stigmatised and most people do not differentiate between someone who has worked in prostitution and someone

who was trafficked and forcibly sexually exploited.”⁶²⁶ The Special Adjudicator in the *Lyudmyla Dzhygun* case acknowledged that where women are forced into prostitution, the State treated them differently to other Ukrainian women because of the negative perception which is attached to the women involved in this type of sexual activity. It was stated that:

“the test is not whether what happens to the sufferer is a crime but whether the sufferer belongs to a group which is discriminated against and unprotected by the State. We find that women in the Ukraine who are forced into prostitution against their will are discriminated against and unprotected by the State. The discrimination arises because members of this group are not accorded the same protection as other women or other people in the Ukraine. The differential element in the lack of protection results in the discrimination.”⁶²⁷

As referenced earlier, some victims of trafficking may have been subjected to abuse in their home country before being trafficked to another country. A leading authority which looked at this is the case of *Demirkaya v SSHD*,⁶²⁸ where it was stated that “the treatment a person had been subjected to before leaving his country of origin was very relevant to the question of whether that person had a well-founded fear of persecution on his return. The court held that in the absence of a significant change in the country of origin, there may be a real risk of persecutory treatment on return.”⁶²⁹ The *AZ Thailand* case acknowledges the risks of re-trafficking and it was argued that the evidence indicates that former victims of trafficking are even more vulnerable to re-trafficking because “they have already been through the business

⁶²⁶ *SB (PSG- Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002 Asylum & Immigration Tribunal 26th April 2007 at para 102. As discussed in Chapter 2, the difference between someone who is voluntarily consenting to engaging in sex work and one who is being exploited is often difficult to see.

⁶²⁷ *Secretary of State for the Home Department v Lyudmyla Dzhygun* (Immigration Appeals Tribunal), Appeal No: CC-50627-99 (00TH00728), April 13, 2000 at 34.

⁶²⁸ *Demirkaya v SSHD* [1999] ImmAR 498.

⁶²⁹ *Demirkaya v SSHD* case found in *AZ (Trafficked Women) Thailand CG* [2010] UKUT 118 at para 154.

and know how to be compliant. They are easier for traffickers to deal with as they do not have to be taught the rules from scratch; the breaking in point has already taken place.”⁶³⁰ This situation may be beneficial for traffickers and evidence suggests that increasingly, “women who are complicit with the trafficker, possibly for either economic reasons or because they see the arrangement as being a way to escape from an abusive or traditional family and decide to travel abroad possibly to find a foreign husband.”⁶³¹ Many women have often used the business of human trafficking to escape the environment of abuse but have then been exploited:

“There now appears to be a much higher proportion of trafficked women who have approached the traffickers themselves, having made a decision that working as a prostitute in Europe is preferable to the life that they might lead in Albania.”⁶³²

The *AZ Thailand* case also referenced that the lack of education is rooted in discrimination which makes vulnerable individuals at risk of being trafficked. It was acknowledged that:

“Although it was not suggested that societal discrimination in itself amounts to persecution, it is a factor which is relevant for the purposes of assessing risk as it contributes to the isolated position a woman would find herself in which, in turn, increases her vulnerability and her attraction to traffickers. We do not say that the likelihood that the appellant would be unable to find work which would be unlikely to expose her to a risk of trafficking, amounts to persecution, but it is a factor that when viewed cumulatively with the other facts of her situation places her at additional risk.”⁶³³

⁶³⁰ *AZ (Trafficked Women) Thailand CG* [2010] UKUT 118 at para 150.

⁶³¹ *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC) at para 137.

⁶³² *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC) at para 212.

⁶³³ *AZ (Trafficked Women) Thailand CG* [2010] UKUT 118 at para 149.

The discussion above shows why the identification of trafficked victims is so important, because once women in these situations have received a Conclusive Grounds Decision, the risk of being deported minimises.

C. The Risk of being Stigmatised and Ostracised by their Community if Deported due to being Trafficked

The third risk for trafficked victims should they be deported is the stigma from their home community if trafficked and exploited, especially if they were involved in prostitution. A victim who is stigmatised by their community may affect the ability to integrate back into society, which may compromise their recovery. Stigma impacts the victim's ability to recover from their ordeal because it directly affects "a victim's access to assistance, with some victims unwilling to accept services from anti-trafficking organisations."⁶³⁴ This section will discuss three effects where a victim is stigmatised, justifying why a trafficked victim should not be deported. They are:

- (i) The effect that stigma has in ostracising the trafficked victim;
- (ii) The problems of reintegration for the trafficked victim as a result of stigma;
- (iii) The direct effect on a trafficked victim's mental health.

(i) The Effect of Ostracism on the Trafficked Victim

Ostracism occurs when a person is excluded from a society or group. Where a trafficked victim experiences ostracism, there may be an increased risk of re-trafficking. This is because people from communities where victims may judge those who have been associated with the sex

⁶³⁴ *SB (PSG- Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002 Asylum & Immigration Tribunal 26th April 2007 at para 102.

industry, and the severity of the ostracism may differ depending on the various cultural and social norms in the region which the victim is from. As Piotrowicz acknowledges, “certain victims of trafficking, but not all, may qualify as a member of a particular social group if they come from societies that are likely to ostracise them (should they ever go home) should the fact that they have worked in the sex trade become known.”⁶³⁵ Being ostracised would also lead to persecution because of the association with sex trafficking.⁶³⁶ It can also lead to difficulties of being re-integrated back into society and a lack of education, employment and social opportunities which may make them at risk of being targeted again by traffickers and starting the cycle of re-trafficking again:

“One psychologist explained that one of her clients who had been abroad was brutalised in her community because of the stigma. She did not tell anything, but there were a lot of people suspecting this, because she had been away for four years. She went to a party in the village and guys there took her out and raped her – you were there and did this for money, why not do it for us free of charge. She came here very depressed. So stigma is a very serious problem.”⁶³⁷

Victims may become alienated and isolated from opportunities to reintegrate back into society as a result of ostracism. This suggests a well-founded fear of persecution because “even if the ostracism from, or punishment by, family or community members does not rise to the level of persecution, such rejection by, and isolation from, social support networks may in fact heighten the risk of being re-trafficked or of being exposed to retaliation, which could then give rise to

⁶³⁵ R. Piotrowicz, “Victims of People Trafficking and Entitlement to International Protection,” (2005) Australian Year Book of International Law, Vol 24, 159 at 169.

⁶³⁶ See R. Piotrowicz, “Victims of People Trafficking and Entitlement to International Protection,” (2005) Australian Year Book of International Law, Vol 24, 159 at 166.

⁶³⁷ *SB (PSG- Protection Regulations – Reg 6) Moldova CG* [2008] UKAIT 00002 Asylum & Immigration Tribunal 26th April 2007 at para 103.

a well-founded fear of persecution.”⁶³⁸ Furthermore, victims may be at risk of inhuman and degrading treatment due to ostracism in her own country. It has been argued that “in such cases, the destination State may also have to offer subsidiary protection.”⁶³⁹ As we can see, ostracism can lead to further persecution as a result of being trafficked and exploited by traffickers.

(ii) **The Problems of reintegration for the Trafficked Victim as a result of Stigma**

The second effect of experiencing stigma is the challenge of being reintegrated back into society. Victims may have problems and challenges in becoming part of their community after being trafficked and exploited in another State. The successful reintegration of victims is an important issue because it plays a role in the victim’s recovery, and for the ability for victims to live a normal life:

“Reintegration is not simply a victim's return to her native country, but the more comprehensive process of re-entering society. In addition to providing for safe transportation, the embassy should also identify appropriate NGOs that can provide social services.”⁶⁴⁰

If victims are successfully reintegrated they may become safer, and it may lower the risk of being re-trafficked. The challenges which require to be overcome in the *AM* and *BM* case were

⁶³⁸ 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,” HCR/GIP/06/07 7 April 2006, at para 18. Furthermore, Piotrowicz, argues that where it is common knowledge that a woman has been trafficked, her fear of rejection or ostracism may well amount to a fear of persecution, depending upon the society she comes from. See R. Piotrowicz, *Victims of People Trafficking and Entitlement to International Protection*, (2005) 24 Aust, YBIL, 159 at 167.

⁶³⁹ R. Piotrowicz, “Victims of People Trafficking and Entitlement to International Protection,” (2005) 24 Aust YBIL, 159 at 178.

⁶⁴⁰ K. Hyland, “Protecting Human Victims of Trafficking: An American Framework,” (2001) 16 Berkeley Womens Law Journal 29 at 59.

sociological, because of the negative culture attached to Albania and the prevalence of trafficking:

“Much of Albanian society is governed by a strict code of honour which not only means that trafficked women would have very considerable difficulty in reintegrating into their home areas on return but also affect their ability to relocate internally. Those who have children outside marriage are particularly vulnerable.”⁶⁴¹

The apparent strict code of honour would have potential consequences for women who do not follow it. Pressures and awareness of how women should behave are part of this honour and women are risk of “honour killings who are thought to have damaged a family’s honour by having stepped outside rigid standards of behaviour.”⁶⁴² It would be difficult for victims to return back to their country of origin without any additional skills or education levels as the same as when they left the State. Victims are presented with the reality of having no support network to help them find employment opportunities or increase their education. The victim in *AM* and *BM* argued that she would not be protected by the police because of corruption, and believed that she “would not be safe anywhere in Albania as such men had connections everywhere,”⁶⁴³ with a fear of being ostracised. This danger has also been acknowledged as a significant challenge for victims to overcome:

“There may be individual cases who find protection with their families, but I suspect that the majority of them fall into re-trafficking. They come back with no skills, and all

⁶⁴¹ *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC) at 2 para (c).

⁶⁴² *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC) at para 213.

⁶⁴³ *AM and BM (Trafficked women) Albania CG* [2010] UKUT 80 (IAC) at para 16.

that is left to them is prostitution in Albania as they have to feed their families and/or themselves. It is a matter of their survival.”⁶⁴⁴

The *AZ Thailand* case reinforces the view that the stigma attached to prostitution plays a significant role when victims return, which affect their ability to be reintegrated. The stigma experienced by victims implies that the victim may become more vulnerable to re-trafficking and places the victim at the risk of further harm by re-entering the cycle of trafficking and exploitation, because of stigmatisation:

“We find that either her traffickers would be reasonable likely to learn of her return and would be motivated to seek her out or that she would be at risk of being re-trafficked because of her lack of support, lack of economic opportunity, the stigma attached to her as a prostitute and her vulnerable state of mind.”⁶⁴⁵

Vulnerable victims who are stigmatised and become ostracised may leave them feeling very alone and isolated and increases their vulnerability which is already present due to their history of experiencing trauma as a result of being exploited. Victims may also become vulnerable as a result of a deterioration in their mental health.

(iii) **The Impact on a Trafficked Victim’s Mental Health**

Trafficked victims may be still suffering from mental health conditions as a result of being subjected to trauma from their exploitation. They may have received or be in the process of receiving medical treatment to control and alleviate some of the symptoms of mental and physical health conditions. If victims are deported, their recovery may be compromised if the

⁶⁴⁴ J. Hollinger, Georgetown University quoted in AM and BM (Trafficked women) Albania CG [2010] UKUT 80 (IAC) at para 58.

⁶⁴⁵ *AZ (Trafficked Women) Thailand* CG [2010] UKUT 118 at para 154.

continuation of their medical treatment is broken, which has been acknowledged by medical experts:

“I believe that BM’s current symptoms render her less able to adjust to return to Albania than a healthy person, or one who has not experienced abuse. She is likely to be triggered to heightened flashbacks. She is more likely to develop major depressive symptoms. My professional opinion is that BM’s return to Albania would cause significant detriment to her mental health and jeopardise her recovery prospects.”⁶⁴⁶

Not only are victims stigmatised for being involved in prostitution, but victims are also at a risk of being stigmatised because they are experiencing mental health issues as a result of experiencing physical and psychological abuse from their traffickers. The quality and availability of mental health services may vary from one country to another. If a victim is returned back to a State where the facilities are poor or not available it will affect the ability of the victim to recover. In *EK (Article 4 ECHR: Anti – Trafficking Convention) Tanzania*,⁶⁴⁷ the Immigration Tribunal took into account what the likely effect would be on the victim’s mental health if she were returned to Tanzania. After receiving expert evidence from Shelly Lees who has published work on Tanzanian culture and gender issues and is a trained nurse who has worked in Tanzania she explained that “health services in Tanzania are of extremely poor quality, and there is a severe shortage of health workers with mental health experience and no expertise is available in trauma care in the public health service. Mental health problems are highly stigmatised in Tanzania.”⁶⁴⁸ The Tribunal took further evidence of poor medical facilities to assist in the recuperation of her physical conditions into account and held that it would be unreasonable to compel the victim to leave the UK. The issues which directly affect

⁶⁴⁶ Dr Agnew Davies, Clinical Psychologist specialising in violence against women, in *AM and BM (Trafficked women) Albania* CG [2010] UKUT 80 (IAC) at para 34.

⁶⁴⁷ *EK (Article 4 ECHR: Anti – Trafficking Convention) Tanzania*,⁶⁴⁷ [2013] UKUT 00313 (IAC).

⁶⁴⁸ *EK (Article 4 ECHR: Anti – Trafficking Convention) Tanzania* [2013] UKUT 00313 (IAC) at para 53.

victims of human trafficking becoming identified, especially in respect of the stigma surrounding mental health has already been highlighted earlier in the thesis.

Conclusion

This section has set out and examined the main arguments which an advocate could use to argue against a trafficked victim being deported. These focussed upon three main risks to the victim. The first argument is the risk of being re-trafficked if returned back to their home State which examined the risk of persecution to the victim and the challenges of internal relocation. The second argument is the risk to the victim being subjected to discrimination in their home State, and the third argument is the risk of being stigmatised and ostracised back in their communities. I outlined three additional reasons for an advocate to argue either for grounds to compliment a claim for asylum or DLR on behalf of the trafficked victim. These are the effects of ostracism, the problems that this causes in terms of being successfully reintegrated back into their home societies, and the direct effect on a trafficked victim's mental health. These are strong arguments in favour of the victim staying in the UK and not being deported.

IV. THE REGULARISATION OF TRAFFICKED VICTIMS

IMMIGRATION STATUS AFTER IDENTIFICATION WITHIN

THE UK

Due to the difficulties of claiming asylum, I argue on the basis of Article 7 of the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women*⁶⁴⁹ that the route for a trafficked victim to regularise their immigration status after identification is claiming

⁶⁴⁹ Article 7 states that States should consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory or permanently in appropriate cases.

Discretionary Leave to Remain (DLR) which is in the best interests of the victim.⁶⁵⁰ It is also in the UK's interest for the victim to obtain DLR because they could advance the interests of the victim to become empowered to cooperate with police in investigations. Therefore, it has been argued that "such measures can have a strong effect on victims coming forward to testify against traffickers."⁶⁵¹ Where this happens, it can help States meet their obligations to combat trafficking from a crime control perspective by prosecuting traffickers. The facilitation of how the residence permits can be issued is seen through the *CofE Convention on Action against Trafficking of Human Beings*.

The *CofE Convention on Action against Trafficking of Human Beings* (to which the UK is party), expressly requires states to make provision for issuing residence permits to trafficked victims in certain circumstances. Residence permits for trafficked persons are "often referred to as 'humanitarian residence permits' and may be issued on a temporary or permanent basis."⁶⁵² These can be granted in three different circumstances which can be found from Articles 14 and 15.

Article 14 states two circumstances where victims should be able to apply for a residence permit. The first is when the victim is cooperating with the police in an investigation. The second circumstance is where a residence permit can be issued based upon the victim's personal situation. Article 14 states that:

"Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both: a) the competent authority considers that their stay

⁶⁵⁰ Discretionary Leave to remain entitles a person to stay in the UK for a period of time, because it would be unfair to forcibly remove that person from the country.

⁶⁵¹ UNODC Human Trafficking Toolkit at 335, found at https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_7-2.pdf.

⁶⁵² UNODC Human Trafficking Toolkit at 335, found at https://www.unodc.org/documents/human-trafficking/Toolkit-files/08-58296_tool_7-2.pdf.

is necessary owing to their personal situation; b) the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.”⁶⁵³

The third circumstance is where a victim may be granted a residence permit when a victim is obtaining compensation from their trafficker. This is stated in Article 15 which states:

“Each Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators.”⁶⁵⁴

The renewal of a residence permit on the basis of the circumstances above will be “subject to the conditions provided for by the internal law of the Party.”⁶⁵⁵ Despite the State having an obligation to provide for a residence permit if they meet either of the two criteria above, a State has wide discretion whether to extend the permit or not. In addition to the CofE Convention obligations, the *2004 EU Council Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings*⁶⁵⁶ obliges Member States to provide victims with protection from deportation by providing them with a legal status for a period of time:

“This Directive introduces a residence permit intended for victims of trafficking in human beings or, if a Member State decides to extend the scope of this Directive, to third-country nationals who have been the subject of an action to facilitate illegal

⁶⁵³ Article 14 Council of Europe Convention on Action against Trafficking in Human Beings, 16 May 2005.

⁶⁵⁴ Article 15 (3) Council of Europe Convention on Action against Trafficking in Human Beings, 16 May 2005. This circumstance is very rare to succeed. This is not surprising given the current negative rhetoric on immigration which was discussed earlier in the thesis. However, it still remains an option for a victim to pursue.

⁶⁵⁵ Article 14(3) Council of Europe Convention on Action against Trafficking in Human Beings, 16 May 2005.

⁶⁵⁶ EU Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

immigration to whom the residence permit offers a sufficient incentive to cooperate with the competent authorities while including certain conditions to safeguard against abuse.”⁶⁵⁷

The *Modern Slavery Act 2015* remains largely silent on offering stay to identified victims. Instead, it focuses on the obligations of businesses not to facilitate human trafficking in their corporations, in their goods and services, and stresses what the role of businesses can and should play in tackling the crimes of modern slavery. Trafficked victims who have been positively identified are not automatically entitled to stay in the UK. However, trafficked victims identified by the NRM in the UK can rely on domestic immigration law to ensure a temporary right of stay in the UK, through Discretionary Leave to Remain (DLR). The process satisfies the UK’s obligation from the CofE under Article 14 and the Council Directive. Despite obstacles for victims to overcome, DLR remains the best avenue to pursue to regularise their immigration status after successful identification by the NRM.

A. Discretionary Leave To Remain (DLR)

Where victims have been positively identified through the National Referral Mechanism (NRM), victims who are non EEA nationals are able to regularise their immigration status. DLR can be applied for as long as they do not qualify for asylum. It is more advantageous to be awarded asylum because the rights of leave for asylum are higher than that of DLR and the highest form of protection must be granted. The important issue for the individual is to be successfully identified as a trafficked victim by the NRM in order to apply for DLR.

⁶⁵⁷ EU Council Directive 2004/81/EC of 29 April 2004 Preamble at para 9.

If they are EEA nationals, they presently have the right to remain in the UK, as confirmed in the case of *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD*,⁶⁵⁸ where it was held that “if a victim is an European Economic Area (EEA) National exercising free movement rights, the victim has an independent right to remain in the United Kingdom.”⁶⁵⁹ The path for victims to follow is to apply for DLR to stay in the UK. The policy intention of introducing Discretionary Leave is to consider “exceptional and compassionate individual circumstances which may justify leave on a discretionary basis.”⁶⁶⁰ As the Home Office guidance on Asylum explains, the system is to:

“...maintain a firm, but fair and efficient immigration system that generally requires those who do not meet the rules to leave the UK, but carefully considers exceptional and compassionate individual circumstances that may justify leave on a discretionary basis by providing a mechanism to cover those few cases where it would, at the time leave is granted, be unjustifiably harsh to expect someone to leave or enforce their removal - it is intended to be used sparingly, carefully considering evidence relating to exceptional compassionate circumstances raised as part of a protection claim to assess whether a grant of Discretionary leave is appropriate, granting limited leave appropriate to the individual circumstances but not more than 30 months unless there is compelling evidence to justify a longer period and ensuring that those granted DL generally do not benefit from a faster route to settlement than those who meet the Immigration Rules.”⁶⁶¹

During the NRM process, the victim is protected from deportation. As stated in the case of *R (on the application of Atamewan) v SSHD*⁶⁶² “if the conclusion is that there are reasonable

⁶⁵⁸ *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD* [2016] EWHC 942 (Admin).

⁶⁵⁹ *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD* [2016] EWHC 942 (Admin) at 93.

⁶⁶⁰ Home Office, Asylum Policy Instruction Discretionary Leave, 18 August 2015 at 5.

⁶⁶¹ Home Office, Asylum Policy Instruction Discretionary Leave, 18 August 2015 at 5.

⁶⁶² *R (on the application of Atamewan) v SSHD* [2013] EWHC 2727.

grounds, then there is an obligation on the Party not to remove the person from the territory until the process has been completed. That obligation is clear and unqualified. If there are reasonable grounds then there is an obligation to ensure that the person receives assistance.”⁶⁶³

Once all the investigations have taken place on the potential victims circumstances for being in the UK, the individual (if judged to have been trafficked) will be granted a positive CGD.

Once this decision has been made, DLR can be applied for. However, as we will now see, there are both advantages and disadvantages for trafficked victims claiming leave to stay in the UK.

(i) **The Advantages of claiming DLR**

There are three advantages for victims to claim DLR. Firstly, it will provide the victim with the reassurance that they will not be deported in the foreseeable future. A victim of trafficking who has been granted DLR will also be entitled to ‘recourse to public funds, and entitlement to work.’⁶⁶⁴ The fact that victims will be able to work opens the possibility of claiming in work benefits. Alternatively, if the victim is not able to be fit for work despite being able to have the possibility of working legally because of the victim’s legal immigration status, then the victim can apply for out of work benefits. Secondly, there is a right to appeal a negative DLR decision. So, if someone makes such a claim as part of an application for DL, “there will be a right of appeal against its refusal.”⁶⁶⁵ Thirdly, DLR provides a route for an individual where an asylum claim has been rejected. The case of *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD*⁶⁶⁶ showed that “a person who has claimed asylum will automatically be considered for DLR if they are not granted asylum or humanitarian protection.”⁶⁶⁷ Thus, the

⁶⁶³ *R (on the application of Atamewan) v SSHD* [2013] EWHC 2727 at para 72.

⁶⁶⁴ Home Office, Asylum Policy Instruction – Discretionary Leave, 18 August 2005 at 14.

⁶⁶⁵ *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD* [2016] EWHC 942 (Admin) at para 92.

⁶⁶⁶ *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD* [2016] EWHC 942 (Admin).

⁶⁶⁷ *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD* [2016] EWHC 942 (Admin) at 89.

victim is provided with a second opportunity to regularise their immigration status in the UK after trying to gain asylum by pursuing DLR.

(ii) **The Disadvantages of claiming DLR**

The main disadvantage of claiming DLR is that the length of the stay is limited. In cases, “leave should normally be granted for a minimum of 12 months, and normally no more than 30 months.”⁶⁶⁸ It appears that there will not be an extension to the period granted unless there are specific circumstances to justify extension. Where there is an initial period of discretionary leave, this does not necessarily mean that they are entitled to further leave or settlement. Where victims have applied for asylum whilst going through the NRM, the Home Office should not make a decision on their asylum application whilst they are being processed through the NRM. The Home Office Victims of Modern Slavery Competent Authority Guidance states that “once a conclusive grounds decision has been taken, any outstanding claim for asylum should be decided.”⁶⁶⁹ This is in contrast to DLR which can only be applied for after a Positive CGD. Even in cases where an individual has been judged to have been trafficked by the NRM, this does not mean that asylum will be automatically granted. The positive Conclusive Grounds decision from the NRM, must be communicated to the authorities deciding upon the asylum issue. This shows that the evidence and information used in the NRM process will be useful for the DLR and asylum proceedings.

An advocate who is acting on the victim’s behalf would be useful here to ensure that the evidence showing the victim’s past circumstances is presented to the decision maker. For a

⁶⁶⁸ Home Office Competent Authority Guidance for Victims of Modern Slavery, 21 March 2016 at 78.

⁶⁶⁹ Home Office Victims of Modern Slavery Competent Authority Guidance 21 March 2016 at 71.

host of reasons already examined in this thesis, victims may not be able to do this themselves and may benefit from this type of service and support.

Now that a broader analysis of what DLR is and how it can be an option for trafficked victims to apply for once they have been identified, it is necessary to examine the specific criteria from the perspective of trafficked victims.

B. The Criteria for Claiming DLR

This section will now examine the criteria of successfully claiming DLR. As discussed above, an individual must have a positive CGD before applying for stay in the UK. A successful application for leave will not be solely based on the fact that the positive conclusive grounds decision. The victim must satisfy the criteria for granting discretionary leave. This section will examine how an individual, identified as a trafficked victim will be able to apply for DLR in one of the three following circumstances:

- i) Obtaining Compensation from Traffickers;
- ii) Cooperating with Police Enquiries; or
- iii) Compelling Personal Circumstances⁶⁷⁰

Presently, the number of victims claiming DLR is very low. Latest figures show that from the period of 2010 -2016 there were “661 confirmed victims of trafficking that were issued with a grant of DL, and it is not clear in how many cases the grants of DL were connected to the individual’s cooperation in a police investigation, a compensation claim or their personal situation.”⁶⁷¹ Based on 819 victims who were positively identified in 2013, 834 in 2014, 674

⁶⁷⁰ Home Office - Victims of Modern Slavery – Competent Authority Guidance, 21 March 2016 at 74.

⁶⁷¹ K. Roberts, Human Trafficking Foundation & V. Brotherton, Anti-Trafficking Monitoring Group, Letter to Frank Field MP Chair, Work and Pensions Committee, 27th February 2017.

in 2015⁶⁷² and 635 identified in 2016,⁶⁷³ the best case scenario for the number of positively identified victims who were successful in obtaining DLR was 22%.

Obtaining compensation from traffickers and cooperating within police enquiries will be discussed first. The third situation, compelling personal circumstances will dominate the section because there has been substantial case law on this area which dictates two main features that victims have tried to rely upon as arguments to justify a compelling personal circumstance. These are the type of medical conditions that victims have and secondly the type of specific medical treatment which may not be available in the victim's home State. This criterion is most beneficial to trafficked victims who have been subjected to physical and psychological abuse by traffickers through coercion and control which was examined earlier in Chapter 2.

(i) **Obtaining Compensation From Traffickers**

The first criterion is justifying leave on the basis that victims need to stay in the UK in order to pursue a claim against their traffickers. In this situation, "it may be appropriate to grant DLR to pursue compensation in line with Article 15 of the CofE Convention which deals with the right of victims to compensation from traffickers."⁶⁷⁴ In deciding whether leave can be granted, the Home Office must consider the following issues:

⁶⁷² NCA Statistics, End of Year Summary 2015, <http://www.nationalcrimeagency.gov.uk/publications/national-referral-mechanism-statistics/2015-nrm-statistics/676-national-referral-mechanism-statistics-end-of-year-summary-2015/file> at 3.

⁶⁷³ NCA Statistics, End of Year Summary 2016 <http://www.nationalcrimeagency.gov.uk/publications/national-referral-mechanism-statistics/2016-nrm-statistics/788-national-referral-mechanism-statistics-end-of-year-summary-2016/file> at 3.

⁶⁷⁴ Home Office Competent Authority Guidance for Victims of Modern Slavery, 21 March 2016 at 75.

“The type of compensation, the grounds of the claim, how credible the claim is and whether the person needs to be physically in the UK for the duration of their claim.”⁶⁷⁵

Whether the individual seeking compensation from their traffickers was required to be in the UK was one of the issues decided upon in the case of *R (Cristy Ferrer Poquiz) v SSHD*.⁶⁷⁶ The use of conducting proceedings by video-link was highlighted by the Court as an alternative way of meeting the objectives without granting leave to the individual for this purpose, but leave could still be an option if the case went to trial:

“I would expect in the normal course that a claimant would be allowed to return to give evidence and hear the evidence of the other side if a trial were to take place. The Defendant (SSHD) acknowledged that the Claimant could seek limited leave to enter for the purposes of her claim if it proceeded to trial.”⁶⁷⁷

The length of the leave would only be short in duration and must not be confused with a long length of time that DLR is usually given for. Additionally, it would also mean that the individual’s prime purpose is to attend court and not have any entitlement to any services or benefits for the duration of the stay. Therefore, the allowance of the individual would be quite strict and not as beneficial to a victim who may be helping the police with their enquiries.

(ii) Victims Cooperating With The Police In Investigations

In instances where victims have been identified as a trafficked victim by the NRM, they can be granted stay in the UK in exchange for cooperating with the police in investigations.

⁶⁷⁵ Home Office Competent Authority Guidance for Victims of Modern Slavery, 21 March 2016 at 75-76.

⁶⁷⁶ *R (Cristy Ferrer Poquiz) v SSHD* [2015] EWHC 1759 (Admin).

⁶⁷⁷ *R (Cristy Ferrer Poquiz) v SSHD* [2015] EWHC 1759 (Admin) at para 41 -42.

The Home Office Competent Authority Guidance⁶⁷⁸ shows that “where a person is conclusively found to be a victim of human trafficking and has agreed to assist with police enquiries from the UK, the police must make a formal request for them to be granted leave to remain on this basis.”⁶⁷⁹ Despite this obligation placed upon the police, inconsistencies have arisen as to whether applications made by police forces are submitted on behalf of victims. In the case of *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD*⁶⁸⁰ twin brothers were identified as victims of human trafficking and had decided to cooperate with the police in their investigation. However, the police failed to apply for DLR for them. It was acknowledged that some forces are not fulfilling their obligations to apply for DLR for victims:

“There is evidence that a number of police forces have made requests for DLR on behalf of trafficking victims who have helped the police, and on the other hand, there is evidence about others who have helped the police, who have failed to request DLR. The Subatkis twins assisted the police, who for reasons which I do not know did not request DLR. In consequence, they did not receive DLR or indeed any benefits.”⁶⁸¹

Where DLR applications have not been made, it conflicts with the guidance found in the judgment in *R (on the application of Atamewan) v SSHD*⁶⁸² [2013] EWHC 2727, which made the following statement:

“The Claimant has made it clear that she wishes to take part in further investigations by the police of her case, there should be an order that the SSHD grant the Claimant 12

⁶⁷⁸ Home Office Competent Authority Guidance for Victims of Modern Slavery, 21 March 2016.

⁶⁷⁹ Home Office Competent Authority Guidance for Victims of Modern Slavery, 21 March 2016 at 76.

⁶⁸⁰ *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD* [2016] EWHC 942 (Admin).

⁶⁸¹ *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD* [2016] EWHC 942 (Admin) at para 75.

⁶⁸² *R (on the application of Atamewan) v SSHD* [2013] EWHC 2727.

months and one day's leave to remain in the UK in line with the SSHD's policy applicable to victims of trafficking who wish to take part in the police investigations of their case.”⁶⁸³

The guidance is clear that where the victim wishes to cooperate with the police, DLR should be applied for by the police and granted. It is also clear that it is only the police that should apply for DLR under this criteria. The victim (or indeed any advocate) is unable to apply for this and victims are reliant on the police to action this process. The victim argued in *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD*,⁶⁸⁴ that the Competent Guidance from the Home Office is unlawful “in that it does not allow victims or their legal representatives to request DLR on the grounds of agreeing to assist the police with their enquiries.”⁶⁸⁵ In light of the inconsistencies from the police making DLR applications, it would not be unreasonable to suggest that victims should be able to make an application either with the cooperation of the police, or with the help of an advocate, bypassing the involvement of the police.

As the above shows, there are inconsistencies as to whether the police do this, as the victim is often waiting for the police to act. Cooperation with the police is required so that victims can be granted DLR so they can start assisting the police. It would be useful for the police to be placed under a duty to apply for DLR automatically when NRM decision is received by a victim. The Police could be placed under a duty to apply for DLR, once identification has been completed, and the victim has agreed to cooperate. It would also be useful for the victim to ask for a trafficking advocate who can advise on what will be involved and the importance of

⁶⁸³ *R (on the application of Atamewan) v SSHD* [2013] EWHC 2727 at para 103.

⁶⁸⁴ *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD* [2016] EWHC 942 (Admin).

⁶⁸⁵ *R (on the application of AG & RT Edgaras Subatkis Edviana Subatkis) v SSHD* [2016] EWHC 942 (Admin) at para 116.

regularising their immigration status. An advocate should be able to apply for DLR on behalf of victims, positively identified by the NRM if the Police are unwilling to do this.

A further issue is establishing at which point the police are under an obligation to start an investigation which may then require the need to submit a DLR application in the future. Under Article 27(1) of the CoFE Convention, the commencement of investigations is not dependent upon the victim making an allegation, and there is a positive duty on authorities to start an 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.”⁶⁸⁶

This will put the police ‘on notice’ that a potential DLR application may be required sooner rather than later, once potential victims have been referred through the NRM. In the case of *O v Commissioner of Police for the Metropolis*⁶⁸⁷ Judge Wyn Williams “decided that the police were under a duty to carry out an effective investigation once a credible account of a breach of Article 4 of the ECHR had been brought to their attention, even without a complaint from or on behalf of the victim.”⁶⁸⁸ The case of *The Queen (on the application of FM) v SSHD*⁶⁸⁹ confirmed that when the potential victim is being processed through the NRM, this is when the investigation should start:

⁶⁸⁶ Article 27(1) CoFE Convention 2005.

⁶⁸⁷ *O v Commissioner of Police for the Metropolis* [2011] HRLR 643.

⁶⁸⁸ *O v Commissioner of Police for the Metropolis* [2011] HRLR 643 found at *FM v SSHD* [2015] EWHC 844 (Admin) at para 40.

⁶⁸⁹ *The Queen (on the application of FM) v SSHD* [2015] EWHC 844 (Admin).

“The process of involving the police should have started as soon as there was a credible allegation of trafficking. The officers involved should have had special training in dealing with victims of trafficking. They would have explained what was involved in her cooperation, what protection could be given to her and the special measures available to her to make giving evidence in court easier.”⁶⁹⁰

However, for the victim to come to a well informed decision as to whether to cooperate or not, the victim must be made aware of their rights. The *FM* case clearly highlighted the concern that the Judge had if the victim is not given all of the information that is required in order for her to decide whether to cooperate or not. It would be reasonable to believe that the time when a reasonable grounds decision has been made that the individual is a victim of human trafficking, the police’s obligation to investigate the case starts. This assertion has been confirmed in the case of *R (on the application of K) v Secretary of State for the Home Department*⁶⁹¹ where it was found that “the latest stage at which the Defendant’s duty (the Secretary of State’s duty) arose was in Nov 2013 when the defendant made her reasonable grounds decision in respect of the Claimant as a victim of trafficking – and the earliest in January 2013 when the NRM referred the Claimant’s case to the Defendant.”⁶⁹² The most suitable time where a police investigation should start is between the period of when the referral is made to the NRM and when the reasonable grounds decision is made. In addition, this is where an advocate could also be instructed on the victim’s behalf to assist the victim as support.

The criterion of assisting police in exchange for DLR is not as ‘victim-focussed’ as it may appear. The criterion is almost a ‘carrot and stick’ approach where the benefit is more weighted towards the police in terms of a victim cooperating with an investigation, rather than advancing

⁶⁹⁰ *The Queen (on the application of FM) v SSHD* [2015] EWHC 844 (Admin) at para 38.

⁶⁹¹ *R (on the application of K) v Secretary of State for the Home Department* [2015] EWHC 3668 (Admin).

⁶⁹² *R (on the application of K) v Secretary of State for the Home Department* [2015] EWHC 3668 (Admin) at para 106.

the victim's rights. As the Explanatory Report to the CofE Convention states, "the availability of residence permits is a measure calculated to encourage them to cooperate."⁶⁹³ However, a victim may not wish to cooperate because of the potential repercussions from traffickers, against themselves or others:

"a factor is fear of reprisals by the traffickers, either against the victims themselves or against family or friends in the country of origin."⁶⁹⁴

Victims must be reassured that if they cooperate, they will have their concerns about safety addressed. The fear of reprisals will be the main issue preventing victims from cooperating.

(iii) Compelling Personal Circumstances

Requiring victims to cooperate with police or have the ability to pursue compensation in exchange for DLR may be difficult given the situation that victims face after exploitation has ended. The victim may not be physically or mentally competent to fully understand the process that they are being asked to participate within. Therefore, applying for DLR in the UK on the basis of compelling personal circumstances may be more beneficial for the victim. This is the best circumstance because this option gives rise to advance the personal health concerns of the victim, highlighting the victim's specific mental health needs as a direct consequence of being trafficked and systematically exploited by traffickers, through repeated trauma.

⁶⁹³ Council of Europe Convention on Human Trafficking Explanatory Report at para 181.

⁶⁹⁴ Council of Europe Convention on Human Trafficking Explanatory Report at para 181.

C. Compelling Personal Circumstances - The Issues and Challenges for Victims in Meeting this Criterion

The Home Office guidance on what constitutes compelling personal circumstances can be found under para 2.4 of the Asylum Policy Instruction, which explains that:

“a grant of DL should be considered where a Competent Authority has conclusively identified that person as a victim of trafficking and the individual’s personal circumstances, although not meeting the criteria of any of the other categories, are so compelling that it is considered appropriate to grant some form of leave.”⁶⁹⁵

There must be “compelling reasons to justify a grant of discretionary leave, where they do not qualify for other leave on any other basis such as asylum or humanitarian protection.”⁶⁹⁶ The CofE Explanatory Report states that the ‘personal situation’ of the victim “must be such that it would be unreasonable to compel them to leave the national territory, or there has to be an investigation or prosecution with the victim co-operating with the authorities.”⁶⁹⁷ Additionally, “the personal situation requirement takes in a range of situations, depending on whether it is the victim’s safety, state of health, family situation or some other factor which has to be taken into account.”⁶⁹⁸ The consideration of other factors creates the opportunity for a victim to bring in arguments as to why they need to stay in the UK as opposed to return to their home country. UK case law has shown that the factors that are considered are primarily health-based arguments. This focus helps trafficked victims argue that removal from the UK affects their ability to treat health conditions.

⁶⁹⁵ *R (on the application of K) v Secretary of State for the Home Department* [2015] EWHC 3668 (Admin) at para 113.

⁶⁹⁶ Home Office Competent Authority Guidance for Victims of Modern Slavery, 21 March 2016 at 73.

⁶⁹⁷ Council of Europe Convention on Action against Human Trafficking Explanatory Report at para 182.

⁶⁹⁸ Council of Europe Convention on Action against Human Trafficking Explanatory Report at para 184.

The next part will examine a two-part test relating to the personal circumstances of the victim. This is firstly justifying leave because of a specific medical condition which requires treatment, and secondly, justifying leave based on the fact that the specific type of medical treatment required is not available in the victim's home country and should be provided in the UK. It seems likely to be the case that both would need to be argued to be successful to justify stay in the UK.

(i) **Advocating For The Medical Conditions Of Victims As ‘Compelling Personal Circumstances’**

As discussed in Chapter 2, victims often develop mental and physical problems as a result of exploitation. What type of care is required will depend on the condition. The types of care required can be seen from the case of *EK (Article 4 ECHR: Anti – Trafficking Convention) Tanzania*.⁶⁹⁹ The victim required regular attendances for specific medical attention as a result of developing “chronic lung disease and treatment for infections including tuberculosis and persistent and permanent left upper lobe lung collapse.”⁷⁰⁰ These conditions needed highly specialised medical treatment to be administered, constituting specific care. Additionally, it was stressed that the surgery needed to be carried out safely and there was not an expectation “these operations to be available to be safely carried out in most parts of Tanzania.”⁷⁰¹ It was decided that “she should be regarded as vulnerable and that she will remain so indefinitely, she will need an enduring period of safety without risk of disruption in order to maximise her rehabilitative potential.”⁷⁰² This highlights a successful case of meeting the criterion of

⁶⁹⁹ *EK (Article 4 ECHR: Anti – Trafficking Convention) Tanzania* [2013] UKUT 00313 (IAC).

⁷⁰⁰ *EK (Article 4 ECHR: Anti – Trafficking Convention) Tanzania* [2013] UKUT 00313 (IAC) at para 52.

⁷⁰¹ *EK (Article 4 ECHR: Anti – Trafficking Convention) Tanzania* [2013] UKUT 00313 (IAC) at para 52.

⁷⁰² *EK (Article 4 ECHR: Anti – Trafficking Convention) Tanzania* [2013] UKUT 00313 (IAC) at para 51.

compelling personal circumstances using medical reasons as long as they are having a material effect on the victim's wellbeing.

A further case where medical conditions were overlooked, in favour of focussing on whether the claimant was a victim or not was the case of *R (on the application of K) v SSHD*.⁷⁰³ This case involved a 35 year old from Ghana who was trafficked in 2003 and was identified as a trafficked victim with a positive conclusive grounds decision in 2013. Despite this conclusion after being identified, it was held that “the victim was found to be trafficked because of the particular circumstances, but those circumstances no longer exist and do not qualify for leave to remain in the UK, and you will be liable for removal.”⁷⁰⁴ Despite the exploitation ending, the victim was still suffering from mental health issues as a result of the exploitation. This illustrates the importance of not being returned back home, but instead being identified as a victim, and one who is suffering from either a physical or mental health condition which cannot be treated in the home State of the victim. Ideally, the purpose of any stay in the UK would be for the victim to assist the police in investigations. However, in this case, the victim was perceived as not being a victim, because the exploitation had ended. K's legal team made reference to the case of *R (on the application of Atamewan) v SSHD*⁷⁰⁵ stating that the victim should still be regarded as a victim despite the exploitation ending:

“If a person came forward and claimed that he was a victim of trafficking all those years ago, the process of dealing whether there was reasonable grounds for believing that he was trafficked would have to be undertaken.”⁷⁰⁶

⁷⁰³ *R (on the application of K) v SSHD* [2015] EWHC 3668 (Admin).

⁷⁰⁴ *R (on the application of K) v SSHD* [2015] EWHC 3668 (Admin) at para 14.

⁷⁰⁵ *R (on the application of Atamewan) v SSHD* [2014] 1 WLR 1959.

⁷⁰⁶ *R (on the application of K) v SSHD* [2015] EWHC 3668 (Admin) at para 80.

The reason why it was important for the victim's legal team to persuade the Court that the individual should still be regarded as a victim of trafficking was a claim for DLR on the basis of arguing compelling personal circumstances to ensure that the victim would not be deported back to Ghana. Despite the exploitation, it was clear that he was still suffering from various physical and mental health conditions arising from his experience which the judgment made clear:

“He has several physical conditions, as follows: epilepsy, migraines, anal and rectal pain, haemorrhoids, intermittent testicular pain, cysts on his head and buttock, depression and anxiety, history of thoughts of self-harm and suicide, and Post-Traumatic Stress Disorder. Detailed recommendations were given that K requires medication and highly-specialised psychotherapy and counselling by highly trained practitioners to treat his complex needs.”⁷⁰⁷

What can be learnt from these cases is that it is in the interests of each victim to have their medical conditions and the required treatment to be recognised and provided for by the State. If they are serious physical injuries which require attention or have mental health issues, then they could fit within the first part of the test on compelling personal circumstances.

The State granting DLR, based on compelling personal circumstances, illustrates a victim centred approach to the understanding what the victim is presently experiencing. The crucial aspect is how the medical conditions are treated and whether the conditions can be treated from available services and support in the victim's home State. If a victim requires specific medical attention not available in their home State there is a greater chance of success in claiming DLR.

⁷⁰⁷ *R (on the application of K) v SSHD* [2015] EWHC 3668 (Admin) at para 18.

(ii) **Advocating the medical treatment of victims As ‘Compelling Personal Circumstances’**

The previous part illustrated how the type of medical conditions experienced by a victim can be used as compelling personal circumstances. This part will discuss the second part of the compelling personal circumstances test. This argument is based upon the specific medical treatment which is required to treat the medical conditions, and may not be available in the victim’s home State, which this thesis believes justifies stay in the UK.

Under the Home Office Competent Authority guidance, personal circumstances might mean to “allow them to finish a course of medical treatment that would not be readily available if they were to return home.”⁷⁰⁸ The availability to treat individuals is an issue that has been examined in case law under this area. In the case of *EK (Article 4 ECHR: Anti – Trafficking Convention) Tanzania*,⁷⁰⁹ it was stated where a rescued trafficked victim was held to be very ill and requiring ‘specific care and major surgery,’⁷¹⁰ it would be “unreasonable to compel the victim to leave the UK because of the victim’s specific medical needs which are likely to be unavailable in Tanzania.”⁷¹¹ In the case of *R (on the application of K) v SSHD*⁷¹² the victim tried to use his medical conditions and the treatment of those conditions as a basis to justify that he had compelling reasons to stay in the UK. The victim suffered from varying health conditions and taking numerous types of medication to control these conditions.

There is a distinction between victims taking medication and receiving specific care. The Court acknowledged that the victim was taking medication for conditions, but they found that this

⁷⁰⁸ Home Office Competent Authority Guidance for Victims of Modern Slavery, 21 March 2016 at 75.

⁷⁰⁹ *EK (Article 4 ECHR: Anti – Trafficking Convention) Tanzania* [2013] UKUT 00313 (IAC).

⁷¹⁰ What is meant by ‘specific care and major surgery’ were discussed and was held that the condition TB met this definition.

⁷¹¹ *EK (Article 4 ECHR: Anti – Trafficking Convention) Tanzania* [2013] UKUT 00313 (IAC) at para 64.

⁷¹² *R (on the application of K) v SSHD* [2015] EWHC 3668 (Admin).

situation is not as justifiable as someone requiring surgery.⁷¹³ The Court rightly separated the issue of medication from surgical procedures because reliance on the former is not a strong argument compared to an argument where a victim requires a specific surgical procedure.

In the same case,⁷¹⁴ the crucial issue was establishing whether the medication/treatment is available in the victim's home State. It was found that all specific medication to treat mental health issues such as psychosis, and depression were available, along with many pain relief medications.⁷¹⁵ If treatment required is available in the victim's home State, then it is less likely that the victim will be able to fit within the criteria of compelling personal circumstances.

Where a victim was completing a period of mental health treatment such as therapy, then this could be argued as 'a compelling personal circumstance.' After all, Article 12(1) of the CoFE Convention requires States to adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery."⁷¹⁶ The type of treatment is not limited to physical treatment but also to treatment to treat mental health conditions such as anxiety and depression and Post Traumatic Stress Disorder (PTSD). These require a longer time period to treat and an appropriate environment for victims to start the psychological process of healing and coming to terms with what has happened to them.

However, it is clear that if the treatment that the victim is seeking is available in the home country of the victim, it is unlikely that a claim for DLR based on compelling personal circumstances will succeed. This is explicitly clear from the judgment:

⁷¹³ *R (on the application of K) v SSHD* [2015] EWHC 3668 (Admin).

⁷¹⁴ *R (on the application of K) v SSHD* [2015] EWHC 3668 (Admin).

⁷¹⁵ See *R (on the application of K) v SSHD* [2015] EWHC 3668 (Admin) at para 27 for a full list of available medication to treat the victim in Ghana.

⁷¹⁶ Article 12 (1) Council of Europe Convention on Action against Human Trafficking, 2005.

“If your client was returned to Ghana, based on the country information it is considered that medical treatment is available to treat his conditions. Although healthcare facilities in Ghana may not be of the same standard of healthcare as in the UK, your client would have been able to seek treatment there.”⁷¹⁷

It refers to surgical treatment rather than the treating of conditions through medication and therapy which is the correct issue to address, as opposed to controlling a condition in order to recover from health conditions K was suffering from. Success will depend on the health services in the home State of the victim. As we have seen, stigma towards mental health issues may preclude the availability of mental health treatment which is not in the victim’s best interests. The UK granting DLR may help victims from poorer countries, that do not have support services or basic healthcare provision, which is tailored towards victims who have been trafficked and identified in the UK.

Conclusion

This section of the chapter examined how a trafficked victim may be able to claim DLR on the basis that they are either cooperating with police in their investigations, looking to obtain compensation from traffickers or because of a compelling personal reason. These obligations of the State arose from the CofE and Council Directive which are victim centred and address the issue of residence permits that may be granted to victims who have been identified by the NRM.

DLR is a more viable path forward for the victim to regularise their immigration status, rather than asylum. This is because the State has a vested interest where leave to stay is granted

⁷¹⁷ *R (on the application of K) v Secretary of State for the Home Department* [2015] EWHC 3668 (Admin) at para 29.

because of the chance that the victim can cooperate with the police to help secure more prosecutions and convictions of traffickers. Victims benefit from not having the fear of being deported. With increased awareness, this may help and persuade more victims to come forward.

Who makes the application for DLR varies with the grounds for making the application. In circumstances where victims are cooperating with the police in investigations, then the police makes a “formal request to the Home Office competent authority to ask for discretionary leave to be granted to the individual”⁷¹⁸ on the basis that the trafficked victim is cooperating. However, if the victim is applying for DLR on the basis of claiming compensation from the traffickers or applying under compelling personal circumstances, then the victim themselves will need to apply for this. This raises many issues of whether the victim is able to do this themselves or more likely require the assistance of an advocate to facilitate this once they have a conclusive grounds decision. Furthermore, victims may not know how to start an action to pursue compensation. They will not have the capability to apply for discretionary leave themselves and will require the assistance of an advocate or immigration solicitor to assist the victim which has cost implications. It must be stated that there has not been any successful attempt to use this circumstance of obtaining compensation justifying the need to stay in the UK, and therefore not a viable circumstance to rely upon. Victims may not be medically well to cooperate with police or make important decisions on which circumstances to base a DLR application upon.

Out of the three circumstances, the most viable option from the victim’s perspective would be to use the personal circumstances option. To rely on the cooperation with the police option would be very difficult for victims because of the trust issues which are present between the police and victim, along with the fear of retaliation from their trafficker if victims assist police.

⁷¹⁸ Home Office Competent Authority Guidance for Victims of Modern Slavery, 21 March 2016 at 73.

In addition, the chances of obtaining leave in order to pursue compensation against a trafficker are extremely poor and unrealistic due to the current negativity towards immigration and hostility of others from different nationalities.

This section highlighted the opportunities that victims have in obtaining leave if they have serious medical conditions which require medical attention which is not available in their home State. The main challenge which remains is whether the victim is to be regarded as a historical victim which may count against the victim overshadowing the medical issue at hand and returns the focus back upon the immigration issue and whether to deport a victim. In my view, the focus should be on the treatment of the mental health of victims, even after victims have escaped from an exploitative situation. The fact that a victim is suffering from mental health conditions as a result of their exploitation is not be a successful argument to use when trying to apply that they have compelling reasons as to justify DLR. However, the fact that the medication and services required to treat the conditions are not available in the victim's State may increase the chances of successfully claiming DLR.

CONCLUSION

In this chapter, arguments have been advanced against the deportation of trafficked victims in cases where identification has or has not taken place, and the compelling reasons why victims should be protected in the UK. As we have seen, there are two routes which trafficked victims can take to regularise their immigration status as a result of being trafficked.

The first option is to apply for asylum as a refugee. It can be difficult in persuading the Tribunal that trafficked victims fit as part of a particular social group. As the discussion above examined, a victim of human trafficking from one country may be looked at and treated less favourably than a victim of trafficking from another country, making it more difficult for women from

certain countries to be classed as part of a particular social group. This situation is largely due to social stigma and cultures associated with each country. Having said that, due to social stigma and cultures associated with victims from originating from countries that do not protect vulnerable groups, it has been possible to fit certain victims in a particular social group. This is due to the role that the discrimination of women plays alongside the stigma of prostitution seen in other countries which continue to make vulnerable women more exposed to the risk of persecution, and the risk of being trafficked in the first place.

The second option for victims is applying for DLR, which is an example of a residence permit offered to trafficked victims. However, this period is extremely limited because of the duration and cooperation elements attached to them. The decision to accept a temporary stay is dictated by the cooperation from the victim in helping in the investigation, or for another compelling personal circumstance. The emphasis (especially seen in the case of *K v SSHD*) remains that admission to stay in the UK through successful applications for DLR is heavily dependent upon whether the victim could be medically treated in the same way as in the victim's host country. On the one hand, the obligation of the State is to treat victims in their country where they are identified, but the consequences of offering leave to stay in the UK may not be politically attractive for the Government to justify to the electorate. States will have a financial burden of medically treating non-nationals, increasing the demand on stretched public services. Having said that, a Government does have the power to offer protection to victims with the opportunity of assisting in investigations, thereby satisfying their interests in prosecuting more traffickers. Simultaneously, it will encourage more trafficked victims to feel confident to come forward. When the UK accepts applications for DLR from trafficked victims, it illustrates cooperation between the victim and authorities and helps to build mutual trust and confidence within the identification procedure, especially if this approach is combined with a presumption of non-prosecution.

Despite the two routes above, the main pathway is the referral route via the NRM so that they can be formally identified as a victim, enabling them to have access to advice and support. Referral through the NRM offers short term support and protection from deportation. If, for example, a victim is a woman who has been sex trafficked, physically and mentally harmed by the exploitation and is vulnerable to social stigma if returned back home and it is not possible for her to be relocated internally in their home State then the preferred option would be to apply for asylum. Where a victim has been traumatised by their ordeal and is in need of specific medical assistance, which is not available in their home State, the victim could apply for DLR on the basis of compelling personal circumstances. However, as I have highlighted, applying for DLR to help police remains problematic, primarily because it relies on the police to submit DLR on behalf of victims which police forces are not consistently doing.

There may be a type of trafficked victim who does not necessarily meet the asylum standard but meets a compelling circumstance to be granted leave, apart from advocating specific medical treatment to treat conditions as a result of exploitation. The group of trafficked victim I envisage is the individual who has been forced to leave their country because of poor economic circumstances or through conflict and finds themselves having to become an economic migrant and been smuggled to the UK. That individual has then been living in the UK illegally for a period of time but has then been trafficked into either the sex trade or into forced labour. Once found and identified by the NRM, it would be unfair to expect that person to return home due to war or has no family because of conflict or separation. This could be a compelling reason to stay in the UK for a period of time.

The chapter emphasises how asylum and DLR only provide very limited possibilities and this has significant repercussions for greater identification, because of the chances of succeeding being so limited. Ultimately, it is a question of political will on behalf of the government to

take a moral stand and embrace the dual benefits that identification can have for the State who can benefit from improved identification rates and future prosecutions, as well as helping victims. It would show empathy towards victims and the possibility of using victims to help convict more traffickers, preventing more vulnerable individuals becoming victims in the future which has political capital for any government tackling this global crime issue.

CHAPTER 6: CONCLUSION

My research has clearly been victim focussed, bringing different issues together which affect victims of trafficking into a victimology thesis. Until now, the research has been disconnected from one another, but this work has coordinated and been presented into one consolidated piece of work, examining the challenges of identifying trafficked victims. The thesis has argued that States have moral obligations to protect trafficked victims from further harm by traffickers. This can be achieved by States taking greater responsibility to understand what the challenges to identifying trafficked victims are, and accepting that it is in the interests of the State and the trafficked victim for more potential victims to be referred and identified through the NRM.

The aims of this research were to establish what barriers exist, preventing more identifications from taking place, and establishing who they come into contact with, and which environments trafficked victims find themselves in after escaping or are rescued from slavery. The thesis identified which organisations and authorities come into contact with trafficked victims, who then have the opportunity to make referrals to Public Authorities (PA) who have a duty to inform Competent Authorities (CA) who identify victims.

These challenges were examined in depth within this thesis, and suggested how they could be overcome by implementing practical solutions, including the introduction of a ‘Trafficking Advocate’ within different environments to support victims and assist the State in helping to prosecute more traffickers.

The following sections (I – V) will summarise the findings from each chapter, and will be followed by an overarching conclusion (VI) which consolidates the thesis.

I. Introduction And Political Context Of Identifying Human Trafficking

The introduction provided the contextual background which set the scene for the following chapters, examining the challenges of identification. The thesis started by establishing how immigration has been continuously politicised over a number of decades, and particularly more recently during the Brexit referendum. The desire for some of the electorate to restrict low skilled, low educated people from travelling from the EU and from other countries has tended to group as all migrants as the same, and been argued as the reason why many of the social issues exist in the UK today. Consequently, immigrants have become scapegoats and have been perceived negatively and less deserving than UK nationals. Allowing this rhetoric to continue creates an atmosphere where it is becoming increasingly difficult to distinguish between different types of migrants. Misidentification prevents genuine trafficked victims from being recognised and having the access to help which they are entitled to. It exposes victims to further harm including deportation, and the risk of re-trafficking in the future.

The challenge for everyone is to be aware that trafficked victims exist within society, and have the ability to distinguish victims from other groups. If authorities and organisations fail to identify which group an individual belongs to, victims can be misidentified and not granted the protection they deserve as victims of crime. What makes identification more difficult is that a trafficked victim may have been a smuggled person before being trafficked due to their vulnerability. Often, victims may have consented to being smuggled but later found themselves trapped once at the destination because of the advantage the trafficker has in terms of placing the victim in debt bondage without a means of escape, making it easier to exploit the victim.

This chapter highlighted the difficulty of identifying victims of sexual exploitation because of the blurred lines associated with consent. Where a victim gives free consent to providing sex services, but does not consent to being trafficked and exploited, the threshold towards

exploitation is crossed. However, victims are still regarded as sex workers, but not recognised as having victim status. Difficulties of identification exist because of the negative portrayal of this type of work, generalising and perceiving all sex workers as voluntary consenting, when this is not always the case.

Whilst a government allows a negative rhetoric attitude towards how migration and illegal immigration to exist, the consequences for vulnerable individuals who are living in the UK, instils mistrust between the individual and the State, preventing more trafficked victims from having the confidence to escape and know where and who to approach to seek help and protection.

Any Government should see identification as an opportunity to embrace a positive determination to integrate vulnerable individuals by rescuing them from exploitation. This approach can be seen as being an example to the rest of the world, creating a more humane identity which the UK wishes to project internationally, by taking the lead on the issue of identification.

II. The Challenges For Individuals To Recognise Themselves As Victims Of Human Trafficking

Chapter 2 examined how difficult it is for trafficked victims to self-identify, and in most cases will have to rely on others to recognise them as victims of trafficking. The aim of the chapter was to establish what the challenges are from the perspective of the victim which makes self-identification so problematic.

The research clearly showed that the way in which traffickers deceive, coerce and control victims makes it difficult for individuals to recognise that they are being exploited as victims of trafficking. I demonstrated how the ‘means’ element must be better understood to inform

how trafficking occurs through grooming, how exploitation is facilitated through coercion and continues by the control from the trafficker over the victim.

Victims face being trapped in a cycle of exploitation and emotional attachment, making it difficult for victims to break free, because of the relationship which was formed which led to the exploitation and through fear of reprisals, or the threat of deportation. The threats make victims hidden from view within society, making identification even more difficult.

The research has successfully identified the significance of the means element of the offence and the devastating effects on victims. My thesis showed how coercion, deception and control over the victim each play a different role, making it demanding for victims to disclose this to authorities.

The chapter examined how vulnerable individuals are often deceived by being promised a better life elsewhere. Often victims come from poor areas. Where a trafficker deceives a victim, it does not mean to say that the victim will leave. Although they may accept they have been deceived, the economic and social environment of their home country may be worse than what than they are experiencing. I also highlighted how victims often blame themselves for their situation because of the decision they made to travel, making them feel responsible for their own exploitation.

I have shown how coercion is both a physical and psychological tactic, employed by traffickers and one which occurs after victims have been deceived. Victims are drawn into emotional bonds with their trafficker, making it easier for the trafficker to make them undertake activities such as sex work or labour exploitation and for the victim to find it more difficult to escape, and break this attachment. The degree of coercion can be extremely emotionally draining for victims, and more likely to accept the abuse without having the strength to retaliate. This often

leads to a sense of helplessness preventing self-identification. I have identified the difficulty of establishing coercion within sex work, because of the difficulty to distinguish between freely consenting sex workers, and vulnerable individuals who appear to have consented, but in fact have been trapped, and cannot escape from the exploitative situation.

I have demonstrated how victims are kept as commodities by traffickers, making the chances of escape and self-identification remote. It was seen how control over the person manifests itself within the environment of exploitation which prevents escape because of threats to their life or threats to family or friends. I evidenced how victims are reliant upon their trafficker for protection from being deported because they have no immigration stay or are protected from being prosecuted because of the acts which they are being forced to commit.

From my research on the means element of the offence, I have learnt how difficult it must be for victims to escape from exploitation, especially when the abuse is inflicted on a long term basis. I have developed immense empathy for victims who are exposed to abuse who are often repeatedly exploited because of the restrictive environment victims find themselves in. Exploitation is often an environment of solitude with invisible chains preventing them from breaking free and escaping. Often this vulnerability makes victims give implied consent to abuse because of the powerlessness they feel to change their situation. The isolation that results illustrates the degree of invisibility of victims, further preventing society from seeing and recognising victims and for victims themselves to also acknowledge they are victims.

During this chapter, I have shown the impact of the harm inflicted by traffickers on victims affects the mental health of victims which is a huge barrier to self-identification. I evidenced how victims develop anxiety, depression, and PTSD as a result of being exploited and being subjected to slavery exploitation triggers memories of past abuse which some victims had experienced earlier in their childhoods. I have argued that the consequences of trafficking and

exploitation for the victim can be devastating without support and help which can only take place in a safe environment, free from traffickers and exploitation, and can only be guaranteed through positive identification via the NRM.

I have shown that the main barrier to accessing help is often the stigma attached to experiencing mental health issues. I have emphasised that if victims are from other countries, they have the stigma of being a migrant, and a stigma of being migrant with a mental illness. Later in my research I argued the importance for victims not to be deported back to places where victims will be ostracised and discriminated against because of their presumed consent becoming involved in human trafficking, which can ultimately lead to victims becoming re-trafficked.

What I have clearly shown is that society cannot wait for victims to self-identify and victims need encouragement, help and support to do so. To create trust between the State and the victim, I have argued that an advocate is required who can act in the best interests of the victim by liaising with the police in investigations. An advocate can be used by Third Sector Organisations (TSOs) to increase the awareness and better understand how the harm is inflicted on victims so that victims have a better chance of being recognised as potential victims and referred to PAs who can refer to the NRM. More broadly, society needs to be more proactive and prepared when coming into contact with potential victims by having the confidence to know how to alert PAs. Trafficked victims are often invisible, and to simply wait for victims to appear from the shadows will not happen, without society becoming more aware and becoming more confident and assertive. This issue led to the next part of my research, evaluating how organisations, PAs and decision makers in charge of identification respond and interact with potential victims of human trafficking.

III. The Response of Civil Society and The UK in Identifying Victims of Trafficking Through a National Referral Mechanism

Chapter 3 examined the role of TSOs and PAs play when they come into contact with potential trafficked victims, and the opportunities to refer victims to the NRM. I identified a top down approach and a grassroots approach to identification which presently exist.

The research indicated that the top down approach has typically been carried out by the State by issuing guidance to staff on spotting the signs of trafficking. Whilst this sounds positive, in practice this was found not to be practical, because of the difficulties in recognising physical injuries of victims due to how invasive it is to make these investigations. I also found that it is not the obligation of charities to do this task. I have shown that the top-down approach is primarily dominated by a statutory duty imposed upon PAs to report potential victims of trafficking to CAs. However, as I have demonstrated throughout this chapter, TSOs such as charities are often the first people to come into contact with victims, but there is no present statutory duty upon them to make a referral to a PA. I identified that the current statutory duty conflicts with what is in the best interest of the victim, especially where victims who are fearful of authorities give consent to be referred by a PA to a CA without any support from an advocate. Victims will also be fearful of reprisals or if they have entered the State illegally or have no identification papers, and run the risk of being deported. The statutory duty has not taken the impact on the victim into account, and places PAs in a dilemma. Whilst I accept that the purpose of the duty to refer is to potentially identify more victims, the best interests of some victims will be compromised and expose them to further risks such as prosecution and immigration offences which may serve the interest of the State, but not the victim.

I have evidenced the difficulties which TSOs, and PAs have in recognising potential trafficked victims if they do not understand what human trafficking is, or how the harm is inflicted which

continues to make identification challenging. What my research has shown is that the start of identification starts before victims are eventually presented to a CA. In fact, the identification of victims start when they come into contact with the TSO or PA. Distinguishing between a potential trafficked victim and another type of migrant poses difficulties along with understanding mental illness also pose difficulties that someone is trafficked, at this early stage, along with recognising that victims may have difficulty in self-identifying.

The present situation relies on a few specific anti-trafficking organisations who offer support and training to other organisations who may come into contact with potential victims. I identified a grassroots approach which looks at increasing the awareness to spot more potential victims by investing additional resources to reach civil society groups which is in the best interests of the State and victims. I have demonstrated that it makes more sense to invest in more training to frontline staff within TSOs to help spot potential victims. I have argued the case for Government and local authorities to provide more funding for greater awareness and funds for specific anti-trafficking charities and voluntary groups to assist victims at the beginning of the referral process. Better awareness at an earlier stage will increase referrals, especially when resources are directed within hospitals, GP surgeries and police stations.

I have demonstrated how the NRM referral mechanism operates, identifying its flaws which prevent the advancement of trafficked victim interests, and in some cases exposes them to a greater risk of being re-trafficked. Whilst the purpose of the NRM is to recognise individuals of human trafficking so that they are entitled to help and support, I have found that the NRM is a State entity where most of the decisions are made by Home Office UK Visa and Immigration. My research has identified bias within the identification process against the victim. State bias remains a huge barrier which victims, particularly non – UK nationals need to overcome if more victims are to be positively identified.

As the identification of victims takes place under a negative narrative towards immigrants, it is evident that there is too much emphasis on the immigration status of an individual. I have demonstrated that the bias against trafficked victims in favour of the State controlling immigration numbers stands in the way of more potential victims from coming forward. In fact, it will increase the fear and anxiety of victims believing that they will be deported. The purpose of the NRM is to identify those victims with merit so that they can be protected from further harm and provide them with help to support their recovery from their ordeal. I have argued for an advocate to be introduced to support the victim, and prevent such bias and for the decision making process to be taken away from the UKVI altogether, and giving decision making authority to the MSHTC or replacing the present procedure with a Tribunal made up of experts, aligned outside of the State, with a right of appeal for victims. The way in which support is needed would protect victims from this bias as advocates would be able to voice their concerns on behalf of victims. Bias against victims cannot facilitate an environment of trust within the system, and does not enable victims to have the confidence to come forward to have their cases looked at on merit.

In the final part of this chapter, I showed where the gaps in protection of the victim are during and after the NRM. A victim often has to wait longer than 45 days after the positive grounds decision is received. Formal identifications need to be made sooner in an appropriate time frame for the benefit of victims. The sooner the decision is made, the quicker victims can be assisted and this is also in the interest of the State. Delays in decisions have a negative impact on the wellbeing of victims. Every potential victim must be given the right to be given an informed decision, free from bias. After all, the purpose of the NRM is to identify those with merit.

The gaps in protection from the NRM expose victims to a greater risk of vulnerability by becoming re-trafficked, especially when support is withdrawn. This can be evident where there are delays in CAs making decisions, and support and help stops after 45 days, leaving TSO to fill the gaps which the NRM has created. The present flaws in the system justify a greater specialist bank of knowledge being introduced with the introduction of more anti-trafficking advocates within organisations playing a bigger role to assist decision makers and providing support to victims.

I have demonstrated that the 45 days reflection period does not meet the needs of victims. It remains to be seen whether the proposals which have been progressing through the legislative route in the House of Lords will be fully implemented into law. In any case, I have suggested that it would be practical to establish an ‘individual needs assessment’ of the victim which takes place at the beginning of the referral process and one which takes place at the end to ensure that the needs of the victim are addressed throughout. Every effort should be made to seek the required support for the victim and safeguarding measures are actioned when a victim exits the mechanism, but this issue is for another piece of published work.

What emerges from the research is that if the Government is serious about tackling modern slavery and increasing identification rates, more resources are required and directed towards finding victims and using civil society. Whilst I acknowledge that the State will bear a heavier cost if the NRM makes more positive conclusive grounds decisions because of the increased demand for housing or safe houses, creating more pressures on health services and more finances by paying victims welfare benefits, I advocate that this is worth the cost for the State to satisfy their moral obligations. The costs to the State can be outweighed by the benefit of the Police in having victims play a part in prosecuting traffickers by giving evidence. A ‘carrot and stick’ approach to this issue which would have dual benefits for the victim and the State.

IV. The Prosecution of Trafficked Victims and the Issues and Challenges
Associated with the Identification of Trafficked Victims during Criminal
Proceedings

Chapter 4 examined how trafficked victims are prosecuted for offences committed under duress, rather than being referred and identified by the NRM.

I have highlighted the inconsistencies across the international legislative framework, showing that each State has discretion as to how they address the issue of non-prosecution of victims. This discretion can leave individuals exposed to the criminal law at the expense of being identified as a trafficked victim through the NRM.

From my research I have demonstrated that depending on where victims are found and how they come into contact with the State, they will be treated differently by the criminal justice system of that country. The introduction of the NRM shows a unified approach to identification across the UK, but the issue of non-prosecution remains inconsistent, exposing some victims in some parts of the UK. I have shown that victims in Scotland will be treated more favourably than those found in England and Wales, because of the Scottish presumption that there will be no prosecution against trafficked victims. I agree with having a presumption of non-prosecution, and I do hope that one can be adopted across the jurisdictions within the UK to show consistency and show equality to all victims, regardless of which country they come into contact with authorities. The UK wide NRM together working alongside a UK wide non-prosecution presumption would help facilitate a victim centred approach.

An inconsistent approach shows to the wider international community that the UK is not united, and some countries are not willing or indeed able to distinguish between an offender and a victim. It cannot be right where one victim in the UK will be treated differently to another,

depending upon where the victim is identified under the same mechanism. This illustrates the importance of ensuring that identification plays an influential role so that victims are diverted away from prosecution so that they can obtain services and advocacy, rather than victims from being charged by the CPS. I believe that if the UK improves the NRM, it will be taking the moral lead by choosing to protect victims who may also be offenders.

I have shown how trafficked victims are often prosecuted for offences which have been committed whilst they have been under duress, and the different types of defences available for victims. Furthermore, I have demonstrated that the present defences are not strong enough to mitigate a victim's criminal liability. As I have identified, the common law defences do not provide adequate protection, and despite a statutory defence being available for victims, I have argued that it is so restrictive that the reliance upon which it to use should be advanced with caution, because it does not serve the interests of protecting trafficked victims from the criminal law. What is required is for the law to introduce a specific defence which deals with coercion of trafficked victims, which acknowledges how the harm is inflicted. Victims must be able to show evidence of the harm through the support of an organisation or defence representative to successfully rely on this defence.

Nevertheless, I argued in the chapter that even though there are defences available, victims should not be prosecuted in the first place, because of the absence of moral culpability. I have advanced an argument that trafficked victims should not be prosecuted, because they cannot be held morally culpable for offences in this way for any type of offence. This view has been justified on the fact that trafficked victims are coerced into committing these crimes whilst the trafficker remain unaccountable. This situation is unfair on the victim, because victims cannot get justice for the harm committed. At the end of the day, where a victim has been positively identified by the NRM, I would expect that this decision to satisfy that there is no need for the

CPS to prosecute. Arguably the guidance should be amended reflecting a positive decision from the NRM, and a presumption against prosecution in a similar form to that adopted in Scotland.

As identified in Part III of Chapter 4, the bigger picture whilst trafficked victims continue to be prosecuted is that traffickers are able to escape criminal liability and carry on exploiting other vulnerable victims. A mind-set of prosecuting for prosecuting sake prevents the attention needed to identifying more victims and investing in their care so that they can assist the police in investigations for the purpose of prosecuting more traffickers. An approach to identify more victims creates an environment where victims can access the opportunity to participate in obtaining justice by helping the police. This is not possible when prosecutors are distracted by continuing to prosecute victims. An intention from the CPS to prosecuting offenders must be weighed against the likelihood that offenders in their judgment may also be victims who require protection from the law and also protection from further exploitation from traffickers. Identification remains the first step in facilitating this approach by moving focus away from the liability of the victim and efforts to concentrate on the opportunity which the victim can provide in helping the State combat trafficking in investigations and during trials by prosecuting the real offenders. The priority must be to identify and protect trafficked victims so that they can be used within the criminal justice system to help police pursue traffickers which is in the interests of the State and victims.

V. The Issues and Challenges for Trafficked Victims to Regularise their Immigration Status during Immigration Proceedings

Chapter 5 examined the ways in which trafficked victims can regularise their immigration status with or without being referred and identified through the NRM. I explained that the two possible routes are either applying for asylum for victims who had not been identified by the

NRM, or if they have been positively identified, applying for Discretionary Leave to Remain (DLR).

I justified my view that trafficked victims should not be deported, because it is not in the interest of victims because of the risk of discrimination, ostracism and stigma in their home country, resulting in further harm to victims or the risk of being re-trafficked. I have also explained that the State must also satisfy the non-refoulement principle which protects victims.

This part of the research reflected the difficulties which must be overcome by victims and their advocates to succeed in being granted asylum or DLR. Although the granting of asylum and leave to remain may benefit victims by removing the fear of being deported and reassurances that they are protected, it is not a politically attractive proposition for the State and politicians. It will also be seen to be very unpopular from some groups of the electorate to accept a position where non-nationals are given stay in the UK. However, as I have argued in the thesis, the identification of victims should not be an immigration issue, but prioritised as a human rights one. The toxic discourse surrounding immigration overshadows the plight of many victims of exploitation as well as the extensive culpability of serious offenders. It exacerbates the problem because human trafficking remains a hidden crime, affecting vulnerable, marginalised individuals who become victims who are often hidden themselves from society. The continuing discussion on the perils of limiting immigration fails to acknowledge the issue in its entirety and prevents victims from emerging from the shadows, and remaining in slavery.

Since human trafficking is predominately an issue of human rights, it is my view that the UK must uphold their international standards and show compassion and recognition towards trafficked victims. This involves the focussing on the identification of trafficked victims so that they are recognised as having rights to access services and support, rather than treating victims

as unworthy migrants and framing the protection of vulnerable non-nationals as a politically driven, negative rhetoric towards immigration, preventing the State from carrying out their international obligations towards trafficked victims.

Progress can be made by additional referrals and more positive identifications taking place which will lead to further convictions in due course. To make this approach realistic, a human rights perspective must be rigorously pursued, instead of a domineering cynicism towards immigration adding to the present politicisation of the issue.

A change of mindset, leading to a change in behaviour from viewing the victim as an immigrant to a human being is required to start facilitating an increased positive approach to identification. Politicians do have the control to change policy to advocate that it is in the UK's interest to help and protect more victims to help lead to more convictions of traffickers. I believe that the UK should take the lead to do more to protect more victims from human trafficking, whilst communicating a stronger message to traffickers asserting that they will be prosecuted and convicted.

This part of the research showed that granting leave is a vital method to obtain cooperation and trust from the victim so that the time spent in the UK can be effectively used well by victims in recovering from their ordeal and simultaneously participating in the criminal justice system. I believe that there is space for both interests to coexist in the same system to identify more victims and combat the crime by pursuing more prosecutions. If victims are treated with respect as human beings, then there is no reason why victims cannot help the State playing a significant role in assisting police with prosecutions and more convictions.

Nevertheless, the UK must increase its efforts to make the NRM a system which projects a framework of trust where TSOs, PAs, CAs and victims all have faith in. A sense of trust can

only be built within a system victims feel safe to cooperate with. They cannot do this if they feel that they will not be believed or recognised fairly by a framework which should exist to encourage victims to come forward, and has the purpose of increasing identification rates.

VI. Conclusion – A Path Forward To Enable Further Progress To Identify More Victims

This thesis has consistently argued that identifying more victims of human trafficking is not only in the interests of victims, but also in the interest of the State.

This research has set out the environments where the main challenges of identifying victims of human trafficking exist. I have evidenced that the solutions to the challenges have a dual benefit. The process of identifying more potential victims of human trafficking take place within the context a negative view towards legal and illegal immigration. Despite this, there is no doubt that there has been instances of misidentification by authorities within a range of environments where trafficked victims come into contact with. There are plenty of potential victims of human trafficking hidden in our society, waiting and wanting to be rescued, protected and identified.

Running synchronously within the thesis have been recurring themes of identification and misidentification, recognition and repression of the victim, and responsibilities of authorities and obligations of the State. These themes combine to make up a complex problem within the UK in terms of starting to address the issue of identifying individuals correctly as trafficked victims. Without victims feeling safe and having the confidence to come forward and overcome their own challenges of self-identification along with authorities being able to spot the signs of trafficking and increase referrals, traffickers are presently able to easily escape and they will continue to exploit many other vulnerable individuals.

Despite the increased rates of referrals to the NRM, I have demonstrated that the low rates of identification illustrate that the present situation of identification is not working as well as it should, because of bias or misidentification within the NRM, a lack of awareness of human trafficking and knowing what the signs are. I have learnt that the present system needs to be restructured to accommodate a trafficking advocate, working for victims to help counter some of the challenges victims encounter in becoming recognised, referred and identified, whilst assisting the State in meeting their objectives in increasing more prosecutions against traffickers.

Within this thesis, I have shown how a trafficking advocate can often bridge the gap between the State and the victim, working alongside third sector organisations in increasing awareness of human trafficking and showing how the harm is inflicted on them, offering help and assistance to PAs and CAs, whilst informing prosecutors during whether to prosecute individuals involved in criminal acts indirectly from trafficking. Advocates are able to make victims aware of their rights in accessing care and support during the 45 day reflection period and playing a part in regularising their immigration stay after identification. They can also alert them to the NRM. They can be introduced into organisations, and in environments where the vulnerable are likely to be such as police stations and hospitals. Currently, there is not a comprehensive trafficked victims' service to access help from. A victim of any crime can access the Victims Information Service (www.victimsinformationservice.org.uk) to find out where to get support from. Typically, this will be through Victim Support (www.victimsupport.org.uk). Where trafficked victims are sexually exploited, they can access the Survivors Trust (www.thesurvivorstrust.org.uk) or Rape Crisis (www.rapecrisis.org.uk), but these are not anti-trafficking organisations. Neither do organisations provide for help for victims of labour exploitation. Migrant Help (www.migranthelp.org/supporting-survivors) help victims by liaising with law enforcement and assistance with acquiring new identification

documents but the problem is that there are no nationwide organisations which specifically deal with providing help for specific problems outlined in my thesis. Typically, they are provision based organisations such as the Salvation Army who provide safe shelters.

However, my thesis has not argued that an advocacy solution is the ‘silver bullet’ solution. As I have outlined throughout the chapters, there are smaller solutions which can take place. My point about the advocate solution is that the role is one of a facilitator to enable these smaller solutions to take place and actioned for the benefit of the victim and in some circumstances helps the State. My argument is that States should be seen to operationalise their moral obligations towards trafficked victims. Even though States have a legal obligation to train and identify trafficked victims, I believe that States, and particularly the UK also has a moral obligation to make the system accountable to the person accessing it. If a country wishes to uphold its international reputation of standing up for human rights and advancing the rights of those who are subjected to a gross violation of human rights. Upholding the legitimacy of a national referral system depends upon it. This thesis has highlighted the challenges, but they can be overcome if there is enough political will to do so.

For the UK to lead the international community in demonstrating a victim centred approach to the issue of identification, there is substantial work to be done to make progress on identifying more victims and safeguarding them during and after their involvement within the NRM. This will involve organisations and authorities cooperating to play a greater role in supporting victims, and being more deeply involved in the referral and identification process.

What I have ultimately learnt from my research is that victims are being punished and let down, whilst traffickers are able to flaunt the law entirely and escape liability for acts committed against vulnerable individuals. Traffickers may treat their victims as commodities and show little, if not any empathy towards them. In contrast, it is vital that society and the individuals

who work for organisations and authorities who come into contact with potential victims show humanity towards victims who are extremely vulnerable individuals and treat them with the respect that they deserve. This research should persuade those who interact with victims the importance of understanding the predicament which victims have endured from traffickers, and seek to protect them from further harm.

By overcoming these challenges, an environment in which vulnerable individuals are treated with respect by those with whom they come into contact, and are protected whilst their cases are being decided upon, based on their merit, can emerge. With the introduction of victim advocates, they can help provide support for victims so that they can start their journey from the end of their exploitation, towards a path to recovery through empowerment, one which is free from slavery and free from the fear of being re-trafficked. This thesis presents practical possibilities for victims to be led out from the shadows, by making them visible to society. Alongside the support, which my thesis advocates, the hope is that more traffickers will eventually be prosecuted, and held accountable for their criminal actions by the State.

Bibliography

Books & Book Chapters

Allain. J, "Trafficking and Human Exploitation in International Law with Special Reference to Women and Children in Africa," found in B. Lawrence & R. Roberts, "*Trafficking in Slavery's Wake*," (Ohio University Press, 2012)

Chandran. P, "*Human Trafficking Handbook: Recognising Trafficking and Modern Day Slavery in the UK*," (LexisNexis, 2011)

Child. J, & Ormerod. D, "*Smith & Hogan's Essentials of Criminal Law*," (Oxford University Press, 2015)

Christie. N, "The Ideal Victim," from Fattah. E.A, "*From Crime Policy to Victim Policy*," (Macmillan Press, 1986)

Deigh, J. & Dolinko. D, "*The Oxford Handbook of Philosophy of Criminal Law*," (Oxford University Press, 2015)

Dressler. J, edited by Deigh. J, and Dolinko. D, "*The Oxford Handbook of Philosophy of Criminal Law*," (Oxford University Press, 2015)

Edwards. M, "*Civil Society*," (Wiley, 3rd Edition, 2014)

Gallagher. A, "*The International Law of Human Trafficking*," (Cambridge University Press, 2010)

Horder. J, "*Ashworth's Criminal Law*," (8th Edition, Oxford University Press, 2016)

Horder. J, "*Autonomy, Provocation & Duress*," (West, 1984)

Malloch. M, & Rigby. P, "*Human Trafficking: The Complexities of Exploitation*," (Edinburgh University Press, 2016)

Obokata. T, "*Trafficking of Human Beings from a Human Perspective, Towards a Holistic Approach*," (Martinus Nijhoff, 2006)

Ochberg. F, & Soskis. D, "*Victims of Terrorism*," (Boulder CO, Westview, 1982)

Scarpa. S, "*Trafficking in Human Beings: Modern Slavery*," (Oxford University Press, 2008)

Simester. A P, Spencer. J R, Sullivan. G R & Virgo. G J, "*Simester and Sullivan's Criminal Law Theory and Doctrine*," (5th Edition, Hart Publishing, 2013)

Singer. P, Gates. B, Gates. M, "Famine, Affluence and Morality," (Oxford University Press, 2015)

Sunstein. C, "*Why Nudge? The Politics of Libertarian Paternalism*," (Yale University Press 2014)

Articles

- Abas. M, Ostrovschi. N, Prince. M, Gorceag. V, Trigub. C, & Oram. S, "Risk Factors for Mental Disorders in Women Survivors of Human Trafficking: A Historical Cohort Study," BMC Psychiatry, (2013) 13: 204
- Baldwin. S, Fehrenbacher. A, & Eisenman. D, "Psychological Coercion in Human Trafficking: An Application of Biderman's Framework," Qualitative Health Research (2015), Vol 25(9), 1171
- Basoglu. M, Paker. M, & Paker. O, "Psychological effects of torture: a comparison of tortured political activists in Turkey," American Journal of Psychiatry (1994) 151: 76 - 81
- Berry. S. J, "Nurses at the Forefront of Fight against Modern Slavery," (2017) Royal College of Nursing Journals, Vol 32, Issue 14, 12
- Boister. N, "Transnational Criminal Law?" (2003) European Journal of International Law, 953
- Brennan. D, "Competing Claims of Victimhood? Foreign and Domestic Victims of Trafficking in the United States," Sexuality Research & Social Policy, December 2008, Vol 5, No 4
- Brewin. C.R, Andrews. B, Valentine. JD, "Meta-analysis of risk factors for posttraumatic stress disorder in trauma-exposed adults," Journal Consult Clinical Psychology, (2000), Vol 68(5) 748 - 766
- Canter, D. & Youngs. D, "Sexual and Violent Offenders' victim role assignments: a general model of offending style," The Journal of Forensic Psychiatry & Psychology (2012) 23: 3 297
- Chudakov. B, Illan. K, Belmaker. R.H, & Cwikel. J, "The Motivation and Mental Health of Sex Workers" Journal of Sex & Marital Therapy (2002) Vol 28, Issue 4 305
- Corrigan. P, "How Stigma interferes with Mental Health Care," American Psychologist (2004) Volume 59, No 7, 614
- Coutois. C, "Complex Trauma, Complex Reactions: Assessment and Treatment," Psychological Trauma: Theory, Research, Practice and Policy, (2008) Vol S, No 1 86 – 100
- Crabb, S & Schinina. G, "Mental Health of Victims of Trafficking: a right, a need and a service," (2016), Epidemiology and Psychiatric Sciences, Vol 25, Issue 4
- Dando. C, Walsh. D & Brierley. R, "Perceptions of Psychological Coercion and Human Trafficking in the West Midlands of England: Beginning to Know the Unknown," PLoS One (2016), 11(5)
- Danziger. R, "Where are the victims of trafficking?" (2006) Forced Migration Review, No 25
- Dietel. C, "Not our Problem: Russia's resistance to joining the Convention on action against trafficking in human beings," (2009) Suffolk Transnational Law Review, Vol 32, Issue 1
- Doezema. J, "Who gets to choose? Coercion, consent, and the UN Trafficking Protocol," Gender and Development (2010) Vol 10, Issue 1 20
- Dressler. J "Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code," (1988) 19 Rutgers L. J, 671

Dressler. J, "Exegesis of the law of Duress: Justifying the Excuse and Searching for its Proper Limits," (1989) 62 S. Cal L. Rev. 1331

Dunne. J, "Hijacked: How efforts to redefine the international definition of human trafficking threaten its purpose," Willamette Law Review, (2012), Vol 49, 403

Elliott. J, "Misidentification of Victims of Human Trafficking: The Case of R v O," (2009) International Journal of Refugee Law, 21(4): 727 – 741

Fairclough. S, "Barriers to vulnerable defendants giving evidence by live link in Crown Court trials," The International Journal of Evidence and Proof (2017), 21(3) 209

Farley. M, & Barkan. H, "Prostitution, Violence and Posttraumatic Stress Disorder," Women & Health (1998), 27:3 37

Farrell. A, McDevitt. J & Fahy. S, "Where are all the victims?" (2010) American Society of Criminology, Vol 9, Issue 2

Flannery. R, & Harvey. M, "Psychological Trauma and Learned Helplessness: Seligman's Paradigm Reconsidered," Psychotherapy, (1991) Vol 28, No 2 374

Francesca Haynes. D, "Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and Secure the Prosecution of Traffickers," (2004) Human Rights Quarterly, Volume 26, Number 2

Gallagher. A, "Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis," Human Rights Quarterly, (2001), Volume 23, Number 4 975

Gerrard. M.B, "Climate Change and Human Trafficking After the Paris Agreement," University of Miami Law Review, (2018), Vol 72, 345

Goodey. J, "Sex Trafficking in Women from Central & East European Countries: Promoting a 'Victim Centred' and 'Woman-Centred' approach to Criminal Justice Intervention," Feminist Review (2004) 76, 26

Gray. F, "Stigma: Barrier to Mental Health Care amongst Ethnic Minorities," Issues in Mental Health Nursing, (2005) Volume 26: 10, 979

Hathaway. J "The Human Rights Quagmire of Human Trafficking," Virginia Journal of International Law (2008) Vol 49 Issue 1

Hatton. T, "Migration & Public Opinion and the Recession in Europe," Economic Policy (2016) 31

Haynes. D, "Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers," Human Rights Quarterly (2004) Vol 26, 221

Haynes. J, "The Modern Slavery Act (2015): A Legislative Commentary," (2015) Statute Law Review Vol 37, Issue, 1

Herman. J. L, "Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma," Journal of Traumatic Stress, (1992) Vol 5, No 3, 377

Hodelet. N, & Darjee. R, "The Galbraith Judgment and the Defence of Diminished Responsibility in Scotland," 45 Med. Sci. & L. (2005)

Hodge. D, "Sex Trafficking in the United States: A domestic problem with transnational dimensions," (2008) Social Work, 53, 143 – 152

Hom. K & Woods. S, "Trauma and its Aftermath for Commercially Sexually Exploited Women as Told by Front-Line Service Providers," Issues in Mental Health Nursing, (2013) Volume 34, Issue 2 75

Hopper. E, & Hidalgo. J, "Invisible Chains: Psychological Coercion of Human Trafficking Victims," Intercultural Human Rights law Review (2006), 1: 185

Hopper. E, "Under-identification of Human Trafficking Victims in the United States," (2004) Journal of Social Work Research & Evaluation, Volume 5, No 2

Hossain. M, Zimmerman. C, Abas. M, Light. M, & Watts. C, "The Relationship of Trauma to Mental Disorders Amongst Trafficked and Sexually Exploited Girls and Women," American Journal of Public Health, (2010), Vol 100, No 12 2442

Hua. J, & Nigorizawa. N, "US Sex Trafficking, Women's Human Rights and the Politics of Representation, International Feminist Journal of Politics, (2010) Volume 12, Issue 3-4, 401

Hussein. R.A, "The Existing Tensions in the defining of human trafficking at a UK and international level: a critical overview," International Journal of Comparative and Applied Criminal Justice, (2015), Vol 39, No 2

Hyland. K.E, "Protecting Human Victims of Trafficking: An American Framework," (2001) 16 Berkeley Womens Law Journal 29

Ioannou. M, & Oostinga. M, "An empirical framework of control methods of victims of human trafficking for sexual exploitation," Global Crime (2015), Vol 16, No 1, 34

Johnson. B, "Aftercare for Survivors of Human Trafficking," Special Work & Christianity, (2012), Vol 39, No 4 370 – 389

Kim. K, "Psychological Coercion in the Context of Modern-Day Involuntary Labour: Revisiting United States v Kozminski and Understanding Human Trafficking," University of Toledo Law Review (2007) Vol 38, 941

Kliner. M, & Stroud. L, "Psychological and Health Impact of Working with Victims of Sex Trafficking," J Occup Health (2012): 54: 9 – 15

Laird. K, "Evaluating the relationship between Section 45 of the Modern Slavery Act 2015, and the defence of duress: an opportunity missed?" (2016) Criminal Law Review, 395

Lange. A, "Research Note: Challenges of identifying female human trafficking victims using a national 1-800 call center," (2011) Trends Organised Crime 14: 47

Lippincott Williams & Watkins, "Mental Illness Stigma and Care Seeking," The Journal of Nervous and Mental Disease, (2003) Volume 191, No 5 339

McKenzie, I. K, "The Stockholm Syndrome Revisited," (2004) Journal of Police Crisis Negotiations, 4:1, 5

Mrsevic. Z & Hughes. D, "Violence against women in Belgrade, Serbia," (1997) *Violence against women – An International Interdisciplinary Journal*, Vol 3, No 2 101

Nichols. A, and Heil. E, "Challenges to Identifying and Prosecuting Sex Trafficking Cases in the Midwest United States," (2014) *Feminist Criminology*, 1 – 29

Office of UN High Commission for Refugees, "Advisory Opinion on the Extraterritorial Application of Non-refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol," (2007) *European Union Human Rights Law Review*, 484 - 503.

Oram. S, Abas. M, Bick. M, Boyle. A, French. R, Jakobowitz. S, Khondoker. M, Stanley. N, Trevillion. K, Howard. L, & Zimmerman. C, "Human Trafficking and Health: A Survey of Male and Female Survivors in England," *American Journal of Public Health* (2016), Vol 106, No 6 1073

Oram. S, Stockl. H, Busza. J, Howard. L, & Zimmerman. C, "Prevalence and Risk of Violence and the Physical, Mental, and Sexual Health Problems Associated with Human Trafficking: Systematic Review," *PLoS Medicine*, (2012) Volume 9, Issue 5

Peters. K, "The Growing Business of Human Trafficking and the Power of Emergency Nurses to stop it," (2013), *Journal of Emergency Nursing*, Vol 39, Issue 3

Piotrowicz. R & Dr van Eck. C, "Subsidiary Protection and Primary Rights," (2004) *ICLQ*, Vol 53, 107

Piotrowicz. R, "European Initiatives in the Protection of Victims of Trafficking," (2002) *International Journal of Refugee Law*, Vol 14, 263

Piotrowicz. R, "States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations," (2012) *International Journal of Refugee Law*, Vol 0, No 0, 1-21

Piotrowicz. R, "The UNHCR's Guidelines on Human Trafficking," (2008) *International Journal of Refugee Law*, 20(2), 242

Piotrowicz. R, "Victims of People Trafficking and Entitlement to International Protection," (2005) *Australian Year Book of International Law*, Vol 24, 159

Posner. E.A, "Do States Have a Moral Obligation to Obey International Law?" (2003) 55 *Stanford Law Review*, 1901

Raghavan. C, & Doychak. K, "Trauma-coerced Bonding and Victims of Sex Trafficking: Where do we go from here?" *International Journal of Emergency Mental Health & Human Resilience* (2015), Vol 17, No 2, 583

Robinson. J, "Crime, Culpability & Excuses," (2012) *Notre Dame Journal of Law, Ethics and Public Policy*, Volume 2, Issue 1

Ross. C, Dimitrova. S, Howard. L, Dewey. M & Zimmerman. C & Oram. S, "Human Trafficking and Health: A cross-sectional survey of NHS professionals' contact with victims of human trafficking," *BMJ Open* (2015)

Sadrudin. H, "Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses," 16 *Stanford Law & Policy Review*, (2005), 379

Sigmon. J.N, "Combating Modern – Day Slavery: Issues in Identifying and Assisting Victims of Human Trafficking Worldwide," (2008) *Victims & Offenders*, Vol 3 Issue 2-3 245

Silove. D, Sinnerbrink. I, Field. A, Manicavasagar. V, & Steel. Z, "Anxiety, depression and PTSD in Asylum Seekers: Associations with pre-migration trauma and post-migration stressors," *Psychiatry Research and Teaching Unit, School of Psychiatry, University of New South Wales*, (1997) 170: 351 – 358

Silverman. J.G, Decker, M.R, Gupta. J, Maheshwari. A, & Willis. A, "HIV prevalence and predictors of infection in sex-trafficked Nepalese girls and women," *JAMA* 298: 536

Srikantiah. J, "Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law" *Boston University Law Review* (2007) 87: 157

Stepnitz. A, "A lie more disastrous than the truth: Asylum and the identification of trafficked women in the UK," (2012) *Anti-Trafficking Review* 1, 104

Tadros. V, "The Structure of Defences in Scots Criminal Law," *7 Edinburgh L. Rev* (2003)

Thapa, S.B & Hauff. E, "Psychological distress among displaced persons during an armed conflict in Nepal," *Soc Psychiatry Epidemiol*, (2005) 40: 672

Tsutsumi. A, Izutsu. T, Poudyal. A, Kato. S & Marui. E, "Mental health of female survivors of human trafficking in Nepal," *Social Science & Medicine* (2008) Vol 66, 1841

Turner-Moss. E, Zimmerman. C, Howard. C, & Oram. L, "Labour Exploitation & Health: A case of Men & Women Seeking Post-Trafficking Services," *Journal of Immigrant and Minority Health/ Centre for Minority Public Health* (2013)

Wake. N, "Human Trafficking and Modern Day Slavery: When Victims Kill," (2017) *Criminal Law Review*, 658

Wijers. M, "Purity, Victimhood and Agency: Fifteen years of the UN Trafficking Protocol," *Anti-trafficking Review*, (2015) Issue 4, 56

Yehuda. R, & LeDoux. J, "Response variation following trauma: a translational neuroscience approach to understanding PTSD," *Neuron Review* (2007), 56: 19 – 32

Zimmerman. C, Hossain. M, Hun. K, Gajdadziev. V, Guzun. N, Tchomarova. M, Ciarrocchi. R.A, Johansson. A, Kefurtova. A, Scodanibbio. S, Motus. M.N, Roche. B, Morison. L, & Watts. C, "The Health of Trafficked Women: A Survey of Women Entering Post-trafficking Services in Europe," *American Journal of Public Health* (2008) Vol 98, No 1 55

Zimmerman. C, Hossain. M, Yun. K, Roche B, Morison. L & Watts. C, "Stolen Smiles: a summary report on the physical and psychological health consequences of women and adolescents trafficked in Europe," *London School of Hygiene and Tropical Medicine*, (2006)

Government of Canada

"Syrian Refugees Horizontal Initiative" found at <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/departmental-performance-reports/2016/section-4.html>

UK Government

‘Prosecution of Defendants Charged with Offences who might be trafficked Victims’ at http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#Prosecution

CPS Full Test Code found at

https://www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html

CPS Guidance found at

http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/

CPS Guidance on Human Trafficking found at

http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a23

CPS Human Trafficking, Smuggling and Slavery Legal Guidance, found at http://cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a20

CPS Policy for Prosecuting Cases of Human Trafficking, May 2011

CPS “Violence against Women & Girls, 10th Report,” found at https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2017_0.pdf

Home Office Competent Authority Guidance for Victims of Modern Slavery, 21 March 2016

Home Office Victims of modern slavery – Competent Guidance issued on 21 April 2016 and Victims of Modern Slavery – Frontline Staff Guidance 18 March 2016

Home Office, Asylum Policy Instruction Discretionary Leave, 18 August 2015

Home Office, Victims of Modern Slavery – Competent Authority Guidance, 21 March 2016

Home Office - Victims of Modern slavery – Competent Authority Guidance, 21 January 2019

National Crime Agency (NCA) – National Referral Mechanism, found at <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism>

NCA Statistics, End of Year Summary 2015, published 11th Feb 2016

<http://www.nationalcrimeagency.gov.uk/publications/national-referral-mechanism-statistics/2015-nrm-statistics/676-national-referral-mechanism-statistics-end-of-year-summary-2015/file>

NCA Statistics, End of Year Summary 2016, published 7th April 2017

<http://www.nationalcrimeagency.gov.uk/publications/national-referral-mechanism-statistics/2016-nrm-statistics/788-national-referral-mechanism-statistics-end-of-year-summary-2016/file>

NCA Statistics, End of Year Summary 2017, published 26th March 2017

The Public Interest Stage, Code for Prosecutors found at

https://www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html

Victims of modern slavery – frontline staff guidance, 18th March 2016

NGOs, Charities and Other Bodies

“EU urges higher priority on Trafficking in Women and Children” Europa Press Release IP/01/325, March 7 2001

“Proposal for a Framework Decision on preventing and combatting trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA,” Europa Press Release MEMO/01/131, Mar 23, 2009

2013 British Social Attitudes Survey

Andreatta. C, “Protection, assistance and social reintegration of human trafficking survivors: a comparative analysis of policy approaches and practices in the UK and in Italy,” Centre for Social Justice and Change, Working Paper No 2, University of East London

Andreatta. C, Centre for Social Justice and Change, “Protection, assistance and social; (re) integration of human trafficking survivors: a comparative analysis of policy approaches and practices in the UK and in Italy,” (2015)

Anti-Trafficking Monitoring Group, “The National Referral Mechanism – A Five Year Review,” February 2014

Anti-Trafficking Monitoring Group, “Wrong kind of victim? One Year on: an analysis of UK measures to protect trafficked persons,” June 2010

Beddoe. C, & Brotherton. V, Anti Trafficking Monitoring Group, “Class Acts: Examining Modern Slavery legislation in the UK,” October 2016

Beddoe. C, Bundock. L, Jordan. T, “Life beyond the Safe House for Survivors of Modern Slavery in London, Gaps and Options Review,” Human Trafficking Foundation, July 2015

Blinder. S, “UK Public Opinion toward Immigration: Overall Attitudes and level of Concern,” The Migration Observatory at the University of Oxford, published 20th August 2015

Burland. P, “Counting the Days: A Study of Kalayaan’s referrals into the National Referral Mechanism in 2015,” Kalayaan, accessed at <http://www.kalayaan.org.uk/wp-content/uploads/2014/09/Counting-the-Days-Study-of-2015-NRM-referrals.pdf>

Care and Support Statutory Guidance, Department of Health, 2014

Clawson. H, & Dutch. H, “Identifying Victims of Human Trafficking: Inherent Challenges and Promising Strategies from the Field,” US Department of Health & Human Services, Office of the Assistant Secretary for Planning and Evaluation

Code of Practice for Victims of Crime, Ministry of Justice, October 2015

Duffy. B, & Smith. T.F, “Perceptions and Reality, Public Attitudes to Immigration” IPSO Mori Social Research Institute, January 2014

Easton. H & Matthews. R, “Investigating the experiences of people trafficked into commercial sexual exploitation in Scotland,” Equality and Human Rights Commission Research Report, January 2012

Elliott. J, and Garbers. K, “The National Referral Mechanism Pilots: A Review of the Training,” University of the West of England, 2016

European Commission Migration & Affairs, "Safe Countries of Origin," European Migration Network (2018)

Greta Group of Experts on Action Against Trafficking in Human Beings, "Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom," 2nd Evaluation Round, Council of Europe, 2016

Gross, J. & Douglas, J, "U.K's Immigration Unease Animates 'Brexit' Vote; Surge of new arrivals fuels support for leaving the European Union," Wall Street Journal Online 16 June 2016

Gross, J, "U.K's Immigration Statistics Gap Explained by Short Term Stays," Wall Street Journal Online 12 May 2016

Hammersmith & Fulham Community Law Centre, Z. Duszynska, "Victims of Trafficking and the Law."

Haughey, Caroline "The Modern Slavery Act Review," 31 July 2016

Holiday, Y, "Victims of human trafficking and the CCRC," The Law Society Gazette, 25th October 2012

Home Office, "Review of the National Referral Mechanism for Victims of Human Trafficking," November 2014

Hooper, L, "Victims of Trafficking and the Law: Immigration Law," Garden Court Chambers & Kirsty Thomson, Legal Services Agency

Human Trafficking Foundation, "Day 46: Is there life after the Safe House for Survivors of Modern Slavery?" October 2016

Migration Observatory Report 2011

Organisation for Security & Cooperation in Europe, "Trafficking in Human Beings: Identification of Potential and Presumed Victims A Community Policing Approach," June 2011

Stephen-Smith, S, & Sachrajda, A, "Prisoners with no Crime: Detention of trafficked women in the UK," The Poppy Project 2008

Stephen-Smith, S, "Detained: Prisoners with No Crime, Detention of trafficked women in the UK," (2008)

Transatlantic Trends Report 2014

UNHCR – The UN Refugee Agency "The 1951 Convention and its 1967 Protocol," September 2011

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," HCR/GIP/06/07 7 April 2006

United States Department of State Trafficking in Persons Report 2012

Online Reports: NGOs, Charities and Other Bodies

“The Problem of Trust” at <https://yougov.co.uk/news/2012/11/13/problem-trust/>

“Worsening Conditions inside Syria and the region fuel despair, driving thousands towards Europe,” UNHCR found at <http://www.unhcr.org/55eed5d66.html>

Anthony Steen MP Debate on Human Trafficking in Westminster Hall 20th January 2010 found at <https://www.theyworkforyou.com/whall/?id=2010-01-20b.103.0>

Asylum Aid, “The Asylum Process made Simple,” found at <http://www.asylumaid.org.uk/the-asylum-process-made-simple/#Application>

Asylum Support - UK Government website at <https://www.gov.uk/asylum-support/overview>

Beddoe. C, Bundock. L, & Jordan. J, “Life beyond the Safe House for Survivors of Modern Slavery in London, Gaps and Options Review,” Human Trafficking Foundation, July 2015

Beddoe. C, Bundock. L, Jordan. T, “Life beyond the Safe House for Survivors of Modern Slavery in London, Gaps and Options Review,” Human Trafficking Foundation, July 2015

Citizens Advice Advice-guide Publication, found at <https://www.citizensadvice.org.uk/advisernet/immigration/refugees-and-asylum-seekers/rights-ofpeople-with-humanitarian-protection-and-discretionary-leave/>

Client Services Program, Coalition to Abolish Slavery & Trafficking website, www.castla.org/client-services-program

Edwards, End Slavery, “The Secret Victims of Sex Trafficking,” July 2015 found at <http://www.endslaverynow.org/blog/articles/the-secret-victims-of-sex-trafficking>

European Election Database and www.europarl.europa.eu/pdf/elections_results/review.pdf

Forced Migration Review, Non-signatories to the 1951 Convention found at <http://www.fmreview.org/non-signatories.html> Home Office, Asylum Policy Instruction Discretionary Leave, 18 August 2015

Free the Slaves & the Human Rights Centre, University of Berkeley “Hidden Slaves: Forced Labour in the United States” (2004)

Human Rights First, “Human Trafficking by the Numbers,” 17th Jan 2017, found at <https://www.humanrightsfirst.org/resource/human-trafficking-numbers>

International Labour Organisation, “Global Estimates of Modern Slavery: Forced Labour & Forced Marriage,” September 2017, found at www.ilo.org/global/topics/forced-labour/statistics/lang--en/ondex.htm

IOM “IOM Monitors Migrant Arrivals, Deaths in Italy, Greece and Spain,” 9th September 2015 found at <https://www.iom.int/news/iom-monitors-migrant-arrivals-deaths-italy-greece-and-spain>

IOM found at www.iom.int/statements/more-needs-be-done-address-stigma-and-discrimination-towards-women-trafficked-sexual

IOM <https://www.iom.int/news/mediterranean-migrant-arrivals-2016-204311-deaths-2443>

Kofman, E. Lukes, S. D'Angelo, A. Montagna, N. "The Equality implications of being a migrant in Britain," Equality & Human Rights Commission, Research Report 19 (2009)

Mark Harper, "More training to identify and support victims of human trafficking," Press release from www.gov.uk/government/organisations/home-office, 21 January 2013

Mental Health Foundation found at <https://www.mentalhealth.org.uk/a-to-z/s/stigma-and-discrimination>

Migration Observatory found at <http://www.migrationobservatory.ox.ac.uk/resources/briefings/migration-to-the-uk-asylum/>

Migration Observatory, "UK Public Opinion toward Immigration: Overall Attitudes and Level of Concern," 7 Jun 2018 found at <https://migrationobservatory.ox.ac.uk/resources/briefings/uk-public-opinion-toward-immigration-overall-attitudes-and-level-of-concern/>

Nickerson. J, "Traffickers v Smugglers: The Refugees crisis is changing how migrants are moved," New Statesman, 12 May 2016 at <http://www.newstatesman.com/world/europe/2016/05/traffickers-v-smugglers-refugee-crisis-changing-how-migrants-are-moved>

Polaris Project at <http://polarisproject.org/>

Political disaffection with mainstream politicians has increased the popularity of the UK independence Party at <https://yougov.co.uk/news/2014/10/29/political-disaffection-not-new-it-rising-and-drivi/>

Refugee Council, "Asylum Seekers in Europe - September 2016" found at https://www.refugeecouncil.org.uk/assets/0003/8979/Asylum_in_Europe_Sept_2016.pdf

Refugee Council, "The UK's role in the international refugee protection system," found at http://www.refugeecouncil.org.uk/assets/0003/8056/The_UK_s_Role_in_the_international_refugee_protection_system_Jun_2016.pdf

Rijken. C, Jan van Dijk. J & Klerx-van Mierlo. F, "Trafficking Victims in The Netherlands - An exploratory study," (2013), International Victimology Institute, Tilburg University

Stephen-Smith. S, & Sachrajda. A, "Prisoners with no Crime: Detention of trafficked women in the UK," The Poppy Project 2008

UNHCR Global Trends report 2015 accessible from <https://s3.amazonaws.com/unhcrsharedmedia/2016/2016-06-20-global-trends/2016-06-14-Global-Trends-2015.pdf>

William Jordan, YouGov research, "Mentally Ill most discriminated against group in Britain," October 2013 at <https://yougov.co.uk/news/2013/10/01/mentally-ill-most-discriminated-against/>

Williamson. E, Dutch. N, Clawson. H, "Evidence Based Mental Health Treatment for Victims of Human Trafficking," U.S Dept of Health & Human Services, Office of the Assistant Secretary for Planning & Evaluation."

Press Releases

Anna Soubry, “Help for NHS staff to spot and support trafficking victims,” Press release from www.gov.uk/government/organisations/department-of-health, 18 April 2013

“CPS hosts international summit to improve the prosecution of modern slavery,” 21st February 2018 found at <https://www.cps.gov.uk/cps/news/cps-hosts-international-summit-improve-prosecution-modern-slavery>

Newspaper Articles (Online)

A. Christie, “Theresa May promised to help victims of trafficking. Why is she doing the opposite?” The Guardian, 23 Nov 2018 found at <https://www.theguardian.com/commentisfree/2018/nov/23/theresa-may-broken-promise-trafficking-victims>

P. Gallagher, “Do 34 million British adults really have mental health problems?” 9th May 2017, found at <https://inews.co.uk/essentials/news/health/mental-health-issues-british-men-problem/>

R. Merrick, “Theresa May refuses to roll back 'hostile environment' policy despite calls from her own home secretary,” The Independent, 9th June 2018 found at <https://www.independent.co.uk/news/uk/politics/theresa-may-hostile-environment-sajid-javid-windrush-scandal-refuses-three-times-a8391066.html>.

Websites

Anti Slavery International <https://www.antislavery.org/>

Haddad. P, and Haddad. I, “Mental Health Stigma,” British Association for Psychopharmacology (BAP), 3rd Mar 2015 found at <https://www.bap.org.org.uk/articles/mental-health-stigma/>

HM Government Appointments at <https://publicappointments.cabinetoffice.gov.uk/appointment/independent-anti-slavery-commissioner/>

Human Rights First, “Human Trafficking by the Numbers,” <http://www.humanrightsfirst.org/resource/human-trafficking-numbers>

National Public Radio <https://www.npr.org/2017/12/01/567789605/cyntoia-brown-case-highlights-how-child-sex-trafficking-victims-are-prosecuted>

Roulet, T. “EU citizens in Britain are already being stigmatised – and it’s likely to get worse,” London School of Economics 23 Jan 2018 found at <https://blogs.lse.ac.uk/politicsandpolicy/eu-citizens-in-brexit-britain/>

Scotland Government Website, <http://www.gov.scot/Topics/Justice/policies/reducing-crime/human-trafficking/HumanTraffickingandExploitationScotlandAct2015>

The Faculty of Advocates, “Statutory defence not to feature in Human Trafficking Bill,” <http://www.advocates.org.uk/news-and-responses/news/2015/may/statutory-defence-not-to-feature-in-human-trafficking-bill>, 13th May 2015

The Scots Law Blog, <http://www.scotslawblog.com/criminal-law/statutory-defence-crimes-victims-human-trafficking/> 7th April 2015

Miscellaneous

Daily Hansard Debate 10 Jun 2014; Column 389

Draft Modern Slavery Bill Standard Note: SN/HA/6792 Last updated: 15 April 2014 Author: Oonagh Gay Section Home Affairs Section

House of Commons Work and Pensions Committee, Victims of Modern Slavery, 30 April 2017, HC 803 of session 2016–17

Ipsos Mori for British Future, January 2012

L. Maule, “Senior Researcher Centre for Social Justice (former specialist adviser to the Joint Committee on the draft Modern Slavery Bill) Committee Debate: 1st Sitting: House of Commons, 21 July 2014 at column 25

Modern Slavery Act Explanatory Notes, 26 March 2015

Modern Slavery Bill 2014-15 Bill 8 of 2014-15 House of Commons Research Paper 14/37 2 July 2014

Modern Slavery Bill Debate, 11 Sep 2014

New European Crimes and Trust-based Policy (FIDUCIA), “Policy Brief on the Findings on Human Trafficking,” European Commission, February 2015 at 1 found at https://ec.europa.eu/research/social-sciences/pdf/policy_briefs/policy-briefs-fiducia-02-2015_en.pdf

OSCE Policy and Legislative Recommendations towards the effective implementation of the non-punishment provision, in consultation with the Alliance against Trafficking in Persons Expert Co-ordination Team, Vienna, 2013

OSCE Resource Police Training Guide: Trafficking in Human Beings, TNTD/SPMU Publication Series Vol 12, Vienna, July 2013.

OSCE’s Efforts to Combat Trafficking in Human Beings, MC(8). Dec/1 (Vienna, 28 Nov 2000).

Winchester. N, House of Lords, Library Meeting, Modern Slavery (Victim Support) Bill [HL] (HL Bill 4 of 2017–19), 17 August 2017.