

**State Obligations in International Law and the  
Application of the Non-Prosecution Principle:  
The Case of Victims of Human Trafficking  
Prosecuted in England and Wales**

**by**

**Linimose Nzeriuno Omotayo**

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# RESEARCH STUDENT DECLARATION FORM

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**Print name:**

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## **ABSTRACT**

This thesis critically examines the interconnection between state obligations in international law, and the application of the non-prosecution principle. Using the template of state obligations, this research assesses the provision of the non-prosecution principle and its application to victims of trafficking in human beings (THB). This analysis concerns trafficked victims identified in the United Kingdom (UK), specifically in England and Wales. Importantly, an assessment into the implications of the non-prosecution principle where immigration laws have been violated, because of a victim's trafficked status, have been considered. Trafficked victims may be prosecuted for immigration offences including, possession of a forged passport or false identity document (contrary to Section 6 of the Identity Documents Act 2010) or using a false instrument (contrary to Section 3 and 5 of the Forgery and Counterfeiting Act 1981). The arrest and subsequent prosecution of trafficked victims for offences committed as a direct consequence of their exploitative situation is a recurring theme in the UK.

The non-prosecution principle is in place to provide protection for victims of trafficking, with a view to upholding their legal rights and thereby promoting prosecutorial justice for victims. However, there are some inconsistencies, in relation to the provision of the principle in the legal instruments, and its operation in factual trafficking situations. In terms of policy and practice, the State (authorities and the courts) often, wholly, or partially, fails in its implementation of the non-prosecution principle. The State's failure to protect victims has occurred, even when an individual has been correctly identified as a credible victim of human trafficking. Thus, unfulfilled State obligations and inadequate victim status attainment, have been determined to be two of the main reasons that victims

of THB are prosecuted for criminal activities carried out during their trafficking circumstance.

This research examines the different classes and categories of victims, with the aim of improving the current system of protection for victims of trafficking. The different classes of victims consist of the pure/ideal victim, historical, location and transition victims. The case of a location (exploited in a different jurisdiction outside the UK) and transition victim (victim turned perpetrator) represents an unclear area in the law. This research, therefore, considers the best practices to employ in these situations, where legal rules for new classes of victims are unclear or uncertain. The aim of the categorisation of victims is to promote protection from exploitation and to further develop the application of the non-prosecution principle. An acknowledgement of all the four classes of victims, may improve the application of the non-prosecution principle to a victim's trafficking circumstance.

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To the loving memory of my father, Mr. Andrew Jibunoh Anyiwe, who inspired a generation with his legacy of hard work and commitment.

## **ACRONYMS / ABBREVIATIONS**

AJIL – Asian Journal of International Law

AJPH – American Journal of Public Health

Arch. Rev. – Archibold Review

ATMG – Anti- Trafficking Monitoring Group

ATR – Anti Trafficking Review

BJC – British Journal of Criminology

BULR – Boston University Law Review

CL & J – Criminal Law and Justice Weekly

CLJ – Cambridge Law Journal

CLJ – The Cambridge Law Journal

CoE – Council of Europe Convention

Cov. L. J – Coventry Law Journal

CPS – Crown Prosecution Service

Crim. LR – Criminal Law Review

DACEI – Dossier de Analisis Centro de Estudios Internacionales (Dossier of Analysis,  
International Studies Centre)

E. H. R. R – European Human Rights Reports

ECHR – European Convention on Human Rights

EEA – European Economic Area

EILR – Emory International Law Review

EU – European Union

EWCA – England and Wales Court of Appeal

EWHC – England and Wales High Court

GAATW – The Global Alliance Against Traffic in Women

GRETA – Group of Experts on Action against Trafficking in Human Beings

HRA – Human Rights Act

HRLR – Human Rights Law Review

HRQ – Human Rights Quarterly

I.J Com. Applied Crim. J. – International Journal of Comparative and Applied Criminal  
Justice

IJHR – International Journal of Human Rights

IJOTCC – International Journal of Offender, Therapy and Comparative Criminology

IJRL– International Journal of Refugee Law

ILO – International Labour Organization

Ind. L. J – Indiana Law Review

IRV – International Review of Victimology

JCL – Journal of Criminal law or J. Crim Law

JIANL – Journal of Immigration, Asylum and Nationality Law

JICJ – Journal of International Criminal Justice

JTHE – Journal of Trafficking and Human Exploitation

MSA – Modern Slavery Act

MSHTU – Modern Slavery Human Trafficking Unit

NCA – National Crime Agency

NGO's – Non- Governmental Organisation

Non-EEA – Non- European Economic Area

NRM – National Referral Mechanism

OIDHR – Office for Democratic Institutions and Human Rights

OSCE – Organization for Security and Co-operation in Europe

OUP – Oxford University Press

QB – Queen's Bench

S.C.R – Supreme Court Ruling (Supreme Court of Canada)

SADC – Southern African Development Community

SCA – Single Competent Authority

SLS – Social and Legal Studies

SPILJ – State Practice and International Law Journal

SSHD – Secretary of State for the Home Department

THB – Trafficking in Human Beings

TVA – Trauma, Violence and Abuse, Research Article

UK – United Kingdom

UKBA – United Kingdom Border Agency

UKHL – United Kingdom House of Lords

UKSC – United Kingdom Supreme Court

UKUT – United Kingdom Upper Tribunal

UKVI – United Kingdom Visas and Immigration

UNODC – United Nations Office on Drugs and Crime

UQ Research Paper – The University of Queensland, Australia

US – United States

USDS – United States Department of State

V & O – Victims and Offenders (An International Journal of Evidence-based  
Research, Policy and Practice)

VLR – Virginia Law Review

WILJ – Wisconsin International Law Journal

WLP – Wolf Legal Publishers

WLR – Weekly Law Report

## **Table of Cases**

### **England and Wales Cases**

*E v SSHD* [2012] EWHC 1927

*Galdika & Ors v DJ Houghton Catching Services Ltd & Ors* [2016] EWHC 1376 QB

*HD (Trafficked Women) CG* [2016] UKUT454 (IAC)

*Hounga v Allen* [2014] UKSC 47

*L, HVN, THN, T v R* [2013] EWCA Crim 991

*Marian v Regional Prosecutor's Office of Ruse, Bulgaria* [2019] EWHC 602 (Admin)

*NN and LP v SSHD* [2019] EWHC 1003

*R (Atamewan) v SSHD* [2014] 1 WLR 1959, [2013] EWHC 2727

*R (B) v. London Borough of Merton* [2003] EWHC 1689

*R v Brecani* [2021] EWCA Crim 731

*R v Brennan* [2014] EWCA Crim 2387

*R v Campbell* [1987] Crim LR 257

*Regina v DS* [2021] 1 WLR 303

*R v EK* [2018] EWCA Crim 2961

*R v Golds* [2016] UKSC 61

*R v Kookan* [1981] 74 CR App Rep 30

*R (FM) v SSHD* [2015] EWHC 844

*R (Galdikas) v SSHD* [2016] EWHC 942 (Admin), [2016] 1 WLR 4031

*R (Hoang) v SSHD* [2015] EWHC 1725

*R (on the application of AM) v SSHD* [2021] EWHC 1373 (Admin)

*R (On the application of BG) v SSHD* [2016] EWHC 786

*R (on the application of EL) v SSHD* [2018] EWHC 968 (Admin)

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

*R (On the application of KTT) v SSHD* [2021] EWHC 2722u

*R (on the application of Y) v SSHD* [2012] EWHC 1075

*R v Iyamu (Josephine)* [2018] EWCA Crim 2166

*R v Kizlaite & Anor* [2006] EWCA Crim 1492

*R v LM & Ors* [2010] EWCA 2327

*R v MK; R v Gega* [2018] EWCA Crim 667 para 45, [2019] QB 86

*R v Mullen* [2000] QB 520

*R v N* [2012] EWCA Crim 189, [2013] Q.B. 379

*R v O* [2008] EWCA Crim 2835

*R v O; R v N* [2019] EWCA Crim 752

*R v S* [2020] EWCA Crim 765

*R v Zielinski (David)* (2017) EWCA Crim 758

*Regina v Hasan* [2005] UKHL 22

*Regina v Joseph (Verna) & ors* [2017] EWCA Crim 36

*Regina (MN) v SSHD; Regina (IXU) v SSHD* [2021] 1 WLR 1956, [2020] EWCA Civ 1746

*Y. v SSHD* [2012] EWHC 1075

## **Other Jurisdictions**

### **Canadian Case**

*Norberg v. Wynrib* [1992] 2 S.C.R. 226

### **European Court of Human Rights**

*N v The United Kingdom* [2008] (Application no. 26565/05)

*Rantsev v Cyprus & Russia*, App. no. 25965/04 [ECtHR, 7 January 2010], 51 E.H.R.R. 1

*Siliadin v. France* App no 73316/01 (ECtHR, 26 October 2005)

*Stojanovic v Serbia* (Application No. 34425/04) (2009)

*VCL v United Kingdom* (application nos. 77587/12 and 74603/12) (2021)

## **Dutch Case**

*S and Mehak Case*, Case number 22-000412-08, ECLI: NL: GHSGR: 2010: BK9410

## **United States, District Court for the District of Rhode Island**

*Santos v Providence, et al.* 09-CV-348S

## **Supreme Court of the Philippines**

*Mary Jane Veloso Case* (2020) (unreported)

## **Legislation / Statutes**

### **United Kingdom**

Homicide Act 1957

Human Rights Act 1998

Criminal Justice Act 2003

Asylum and Immigration Act 2004

Coroners and Justice Act 2009

Modern Slavery Act, 2015

### **Other Jurisdictions**

Council of Europe Convention on Action against Trafficking in Human Beings CETS  
No. 197, 2005

Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and  
mechanisms for determining the Member State responsible for examining an  
asylum application lodged in one of the Member States by a third-country  
national

European Union Directive 2011/36 on Preventing and Combating Trafficking in Human  
Beings and Protecting its Victims [2011] OJ L101/1

ILO Convention No. 182, 1999

International Agreement for the Suppression of the “White Slave Traffic” 1904

Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and  
Children 55/25, 2000

Regulation (EU) 604/2013 establishing the criteria and mechanisms for determining the  
Member State responsible for examining an asylum application lodged in one

of the Member States by a third-country national or a stateless person (recast),

[2013] OJ L180

Slavery Convention 1926

Southern African Development Community Protocol on Gender and Development 2008

The United Nations Convention on the Rights of the Child 1989

United Nations Office on Drugs and Crime, Model Law against Trafficking in Persons,

Vienna 2009

# **CHAPTER ONE: INTRODUCTION**

## **1.1 The Problem of Human Trafficking – Recruiting Victims for Purposes of Exploitation**

The inception of an individual's human trafficking experience may commence some months or even a few years prior to the date of a trafficking occurrence. In some cases, the trafficking offender may lay the groundwork for a trafficking offence several years in advance, by subjecting a person to a situation of exploitation. These situations may include instances of domestic violence, discrimination, or labour exploitation. Thereby, causing the potential victim to become vulnerable or susceptible to a trafficking occurrence.

Other circumstances that may create vulnerability in a potential trafficking victim are, a lack of education, poverty, housing, and food instability.<sup>1</sup> This vulnerability may subsequently lead the individual into trafficking and exploitative conditions. According to the National Crime Agency (NCA), most victims of trafficking are recruited in person by their trafficker. The NCA is a government organisation in the United Kingdom tasked with the responsibility of combating human trafficking crimes among other criminal offences. The NCA further reports that in some cases of sexual exploitation, the trafficked victim may have been enlisted through social media websites and online job adverts.<sup>2</sup> In addition, adult services websites often play a key role in expanding the client base of offenders, thereby leading to more victims being trafficked.

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<sup>1</sup> D'Adamo K., 'Prioritising Prosecutions is the wrong Approach' (2016) 6 ATR 111

<sup>2</sup> NCA, Modern Slavery and Human Trafficking <<https://nationalcrimeagency.gov.uk/what-we-do/crime-threats/modern-slavery-and-human-trafficking>> accessed 1<sup>st</sup> July 2019

In many situations, the victim of trafficking in human beings (THB), may have been threatened by the trafficking offender; or the person may have suffered extreme violence at the hands of their trafficker. As the trafficker exerts control over the vulnerable person, the trafficking offender may, confiscate the identity documents of the victim, and withhold the person's earnings. The victim's earnings may be withheld as payment for living costs, or payment for their journey to the United Kingdom (UK) or any other destination state.<sup>3</sup> Three case studies will be considered to further illustrate the recruitment process some trafficking offenders may employ, in exploiting vulnerable individuals.

### **1.1.1 Human Trafficking Case Studies:**

#### **Case Study One: The Case of Ben**

The first case study concerns a British unemployed man, called Ben. Ben is homeless and living on the streets of a major city in the UK. He was approached at a soup kitchen. He was offered work and accommodation by a couple who owned a block paving business.<sup>4</sup> Ben was socially isolated. He had just ended a relationship with his girlfriend and lost his job within a short space of time. There were clear indications to the couple who sought him out, that he lacked any form of support – neither physical, emotional nor financial.<sup>5</sup> Feeling hopeless and uncertain of any other available option, he agreed to accompany the couple to the location of the prospective job. Subsequently, he was taken to a work site several miles away from his original pick-up point/location. Upon arrival

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<sup>3</sup> Ibid

<sup>4</sup> Cheshire Constabulary: Modern Slavery and Human Trafficking  
<<https://www.cheshire.police.uk/advice-and-support/modern-slavery-and-human-trafficking/>> accessed 6<sup>th</sup> July 2019

<sup>5</sup> Ibid

at the site, the couple subjected him to intimidation and violence. He was forced, to work on paving driveways, and was paid little or often nothing for his labour.<sup>6</sup> As he was terrified of the consequences of trying to leave, Ben submitted to this abuse, and did not make any definite efforts to secure his freedom.

### **Case Study Two: Four Men from the Czech Republic**

The second case study relates to four men, from the Czech Republic who were offered work in Birmingham. Upon arrival in the UK, their identity documents were taken from them, and they were forced to live together in an uninhabitable house amidst appalling living conditions.<sup>7</sup> Every day, the men were driven to Bedfordshire to work in a bread factory. The gang master who had seized their documents, registered all four men with the worker's registration scheme and forced the men to pay all their wages to him. When one of the men – Mr. A, began to question his lack of wages, he was chained to a radiator and beaten.<sup>8</sup> Mr. A was subsequently tortured and burned with cigarettes. These four individuals eventually escaped their situation of captivity. The escape occurred on their usual journey to Bedfordshire, while travelling in the back of a van. One of the men – Mr. B, devised a clever plan to escape, by feigning illness to induce the driver to halt the vehicle.<sup>9</sup> When the vehicle doors were opened, all the four individuals, ran off in different directions and escaped.

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<sup>6</sup> Ibid

<sup>7</sup> Cheshire Constabulary: Advice and Information on Modern Slavery  
<<https://www.cheshire.police.uk/advice/advice-and-information/ms/modern-slavery/>> accessed 21<sup>st</sup> September 2021

<sup>8</sup> Ibid

<sup>9</sup> Ibid

An examination of the two case studies on human trafficking discussed above, suggests that potential victims of trafficking are often unaware of the situation of exploitation they are about to encounter. They may experience these exploitative situations due to an innocent agreement to undertake work opportunities or job offers. The case studies of Ben and the four men from the Czech Republic, also show that these job offers are presented to the potential victim, in a manner that appears genuine and reasonable. The proposal for employment in fact, appears to be thoroughly legitimate. Thus, the potential victim does not suspect that there may be an element of ill-intent, on the part of the trafficking offender. A person's implicit trust in the trafficking offender, is one of the circumstances, that may lead the victim into a situation of exploitation.

### **Case Study Three: Exploitation of over 400 victims in the West Midlands**

A further situation of exploitation, comparable to the two case studies discussed, occurred in the West Midlands of England. The West Midlands is a region in England which consists of seven metropolitan boroughs: the city of Birmingham, Coventry and the boroughs of Dudley, Sandwell, Solihull, Walsall, and Wolverhampton. In this instance, a similar offer of employment, under apparently authentic work conditions, was presented to unsuspecting individuals. This deceitful offer, resulted in the exploitation of over 400 individuals by an organised crime gang in the West Midlands.<sup>10</sup>

The members of the crime organisation encouraged vulnerable people resident in Poland, to migrate to England, with the promise of work and a better life. After their arrival in England, these migrants were forced to live in inhumane conditions, rat-infested

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<sup>10</sup> BBC News, 'UK Slavery Network 'had 400 victims' (5<sup>th</sup> July 2019) <<https://www.bbc.co.uk/news/uk-england-birmingham-48881327>> accessed 8<sup>th</sup> July 2019

accommodation, and work for long hours.<sup>11</sup> The eight trafficking offenders (five men and three women, all originally from Poland), targeted the most desperate from their homeland including the homeless, ex-prisoners and alcoholics. These victims were then transported to the UK by bus. When they arrived, they were housed in run-down homes and forced to sleep (sometimes, four in a room) on filthy mattresses.<sup>12</sup> After working long days at rubbish recycling centres, farms and turkey-gutting factories, their wages were taken from them. The victims were paid as little as 20 pounds a week by their exploiters.

The incident of the exploitation of over 400 victims from Poland by a criminal gang in England, raises some questions. Firstly, how did the trafficking offenders succeed in committing this criminal offence, without early detection or suspicion by the victims? The perpetrators exploited vulnerable individuals for five years. It is estimated that the criminal gang made over 2 million pounds between June 2012 and October 2017, which resulted in the offenders living a life of luxury.<sup>13</sup>

Secondly, why were the police and other relevant law enforcement agencies unaware of the gang's criminal activity for the five-year duration of their trafficking offence? The answer to these questions lies in the fact that human traffickers have overtime developed sophisticated techniques, of beating the system and concealing their criminal activity from law enforcement agencies. For example, the criminal organisation opened bank accounts in the names of their trafficked victims, and outwardly presented their criminal operation as a legitimate business enterprise. In this case, the perpetrators were

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<sup>11</sup> Ibid

<sup>12</sup> Ibid

<sup>13</sup> Ibid

apprehended when two of the victims escaped in 2015 and informed a slavery charity called ‘Hope for Justice,’ of their ordeal.<sup>14</sup> The charity then proceeded to contact the authorities.

It is evident, from these three case studies, that there may be some challenges to successful efforts at combating human trafficking. These challenges imply that a victim may not receive protection from the state unless and until, they are able to contact the authorities for help. Some of these challenges in combating human trafficking will be considered in this chapter, with the aim of improving protection for victims of human trafficking.

### **1.1.2 Challenges in Combating Human Trafficking**

The challenges to successful efforts in combating human trafficking are related to issues regarding the state’s obligations of policing, identification, and protection of vulnerable victims.<sup>15</sup> Although the awareness of modern slavery in the UK Police Force, has risen considerably in recent years, the state has in some cases failed to protect trafficked victims. The three case studies discussed are relevant examples of situations where the state was unable to protect victims of THB. The rise in awareness in the police force, has mainly been due to police courses and programmes that have been created to promote knowledge on human trafficking offences in the UK.<sup>16</sup> Some of the initiatives created to strengthen local policing efforts comprise of: a national training co-ordination function, to develop and provide training courses accredited by the College of Policing, including

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<sup>14</sup> Ibid

<sup>15</sup> Anti-Slavery, Slavery in the UK <<https://www.antislavery.org/slavery-today/slavery-uk/>> accessed 2<sup>nd</sup> July 2019

<sup>16</sup> Her Majesty Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS), *Stolen Freedom: The Policing Response to Modern Slavery and Human Trafficking* (2017) 25

specialist investigators' courses and awareness-raising modules.<sup>17</sup> A team to help debrief investigators, and support the development and dissemination of good practice was also instituted to take effect from November 2016 to March 2019.<sup>18</sup>

Despite the increase in awareness on human trafficking and modern slavery by the police and other law enforcement authorities, there are still cases where potential trafficked victims may be turned away by police officers. Thus, a major challenge in combating the offence lies in the fact that credible trafficked victims, are sometimes turned away by the Police. This may be because, their trafficking ordeal is inconsistent or sounds unbelievable.<sup>19</sup> This situation suggests that the police may need to provide more resources for complex anti-trafficking and anti-slavery investigations. In this regard, the Cheshire Police have argued that human trafficking and modern slavery are not matters the police can address on their own.<sup>20</sup> Agencies and other organisations from both the public and private sectors are expected to actively work together in addressing trafficking-related crimes.

Another challenge to successful detection and protection of victims of trafficking, is the extreme vulnerability of trafficked victims. Potential victims of human trafficking and modern slavery are likely to be extremely vulnerable. In some cases, the vulnerable position of victims suggests that proper identification may be unattainable. The victim may be fearful of revealing their trafficking status or experiences to state authorities, and

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<sup>17</sup> Ibid, 24

<sup>18</sup> Ibid

<sup>19</sup> Anti-Slavery, Slavery in the UK <<https://www.antislavery.org/slavery-today/slavery-uk/>> accessed 2<sup>nd</sup> July 2019

<sup>20</sup> Cheshire Constabulary: Modern Slavery and Human Trafficking <<https://www.cheshire.police.uk/advice-and-support/modern-slavery-and-human-trafficking/>> accessed 6<sup>th</sup> July 2019

will often mistrust individuals in leadership positions within the state.<sup>21</sup> Therefore, a victim's ability to participate in any future legal proceedings, for example as a witness, will depend largely on their psychological, emotional and physical health.<sup>22</sup> Hence, front line practitioners in the police force and other relevant agencies, have a responsibility to put the potential victim at ease as much as possible. Putting the victim at ease is necessary because, the individual may also face difficulty, in relation to language and communication barriers, including literacy or learning disabilities, as well as cultural considerations.<sup>23</sup> These are contributory factors which make proper identification of victims of THB problematic.

A further challenge to protecting victims by the state, relates to the fact that some of these victims are non-British nationals. This indicates that there may sometimes be no record of their entry into the country, especially when they have travelled by road into the UK. Hence, the state's ability to protect these victims that are undocumented is limited or non-existent. The NCA reports that many victims have been trafficked from overseas into the UK.<sup>24</sup> Victims from Eastern Europe, Southeast Asia and Africa are frequently exploited. Their exploitation often begins en-route to the UK.<sup>25</sup>

Conversely, in cases where British nationals are trafficked, the exploited individuals are often citizens that have fallen on difficult times.<sup>26</sup> The difficulty they are experiencing is

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<sup>21</sup> Ibid

<sup>22</sup> Ibid

<sup>23</sup> Ibid

<sup>24</sup> NCA, Modern Slavery and Human Trafficking <<https://nationalcrimeagency.gov.uk/what-we-do/crime-threats/modern-slavery-and-human-trafficking>> accessed 1<sup>st</sup> July 2019

<sup>25</sup> Ibid

<sup>26</sup> Ibid

usually related to financial hardship, and a lack of a decent accommodation /shelter. Their circumstance may make them vulnerable to the lure of a well-paying job. This well-paying job may also have some benefits attached to it, including accommodation and access to free meals. Often, the offer of a good job with a decent pay may be a deceitful arrangement, intended to bait the individual into a situation of human trafficking and exploitation.<sup>27</sup>

In addition to the challenges discussed above, another reason why identification and protection of victims may be problematic, is sometimes due to the victim's reluctance to give useful information about their trafficking experience or co-operate with state authorities. On initial contact, these trafficked victims may appear unwilling to co-operate, especially when their controller/trafficker is physically present, or other victims are nearby.<sup>28</sup> It is likely that the victim has been isolated from family or friends and is living in an unfamiliar country or area. The trafficked person may also have feelings of fear and intimidation, they may feel dependent on their controllers/ traffickers who may be individuals well known to the victim.<sup>29</sup>

In many cases, the victim of THB does not understand the concept of trafficking and slavery. In fact, the individual may not perceive their circumstance to be one of exploitation; neither do they consider themselves to be victims of trafficking. The implication of this is that victims of human trafficking and slavery often suffer a range of physical and psychological problems including post-traumatic stress disorder due to

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<sup>27</sup> Ibid

<sup>28</sup> UNODC, Anti Trafficking Manual for Criminal Justice Practitioners, Module 3: Psychological reactions of victims of trafficking in persons (2009) 10

<sup>29</sup> Ibid

their circumstance.<sup>30</sup> These individuals may have been deprived of food, kept in slave-like conditions, or may have become vulnerable to sexually transmitted infections, where their trafficking condition was related to sexual exploitation.<sup>31</sup> They may have also been exposed to hazardous material or dangerous working conditions.<sup>32</sup> Hence, these victims will usually require immediate medical attention and counselling when they are eventually identified by the state authorities. It is useful to point out that research has shown that human trafficking circumstances may be more complex than the norm such that it may lead to an improper application of the non-prosecution principle such as the case of *R (Hoang) v SSHD* case discussed in chapter one. Other complex cases of human trafficking which are later discussed in chapter two, chapter five and six include *R v LM & Ors* (assessing victim status, whether a person is a victim or perpetrator), *R v Kizlaite & Anor* (situations where a victim turns into a trafficking offender.) Also, *R v Brecani* discussed in chapter five section 5.8. The evidence in the *Brecani* case showed that the appellant was a location victim exploited in Albania for 3 years prior to arriving in the UK. These cases illustrate that the victim's situation may be diverse and that there is a trajectory of a spectrum of victim's experiences.

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<sup>30</sup> Ibid 8

<sup>31</sup> Cheshire Constabulary: Modern Slavery and Human Trafficking  
<<https://www.cheshire.police.uk/advice-and-support/modern-slavery-and-human-trafficking/>> accessed 6<sup>th</sup> July 2019

<sup>32</sup> Ibid

## 1.2 The Problem of Prosecuting Victims of Human Trafficking

Victims of human trafficking may be prosecuted for offences they have committed during their trafficking experience. Victims of THB, who have committed crimes because of their exploitative circumstance, are often treated as offenders by the police and other law-enforcement authorities. The commission of a crime by a trafficked victim gives the person the status of an offender, which may conflict with his or her identification as a credible victim of THB.<sup>33</sup>

Thus, trafficked victims are sometimes treated as offenders from the moment they are detected, and in some cases, for the duration of their journey through the criminal justice system.<sup>34</sup> The implication of treating victims of trafficking as offenders, connotes that when a person's matter leaves the police and law-enforcement agencies, without having been established as a case of trafficking, the case may proceed to trial. In such situations where a victim's case proceeds to trial, the person may be prosecuted for their involvement in criminal activity.<sup>35</sup> Prosecution of victims of THB is particularly evident in circumstances, where a person does not present as a pure/ideal victim of human trafficking.<sup>36</sup> Therefore, for individuals who are historical, location or transition victims, the police may treat these persons as offenders from the time of their arrest. Further discussion on the categorisation of victims is carried out in chapter two of this thesis.

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<sup>33</sup> Villacampa C. and Torres N., 'Human Trafficking for Criminal Exploitation: Effects suffered by Victims in their Passage through the Criminal Justice System (2019) 25 (1) IRV, 3, 8

<sup>34</sup> Ibid

<sup>35</sup> Ibid

<sup>36</sup> Ibid

Some victims of human trafficking may also become susceptible to criminal prosecution, particularly in cases where they have been smuggled into the UK. For instance, a person may have been smuggled into the UK from other countries in Europe (as the case study of the criminal gang in the West Midlands illustrates), or from other source/developing countries.<sup>37</sup> Following their smuggling circumstance, these individuals may enter the criminal justice system because of their alleged offences. Often, the offences they are charged with may have occurred as a direct consequence of being a victim of human trafficking or modern slavery.

Smuggled migrants are often convinced that the life that awaits them in the new location entails an improved standard of living or a better life in general. Unknown to them, they are heading towards a life of modern slavery. Their liberty is in the hands of another, working long hours for little or no food or money, forced into a life of crime or coerced into sex and labour trafficking.<sup>38</sup>

The British Government, in a determined effort to protect, support victims of THB and bring the perpetrators of the criminal offence to justice, passed the Modern Slavery Bill 2014 into law by royal assent on the 26th of March 2015. An important section in the Modern Slavery Act (MSA), section 45 provides for immunity from prosecution to victims of THB.<sup>39</sup>

This immunity is not absolute and is available to victims of THB as a defence for offences committed as a direct consequence of their trafficked status. The provision illustrates the ardent resolve by the UK to eradicate and reduce the criminal offence of THB to a bare

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<sup>37</sup>BBC News, 'UK Slavery Network 'had 400 victims' (5<sup>th</sup> July 2019) <<https://www.bbc.co.uk/news/uk-england-birmingham-48881327>> accessed 8<sup>th</sup> July 2019

<sup>38</sup> Home Secretary Foreword by Theresa May in the Draft Modern Slavery Bill, December 2013

<sup>39</sup> Modern Slavery Act 2015, s 45

minimum. A compelling reason for the statutory immunity from prosecution in the Act is because oftentimes victims of THB are children; and the law aims to protect the most vulnerable of victims.<sup>40</sup>

### **1.3 Originality and Relevance of the Research**

The originality and relevance of the research is linked to the categorisation of victims of human trafficking, and the application of legislation to trafficked victims prosecuted in England and Wales. The application of legislation to trafficking cases prosecuted in England and Wales, is an area of concern that needs to be addressed for sufficient progress to be made in protecting vulnerable victims of THB. It is argued that some key provisions in the legal instruments, specifically the provision in the CoE Convention pertaining to non-prosecution of victims of THB has been misunderstood and misapplied by the UK Courts.<sup>41</sup> For instance, the definition of “exploitation” in the CoE Convention is not exhaustive and one may argue that the provision could be applied to children as well.<sup>42</sup> Hence, it falls on the prosecution to look into the victim’s situation and special circumstance to determine whether exploitation has occurred or not. Furthermore, the court is legally required to examine the fundamental issue of whether the circumstances in which an appellant was working at the time of arrest represents a level of coercion and compulsion which should lead to the decision that prosecution should be halted.<sup>43</sup> Where there is insufficient evidence of compulsion to challenge the decision to prosecute, then

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<sup>40</sup> Epstein R. and Squires N., ‘Legislative Comment - Providing Immunity for Trafficking Victims: Human Trafficking and the Modern Slavery Bill 2014’ [2014] Cov. L.J. 68

<sup>41</sup> Brewer M., ‘The Prosecution of Child Victims of Trafficking’ (2012) 4, Arch. Rev., 5,

<sup>42</sup> Ibid

<sup>43</sup> *R v N* [2012] EWCA Crim 189, [2013] Q.B. 379

the court is free to exercise its prosecutorial discretion.<sup>44</sup> Basically, this prosecutorial discretion also implies that if the evidence presented connotes that the appellant or trafficked victim was a willing participant who volunteered to be smuggled into England, then the victim does not fall under the protective ambit of either Article 26 CoE Convention, Article 8 EU Directive or Section 45 of the Modern Slavery Act.

Accordingly, it has become important to assess whether the existing legal provisions are effective and sufficient in protecting and upholding the rights of the victims of THB. This research will contribute to the existing knowledge by providing a thorough examination of the non-prosecution principle and assess the implications for victims of human trafficking. The punishment of victims of trafficking for crimes directly related to their status as trafficked victims is a violation of their fundamental rights. The criminal activities they are often convicted of, including infringement of immigration laws (for victims who are not UK nationals), usually occur in exploitative circumstances. These offences may not have been committed in the first place, if not for their trafficked status. Furthermore, an analysis of the different categories of victims – pure victim, historical, location and transition victim reveal an unclear area in the law.

Essentially, the case of a location (exploited in a different jurisdiction, and not the UK) and transition victim (victim turned trafficker) has not previously been considered, or clearly been defined. For example, in the case of the transition victim, it is not always easy to distinguish between a pure/ideal victim and a recruiter of others for purposes of exploitation. This is because their circumstance may appear so similar, and the evidence often suggests that they are still under the control of their trafficker, even though they are exploiting other individuals.

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<sup>44</sup> Ibid

The categorisation of victims of human trafficking is an area that requires some improvement to aid the protection of trafficked victims from exploitation. The inclusion of the location and transition victims' circumstance to the discussion on categorisation of victims, represents the author's original contribution to knowledge. Including the terminology of a location and transition victim to the categorisation of victims, may aid law enforcement authorities, defence lawyers and the CPS in identifying a trafficked victim. This is because, a trafficked victim who possesses the characteristics of these two classes of victims, may be offered protection by the state, when their situation is clearly ascertained. Here in lies the originality of this thesis.

This research aims to consider ways of improving the protection of victims of human trafficking, by critically analysing how the law applies to these new classes of victims – location and transition victims. Subsequently, an assessment of the application of the non-prosecution principle to their individual situations will be taken.

The location victim who has been exploited in a different jurisdiction other than the UK may escape their trafficking situation and subsequently seek asylum and protection from the State. The location victim may come to the notice of the authorities due to the criminal acts they may have carried out including possession of false documents or forged identity cards. In the case of a transition victim, the circumstances of the individual who has developed from victim into trafficker are sometimes so similar that at first it may appear that the previous victim is still experiencing a trafficking situation. However, a close examination of the evidence will show that they have transitioned from being a victim into a trafficker. The victim-turned trafficker paradigm is also prevalent among children forced into trafficking situations at an early age.<sup>45</sup> For the child victim who was sexually

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<sup>45</sup> *R v Kizlaite & Anor* [2006] EWCA Crim 1492

exploited, some of them form a close bond with their trafficker such that when they are adults, they assist their former trafficker in recruiting and exploiting other young girls.<sup>46</sup> Case law analysis will be used to consider the situations of the location and transition victims. The aim of this legal assessment is to consider how the law can be improved to include all classes of victims and to promote a better application of the non-prosecution principle.

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<sup>46</sup> Ibid

## **1.4 Aims of the Research**

The aims of the research are to explore the categorisation of victims, to assess how the laws in England and Wales are being implemented and applied to victims of THB. Evidence of situations where victims are categorised incorrectly and subsequently treated as criminals and prosecuted will be given and assessed. The author intends to contribute to the existing knowledge on categorisation of victims, with the goal of promoting the effective application of the non-prosecution principle.

This thesis is a critique of the application of UK legislation to trafficking cases. Primarily, an assessment of the non-prosecution principle contained in article 45 of the MSA, article 26 of the CoE Convention and article 8 of the EU Directive. The research aims to determine whether the courts in England and Wales are interpreting the provisions of these instruments correctly and protecting the rights of victims of trafficking. There is a continued failure to identify victims of human trafficking and protect them from prosecution.<sup>47</sup> The reasons for this failure to protect victims and promote justice from prosecution for trafficked victims have been considered. The goal of this examination is to assess legal pathways to resolving the inconsistencies between theory and practice.

This introductory chapter aims to promote a clear understanding of the criminal offence of THB. To achieve this goal, an assessment of the offence of human trafficking and an examination of the application of the non-prosecution principle has been carried out. Thereafter, the relevance of the research, an explanation of the methodology used and how it improves the attainment of the research objectives is provided.

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<sup>47</sup> Prison Reform Trust and Hibiscus Initiatives, *Still No Way Out: Foreign National Women and Trafficked Women in the Criminal Justice System* (Prison Reform Trust 2018) 12

Using the template of state obligations in international law, the research examines the implementation of the non-prosecution principle to victims of human trafficking. This legal examination considers the interconnection between the Single Competent Authority (SCA), the Crown Prosecution Service (CPS) and the court. Some reference may be made to the competent authority, for cases decided before the creation of the SCA in April 2019.

While assessing the implication and application of the non-prosecution principle to victims of THB the following analysis will also be conducted – a critical examination of the existing regulation on THB, and an examination of the legal definition, judicial interpretation, and application of the non-prosecution principle.

This research is primarily focused on the non-prosecution principle contained in Section 45 of the MSA and its application to victims of human trafficking. The MSA mainly relates to England and Wales, but there will be examinations of the protection procedures in the UK in this thesis, because England and Wales are located within the UK. This research will also consider the UK's State obligations in European Union (EU) law and international law. Thus, the non-prosecution principle contained in the Council of Europe Convention on Action against Trafficking in Human Beings (CoE Convention)<sup>48</sup> and the European Union Directive on Preventing and Combating Trafficking in Human Beings and protecting its victims (EU Directive)<sup>49</sup> will also be assessed.

The non-prosecution principle in the MSA was created using the provisions in the CoE Convention and the EU Directive as a template/foundational basis for its creation.<sup>50</sup> Since

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<sup>48</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005

<sup>49</sup> European Union Directive 2011/36 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims [2011] OJ L101/1

<sup>50</sup> Explanatory Notes on the Modern Slavery Act, 2015

the MSA was created using these two instruments as a model, it is necessary to examine their respective provisions while discussing the application of the non-prosecution principle.

An assessment of the role of victims of THB, within the investigation and prosecution process will also be considered. Importantly, an analysis of the application of the non-prosecution principle through case law and case studies, leading to an assessment of the criteria used by the English courts to determine “when to” prosecute and “when not to” prosecute victims of THB, will also be undertaken. A critical analysis of the issues relating to application of the non-prosecution to victims of human trafficking will be undertaken. This will culminate in a proposal of reforms to promote improved application of existing legislation.

## **1.5 Structure of the thesis**

This thesis is comprised of eight chapters. Chapter One is the introduction chapter, and it lays the foundation for further discussion on the UK's state obligations in protecting victims of human trafficking from exploitation and criminal prosecution. The introductory chapter considers the problem of human trafficking, and the problem of prosecuting victims of human trafficking. There are challenges faced in combating human trafficking. Similarly, there are also challenged faced in the successful application of the non-prosecution principle. These circumstances are considered, with the goal of creating a backdrop for future discussion in subsequent chapters.

Chapter two discusses the identification and categorisation of victims of THB. The identification of victims in human trafficking cases is still an area of great concern. Victims are rarely identified; and are sometimes prosecuted for their involvement in criminal activity due to their trafficked status. The case of victims who are prosecuted is unusual, because first, they suffer immense hardship and punishment from being trafficked. Subsequently they are punished again, through prosecution by those who should be identifying and helping them. Identification and categorisation of victims is a pre-requisite for purposeful application of the non-prosecution principle.

Chapter three examines state obligations in international law to prevent prosecution of trafficked victims. Unfulfilled State obligations, and inadequate victim status attainment in human trafficking cases, are two of the main reasons why victims of THB are prosecuted for trafficking-related offences. It is vital, that before an individual is conferred with victim status by the State, the person must first be assessed to be a credible victim of human trafficking. The decision, of determining whether a person is a credible victim of trafficking or not, is called a reasonable grounds decision. This decision is made

through the NRM, and the decision may either be positive or negative. A positive grounds decision implies that the victim of trafficking will receive protection from the State including accommodation and housing, and they may be granted asylum to stay on in the UK, if it is unsafe to return to their home country.

Chapter four discusses the non-prosecution principle and focuses on the importance of instruments providing for the non-prosecution of victims of THB to be clear and easy to understand. The EU Directive in comparison to the CoE Convention is relatively straightforward and self-explanatory. Further, the MSA is helpful in explaining the areas of the non-prosecution principle that are not clearly spelt out in the other two instruments. The provisions of the statute are the first step in determining the question of when to prosecute and when not to. Every trafficking case is different, and the facts of each case should be assessed based on the merits, the evidence provided, and the special circumstances presented before the court.

Chapter five considers the non-prosecution principle and its application to the location victim of human trafficking. The location victim often comes to the attention of the authorities, as an asylum seeker. The location victim who claims to have been a victim of trafficking, may have experienced their exploitative situation in a different country or an EU jurisdiction distinct to the UK. Following an asylum interview, the claimant's case may be referred to the NRM for further determination. Subsequently, a reasonable and conclusive grounds decision of whether the person is a credible victim of human trafficking or not, may be reached. This decision will then be considered by the court in the trial stage, when assessing the circumstances of a victim's case.

Chapter six examines the situation of the transition victim and the criminal liability for offences committed by this category of trafficked victim. The transition victim may have

gradually developed overtime into an offender due to a previous trafficking/exploitation experience or may have committed a serious offence in the course of being exploited. This chapter considers the victim-offender cycle in criminal and human trafficking cases. Sometimes, the victim turned trafficker, may not be aware that they are doing anything wrong, because they have become accustomed to living a life of exploitation. Hence, they may recruit other vulnerable individuals, for purposes of exploitation without realising the gravity of the offence they are committing.

Chapter Seven considers the barriers to the successful application of the non-prosecution principle, and the trafficked victim's access to compensation and legal redress. Prosecuting human trafficking cases, is an invaluable mechanism in correcting the wrongs done to victims of human trafficking. It is also a useful way of reassuring the trafficked victim that their rights are important and that the State and authorities are willing to protect their interests. By holding the perpetrator of trafficking crimes accountable for their actions, the victim's faith in the criminal justice system and legal process may be restored.

Chapter eight is the conclusion and recommendation chapter. This chapter discusses the findings of the research, contribution to knowledge and practice and implications for further research.

## 1.6 The Non-Prosecution Principle

England and Wales, Northern Ireland, and Scotland each have separate legal instruments which focus on protecting the rights of victims of human trafficking. Northern Ireland makes use of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act 2015, while in Scotland the Human Trafficking and Exploitation Act 2015 is in force to tackle human trafficking and modern slavery. This research is aimed at assessing the non-prosecution principle contained in the MSA, which is mainly applicable to England and Wales. In addition, further examination of the non-prosecution principle in the CoE Convention and EU Directive will also be undertaken. The goal of the examination of these three instruments in this thesis, is to consider ways of improving the protection of victims of human trafficking from exploitation and criminal prosecution. There are some challenges/barriers to the successful application of the non-prosecution principle which have led to difficulties in application in practice. These areas will be discussed in this chapter.

In England and Wales, the MSA is the applicable law and Section 45 provides a statutory defence to victims of human trafficking, who have carried out illegal activities because of their trafficking status. The section provides that a person is not guilty of an offence, if the person carries out an act under compulsion, in exploitative circumstances, or in situations similar to slavery, where there is no alternative, other than to carry out the said act.<sup>51</sup> The element of coercion is a key factor in proving that the criminal act executed by a trafficked victim was done under duress and that the situation resulted in their inability to exercise their independent will.

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<sup>51</sup> Modern Slavery Act 2015, s 45, (b) (c)

The non-prosecution principle contained in the MSA was created using the provisions in Article 8 of the EU Directive and Article 26 of the CoE Convention as a model for its creation. Article 8 of the EU Directive requires that:

“... 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...”

Article 26 of the CoE Convention also provides that:

“... 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 ...”

Article 8 and Article 26 of the EU Directive and CoE Convention respectively, jointly provide for the protection of victims of human trafficking from exploitation and criminal prosecution. Both instruments require member states to avoid prosecuting or imposing penalties on victims of human trafficking for their involvement in unlawful, criminal activities which they have been compelled to commit. The provisions in both instruments are worded or written in a similar manner. Hence, both instruments are concerned with the protection of victims of human trafficking from prosecution for illegal criminal activity. The provisions recognise that different Member States have different legal systems for providing for the necessary protection of victims of trafficking, and that this may take the form of non-prosecution.<sup>52</sup>

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<sup>52</sup>Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005 and European Union Directive 2011/36 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims [2011] OJ L101/1

The words ‘entitled not to prosecute’ in the EU Directive and ‘the possibility of not imposing penalties’ in the CoE convention suggests that the application of the non-prosecution principle by states is non-obligatory and requires a discretionary approach in implementing the principle. Thus, the provision in both instruments appears to leave it open to member states to decide whether they might follow the non-prosecution principle or choose not to.

However, Piotrowicz and Sorrentino argue that this interpretation is incorrect.<sup>53</sup> Since victims of human trafficking may commit offences whilst being compelled, where compulsion is proven, prosecutors should consider whether the public interest is best served by continuing to prosecute the victim.<sup>54</sup> Where there is sufficient evidence that a person is a credible victim of human trafficking, then prosecutors are enjoined to consider the public interest before proceeding. The term ‘credible’ in relation to the victim of trafficking is an individual who the investigating officer have reason to believe has been exploited by another. Thus, although effective implementation of the principle is up to individual States, the decision on the best approach should be exercised so that the victim of THB is not punished.<sup>55</sup> In addition, where there is clear evidence that the victim has a reasonable defence of duress, the case should be discontinued on evidential grounds.<sup>56</sup>

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<sup>53</sup> Piotrowicz, R.W. and Sorrentino L., ‘Human Trafficking and the Emergence of the Non-Punishment Principle’ (2016) 16 (4) HRLR 669, 673

<sup>54</sup> ‘CPS Policy for Prosecuting Cases of Human Trafficking’ (cps.gov.uk, 2011)  
<[http://www.cps.gov.uk/publications/docs/policy\\_for\\_prosecuting\\_cases\\_of\\_human\\_trafficking.pdf](http://www.cps.gov.uk/publications/docs/policy_for_prosecuting_cases_of_human_trafficking.pdf)>  
accessed 10 May 2016

<sup>55</sup>Piotrowicz, R.W and Sorrentino L, ‘Human Trafficking and the Emergence of the Non-Punishment Principle’ (2016) 16 (4) HRLR 669, 673

<sup>56</sup> ‘CPS Policy for Prosecuting Cases of Human Trafficking’ (cps.gov.uk, 2011)  
<[http://www.cps.gov.uk/publications/docs/policy\\_for\\_prosecuting\\_cases\\_of\\_human\\_trafficking.pdf](http://www.cps.gov.uk/publications/docs/policy_for_prosecuting_cases_of_human_trafficking.pdf)>  
accessed 10 May 2016

The non-prosecution principle is implemented with regard to public policy. It does not provide blanket immunity from prosecution, nor does it create an automatic defence from prosecution for a trafficked victim. However, the application of the non-prosecution principle is dependent on the specific facts of each case. The authorities are required to carefully consider whether public policy calls for prosecution and punishment of the victim or not based on the facts of the case.<sup>57</sup>

Therefore, the legal standard required of prosecutors in England and Wales, is an observance of the three-stage exercise, or the four-stage approach (where the MSA is applicable to a victim's case). This exercise involves a consideration of whether there is a reason to believe that an individual has been trafficked. When there is satisfactory evidence of trafficking, then the next deliberation is whether there is a clear evidence of a credible common law defence or not. Now, if there is a clear evidence of a credible common law defence, then the case will be discontinued on evidential grounds. Thirdly, even where there is no clear evidence, but the offence may have been committed because of compulsion arising from trafficking, prosecutors should consider whether the public interest lies in proceeding to prosecute or not.<sup>58</sup> Further discussion on the stages of prosecuting human trafficking cases is taken in chapter four of this thesis.

## **1.7 Establishing Victim Status in Human Trafficking Cases**

The process of establishing victim status in human trafficking cases, commences with an examination of the definition of human trafficking. The non-prosecution principle is relevant to cases where the court has determined that the offence of THB has taken place. Thus, the principle is inapplicable unless a person has been resolved to be a credible

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<sup>57</sup> Ibid, para 13

<sup>58</sup>*R v LM & Ors* [2010] EWCA 2327, para 10

victim of human trafficking by the court. This section will consider the circumstances that may arise before an individual will be regarded as a credible victim of human trafficking. Credible victim status attainment is a pre-condition or pre-requisite for purposeful application of the non-prosecution principle to a victim's case.

Human trafficking is an offence that can occur in different forms which include forced labour, sex trafficking through sexual exploitation and trafficking in organs/organ harvesting. Women and children, usually girls may be trafficked into prostitution, others usually teenage boys, but sometimes young adults may be trafficked into cannabis farming or other illegal activities.<sup>59</sup> Occasionally, these victims of THB are trafficked into the UK from other jurisdictions, or may enter the UK lawfully, but are exploited soon after their arrival. Whether these individuals are trafficked from within the UK or overseas, or within cities or towns in the UK, these persons are all victims of crime and should be treated as such.<sup>60</sup>

The CoE Convention defines THB to mean:

“... the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payment or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation ...”<sup>61</sup>

Essentially, a victim of human trafficking is any person who has been recruited, transferred, harboured, transported or received by means of the threat or use of force or

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<sup>59</sup>*L, HVN, THN, T v R* [2013] EWCA Crim 991, para 2

<sup>60</sup> *Ibid*

<sup>61</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 4 (a)

other forms of coercion for the purpose of exploitation.<sup>62</sup> He is anyone subjected to the combination of the elements of action, means and purpose.<sup>63</sup> Alternatively, a victim is a person or persons who have individually and collectively suffered harm including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights.<sup>64</sup> This can be through acts or omissions that are in violation of criminal laws including those laws proscribing criminal abuse of power.<sup>65</sup> A victim's exploitation is categorised under the CoE Convention to include the "exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."<sup>66</sup>

Organised criminal groups are often key actors in the propagation of the offence of THB, in some cases these groups assist in financing elections and other Governance programmes.<sup>67</sup> Hence, the incentive to eradicate or mitigate the problem of human trafficking in such governmental structures are negligible since their political parties and government officials are benefitting from the proceeds of the offence. Some traffickers operate by moving their victims across vast distances and using well established international logistics networks to achieve this.<sup>68</sup> The trafficked victims are sometimes

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<sup>62</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 55/25, 2000 (Palermo Protocol), art 3 (a)

<sup>63</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 4 (e)

<sup>64</sup> United Nations General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power - Res 40/34, p 1

<sup>65</sup> Ibid

<sup>66</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 4 (a)

<sup>67</sup> Shelley L. 'Human Trafficking as a form of Transnational Crime' in Lee M. (ed). Human Trafficking (1<sup>st</sup>edn, Willan Publishing 2007) 134

<sup>68</sup> Shelley L. 'Human Trafficking, a Global Perspective' (1<sup>st</sup>edn, Cambridge University Press 2010) 110

moved so far from their homes that there is no prospect of return; upon arrival at the host country the victims do not even know where they are or the name of the location.<sup>69</sup>

Nonetheless, victims of THB who have reasonable opportunities to escape their trafficking situation, do not always take advantage of it.<sup>70</sup> These reasonable opportunities may comprise of police raids leading to police rescue teams placing the trafficked victims in safe houses for their protection.<sup>71</sup> The victims' reluctance to be liberated may be linked to the fact that they are afraid to burden their families back home with the responsibility of re-paying the debt they still owe their traffickers. Or they may be fearful of the repercussion of occult threats resulting from voodoo and juju rituals performed in their home countries prior to arrival in the host country.<sup>72</sup> Accordingly, the trafficked victims' unwillingness to come forward with vital evidence against their traffickers may be one of the reasons why there are so few convictions and prosecutions of trafficking offenders.

## **1.8 Challenges in Establishing Victim Status**

A major challenge in establishing victim status in the UK, is the structure of the NRM identification system. The NRM often looks at victims of human trafficking through the context of their immigration status. This means that people from outside the European Union (EU) are up to four times less likely to be recognised as victims of trafficking and are often ordered to be deported rather than protected.<sup>73</sup>

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<sup>69</sup> Ibid

<sup>70</sup> Mahdavi P. 'Gridlock: Labor, Migration, and Human Trafficking in Dubai' (1<sup>st</sup> edn, Stanford University Press 2011) 69

<sup>71</sup> Ibid

<sup>72</sup> Carling J. Migration, Human Trafficking and Smuggling from Nigeria to Europe (IOM/ International Organization for Migration, 23 IOM Research Series, 2006) 52

<sup>73</sup> Anti-Slavery, Slavery in the UK <<https://www.antislavery.org/slavery-today/slavery-uk/>> accessed 2<sup>nd</sup> July 2019

Protection and support for victims of trafficking is inconsistent and ineffective due to cost-efficiency savings by the government and government budgetary cuts.<sup>74</sup> There is no system in place to provide long-term support for all victims and many must move out of safe houses before they have fully recovered from abuse and put their lives back on track. Protection of children is also an area of great concern. Although a Child Guardianship scheme has been included in the MSA, which was scheduled for full implementation in the second half of 2019.

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<sup>74</sup> Prison Reform Trust and Hibiscus Initiatives, *Still No Way Out: Foreign National Women and Trafficked Women in the Criminal Justice System* (Prison Reform Trust 2018) 12

### **1.8.1 The National Referral Mechanism (NRM)**

The National Referral Mechanism (NRM) is the framework for identifying victims of modern slavery or human trafficking and ensuring they receive the appropriate support. Support includes access to advice for the victim, including legal advice and accommodation where necessary. The NRM is also the mechanism through which data is collected about victims, helping to build a clear picture about the scope of human trafficking and modern slavery.

In 2018, 6,993 potential victims were submitted to the NRM: a 36% increase on the 2017 total of 5,142 referrals. Out of the total number of 6,993 potential victims, 52 were referred to the police service of Northern Ireland for crime recording purposes, 228 were referred to Police Scotland and 251 to Welsh forces. The remaining 6,462 were referred to the English Police force. The report showed potential victims of trafficking from 130 different nationalities in 2018. UK, Albanian and Vietnamese nationals were the most reported potential victims, with the UK increasing by nearly 100% to 1,625 referrals over the 2017 total of 820 referrals.<sup>75</sup> The most common exploitation type recorded for potential victims exploited as adults and minors was labour exploitation, a category which also includes criminal exploitation.

In 2020, 10,613 potential victims of modern slavery were referred to the NRM, a similar number to 2019. This indicates a high rise in referral numbers in comparison to the 2017 and 2018 figures. The COVID-19 pandemic and associated restrictions is primarily thought to be the reason for the elevation in referrals.<sup>76</sup> 63% (6,716) of the individuals referred claimed that the exploitation occurred in the UK only, whilst 26% (2,722)

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<sup>75</sup> National Referral Mechanism – End of Year Summary 2018 (20<sup>th</sup> of March 2019)

<sup>76</sup> National Referral Mechanism – End of Year Summary 2020 (18<sup>th</sup> of March 2021)

claimed that the exploitation took place overseas. 47% (4,946) of the potential victims referred had been exploited as children, whilst 48% (5,087) had been exploited as adults.<sup>77</sup> The year 2020 is memorable because of the enormous reasonable grounds and conclusive grounds decisions that were made. The single competent authority made 10,608 reasonable grounds and 3,454 conclusive grounds decisions in 2020.<sup>78</sup> This is one of the highest figures ever reported within the UK. 92% of the reasonable grounds decision and 89% of the conclusive grounds decision were positive. A positive decision indicates that the competent authority considers that there are grounds demonstrating that a person has been a genuine victim of human trafficking or modern slavery.

The NRM was created in 2009 to meet the UK's obligations under the Council of Europe Convention on action against trafficking in human beings (CoE Convention).<sup>79</sup> Article 10 of the CoE Convention directs that each party to the convention should "... 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 and relevant support organisations..."<sup>80</sup> The NRM as a victim identification and support process, is designed to make it easier for all the different agencies that could be involved in a trafficking case – for example, the police, Home Office – including Border Force, UK Visas and Immigration (UKVI) and Immigration enforcement, the NCA, local

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<sup>77</sup> Ibid

<sup>78</sup> Ibid

<sup>79</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 10

<sup>80</sup> Ibid

authorities and non-governmental organisations (NGO's) to co-operate, share information about potential victims and facilitate their access to support.

Prior to 2015, the NRM was described as not fit for purpose by Anti-Slavery International, a registered charity in England and Wales, because slavery cases were not dealt with properly, victims were not supported, and traffickers were getting away with trafficking-related crimes.<sup>81</sup> The organisation called for a new comprehensive law to protect the interests of victims of trafficking and slavery which led to the passing into law of the Modern Slavery Act in 2015 (MSA). Following the enactment of the law, the MSA has been criticised as being too heavily focused on policing and does not provide adequate protection for the victims of human trafficking and slavery.<sup>82</sup> As a result, many individuals are not recognised as victims and are not supported sufficiently. Majority of individuals that come to the attention of the authorities are treated as immigration offenders rather than victims of a serious crime.<sup>83</sup> This situation is especially true for non-EEA nationals or third-country nationals (a person who has the nationality of a non-European country). They are also less likely to act as witnesses in court and help prosecute traffickers because they have not been properly identified as victims of human trafficking.

Under the previous NRM process, potential victims were referred by first responders including police, public bodies, and several specified NGOs to one of the two competent authorities – the NCA's Modern Slavery and Human Trafficking Unit (MSHTU) for European Economic Area (EEA) nationals, and the Home Office for non-EEA cases, to

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<sup>81</sup> Anti-Slavery, Slavery in the UK <<https://www.antislavery.org/slavery-today/slavery-uk/>> accessed 2<sup>nd</sup> July 2019

<sup>82</sup> Ibid

<sup>83</sup> Ibid

decide on their status as victims of human trafficking. The CoE Convention requires that potential victims of trafficking are provided with a period of a minimum of 30 days recovery and reflection, during which they will receive support including access to relevant medical services if they are recognised as a trafficked victim. The UK provides this support to potential victims referred to the NRM for a longer period of a minimum of 45 days.<sup>84</sup>

### **1.8.2 The Single Competent Authority (SCA)**

From 29<sup>th</sup> of April 2019, the previous process of two competent authorities has been changed to a single competent authority (SCA) for dealing with referrals. The home office has become the single competent authority as part of a series of reforms to the NRM process by the government. As part of the government's plans to improve the identification and support for victims of human trafficking and modern slavery, the reformation process was instituted in October 2017. The interim review of the NRM for victims of human trafficking was published on the 11<sup>th</sup> of November 2014 and recommended that the support system for identifying and supporting victims of human trafficking should be rebuilt and improved.<sup>85</sup> Different versions of the review were assessed from 2015 to 2017.

The key recommendations of the report included: creating a single case working unit within the Home Office to replace the case working units in the NCA and UKVI, establishing new multi-disciplinary panels, headed by an independent chair, with a view to ceasing the sole decision-making roles of the UKVI and MSHTU, extending the NRM

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<sup>84</sup> Home Office: Victims of Modern Slavery, Competent Authority Guidance, Version 7.0 (29<sup>th</sup> April 2019) 10

<sup>85</sup> Home Office: Interim Review of the National Referral Mechanism for Victims of Human Trafficking (2<sup>nd</sup> November 2014)

to cover all adult victims of modern slavery and strengthening the first responder role. Suggestions were made to strengthen the first responder role by creating new anti-slavery safeguarding leads at the point when potential victims are first identified and referred. These measures should additionally be supported by increased training and feedback for the home office team. The report also proposed that the referral process should be updated by removing the ‘reasonable grounds’ decision once the successful implementation of accredited slavery safeguarding leads has occurred, thereby allowing direct referral to specialist support for potential victims.

The slavery safeguarding leads are a few individuals from local statutory agencies which will be identified in the pilot areas or areas where the safeguarding leads are first implemented. Their role is to accept referrals and then decide whether they believe the referred individual is a victim of modern slavery.<sup>86</sup> The intention was that from 1<sup>st</sup> November 2015, the slavery safeguarding leads will operate in West Yorkshire police force area and the Southwest (Avon and Somerset, Devon and Cornwall, Dorset, Wiltshire, and Gloucestershire police force areas). Cases outside of these specific areas were expected to be managed through the existing process, as set at in the competent authority guidance.

These recommendations and proposals were part of the main reason the SCA was created. The goal of its creation was to simplify and speed up the process of identifying and supporting victims of human trafficking and slavery. Currently, decisions about who is recognised as a victim of modern slavery are made by trained specialists in the SCA. All referrals to the NRM from first responders must be sent to the SCA for consideration.

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<sup>86</sup> Home Office: National Referral Mechanism Pilots: Slavery Safeguarding Lead guidance, version 1 (30<sup>th</sup> October 2015)

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/475716/2015-10-30\\_SSL\\_guidance\\_v1\\_0.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/475716/2015-10-30_SSL_guidance_v1_0.pdf)> accessed 3<sup>rd</sup> of July 2019

The SCA also manages the data on NRM referrals. Importantly, the SCA makes decisions on all NRM cases, regardless of nationality or immigration status of the individual. Therefore, the SCA is empowered to consider and make decisions for: a non-EEA national, an EEA national and a UK national.

## **1.9 The Competent Authority, the Crown Prosecution Service (CPS) and the Court**

A main objective of this thesis is to consider ways of promoting justice from prosecution for victims of human trafficking who have been forced to engage in criminal activity. An examination of the inter-relationship between the competent authority, the CPS and the court is necessary to explain the operation of the non-prosecution principle in trafficking cases. This assessment may also highlight the different ways a victim's rights may be upheld. In human trafficking cases, the UK's state obligations are upheld through the legal institutions of the court, the CPS, and the competent authority.

The competent authority is responsible for ascertaining whether a person is a credible victim of human trafficking or not. As previously stated, the non-prosecution principle is inapplicable to a victim's case unless the person is resolved to be a credible victim of human trafficking. Hence, the identification of human trafficking victims is crucial because it is the first step in the process of assessing a victim's case. Identification precedes the application of the non-prosecution principle.

Prior to April 2019, the competent authority in the UK was comprised of the UK Visas and Immigration (UKVI) and the Modern Slavery Human Trafficking Unit (MSHTU). As previously discussed, this has now been changed to the SCA. The CPS is responsible for prosecuting criminal cases that have been investigated by the police and other

investigative organisations in England and Wales. A further discussion of the Competent Authority, the CPS and their functions is taken in chapter four of this study.

In the first instance, before the non-prosecution principle may be applied to a victim's case, the competent authority must first determine if a person's circumstance equates to an exploitative situation or not. The decision of the competent authority, on a whether a potential victim has been trafficked, for the purpose of exploitation or not, is not binding on the court.<sup>87</sup> However, unless there was evidence to contradict the competent authority's decision or significant evidence that had not yet been considered, it is likely that the criminal court will abide by the decision.<sup>88</sup>

The institutions of the competent authority, the CPS, and the court is structured with the intent of complementing the legal functions of each other. The complimentary functions of the institutions create a system that promotes working in unison, to reduce the margin for legal error in human trafficking cases. Thus, when there is an issue regarding whether a person is a victim of THB or not, the CPS and police may refer the case to the competent authority while the prosecution of the matter is in progress.<sup>89</sup> Provision is made in the guidance to the competent authority for co-operation with the police and CPS, and before a case is concluded. This co-operation has been developed to ensure that, during the process of considering the prosecution of a victim, every effort is made to reach a common view on whether the evidence points to the person being a victim of human trafficking or not. Hence, the evidence relied on by the competent authority must be

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<sup>87</sup> Crown Prosecution Service, 'Human Trafficking, Smuggling and Slavery: Suspects who might be Victims of Trafficking or Slavery (cps.gov.uk, 10<sup>th</sup> December 2018) <<https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery>> accessed 12<sup>th</sup> May 2019

<sup>88</sup> *L, HVN, THN, T v R* [2013] EWCA Crim 991, para 28

<sup>89</sup> *Regina v Joseph (verna) & ors.* [2017] EWCA Crim 36, para 39

thoroughly examined, when the CPS is assessing whether the victim's criminal activities resulted as a direct consequence of being trafficked and whether it is in the public interest to prosecute.<sup>90</sup>

However, in relation to cases where a person claims to be a victim of trafficking after he has been prosecuted/convicted there is no clear guidance on the process of co-operation with the CPS or in obtaining court documents. A clear guidance on the process needs to be developed between the CPS and the competent authority in cases where the claim to be a victim of trafficking is made after conviction.<sup>91</sup> Although the court will take the competent authority's conclusive decision (decision whether a person is a victim of trafficking or not) into account, the court will also examine the cogency of the evidence the competent authority has relied on and subject the evidence to forensic examination.<sup>92</sup> This implies that a person cannot be determined to be a victim of trafficking based on a trafficking profile. Rather, a detailed analysis of facts is required, including examination of the person's account, proper focus on evidence and the nexus between the trafficking circumstance and offence for which they have been charged.<sup>93</sup> A decision on a person's trafficking status will only be reached after careful consideration of the facts of a case and the evidence given. In most cases decided in the UK, the court always ensures that all the relevant information in a case is received and examined carefully before a decision is reached.

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<sup>90</sup> Ibid

<sup>91</sup> Ibid, para 40

<sup>92</sup> Ibid

<sup>93</sup> Ibid

## 1.10 Victim Status and the Application of the Non-Prosecution

### Principle: The *Hoang* case

Improper victim categorisation by the authorities may lead to a missed opportunity to apply the non-prosecution principle. The situation of improperly identifying a victim of human trafficking is illustrated by the circumstances of the claimant in the *R (Hoang) v SSHD* case.<sup>94</sup> The procedure employed by the court in the *Hoang* case is included in this discussion, to exemplify the relevance of a person's victim status and the efficient application of the non-prosecution principle to their matter.

The pre-condition of carefully accessing the evidence in a case, prior to reaching a decision on a person's trafficking status, was implemented by the court in the *Hoang* case. The case concerns the correct procedure for determining whether there were reasonable grounds to believe that a person had been a victim of human trafficking or not. The court conducted this legal inquiry using the CoE Convention and the state's positive obligations under Article 4 of the ECHR (which protects individuals from being subjected to slavery, servitude or forced or compulsory labour). On 2 September 2013, the claimant a Vietnamese national was detained when entering the UK from France and he claimed asylum. On 20 September the defendant Secretary of State refused his claim for asylum and humanitarian protection. On the same day, the competent authority also issued a decision. The decision found that, there were no reasonable grounds to conclude that the claimant had been trafficked from Vietnam to Russia, or onward from Russia to the UK. The claimant contended that the competent authority had failed to apply the Secretary of State's 'Asylum Process Guidance: Guidance for Competent Authorities'

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<sup>94</sup> *R (Hoang) v SSHD* [2015] EWHC 1725

when making the reasonable grounds decisions. As he had set the evidential threshold too high and failed to consider relevant evidence on the prevalence of trafficking from Vietnam to Russia and from Vietnam to the UK via Russia.

In this case, the decision-maker working on behalf of the NRM and competent authority, picked holes in inconsistencies or perceived implausibility in the claimant's account of how he arrived in the UK.<sup>95</sup> According to the decision-maker, there were anomalies present in the claimant's account. These anomalies resulted in a determination that the claimant's circumstance had not met the definition of human trafficking. However, the circumstances that the claimant had experienced are situations consistent with a trafficking occurrence. That is, having never previously travelled abroad, the claimant travelled to Russia from Vietnam by plane, was subjected to bonded labour in the manufacturing sector there, and from there came in a lorry to England via France.<sup>96</sup> The experience encountered by the claimant is a recognised pattern of human trafficking and exploitation.

The decision-maker's findings ultimately resulted in a missed opportunity to identify the claimant as a victim of human trafficking, thereby missing an opportunity to apply the non-prosecution principle to the case. This is because, the non-prosecution principle only becomes applicable to a person's case, after the individual has been properly identified as a credible victim of human trafficking. This implies that even though a person may be a genuine victim of THB, when the individual has not been identified as one by the NRM, the person may still be prosecuted for their involvement in criminal activity. Hence, a credible victim who has not been identified as one, may not receive any protection or

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<sup>95</sup> Ibid, para 104

<sup>96</sup> Ibid, para 90

support by the state. Therefore, proper categorisation of victims is relevant because it may lead to appropriate identification of victims of THB. The claimant in this case, could be regarded as a location victim - exploited in a different jurisdiction other than the UK (further discussion in chapter 2 and 5 of this thesis). However, at no point during the previous proceedings (for asylum and humanitarian protection), prior to the claimant's appeal, was it considered that he may have been exploited. Also, upon referral to the competent authority, it was again determined that the claimant was not a victim of THB.

Upon examination of the evidence provided in the case, Helen Mountfield sitting as Deputy High Court Judge determined that the reasonable grounds decision had been flawed. The competent authority's reasonable grounds decision was flawed by failures to address the right question; to apply the right burden of proof; and failures to apply the inquisitorial and sympathetic approach to credibility advocated in the competent authority's guidance.<sup>97</sup> In addition, the competent authority had breached the positive obligation of reasonable investigation in article 4 of the ECHR, contrary to section 6(1) of the Human Rights Act 1998.<sup>98</sup> Accordingly, the reasonable grounds decision was quashed and remitted for reconsideration.

The application of the non-prosecution principle may be improved when the state works with a singular goal of protecting victims from prosecution. This is the reason why a system of categorising victims of human trafficking is essential. When the authorities are equipped to recognise the markers that distinguish one class/group of victims from the other, it may result in a more efficient application of the non-prosecution principle.

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<sup>97</sup> Ibid, para 129

<sup>98</sup> Ibid, para 130

## **1.11 Methods and Methodology**

### **Socio-legal Methodology and Case Law Analysis**

The justification for the unique contribution of this thesis – the creation of the category ‘location victim’ and ‘transition victim’ is linked to the gap in knowledge in the current legal materials available on the offence of human trafficking and the application of the non-prosecution principle. The writer has employed the socio-legal methodology and case law analysis to bridge this gap by contributing to the available knowledge.

The process of searching for relevant cases, literature and instruments in order to understand the offence of human trafficking commenced with an examination of police/official documents. The purpose of this examination is to assess the procedure for protecting victims of human trafficking within the jurisdiction of England and Wales. That is assessing the ‘Why’ element. Why the perpetrators of the offence of trafficking can continue exploiting vulnerable individuals without early detection and apprehension by the authorities.

The author has chosen the socio-legal methodology and case law analysis because it may aid to examine the second research question posed by the thesis. This study considers the second question of ‘why’. Why are victims of trafficking are being prosecuted in the first place? The goal of examining this question, is to interpret the instruments on the non-prosecution principle. The instruments on the non-prosecution principle are being interpreted, with a view to improving the application of the law to trafficking cases. The cases used will help to show trends in applying the non-prosecution principle, as well as interpret legal principles.

To further this goal, the author has looked at relevant provisions within the Modern Slavery Act 2015, the Human Rights 1998 and the Criminal Justice Act 2003 among others. Apart from the instruments that are applicable within England and Wales, the writer has also examined legal instruments from the council of Europe and the European Union such as the Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, and the European Union Directive 2011/36. In relation to the cases considered for this research, the author has looked at cases decided in England and Wales directly relevant to human trafficking cases. Other jurisdictions examined in this study include cases decided in the European Court of Human Rights, a Dutch Case, and Canadian case.

This research methodology will enable the author to determine and explain the reasons for the disparity and the gap that exists between law in books and law in action. The research will also identify the relevant factors which impact upon the function of law and legal institutions and the underlying policy influences. These factors may include the political, economic, theoretical, and cultural factors that affect the development and application of law.<sup>99</sup> The relevant considerations of how, to what extent, and in what circumstances legal rules on human trafficking are implemented will be examined.

A major strength of the empirical socio-legal approach is its ability to answer questions that have bearing on the social-performance or social-dimension of law and its impact on social behaviour. It also depicts a realistic representation of law by highlighting the gap between legislative goals and social reality. In particular, the gap in relation to the

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<sup>99</sup> Salter M. and Mason J. Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research (1<sup>st</sup>edn, Pearson Education Limited 2007) 125

practice of adjudicators, regulators, and law enforcers; and the use or under-use of the law by intended beneficiaries of the law.<sup>100</sup>

The limitations of this approach comprise of the fact that a strong base of doctrinal legal research may be required to proceed with this methodology. In addition, a certain level of skill in social science research techniques is required to successfully make use of this methodology. The approach tends to pull ideas from different directions thereby creating conflicting results which may sometimes make its reforms intellectually weak.

Another limitation of this study is related to the scope of the research. Due to the aim of the study, which is to consider ways of improving the application of the non-prosecution principle, only cases that are relevant to the issue will be discussed. For example, in the case of the transition victim, only the cases that are relevant to the discussion of improving the application of the non-prosecution principle, to the transition victim's circumstance will be considered. Similarly, in discussing the location victim's situation, only the cases that highlight the treatment of location victims by the courts will be examined. This indicates that there may be other cases which are relevant to the general discussion of the non-prosecution principle, which may not be mentioned at all, due to the scope of this thesis.

The sources that have been used to carry out this research include law journals, policy reports, law cases, newspapers and websites discussing relevant information.

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<sup>100</sup> Vibhute K. and Aynalem F., *Legal Research Methods* (1<sup>st</sup>edn, Justice and Legal System Research Institute 2009) 88

## **CHAPTER TWO**

# **IDENTIFICATION AND CATEGORISATION OF VICTIMS OF HUMAN TRAFFICKING**

The identification and categorisation of victims of human trafficking is a relevant prerequisite resulting in purposeful application of the non-prosecution principle. Thus, for the non-prosecution principle to be applied effectively an individual must first be identified as a credible victim of human trafficking. Identification and categorisation of victims is important in human trafficking considerations because, it often has a direct impact on a victim's case. The application of the non-prosecution principle can be greatly improved when a victim is correctly identified and categorised in a timely manner. This chapter aims to examine the identification and categorisation of victims with a view to assessing ways of improving the application of the non-prosecution principle.

### **2.1 Introduction**

Diverse policies and legal documents have been drafted for the sole purpose of curbing the criminal activity of human trafficking. These documents have been designed with the aim of protecting victims and encouraging states to act proactively to help reduce the problem of THB. The documents have also been created with the goal of facilitating international cooperation and state intervention where possible. A notable policy currently operational in the UK is the anti-slavery and human trafficking policy. This policy is based on the provisions in the MSA. It mandates corporate organisations in the UK, to comply with its provisions in their daily business operations. The relevant provisions are section 54, section 1, 2 and 4 of the MSA. Essentially, section 54 of the MSA requires organisations that carry on a business or are part of a business in the UK

to prepare an annual report each financial year. The report should detail the steps that have been taken during the year to ensure that human trafficking and slavery are not taking place in a company's business activities or supply chains. The requirements apply to organisations with a turnover of 36 million pounds or more, including the turnover of subsidiaries. Section 1, 2 and 4 relates to situations that may amount to an exploitative occurrence. Situations of exploitation may include human trafficking, slavery or practice similar to slavery.

Victims of THB are often forced to work in hidden economies (the sale of goods or services, which have not been declared for tax purposes). This indicates that accurate statistics on the magnitude of the problem are unreliable because of the illicit nature of the offence of THB.<sup>101</sup> Compounding the problem in obtaining reliable statistics is the fact that victims are often reluctant to cooperate with law enforcement officials if identified and rescued; and are generally unwilling to report their victimisation.<sup>102</sup> Victims may refuse to cooperate with authorities particularly in destination countries either because they are afraid of reprisal from traffickers or possess an inherent belief that the authorities will not or cannot assist them adequately.<sup>103</sup> Consequently, the inconsistencies in available data imply that the circumstances of trafficked victims are not being disclosed to the relevant authorities promptly; resulting in victims not being identified.<sup>104</sup> This circumstance has resulted in a situation where the identification of victims in human trafficking cases is difficult to undertake correctly.

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<sup>101</sup> Aronowitz A. A., *Human Trafficking, Human Misery: The Global Trade in Human Beings* (2<sup>nd</sup> edn, Scarecrow Press Inc. 2013) 15

<sup>102</sup> Ibid

<sup>103</sup> Ibid

<sup>104</sup> Scullion D., 'Assessing the Extent of Human Trafficking: Inherent Difficulties and Gradual Progress' (2015) 3(1) *Social Inclusion*, 25

Victims are rarely identified; and are often prosecuted for their involvement in criminal activity despite their trafficked status.<sup>105</sup> The situation of victims who are prosecuted is unusual. First, they suffer immense hardship and punishment from being trafficked. Subsequently, they are punished again through prosecution by those who should be identifying and helping them.<sup>106</sup> This is somewhat due to a general lack of awareness on the issue and difficulty in assessing the extent of the crime, including the international networks that bring it into existence.<sup>107</sup> The principle of protecting victims of human trafficking has been discussed in the previous chapter. The discussion in chapter one demonstrates that to adequately combat THB, states need to identify all types of victims and protect these individuals by diverting them out of the criminal justice system. Where there is a causal link between the trafficking exploitation and the illegal activity committed by the victim, this is where the non-prosecution principle can and should be effective.

Unless purposeful steps are taken to improve the policies in place, trafficking offenders may continue to develop their sophisticated business models; consequently, the victims of THB may continue to be prosecuted.<sup>108</sup> Thus, it is essential that victim identification and effective investigation of the trafficking crime is promoted to ensure overall

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<sup>105</sup>*R v O* [2008] EWCA Crim 2835

<sup>106</sup>Annison R., *In the Dock, Examining the UK's Criminal Response to Trafficking* (Anti-Slavery International for the Anti-Trafficking Monitoring Group, 2013) 9

<sup>107</sup> *Ibid*

<sup>108</sup> Nguyen K., 'Trafficking Victims in Europe Forced into Life of Crime' (Thomas Reuters Foundation, 29 September 2014) <<http://www.reuters.com/article/2014/09/29/us-foundation-crime-trafficking-idUSKCN0HO2BO20140929>> accessed 8 October 2014

protection of victims' rights, including non-prosecution of victims for offences caused or directly linked with their being trafficked.<sup>109</sup>

This chapter will assess victim identification and categorisation to determine how the implementation of the law affects victims of THB. It will examine the different categories of victims including the pure, historical, location and transition victims. In section 2.3.1, an examination of the pure/ideal victim will be considered. This assessment is useful because the term 'pure/ideal victim' will be referred to in subsequent chapters of this study to discuss the different categories of victims and how their status may have an impact on the application of the non-prosecution principle.

## **2.2 The Identification Process**

Often, victims of human trafficking are not identified or classed as trafficked persons. Children and adults are continually prosecuted for criminal activities including cannabis cultivation and defying immigration laws.<sup>110</sup> This places an obligation on countries to provide their competent authorities with persons who are trained and qualified in preventing and combating THB, in order to identify and help victims, including women and children.<sup>111</sup> Collaboration with different authorities and relevant support organisations is an appropriate step to take to ensure that victims are identified.<sup>112</sup> In addition, adopting legislative or other measures by member states of the CoE to aid in

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<sup>109</sup> Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking (OSCE/ Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, 2013) 15

<sup>110</sup> *R v THN in L, HVN, THN, T v R* [2013] EWCA Crim 991

<sup>111</sup> Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 2005, art 10 (1)

<sup>112</sup> *Ibid*

identifying victims is a good approach.<sup>113</sup> It is a good approach because, when the competent authorities have reasonable grounds to believe that a person has been a victim of THB, the person shall not be removed from a member state's territory until the identification process as a victim is complete and assistance provided thereon.<sup>114</sup> In this regard, the competent authorities include the immigration authorities, embassies or consulates, the police, customs and labour inspectorate.<sup>115</sup>

Before April 2019, the competent authority was comprised of two bodies – the Modern Slavery Human Trafficking Unit (MSHTU) and the Home Office Visas and Immigration or United Kingdom Visas and Immigration (UKVI). The MSHTU dealt with referrals from NGO's, local authorities, and the home office. While the UKVI handled immigration and asylum claims. Once a referral has been made, trained decision makers in the competent authority will appraise the situation and decide whether an individual is a victim of trafficking or modern slavery.<sup>116</sup> A person will not obtain protection under the CoE Convention, EU Directive, or MSA unless he has been recognised and identified by the competent authority. A credible victim is one who the investigating officers have reasons to believe has genuinely been trafficked. The evidence in the proceedings of the case, should point to the fact that the person was compelled to carry out illegal activities against their will by threats or use of force.<sup>117</sup>

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<sup>113</sup> Ibid, art 10 (2)

<sup>114</sup> Ibid

<sup>115</sup> Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 2005, Explanatory note, para 129

<sup>116</sup> National Crime Agency, 'National Referral Mechanism' <<http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism>> accessed 24 February 2017

<sup>117</sup> *Regina v Hasan* [2005] UKHL 22, para 17

The usual process prior to April 2019, was that referrals were filed through a central unit, the MSHTU. The MSHTU made decisions on cases involving British Citizens, European Union (EU) nationals and nationals of countries in the European Economic Area (EEA). The UKVI on the other hand, handled all other cases of third-country nationals. The British, EU and EEA nationals do not always require an interview before being conclusively identified as victims of THB. Sometimes, if they have been properly identified by the police at the location where their exploitation occurred, their case can be referred for consideration.<sup>118</sup> For the Non-EEA nationals, decisions and referrals on cases involving them were usually made by immigration staff who had encountered the individual either during an asylum screening interview, a substantive asylum interview or during enforcement activity.<sup>119</sup> Since the 29<sup>th</sup> of April 2019, the home office has launched the single competent authority which has become responsible for all National Referral Mechanism (NRM) decisions regardless of an individual's nationality or immigration status.

A victim of THB will receive protection and support only after proper identification as a victim by the NRM and the competent authority. The NRM process was set up by the UK to comply with the CoE Convention's state obligations. These obligations consisted of providing for the identification of victims of THB, giving assistance to victims of human trafficking, allowing for a recovery and reflection period in which the victims can

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<sup>118</sup> Ibid

<sup>119</sup> Ibid

start to come to terms with the situation they have encountered.<sup>120</sup> There is also a requirement for the return and repatriation of victims where the need arises.<sup>121</sup>

Hooper and Thomson argue that the relevant law enforcement agencies and legal practitioners continue to fail to determine that their clients are potential victims of trafficking.<sup>122</sup> In some cases, the indicators pointing towards trafficking may be obvious but are sometimes disregarded nonetheless by the authorities.<sup>123</sup> One reason for this disregard of trafficking indicators by the authorities, including the police may be the unspoken requirement for the victim of human trafficking to self-identify when they come in contact with enforcement authorities. For example, in a police interview, a Vietnamese national confirmed that he had not gone to a factory voluntarily but was coerced to go there. He had been brought into England in a freezer container, he owed money in Vietnam and the deeds to his parents' home had been taken as collateral.<sup>124</sup>

Despite this clear indication that he was forced into the criminal activity, further inquiry at the interview or trial stages of the case was not conducted to investigate the defendant's claim.<sup>125</sup> One may argue that the obstacle to proper identification of victims is further intensified by the authorities, including the police over reliance on self-identification.<sup>126</sup>

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<sup>120</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 10, 12, 13

<sup>121</sup> *Ibid*, art 16

<sup>122</sup> Hooper L. and Thomson K., 'Victims of Trafficking and the Law Session: Victims of Trafficking – Immigration Law' <[http://www.airecentre.org/data/files/Comic\\_Relief\\_Materials/Glasgow/7\\_-\\_Immigration\\_Materials.pdf](http://www.airecentre.org/data/files/Comic_Relief_Materials/Glasgow/7_-_Immigration_Materials.pdf)> accessed 24 February 2017

<sup>123</sup> *Ibid*

<sup>124</sup> *R v THN in L, HVN, THN, T v R & Ors* [2013] EWCA Crim 991, para 36

<sup>125</sup> Hooper L. and Thomson K., 'Victims of Trafficking and the Law Session: Victims of Trafficking – Immigration Law' <[http://www.airecentre.org/data/files/Comic\\_Relief\\_Materials/Glasgow/7\\_-\\_Immigration\\_Materials.pdf](http://www.airecentre.org/data/files/Comic_Relief_Materials/Glasgow/7_-_Immigration_Materials.pdf)> accessed 24 February 2017

<sup>126</sup> *Ibid*

However, in many cases self-identification is unlikely due to the psychological trauma victims are still experiencing, their fear of being caught by their trafficker-captors, and prosecution by the authorities when they reveal all the acts they have engaged in. Hence, self-identification should not be a requirement, nor should it be expected in every case.

### **2.2.1 NRM Stages**

The NRM process is carried out in two stages. The first stage is the reasonable grounds decision, and the second stage is the conclusive decision. In implementing the reasonable grounds decision, the NRM team has 5 working days from the receipt of a referral in which to decide whether there are reasonable grounds to believe that the individual is a potential victim of human trafficking or modern slavery.<sup>127</sup> The person who is trained to determine an individual's case is called a decision maker. After considering the circumstances of a case, the decision maker is expected to inform the first responder and the victim: from the information available so far, 'I believe but cannot prove that the individual is a potential victim of trafficking or modern slavery'.<sup>128</sup>

The referring authority is known as the first responder. The first responders include the National Crime Agency (NCA), police forces, Salvation Army and Poppy Project.<sup>129</sup> If the decision is affirmative the potential victim will be allocated a place within a government funded safe house accommodation and granted a recovery and reflection period of 45 calendar days.<sup>130</sup> This will allow the individual to begin to recover from their exploitative situation and begin to reflect on what to do next. They may decide to

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<sup>127</sup>National Crime Agency, 'National Referral Mechanism' <<http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism>> accessed 9 January 2017

<sup>128</sup> Ibid

<sup>129</sup> Ibid

<sup>130</sup> Ibid

either return to their home country (if they have been trafficked to a destination country) or co-operate with the police and other government authorities to prosecute the individual who has trafficked them.

The second stage in the process is the conclusive decision stage. During the 45 days recovery and reflection period, the Competent Authority will gather further information relating to the referral from the first responder and other agencies.<sup>131</sup> The conclusive grounds decision is expected to be made as soon as possible following the 45 days of the recovery and reflection period. The decision maker determines the victim's case based on the evidence and circumstances of the case. On a balance of probability, the decision maker determines, "...it is more likely than not, that the individual is a victim of human trafficking or modern slavery".<sup>132</sup> Again, the first responder and potential victim will both be notified of the outcome of their application.

The failure to identify victims of THB implies that the trafficked person is denied access to a recovery and reflection period at the vital time when they come into contact with the authorities.<sup>133</sup> Their inability to begin their recovery or to enter into a reflection process means that their suffering is prolonged due to the physical and psychological injuries they have undergone.<sup>134</sup> In some cases a victim may have already entered a guilty plea and been convicted based on this plea before the State determines that the individual is a

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<sup>131</sup> Ibid

<sup>132</sup> Ibid

<sup>133</sup> Annison R., *Hidden in Plain Sight, Three years on: Updated Analysis of UK Measures to Protect Trafficked Persons* (Anti-Slavery International for the Anti-Trafficking Monitoring Group, 2013) 33

<sup>134</sup> *Trafficking in Human Beings Amounting to Torture and other Forms of Ill-treatment* (OSCE/ Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, Paper Series No. 5, 2013) 85

credible victim of human trafficking.<sup>135</sup> Nonetheless a conviction can be appealed and quashed where new evidence emerges that the defendant was convicted after or in consequence of an abuse of process.<sup>136</sup>

### **2.2.2 Consent, a tool in Identifying Victims**

In relation to cases of THB, the consent of a victim to the intended exploitation is inconsequential where any of the means of trafficking is employed. The means used to control a victim's actions may consist of threat or use of force, coercion, abduction, fraud, deception, and abuse of power or position of vulnerability.<sup>137</sup> Although the element of consent for child victims of THB is always irrelevant, the consent of an adult in trafficking cases only becomes insignificant where the trafficker has used any of the means outlined above.<sup>138</sup> It is also important to point out that the victim's consent to the intended exploitation is irrelevant regardless of the type of exploitation (forced labour, or sexual exploitation) and the means used (coercion, threat or use of force).

The Palermo Protocol does not distinguish between the different types of exploitation that may be carried out towards the victim. Accordingly, in implementing the provisions of the Palermo Protocol, the relevant authorities are obliged to keep in mind the danger of attributing a narrow interpretation to the concept of trafficking. There is a danger that a narrow interpretation of the concept of trafficking based on the definition in the Palermo Protocol, may impede the investigation and prosecution of the crime of THB.<sup>139</sup> Hence,

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<sup>135</sup> Ibid

<sup>136</sup> *R v Mullen* [2000] QB 520

<sup>137</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, 55/25 2000 (Palermo Protocol), art 3 (b)

<sup>138</sup> Ibid

<sup>139</sup> The Role of "Consent" in the Trafficking in Persons Protocol (UNODC/ United Nations Office on Drugs and Crime, 2014) 96

the fact that consent is irrelevant in cases of THB is an important tool in identifying victims. The consent feature reflects anticipated risks and potential confusion that may be posed by the victim's apparent consent. Primarily, it eradicates the risk that victims of THB who have purportedly consented to the exploitation may not be identified as victims, or that the victim's consent could erroneously be invoked as a defence to the offence of THB.<sup>140</sup>

Although victims of THB may have actively sought out the situation in which they are exploited, their apparent consent to the exploitation does not in itself imply a willingness to be taken advantage of.<sup>141</sup> Due to the fact that victims are generally from poor backgrounds, they may consider their exploitative situation to be a better condition compared to their previous circumstance. This poses a challenge to proper identification of the trafficked person as a victim of THB. It is argued that the victim's apparent consent to the trafficking exploitation, in turn makes it difficult to properly identify the person as a victim of THB.<sup>142</sup> The supposed readiness of the victim to be trafficked is an indication of a deeper underlying issue; this issue may be linked to psychological, socioeconomic and cultural factors.<sup>143</sup> The psychological factors the victim is dealing with may relate to inherent feelings of shame, fear and an inability to fully face the trafficking situation that has occurred. The socioeconomic factors may include the victim's previous circumstance, they may be used to working long hours and in poor working conditions.<sup>144</sup>

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<sup>140</sup> Ibid

<sup>141</sup> Ibid

<sup>142</sup> Jobe A., *The Causes and Consequences of Re-trafficking: Evidence from the IOM Human Trafficking Database* (IOM Paper, 2010) 17

<sup>143</sup> 'Toolkit to Combat Trafficking in Persons: Global Programme against Trafficking in Human Beings' (Unodc.org, 2008) <[https://www.unodc.org/document/human-trafficking/HT\\_Toolkit08\\_English.pdf](https://www.unodc.org/document/human-trafficking/HT_Toolkit08_English.pdf)> accessed 26 July 2018

<sup>144</sup> Ibid

Hence, they do not see the trafficking situation as anything new since they have become accustomed to such treatment previously.

The cultural factors may comprise for instance, discrimination against women and girls in society which could make them vulnerable to trafficking.<sup>145</sup> Or a female devaluation system, where the females in a family unit (women and girls) are prevented from expressing their opinions freely and openly or an older male in the family unit has a major control over their daily life and activity.<sup>146</sup> An example of this setting is evident in African families where communal living among extended family members is a typical set up, therefore older uncles and aunts are often present in the household. This devaluation system is implicitly related to an emphasis on the head of a family unit as the person who makes all the decisions. The example of female devaluation is relevant because it illustrates how the victim views the trafficking offender as a person in a position of control, who is responsible for determining their circumstance. Overall, a victim may appear to consent to exploitation such that he or she may not initially appear to be a victim due to complex reasons including complicated relationships with their traffickers marked by affection, dependency, and control, familial or other close ties.<sup>147</sup>

Additionally, victims may be under the misconception that simply because they had consented to the trafficking exploitation at the initial stage, then they had unintentionally accepted the entire trafficking situation.<sup>148</sup> Therefore, they do not consider themselves as

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<sup>145</sup> Korićanac I., Human Trafficking, Trauma and Psychotherapy in Korićanac I. (ed), Human Trafficking, Trauma and Psychotherapy, Collection of Paper (Astra Anti Trafficking Action, 2013) 13, 18

<sup>146</sup> Ibid

<sup>147</sup> The Role of “Consent” in the Trafficking in Persons Protocol (UNODC/ United Nations Office on Drugs and Crime, 2014) 96

<sup>148</sup> Ibid

victims of the trafficking offence. The fact that victims insist that they have consented to the exploitative situations in which they are found, and do not readily identify themselves as victims of THB makes it difficult to remove or assist such persons in extricating themselves from the trafficking situation.<sup>149</sup>

Accordingly, a victim who is not properly identified may be vulnerable to re-trafficking and may subsequently return to their exploitative situation.<sup>150</sup> Failure of the state to identify a victim may also lead to an eventual mistrust of the law-enforcement agencies and authorities. For example, a national of the Russian Federation had detailed in an interview how she escaped her exploiters and sought help from the police. The policemen after hearing her trafficking account ignored her pleas for help and sent her back to her traffickers.<sup>151</sup> In this situation, the authorities were quick to dismiss her claim and failed to make further enquiries to ascertain the truth or falsity of her assertions.

The human rights issues raised by the actions of the police are related to article 2 ECHR—right to life and article 4 ECHR—right to freedom from slavery and forced labour. Human Rights in the UK are governed by the Human Rights Act 1998. But the Human Rights Act incorporates into UK law the European Convention on Human Rights (ECHR). Thus, section 1 of the Human Rights Act introduces articles of the ECHR into UK law. The actions of the police in this instance raises the issue of whether the victim's right to life and right to freedom from slavery and forced or compulsory labour was upheld or not. It may be argued that the police and other law-enforcement official's inability to properly identify a victim of human trafficking is a failure to uphold the individual's right to life

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<sup>149</sup> Ibid

<sup>150</sup> Jobe A, *The Causes and Consequences of Re-trafficking: Evidence from the IOM Human Trafficking Database* (IOM Paper, 2010) 17

<sup>151</sup> Ibid, 35

and right to freedom from slavery and forced labour. For example, if a police officer or other law enforcement agent knows of the existence of a real and immediate risk to someone's life from the criminal acts of another individual, then preventive measures should be taken to protect that person.<sup>152</sup> Article 2 of the ECHR – the right to life means that the Government should take appropriate measures to safeguard life by making laws to protect individuals and by taking steps to protect a person if his life is at risk. Another human rights issue raised by the acts of the police is the victim's right to freedom from slavery and forced labour contained in article 4 of the ECHR. There is a positive obligation on public authorities to intervene to stop slavery, servitude or forced or compulsory labour as soon as they become aware of it. There is also a positive obligation to penalise and prosecute effectively those involved in any act aimed at keeping someone in slavery, servitude or forced or compulsory labour. The apparent complicity of the law-enforcement agencies and authorities in a victim's experience may prevent their timely exit from a trafficking situation; thereby also constituting a form of re-trafficking.<sup>153</sup>

In some instances, a trafficked victim's experience may lead to an inability to report their situation to law-enforcement officials when an opportunity arises. They may also be unwilling to cooperate with criminal justice practitioners. A victim's unwillingness to report their trafficking situation, is often closely linked to the threats used by traffickers to control their victims. The threat of deportation or detention may prevent a victim from reporting their circumstances to law enforcement agencies.<sup>154</sup> The threats made to the

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<sup>152</sup> Equality and Human Rights Commission, 'Human Rights: Human Lives 'A Guide to the Human Rights Act for Public Authorities' (equalityhumanrights.com May 2014) <[https://www.equalityhumanrights.com/sites/default/files/human\\_rights\\_human\\_lives\\_a\\_guide\\_for\\_public\\_authorities.pdf](https://www.equalityhumanrights.com/sites/default/files/human_rights_human_lives_a_guide_for_public_authorities.pdf)> accessed 23 July 2018

<sup>153</sup> Ibid

<sup>154</sup> Ibid

victims by their traffickers also signify that some victims may be unable to testify against their exploiters when a criminal proceeding is set up. Also, in cases where a victim views his exploiter as a benefactor, the victim may have little or no incentive to participate in criminal justice proceedings against the individual who is considered to be a benefactor.

### **2.2.3 Identifying Victims by distinguishing between Trafficking and Smuggling**

The distinction between human trafficking and migrant smuggling is frequently ignored or completely misunderstood. This lack of understanding inevitably leads to the victim of THB being misidentified by the law enforcement officials, who are duty bound to protect them.<sup>155</sup> The confusion among legal authorities and law enforcement agencies about the disparity between THB and smuggling of migrants has greatly impeded the successful implementation of law enforcement initiatives in many countries.<sup>156</sup> Law officials sometimes erroneously classify or misidentify trafficked victims as smuggled migrants, and smuggled migrants as trafficked victims. Admittedly, the situation that induces both offences are intricately linked (a desire to migrate on the part of a trafficked victim / smuggled migrant). Nevertheless, accurate analysis through careful consideration of the circumstances of each individual case could ultimately lead to liberation of the trafficked victim from enslavement.

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<sup>155</sup> Jones S. V., 'Human Trafficking Victim Identification: Should Consent Matter?' (2012) 45 Ind. L.J., 483, 487

<sup>156</sup> Dottridge M. 'Responses to Trafficking in Persons: International Norms Translated into Action at the National and Regional Levels' in *An Introduction to Human Trafficking: Vulnerability, Impact and Action* (UNODC Paper, 2008) 103, 110

One may argue that the smuggling of human beings is a crime against a State: its immigration laws and its sovereignty.<sup>157</sup> The illegal movement of the smuggled individual represents a political issue relating to national security and border protection.<sup>158</sup> THB on the other hand involves deceitfully moving the victim against their will through coercion and force; the trafficked person is a victim of violations.<sup>159</sup> The victim of THB does not consent to be transported or initial consent is irrelevant due to the use of coercion, force or misrepresentation. The consequence of confusing THB with migrant smuggling in destination countries and countries of transit is that the victims of THB are often mistaken for illegal migrants and deported or forced to return to their country of origin. It is argued that deporting victims of THB under the guise of being illegal migrants is tantamount to shifting responsibility thereby guaranteeing impunity for traffickers by failing to prosecute them.<sup>160</sup>

A clear distinction between THB and smuggling cases is the treatment of the individual in the two situations. The Global Alliance Against Traffic in Women (GAATW) argues that smuggled migrants are treated as business associates by their smugglers, while victims of THB are manipulated and controlled by their traffickers.<sup>161</sup> The victim of trafficking is controlled using various forms of abuse, deception, threats, coercion, forced isolation and other forms of ill-treatment to ensure submissiveness.<sup>162</sup> Victims of THB

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<sup>157</sup> Nagle L. E., 'Selling Souls, The Effect of Globalization on Human Trafficking and Forced Servitude' (2008) 26 (1) WILJ, 131, 132

<sup>158</sup> Vayrynen R., 'Illegal Immigration, Human Trafficking and Organized Crime' (2003) 72 UNU/WIDER Discussion Paper 2

<sup>159</sup> FAQ2, Smuggling and Trafficking Intersections (GAATW, 2011) 7

<sup>160</sup> Ibid

<sup>161</sup> Ibid

<sup>162</sup> UNODC, 'Assistance for the Implementation of the ECOWAS Plan of Action against Trafficking in Persons' (Lastradainternational.org 2006)

do not voluntarily or willingly violate the law, they are coerced and forced; they have no choice other than to obey their trafficker. The acquisition of profit is the aim of the trafficker through continued exploitation of the trafficked victim. However, the smuggling relationship ends at the border after the smuggled individual has successfully been transported to their desired destination.<sup>163</sup>

Nonetheless, in some circumstances a situation that originally started as a case of smuggling, may later develop into one of THB. Therein lies the underlying reason for the confusion between the two concepts, they are intrinsically intertwined. The fact that a victim may have given their consent to one or more aspects of the trafficking process does not diminish the exploitative situation they face upon arrival in the destination country.<sup>164</sup> In many cases, the apparently consenting victim may not fully understand the conditions that await them or the type of work that they will be expected to engage in on arrival.<sup>165</sup> In this regard it is contended that while some trafficked persons may be willing to work for example in the sex industry, they did not expect to be kept against their will, beaten, raped, have enormous debts to pay off or have their travel documents confiscated.<sup>166</sup> Even where a victim has purportedly consented to be trafficked, that does not imply that the consent given was informed, free and voluntary.<sup>167</sup> Consequently, the circumstances in which the purported consent was given is the crucial factor in

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<[http://lastradainternational.org/lsidocs/15%20Assistance%20for%20the%20Implementation%20of%20the%20ECOWAS%20Plan%20\(UN\).pdf](http://lastradainternational.org/lsidocs/15%20Assistance%20for%20the%20Implementation%20of%20the%20ECOWAS%20Plan%20(UN).pdf)>

<sup>163</sup> Ibid

<sup>164</sup> Haynes D. F., 'Used, Abused, Arrested and Deported: Extending Immigration Benefits to Protect the Victims of Trafficking and to Secure the Prosecution of Traffickers' (2004) 26 HRQ 221, 231

<sup>165</sup> Ibid

<sup>166</sup> Ibid

<sup>167</sup> Schloenhardt A. & Bowcock H., 'The Role of Consent in Trafficking in Persons Prosecutions in Australia' (2014) UQ Research Paper, 8

determining how trafficking may be distinguished from smuggling in identifying victims of THB.

A fundamental distinction between migrant smuggling and THB is that while smuggling is the illegal movement of people across international borders for a fee; in THB the trafficker is facilitating the movement of that person for the purpose of exploitation.<sup>168</sup> Upon arrival in the destination country, the smuggled person is free. However, in cases of THB there is no need for an international border to be crossed before trafficking can occur; it occurs nationally and internationally, even within a community setting.<sup>169</sup> Accordingly, the case of a smuggled migrant who later becomes a victim of THB is an important legal consideration that can aid in illustrating the concerns inherent in the misidentification of victims.

#### **2.2.4 Smuggled Migrant turned Victim of THB**

A smuggled migrant after initially agreeing to be transported across an international border may subsequently become a victim of THB. Upon successful crossing of the border, the smuggled migrant may be divested of their freedom and treated as an instrument to aid profit generation. Rather than be set free at the border as was the original agreement, they are exploited and coerced into a situation of slavery and servitude or forced labour. Hai's story is helpful in explaining how this condition may arise. Hai a Vietnamese national, raised some money to arrange for travel to Europe to work in a restaurant. He was advised that he could earn a lot of money if he was able to travel and obtain work in Europe. After travelling through countless countries over a 14-month

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<sup>168</sup> UNODC, 'Assistance for the Implementation of the ECOWAS Plan of Action against Trafficking in Persons' (Lastradainternational.org 2006)  
<[http://lastradainternational.org/lisidocs/15%20Assistance%20for%20the%20Implementation%20of%20the%20ECOWAS%20Plan%20\(UN\).pdf](http://lastradainternational.org/lisidocs/15%20Assistance%20for%20the%20Implementation%20of%20the%20ECOWAS%20Plan%20(UN).pdf)>

<sup>169</sup> Ibid

period, he was eventually left at a service station in England.<sup>170</sup> Hai recounted how he was forced by his trafficker on arrival in England to water Cannabis plants to pay off the travel debt, locked away in confinement and fed every few days.<sup>171</sup>

The circumstance of Hai's case clearly illustrate that he was a smuggled migrant whose situation quickly turned into one of THB. Although he initially consented to the smuggling arrangement, he did not envisage that upon arrival he would have his freedom taken away become a victim of human trafficking through labour exploitation.<sup>172</sup> Hai was imprisoned for 24 months for a drug related offence (growing and watering cannabis) and deported after serving his sentence, the fact that he was a smuggled migrant turned victim of THB did not mitigate his punishment.<sup>173</sup> Hai's experience raises the vital question of whether a person can give genuine consent to their own exploitation or whether exploitation and consent are mutually exclusive. In Hai's case after his arrest, he was confused and too scared to tell the Police his trafficking experience. Thus, a solicitor advised him to plead guilty and he was sentenced to 24 months in an adults' prison and told he would be deported after he had served his sentence.<sup>174</sup>

It is an established legal principle that consent will be vitiated where it is obtained by force or threat of force, by fraud or deceit.<sup>175</sup> The concept of consent operates on the

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<sup>170</sup> Anti-Slavery, 'Stories of Trafficked People, Hai's story'  
<[http://www.antislavery.org/english/slavery\\_today/trafficking/personal\\_stories\\_hais\\_story.aspx#Jiera](http://www.antislavery.org/english/slavery_today/trafficking/personal_stories_hais_story.aspx#Jiera)>  
accessed 20 April 2015

<sup>171</sup> Ibid

<sup>172</sup> Ibid

<sup>173</sup> Ibid

<sup>174</sup> Anti-Slavery, 'Trafficking for Forced Criminal Activities and Begging in Europe'  
<[http://www.antislavery.org/wp-content/uploads/2017/01/trafficking\\_for\\_forced\\_criminal\\_activities\\_and\\_begging\\_in\\_europe.pdf](http://www.antislavery.org/wp-content/uploads/2017/01/trafficking_for_forced_criminal_activities_and_begging_in_europe.pdf)>  
accessed 25 June 2017

<sup>175</sup> EU Directive, art 2 (4)

presumption of individual autonomy and free will. Hence, consent will be legally ineffective if it is shown that there was such a disparity in the relative positions of the parties that the vulnerable person or weaker party was not in a position to choose freely.<sup>176</sup> In determining if there has been legally effective consent, an inequality between the individuals must first be proved, and subsequently the element of exploitation needs to be proven.<sup>177</sup>

The consent evaluation in the migrant smuggling-trafficking spectrum also applies to cases where a debtor willingly agrees to perform sexual or labour related activities as payment for having been transported across an international border.<sup>178</sup> The consent obtained in the case of a willing debtor is largely predicated on external pressures-such as social and economic hardship.<sup>179</sup> Nonetheless, the pertinent question here is what value does consent have when it is borne of desperation?<sup>180</sup> Even if a potential victim of THB has apparently consented to the prearranged work, is he also consenting to all of the illegal activities and exploitative circumstances that are attached to or resulting from the work?<sup>181</sup> It is important to establish that consent does not exonerate the trafficker from any form of wrong doing or responsibility for his actions. Specifically, consent should not invalidate or undermine the fact that THB is a wrong that penetrates into the core

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<sup>176</sup> *Norberg v. Wynrib* [1992] 2 S.C.R. 226

<sup>177</sup> *Ibid*

<sup>178</sup> Jones S. V., 'Human Trafficking Victim Identification: Should Consent Matter?' (2012) 45 *Ind. L.J.*, 483, 497

<sup>179</sup> *Ibid*, 507

<sup>180</sup> Haynes D. F., 'Exploitation Nation: The Thin and Grey Legal Liens between Trafficked Persons and Abused Migrant Laborers' (2009) 23(1) *Notre Dame JL Ethics & Pub Pol'y*, 18

<sup>181</sup> *Ibid*

value system of society, delineating human dignity and human rights of an individual.<sup>182</sup> The victim's voluntary decision to accept conceivably exploitative conditions abroad should not inhibit their right to be classed as victims of THB; nor should they be any less entitled to the protection and assistance that they deserve.<sup>183</sup> The voluntary nature of consensual trafficking forms a potential barrier to victim status. However, it is important to establish that consensually trafficked people have been more than smuggled – they have also been exploited. The resultant effect of the exploitation preceding from their smuggled experience places them in a grey area, somewhere between victim and complicit actor.<sup>184</sup> Denial of victim status will adversely affect those who did not consent but were unable to show lack of consent.<sup>185</sup>

Consequently, if consent is deemed irrelevant, the victim of THB is likely to be represented as a victim, and therefore the state will be inclined to accord victim status. Importantly, the treatment of the victims may differ depending on which instruments are ratified by each state and what those instruments provide for. Some difficulty may arise if one argues that the same rights should be accessed by those who evidently consented and those who did not; unless the legislation was drafted so that no distinction was drawn between the different types of victims.

On balance, the failure to identify a trafficked person as a victim of THB is likely to result in further denial of the person's rights. Therefore, states are obliged to ensure that proper identification are executed and have been done correctly. In addition, there is an

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<sup>182</sup> Ibid

<sup>183</sup> Schloenhardt A. & Bowcock H., 'The Role of Consent in Trafficking in Persons Prosecutions in Australia' (2014) UQ Research Paper, 8

<sup>184</sup> Elliot J., *The Role of Consent in Human Trafficking* (1<sup>st</sup>edn, Routledge 2014) 157

<sup>185</sup> Ibid

obligation on States to exercise due diligence in identifying traffickers, including those who are accomplices to the crime of exploiting and controlling trafficked persons. As already elucidated, the critical factor that differentiates THB from migrant smuggling is the element of coercion, force and deception throughout or at some point in the trafficking process; such coercion, force and deception being employed for the purpose of exploitation.<sup>186</sup>

Though, the elements that distinguish THB from migrant smuggling may sometimes be obvious, in most cases they are difficult to prove without proper investigation. The Palermo Protocol is silent on the identification of victims of THB; the fact that identification of victims is not discussed is a void in the instrument. However, this gap in the Palermo Protocol is taken care of by the provisions in the CoE Convention. The obligations on states created by the CoE Convention, clearly requires states to uphold an effective identification mechanism which will enable them to correctly identify victims of THB.<sup>187</sup> Regardless of the system of identification decided upon by member states, it is expected that the provisions of the CoE Convention should be applied with a view to protecting the victims and most vulnerable individuals.

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<sup>186</sup> FAQ2, Smuggling and Trafficking Intersections (GAATW, 2011) 13

<sup>187</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 10

## 2.3 Categorisation of Victims

### 2.3.1 The Pure/Ideal Victim

Studies in victimology and criminology have identified the pure or ideal victims. According to Christie the ideal victim is likely to be female and incredibly young or old. The victim is a virtuous and blameless individual, one who tends to fear crime and is able to elicit sympathy from society and victim status.<sup>188</sup> Christie further asserts that the 'ideal' victim is the one who generates the most sympathy from society. In a sense the ideal victim may be regarded as the little old lady on her way home at midday who has been robbed and hit on the head by hoodlum. This old lady who has spent the morning caring for her sick sister was hit on the head and has had her bag stolen. The hoodlum may be a physically imposing man of superior build.<sup>189</sup> This thief may subsequent use the money found in the stolen bag to buy drugs, thereby indicating that he is a wicked, inconsiderate person lacking a conscience or moral compass. The old lady in this example will be seen as the ideal victim and her unfortunate situation of theft will be viewed with sympathy. In contrast, a victim far removed from society's ideal may be a young man who has been physically assaulted by an acquaintance in a bar fight. The victim in this second example may receive significantly reduced sympathy even if his injuries are more severe. Hence, the society's responses to diverse types of victims show that victims must have power and visibility if they are to gain legitimacy as credible victims of human trafficking. This indicates that the society has varying perceptions of offenders as well as

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<sup>188</sup> Christie N., 'Ideal Victim' in Fattah E. A (ed) *From Crime Policy to Victim Policy* (1<sup>st</sup>edn, St. Martin's Press, 1986) 17

<sup>189</sup> *Ibid*, 1

victims. Christie argues that most real victims and real offenders are ordinary people, not the 'ideals'.<sup>190</sup> However, the ideal victims are the individuals who tend to fear crime.

Kearon and Godfrey also provide a historical account on victimology and their perspective may aid our understanding of the criminal victim. According to the authors, the examination of the symbolic role for the victim of crime, relies on the construction of a 'pure' and unambiguous victim. They argue that the identity of a pure victim is designed to engender unqualified public sympathy and support.<sup>191</sup> This illustrates the creation/identification of social types as pure victims. Pure victims in the context of social types would mean instances of the vulnerable widow, the 'plucky' orphan or the innocent maiden seduced into a life of vice and so on.<sup>192</sup> This indicates a shift in the nature/role of the victim of crime from an active individual to a generic symbolic model. The generic model victim is to hinged on public debates about crime and moral transgression. The complex fragmented and messy identities of real victims do not sit well with these ideal types and the symbolic melodramatic constructions of the victims of crime became entrenched in law and order during the late Victorian period.<sup>193</sup> These constructions of victims of crime from the Victorian period have shaped the debates on victimology for much of the twentieth century. By the end of the first world war this symbolic/mythic centrality of the victim in criminal justice narratives was firmly embedded and remained for most of the twentieth century.

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<sup>190</sup> Ibid

<sup>191</sup> Kearon T. and Godfrey J., 'Setting the Scene: A question of History' in Walklate S. (ed) *Handbook of Victims and Victimology* (2<sup>nd</sup> edn, Routledge, 2017) 25

<sup>192</sup> Hendler 2001 referenced in Kearon and Godfrey, Ibid

<sup>193</sup> Kearon T. and Godfrey J., 'Setting the Scene: A question of History' in Walklate S. (ed) *Handbook of Victims and Victimology* (2<sup>nd</sup> edn, Routledge, 2017) 25

Building upon Kearon and Godfrey's historical backdrop, Srikantiah further refers to the victim of human trafficking as an iconic victim. The iconic victim is one who is defrauded, forced or coerced into the trafficking situation.<sup>194</sup> The force, fraud or coercion complained about must be serious enough for a prosecutor or an investigator to deem the victim a good witness for the subsequent prosecution of the human trafficker.<sup>195</sup> A typical victim is perceived to have several attributes; they cooperate fully with law enforcement investigations, law enforcement assesses the person to be a good victim, in sex trafficking cases, the victim is often a woman or girl trafficked for sex. An evaluation of these characteristics collectively implies that a victim is one who passively waits for rescue by law enforcement authorities and upon rescue presents himself or herself as a good witness who cooperates with all law enforcement requests.<sup>196</sup>

The innocent victim paradigm has been put forth by many Governments and NGOs. This has created an image of the helpless victim.<sup>197</sup> However, not all victims fit this profile. Consequently, those that do not fit the typical victim representation are not regarded as trafficked victims.<sup>198</sup> Aronowitz argues that the circumstances that lead to human trafficking cases are seldom obtained through force or coercion.<sup>199</sup> Deceit has been

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<sup>194</sup> Srikantiah J., 'Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law' (2007) 87 (1) BULR, 157, 187

<sup>195</sup> Ibid

<sup>196</sup> Ibid

<sup>197</sup> Warren K. B., 'Troubling the Victim/Trafficker Dichotomy in Efforts to Combat Human Trafficking: The Unintended Consequences of Moralizing Labor Migration' (2012) 19 (1) Ind. J. Global Legal Stud. 105

<sup>198</sup> Aronowitz A. A., 'Human Trafficking – Victims of Human Trafficking: A Complex Issue' (2015) 8 DACEI, 5

<sup>199</sup> Ibid, 6

established as the foremost method utilized by human traffickers in recruiting victims of THB. Most victims are baited into trafficking situations through false promises of marriage, work or a new life in a flourishing State or geographical location.<sup>200</sup> Essentially, the extent to which they are aware of what awaits them at the end of their journey differs due to the different stories they are told at the start of their affiliation with their traffickers. An easy way to illustrate this evaluation is a scale of victimhood. This scale may be likened to the Plaintiff's claim in civil cases where the burden of proof is predicated on fair preponderance of the evidence. The preponderance of the evidence can be visualised as a scale representing the burden of proof, with the totality of evidence presented by each side resting on the respective trays on either side of the scale. If the scale tips ever so slightly to one side or the other, the weightier side will prevail. If the scale does not tip toward the side of the party bearing the burden of proof, that person's claim will not prevail.<sup>201</sup>

Similarly, with the victimhood scale, the left side of the scale represents victims who are forced and kidnapped into trafficking situations. The further to the left a victim lies, the more he or she is seen as a pure victim.<sup>202</sup> Those falling to the left of the scale provoke less sympathy and are therefore not regarded as victims in the true sense. Cameron assesses the victimhood scale by asserting that the degree of exploitation and victimization of trafficked victims varies, but fundamentally, all have been victimized and exploited on some level.<sup>203</sup> Allegedly, the idea that a person may be responsible for

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<sup>200</sup> Ibid

<sup>201</sup> *Santos v Providence*, et al. 09-CV-348S

<sup>202</sup> Aronowitz A. A., 'Human Trafficking – Victims of Human Trafficking: A Complex Issue' (2015) 8 DACEI, 6

<sup>203</sup> Cameron S. 'Trafficking of Women for Prostitution' in Cameron S. and Newman E. (eds) *Trafficking in Humans: Social, Cultural and Political Dimensions* (1<sup>st</sup>edn, United Nations University Press, 2008) 85

some of the decisions that resulted in their trafficking situation seems unattractive to governments and the media alike.<sup>204</sup> A preferred assessment is the simplistic view that sees the victim as blameless in all regard. Nonetheless, a strict view of a blameless victim is flawed because it does not consider trafficked victims who have displayed some agency or acted as co-conspirators to their trafficking situation. Accordingly, it is useful to assert that there is no typical victim of trafficking. They are not all simple, naive people who are tricked.<sup>205</sup> Even women who are educated and have high social status may be convinced to travel abroad for work; because they expect to save a lot of money after working abroad for a year.<sup>206</sup>

Remarkably, victimhood from the victim's perspective connotes a different application. Although, some element of falsehood and duplicity was employed in their recruitment, Aronowitz argues that trafficked persons do not always identify themselves as victims.<sup>207</sup> Even those who are identified by government officials and NGOs are often hesitant to admit that they are trafficked victims.<sup>208</sup> This may be due to the shame of having been exploited, fear of retribution against one's family or oneself, or loyalty to the trafficker.<sup>209</sup>

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<sup>204</sup> Ibid

<sup>205</sup> Banwell S. Phillips R. and Schmiechen M. 'Trafficking in Women: Moldova and Ukraine' (2000) Minnesota Advocates for Human Rights, 17

<sup>206</sup> Ibid

<sup>207</sup> Aronowitz A. A. 'Human Trafficking – Victims of Human Trafficking: A Complex Issue' (2015) 8 DACEI, 6

<sup>208</sup> Ibid

<sup>209</sup> Ibid

### **2.3.1.1 Factors which indicate Victim Status**

The task of assessing whether a person is a genuine victim of THB or not, can sometimes be a difficult task to undertake. There are of course several factors that may indicate or point to the fact that an individual is a current or potential victim of THB; such as whether the person's movements are restricted or controlled, whether they have been coerced or forced to carry out illegal offences and whether violence or threat have been employed to compel them to work against their will.<sup>210</sup> However the circumstances of each case will determine whether such a person is categorised as a victim by the authorities or not.

The Modern Slavery Act 2015 (MSA) has created a framework whereby victims are afforded protection when it is successfully proven that any offence/offences committed is a direct consequence of their trafficking circumstance. This defence when effectively substantiated will absolve the victim of liability for the acts committed while they were being exploited by their traffickers.

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<sup>210</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 55/25, 2000, art 3 (a)

The relevant section that provides for this defence is Section 45 and it specifies that:

“... a person is not guilty of an offence if the person is aged 18 or over when the person does the act which constitutes the offence; the person does that act because the person is compelled to do it, the compulsion is attributable to slavery or to relevant exploitation and; 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.”<sup>211</sup>

This provision is important because it highlights the key areas wherein the offence of THB may occur. The key areas include compulsion, exploitation of the victim and acts or activity similar to slavery. The section in the act is also significant because it makes specific provision for adult victims of human trafficking. Identifying and assessing whether an adult victim of THB has been exploited and enslaved can sometimes be difficult especially if the authorities require them to self-identify their status. The provision in section 45 connotes that the protection of victims is not left solely to referral mechanisms and witness protection.<sup>212</sup> But with the enactment of the act, victims who commit illegal criminal activity on behalf of other individuals will have a legal defence to prevent prosecution. Prosecution of victims of trafficking in England and Wales may be prevented when exploitation and victim status is properly proven in court.

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<sup>211</sup> Modern Slavery Act 2015, s.45 (1)

<sup>212</sup> Gerry F., ‘Veloso and Victims of Human Trafficking in England’ (2015) CL & J Blog, 179 (16) JPN 331

Although, the MSA provides a legal defence for adults and children for offences they were forced to commit, there is a list of more than 100 offences in schedule 4 of the act that the defence cannot be used for. The Group of Experts on Action against Trafficking in Human Beings (GRETA) argue that section 45 gives a narrow interpretation of the non-prosecution principle. According to GRETA, the exclusion of other offences in schedule 4 eliminates the possibility of withdrawing prosecution and punishment for this wide list of offences.<sup>213</sup>

The UK authorities have stated that the defence does not apply to certain serious offences such as sexual or violent offences, to avoid creating a legal loophole which will allow criminals to escape justice. However, it applies to offences which victims are typically forced to commit, including cannabis cultivation and others. Whilst the statutory defence also includes a list of offences for which it does not apply which include murder, manslaughter, kidnapping, false imprisonment, piracy and perverting the course of justice among others, the CPS explains the operation of section 45 in legal practice.

The prosecutor is required to consider all the circumstances of the offence without being offence specific. Hence, where the defence does not apply because the offence is too serious, the CPS is able to decide not to prosecute if it would not be in the public interest to do so. The court will also be able to stop the prosecution of a victim if the proceeding is found to be an abuse of process.

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<sup>213</sup> GRETA, “Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom” (Council of Europe 2016), Second Evaluation Round (2016) 21, 70

It is established in section 45 of the MSA that adult victims need to show that they were compelled to commit the offence, that compulsion is attributed to slavery or to relevant exploitation, and that a reasonable person in the same situation would have no alternative than to carry out the act. In the case of children, it must be shown that their action was a direct consequence of their exploitation and that a reasonable person in the same circumstances and with the same characteristics would execute the said act. GRETA notes that the reasonable person test indirectly introduces an element of compulsion which should not have to be proven in children's cases.<sup>214</sup> In response to this, the UK authorities have argued that the reasonable person test was created to ensure that a person's relevant characteristics which may include their age are clearly reflected. Hence, the fact that they are children, and that children are particularly vulnerable, should be taken into account when determining whether the defence should apply.

### **2.3.1.2 The Limited Application of section 45 Modern Slavery Act: Veloso Case**

In view of the provision of the modern slavery act, which establishes the relevant criteria to determine whether an individual is a victim of THB, it is pertinent to examine the case of *Mary Jane Veloso* (unreported).<sup>215</sup> This case is useful in illustrating the limited application of the defence in section 45 of the MSA to victims of human trafficking. Although the case concerns a victim of human trafficking convicted of drug trafficking in Indonesia, it raises the question of how to identify victims of trafficking that are forced to engage in other illegal offences not provided for in the MSA. For example, in the *Veloso* case, *Veloso*, a national of the Philippines was sentenced to death in October 2010

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<sup>214</sup> Ibid

<sup>215</sup> (2020) unreported

after she was caught with 2.6 kilograms of heroin at Yogyakarta airport, Indonesia. Veloso claimed she did not know that her recruiters had planted illegal drugs in the suitcase they had given her. She was scheduled for execution by the Indonesian authorities but was granted a stay of execution at the last minute.<sup>216</sup> Her offence for which she was being punished was drug trafficking and drug smuggling – heroin into Indonesia.<sup>217</sup> The evidence presented before the authorities revealed that Veloso was a victim of human trafficking and forced to work as a drug courier against her will by her recruiters. It is argued that to effectively tackle THB states may need to expand the range of individuals identified as victims of trafficking include persons that are forced to engage in the trafficking of drugs.<sup>218</sup> Therefore, where there is credible evidence that a person has been trafficked to commit illegal offences on behalf of individuals who make criminal profit; the State should divert that person out of the criminal justice system.<sup>219</sup>

*Veloso's* situation exemplifies the limited application of the non-prosecution principle defence in section 45 of the MSA. An initial assessment may lead one to presume that the situation is simply a case of drug trafficking and nothing further. Yet, the case is predominantly one of human trafficking. The statements taken during the investigation of the case revealed that the victim was innocent of all the accusations made against her. Hence, she did not deserve to be handed the death penalty. One reason for the initial misidentification of the victim as drug trafficker and not a victim of THB was the

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<sup>216</sup> Orendain S., 'Suspended Execution Puts Spotlight on Trafficking' (Voice of America, 1 May 2015) <<http://www.voanews.com/content/suspended-execution-of-philippine-woman-put-spotlight-on-trafficking/2744290.html>> accessed 5 May 2015

<sup>217</sup> Ibid

<sup>218</sup> Gerry F., Harre T., Naibaho N., Muraszkievicz J. And Boister N., "Is the Law an Ass When it Comes to Mules? How Indonesia Can Lead a New Global Approach to Treating Drug Traffickers as Human Trafficked Victims" (2018) 8 (1) AJIL, 166-188, 166

<sup>219</sup> Ibid

language barrier.<sup>220</sup> While investigating the case, communication was difficult because the accused person could not speak fluent English. Consequently, the translations of court proceedings were irregular and questionable. Bahasa Indonesia was frequently translated into her native Tagalog while her case was on trial.<sup>221</sup> Upon careful evaluation of the affidavit of the accused person, the Philippine law enforcement investigators disclosed that her illegal recruiter was responsible for coercing her to illegally smuggle drugs into the country.<sup>222</sup> There was credible evidence to show that the accused case was an undeniable victim of THB and had been illegally recruited through deceitful means to engage in the illicit activity. Another barrier to proper identification of the Victim as a victim of THB was the fact that she had no legal counsel for most of the court process. Thus, she was in a confused state for most part of the proceedings.<sup>223</sup>

Usually, the accused person's legal team are expected to explain key terms and important steps in the trial to enable the person to understand how the case is unfolding. It is submitted that if Veloso had been provided with legal aid to represent her at the start of the proceedings she may not have been convicted of drug trafficking in the first place. Having gone through the experience of being trafficked against her will, the effect of being convicted for the offence which she was compelled to carry out would certainly cause further psychological trauma to the victim.

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<sup>220</sup> Ibid

<sup>221</sup> Ibid

<sup>222</sup> Ibid

<sup>223</sup> Ibid

However, the progress in this case that led to *Veloso's* reprieve only occurred when her traffickers handed themselves in and she was enlisted as a witness to testify against them. One may argue that the outcome of this case would have been different if the trafficker had not stepped forward or presented herself to the authorities. It is important to point out here that *Veloso's* case had been appealed on two occasions by her legal team prior to this point and both appeals were rejected by the court.<sup>224</sup>

To effectively combat THB, states need to be proficient in identifying all the different types of victims. The task of diverting potential victims out of the different criminal justice systems operated by the various states in the international community, may be an arduous endeavour but it is not an impossible one. When there is credible evidence that a person has been trafficked and compelled to commit criminal offences on behalf of trafficking offenders, further investigation into the matter should be carried out. Otherwise, the individuals will be imprisoned for their part in the offence and the person may be viewed as an offender and not a victim of trafficking. This is where proper classification of victims of THB, may aid better understanding of the offence and a victim's circumstance. Categorising victims as either ideal, historical, location or transition victims may foster improved application of the non-prosecution principle and speed up the process of protection from the relevant authorities.

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<sup>224</sup> Ibid

### 2.3.2 Historical Victims

A person who is no longer in a THB situation may become either a historical, location, or transition victim depending on their individual circumstances. The writer of this study advocates for the human trafficking victim spectrum to be examined in trafficking cases. The victim spectrum inquiry upholds the argument that the inclusion of two additional classes of victims– the location and transition victims, to the discussion on THB is essential to address all the different groups of trafficked victims.

*Y v SSHD*, a case decided in the England and Wales high court, is a leading case law authority on the term historical victim. This case was decided before the enactment of the MSA in 2015. Hence, the court considered the non-prosecution principle contained in article 26 of the CoE Convention. A historical victim is a person who has succeeded in escaping or extricating themselves from their previous trafficking situation.<sup>225</sup> The person has been free from their traffickers for such a long time (three years or more have passed) that their case is viewed as a historic or a historical occurrence. They are no longer in a situation of exploitation, to the extent that the authorities conclude that they do not require any assistance or protection from the state.

A long period of time entails a time frame of three years or more as noted by the Lord Justice Aikens LJ in the case of *R (Atamewan) v SSHD*.<sup>226</sup> Similarly, in the *Y v SSHD* case, Philip Mott, sitting as deputy high court judge decided that two years was sufficient time to make a full recovery from an exploitative circumstance.<sup>227</sup> Thus, a time frame of

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<sup>225</sup> *Y v SSHD* [2012] EWHC 1075, para 39, 51

<sup>226</sup> *R (Atamewan) v SSHD* [2014] 1 WLR 1959, [2013] EWHC 2727, para 15

<sup>227</sup> *Y v SSHD* [2012] EWHC 1075, para 39

two to three years is deemed to be sufficient time for one to be free of their trafficking experience.

In certain circumstances a competent authority may have cause to believe that a historical victim's current condition has changed so much since the trafficking offence occurred; that the case is decided on the basis that the CoE Convention is inapplicable to their situation.<sup>228</sup> Very few victims of THB are still in a trafficking situation at the time their case is referred to the National Referral Mechanism (NRM). Primarily, to be referred to the NRM, the victim must have escaped or been rescued from their trafficking ordeal. Although the individual is free of the trafficking experience, the person may still be dealing with the aftermath of the situation. The title of historical victim has been used to explain that the victim's trafficking experience is a past event and not an on-going trafficking occurrence. The historical victim circumstance leads one to ask some questions. Principally, if a person has been a victim of human trafficking in the past but is not currently undergoing an exploitative experience, what reasonable protection from the state should they expect to receive, if any? Further, is the non-prosecution principle applicable to the historical victim's case or not?

In terms of state protection, one of the advantages of being accorded victim status is the recovery and reflection period that a person is entitled to. In some cases, a victim who has escaped or been rescued from an exploitative situation by a private citizen, without contacting the police thereafter for additional support, may be unable to receive the benefits of the recovery and reflection period. It is only when a person successfully escapes their trafficking situation with the help of the police or other law enforcement

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<sup>228</sup> Ibid

authorities that the individual may possibly be entitled to the benefit of the recovery and reflection period.

In considering whether the non-prosecution principle applies to the historical victim's situation, the person must first be properly identified as a genuine victim of trafficking or modern slavery. Hence, whether the person is an ideal victim or historical victim is irrelevant in the first instance. What is primarily required is sufficient proof that the person has been exploited and is a credible victim of human trafficking. The criteria used by the authorities to determine if a person is a historical victim or not comprises of; whether the person has suffered emotional or physical wounds from the trafficking experience and requires sufficient time to recover from it or not. Secondly, whether the person needs some time to recover from the influence of traffickers or not. Thirdly, whether the person needs to decide to cooperate with the authorities in respect of a trafficking related crime investigation or not; and whether the person was under direct or indirect influence of traffickers at the point in which they were referred to the competent authority.<sup>229</sup>

The authenticity of their condition as victims of THB in the past is not in dispute. However, at the time of the case assessment they do not meet the CoE Convention criteria. In determining whether a person is a victim of trafficking for the purposes of the CoE Convention, the status and individual need of the person is taken into consideration.<sup>230</sup> Thus, the CoE Convention aims to offer protection and assistance to ideal/pure victims who are in urgent need at the material time their case is referred. A

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<sup>229</sup> Home Office, 'Victims of Modern Slavery – Competent Authority Guidance' ([www.gov.uk](http://www.gov.uk), 2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/521763/Victims\\_of\\_modern\\_slavery\\_-\\_Competent\\_Authority\\_guidance\\_v3\\_0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/521763/Victims_of_modern_slavery_-_Competent_Authority_guidance_v3_0.pdf)> accessed 9 October 2016

<sup>230</sup> Supplementary Guidance to the Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 2005, para 9

reasonable grounds test is applied in assessing whether a person's situation requires state intervention or not.

When a person has been free from their traffickers for a long period of time (more than 3 years), has recovered and moved on with their life, then they are presumed to no longer require the protection afforded by the CoE Convention.<sup>231</sup> A recovery and reflection period of 45 days is applicable where a person is determined, to be a victim of THB. During this period, the individual concerned is expected to recover from the influence of their traffickers and/or take an informed decision on cooperating with the competent authorities.<sup>232</sup>

Weiss and Chaudary argue that the refusal to recognise trafficked persons who are no longer in a situation of exploitation as victims of THB is unlawful.<sup>233</sup> Due to the fact that they were not immediately referred to the authorities to be identified as victims; and several months or years may have passed since their ordeal took place, they have been labelled historical victims. Consequently, upon referral to the NRM they are informed that though they may have been victims in the past, for the purpose of the CoE Convention they are not victims and thus cannot enjoy the benefits that victim status confers such as: protection and assistance from the state, granted time to undergo a recovery and reflection period, repatriation and return to their home country where necessary.<sup>234</sup> A negative victim-status determination may also have an adverse effect on

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<sup>231</sup> Weiss A. & Chaudary S., 'Assessing Victim Status under the Council of Europe Convention on Action against Trafficking in Human Beings: the situation of "historical" victims' (2011) J.I.A.N.L 169

<sup>232</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 13

<sup>233</sup> Weiss A. & Chaudary S., 'Assessing Victim Status under the Council of Europe Convention on Action against Trafficking in Human Beings: the situation of "historical" victims' (2011) J.I.A.N.L 169

<sup>234</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 10, 12, 13, 16

the individual's asylum application as more often than not the same person at the UKVI is responsible for the outcome of these two separate applications.<sup>235</sup> Thus, victim status is an issue of utmost importance to asylum and immigration practitioners working with victims of THB because it is directly linked to the victim's right to be granted a residence permit and other ancillary privileges.

It is pertinent to examine the entirety of a person's circumstances, to reach the most appropriate decision at the time the case is referred to the NRM. In cases where there is support provided by external bodies, including NGOs, or police involvement in the investigation process, the competent authority will need to consult with all relevant parties to obtain a thorough assessment of the person's circumstances.

### **2.3.2.1 The NRM Mechanism, and the Historical Victim**

While the concept of an ideal or pure victim appears to be considerably well defined, the situation surrounding the historical victim's circumstance is not as easy to determine. Individuals who have been referred to the National Referral Mechanism (NRM) long after their exploitation has ended are referred to as historic victims and their claims are treated as historic in nature.<sup>236</sup> For example a person may have been exploited or trafficked overseas but subsequently travels to the UK of their own accord, independent of their trafficker. Having passed through a few countries on their way, it is assumed that their exploitation has ended and therefore they do not require protection from the state. An assessment is carried out by the NRM to determine if they meet the three requisite

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<sup>235</sup> Weiss A. & Chaudary S., 'Assessing Victim Status under the Council of Europe Convention on Action against Trafficking in Human Beings: the situation of "historical" victims' (2011) J.I.A.N.L 169

<sup>236</sup> Home Office, 'Victims of Modern Slavery – Competent Authority Guidance' (Home Office 21<sup>st</sup> March 2016)  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/509596/Victims-of-modern-slavery-competent-authority-guidance-v3.0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/509596/Victims-of-modern-slavery-competent-authority-guidance-v3.0.pdf)> accessed 28 March 2016

requirements of a historical victim. These three requirements are: whether the person is still under the influence of their trafficker, do they need time to recover from their trafficking ordeal and third, do they have any support and health concerns as a result of their trafficking ordeal.<sup>237</sup> According to the competent authority guidance by the home office, published March 2016, a person who has purportedly escaped their trafficking situation may still be considered to be a victim of THB under the CoE Convention provided they satisfy these three conditions.

The person must be physically present in the UK to receive NRM related protection and assistance.<sup>238</sup> The NRM was instituted in the UK in 2009 to meet the UK's obligations under the CoE Convention and from 31<sup>st</sup> July 2015, its reach extends to all victims of modern slavery in England and Wales following the implementation of the MSA.<sup>239</sup> The UK Visas and Immigration (UKVI) delivered the historic victim verdict to some trafficked victims. Notable cases of the historic victim verdict include the *R v LM and R v L* cases.<sup>240</sup> Hence, the fact that their exploitation occurred in the past should not preclude them from being treated as victims of THB. It is imperative to keep in mind that the trafficker may still have some control over the victim, thus if a person is classed as a historical victim, the authorities are still obliged to investigate the victim's claims.<sup>241</sup>

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<sup>237</sup> Ibid, 104

<sup>238</sup> Ibid, 103

<sup>239</sup>National Crime Agency, 'National Referral Mechanism' <<http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism>> accessed 30 March 2016

<sup>240</sup> *R v LM* [2010] EWCA Crim 2327, *R. v L & ors.* [2013] EWCA Crim 991

<sup>241</sup> Weiss A. & Chaudary S., 'Assessing Victim Status under the Council of Europe Convention against Trafficking in Human Beings: The Situation of 'Historical' Victims (2011) 25 IANL 168, 175

The debate rejecting the notion that historical victims are not victims in the real sense, is predicated on the fact that it is unlawful to disregard this class of victims.<sup>242</sup> This is because, declining to recognise historical victims as victims, implies that their claims will not be investigated. In addition, failure by the state to protect a historic victim denies the victim of their right under the CoE Convention to obtain the prescribed 30 days recovery and reflection period (45 days is the practice in the UK) and other assistance mechanisms available to them from the state.<sup>243</sup> The other assistance mechanisms consist of access to medical treatment, and access to education among other privileges.<sup>244</sup>

Consequently, courts dealing with judicial review proceedings challenging a state's failure to recognise a historical victim as a pure/ideal victim, may need to apply vigorous measures. Vigorous measures are required to ensure that the trafficked person is provided with a fair trial.<sup>245</sup> Dismissing a victim's claims because their trafficking circumstance occurred in the past is a violation of their rights. The human rights being violated include the right to life (art. 2 ECHR and HRA 1998), the right to personal liberty (art. 5), the right not to be tortured or treated in an inhumane way (art. 3), prohibition of slavery and forced labour (art. 4).<sup>246</sup> The right to life means that neither the Government nor a private citizen should try to end a person's life. It also means that the state should take steps to protect a person if their life is at risk, and relevant laws should be made to safeguard people's lives. Article 5 protects a person's rights to liberty and security. This relates to

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<sup>242</sup> *R (Atamewan) v SSHD* [2014] 1 WLR 1959, [2013] EWHC 2727, para 69

<sup>243</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 12 and 13

<sup>244</sup> *Ibid*, art 12

<sup>245</sup> Weiss A. & Chaudary S, 'Assessing Victim Status under the Council of Europe Convention against Trafficking in Human Beings: The Situation of 'Historical' Victims (2011) 25 IANL 168, 177

<sup>246</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) 1950 and the Human Rights Act 1998

protecting an individual's freedom from unreasonable detention. This means a person must not be imprisoned or detained without good reason. The action of stating that an individual is a historical victim, automatically inhibits the person from instituting court proceedings to challenge their detention, if they think it is unlawful.

In a practical sense, neither passage of time nor delay in instituting a claim should preclude a victim from conferment of the status of a victim of THB. The act of assessing victims as historic is contrary to the state obligations provided for in the Palermo Protocol, because it prevents the victim from receiving protection from the state.

## **2.4 Original Contribution to Knowledge**

Although the studies on human trafficking examined above provide valuable information on the pure and historical victim, there is a limitation in this area of research. Much of the legal knowledge has focused on only these two classes of victims. However, a significant or original contribution to the existing literature or knowledge, would be to include two additional classes of victims to the discussion on THB. The inclusion of these two classes of victims, may further improve our understanding of the offence of human trafficking. By improving our understanding of the offence, the application of the non-prosecution principle to individual trafficking cases may also be enhanced.

The author of this thesis has created a simple terminology to explain two additional classes/categories of victims. The term 'location' and 'transition' victims has been created to explain this new class of victims of THB. The author has defined these terms and explained the usual contexts in which victims of human trafficking may fall under these categories of victims. This examination has been undertaken, while making a comparison of the situation of the pure/ideal and historical victims.

The non-prosecution principle provides immunity or a defence from prosecution, for victims of human trafficking who have committed illegal acts, or criminal offences as a direct consequence of their trafficked status. When assessing applicability of the non-prosecution principle and determining eligibility of victims to use the principle in their defence, these two additional categories of victims illustrate the circumstances that may arise in a victim's trafficking experience. These circumstances range from a pure/ideal victim exploited in a different EU jurisdiction escaping to the UK for protection from their trafficker, or a prior pure/ideal victim evolving into a trafficking perpetrator. The current thesis will examine this area of categorisation of victims, with the goal of assessing effective ways in which the location and transition victim consideration may promote easy identification of trafficked victims. It is intended that this discussion will highlight clear markers for individuals, defence lawyers, the prosecution - CPS, the court and relevant law enforcement authorities to recognise.

#### **2.4.1 Location Victim**

As previously discussed, the non-prosecution principle is not applicable, until an individual is properly identified as a trafficked victim. The term 'location victim' of human trafficking, is a concept created by the writer, to consider a suitable approach, to promote justice from prosecution for victims of human trafficking. Giving a legal terminology to the different categories of trafficked victims, may aid fair and just judicial proceedings, by assessing possible areas for improvement of the application of the non-prosecution principle. This is because, law enforcement authorities may be aided in easily identifying a location victim when they come to them for help. Hence, a person who possesses the characteristics of a location victim may be supported by the authorities in a timely manner.

A location victim is an individual who has been trafficked or exploited in a different country/ legal jurisdiction but has migrated to the UK to escape their trafficking situation. The location victim may intend to seek asylum in the UK. In the process of the asylum application, it may be discovered that the individual has experienced situations of exploitation commensurate to human trafficking and modern slavery.

Specifically, the location where the trafficking offence has occurred is distinct from the country where the victim has chosen to seek asylum. The location and historical victims may share some attributes in common. For example, a location victim may also be a historical victim. That is, the trafficking situation may have occurred two to three years prior to the victim's judicial review of their case in the UK (historic) and exploitation may have happened in a different legal jurisdiction from the UK (location). Conversely, there are instances where a historical victim may not have the characteristics of a location victim concurrently. This may occur when even though a victim's trafficking experience may have been historic, when the situation has occurred within the jurisdiction of the UK alone and not in a different country, then the person is not a location victim. Further discussion on the circumstance of a location victim and similar attributes they may have in common with other trafficked victims is considered in chapter five of this thesis.

This research will focus on the location victim who has been exploited in an EU member state. In England and Wales, the claim of the location victim exploited in an EU member state is often examined under the Dublin III Regulation. The location victim may primarily encounter law enforcement officers/the authorities as asylum seekers.<sup>247</sup> It is often during the process of instituting an asylum claim that it may be discovered that a person has experienced exploitation in a different jurisdiction. The Dublin III

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<sup>247</sup> *Regina (MN) v SSHD; Regina (IXU) v SSHD* [2021] 1 WLR 1956, [2020] EWCA Civ 1746

arrangement establishes the criteria and mechanisms for determining the EU member state responsible for examining an application for international protection lodged by a third-country national or a stateless person.<sup>248</sup> The objective of the regulation is to prevent asylum seekers from being sent from one country to another; and, to avoid abuse of the process whereby an asylum seeker may submit several applications for asylum to increase their chances of approval. Before a decision is made whether to transfer the victim to another state, a personal interview is given to assess their circumstance.<sup>249</sup>

A migrant who claims to have been exploited is likely to be far removed from their trafficking situation when they have travelled overseas independently of any alleged trafficker to the UK. Especially when they have over a period passed through several other countries; they are very unlikely to be considered under the CoE Convention. Nonetheless, it is entirely conceivable that someone who has fled to the UK to escape an ongoing trafficking situation will still be traumatised by their experience; and unless the case meets the Dublin III arrangements, will need to be afforded the help and protection in the UK that is offered under the CoE Convention.<sup>250</sup> In such cases the competent authorities are required to pass on all relevant details of the alleged crime to the party in the territory in which the offence was committed.<sup>251</sup>

For instance, a victim who was exploited in Albania then flees to the UK may apply for refugee status in the UK. Or they may be considered a location victim and returned to

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<sup>248</sup> Regulation (EU) 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national or a stateless person [2013] OJ L180, art 3

<sup>249</sup> *Ibid*, art 5

<sup>250</sup> *E v SSHD* [2012] EWHC 1927

<sup>251</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 27

Albania for consideration of their trafficking case if for example, a refugee status application has been denied. This logic also applies to a person who has been trafficked in Vietnam but travelled to the UK to escape their trafficking situation. The individual who has escaped from Vietnam to the UK could be regarded as a location victim. This is because the trafficking experience occurred in Vietnam which is a different jurisdiction from the UK. In this case, before assessing whether the victim's situation measures up to the required standard of proof and reasonable grounds, the propensity for trafficking in the home country should first be determined.<sup>252</sup> The United States (US) State Department has observed that Vietnam as a source country does not fully comply with the minimum standards required by states in international law to efficiently protect trafficked victims.<sup>253</sup> The "I suspect but cannot prove" is applied by assessing whether a reasonable person would be of the opinion that, having regard to the information in the mind of the decision-maker there were reasonable grounds to believe that the individual concerned had been trafficked.<sup>254</sup> Reasonable suspicion cannot be ascertained on the basis of the victim's appearance alone, rather reliable information of the claimant's specific behaviour is required to determine the claim. The reliable supporting intelligence or information obtained should be precise and up to date. Hence, the single competent authority (SCA) is required to obtain all available information from the first responder (National Crime Agency (NCA), police forces, refugee council among others). From April 2019, the SCA is now responsible for carrying out this function. Information on any subsequent interviews given in police stations should also be obtained to enable

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<sup>252</sup> *R (Hoang) v SSHD* [2015] EWHC 1725, para 58

<sup>253</sup> US State Department Trafficking in Persons Report (June 2013)

<sup>254</sup> *R (Hoang) v SSHD* [2015] EWHC 1725, para 58

thorough assessment of a victim's claims.<sup>255</sup> On balance, the relevant evaluation in deciding a victim's claims should proceed from the facts of the case. The court should also assess whether the victim's account of past experiences was given in a detailed and consistent matter.<sup>256</sup>

The inclusion of the location victim to the discussion of THB may be beneficial in refining our understanding of the offence. Sometimes, an individual who has voluntarily migrated to a destination country may experience a change of circumstance where coercion, force and threats are used to compel them to engage in illegal criminal activity. Alternatively, on arrival or while residing in a destination country they may find that their expectations of work and life are not met but instead they are being exploited. In this regard, Vijayarasa argues that a one-sided perspective of the offence of THB may shift attention away from obvious links between migration, closed borders, and trafficking.<sup>257</sup> A one-sided view of the offence may not acknowledge the factors that drive a victim's decision-making and expectations.<sup>258</sup> The aspiration to improve one's standard of living may be a factor that could influence the victim's decision making. The ambition to obtain financial independence may result in the potential victim travelling illegally into the UK. However, even though the individual has actively participated in illegal travel into Britain, this does not mean that they were not subsequently exploited upon their arrival. Thus, the victim's circumstance may change from an illegal migrant into a victim of human trafficking. Similarly, with the location victim, the fact that the individual was

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<sup>255</sup> Ibid

<sup>256</sup> Ibid, para 59

<sup>257</sup> Vijayarasa R., *Sex, Slavery and the Trafficked Woman: Myths and Misconceptions about Trafficking and its Victims* (1<sup>st</sup>edn, Ashgate Publishing Limited 2015) 85

<sup>258</sup> Ibid, 88

exploited or trafficked in a different country/legal jurisdiction, should not preclude them from retaining their status as victims of human trafficking.

#### **2.4.1.1 The Location Victim and Dublin III Regulation**

It has already been established in this chapter that a location victim is an individual who been exploited in a different country/countries but has migrated to the UK to escape from their trafficking situation. Such a person may have travelled to the UK on their own, independent of their trafficker. Hence, they may no longer be under the trafficker's influence. Importantly, when the victim has passed through several other countries over a period; they are very unlikely to be considered under the CoE Convention.

Nonetheless, it is entirely conceivable that someone who has fled to the UK to escape an ongoing trafficking situation may still be traumatised by their experience; and unless the case meets the Dublin III arrangements will require the help and protection in the UK that is offered under the CoE Convention. The Dublin arrangement is operated by all EU member states and essentially provides for a six-month time limit for the return of asylum seekers to the state which has accepted responsibility to decide their claim.<sup>259</sup> In such cases where the matter has been referred to a different country or state, the competent authority is required to pass on all relevant details of the alleged crime to the party in the territory in which the offence was committed.<sup>260</sup>

An individual may have travelled from a country where one or more of the three constituent elements of trafficking took place, but on arrival in the UK has succeeded in

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<sup>259</sup> Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national

<sup>260</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 27

fleeing their trafficker and escaping the trafficking situation. In *E. v. SSHD*<sup>261</sup> the court examined the submitted evidence, where the individual had travelled through a few countries before arriving in the UK. Upon identification by a first responder, it was reported that the individual had travelled to the UK of their own free will and had not experienced exploitation in the UK. The relevant issues for determination in the case were whether the claimant had any reasonable grounds to challenge the defendant's decision that the claimant was not a victim of trafficking; and whether the defendant was out of time to return the claimant to Norway under the terms of the Dublin III regulation.<sup>262</sup>

The decision reads in part:

*“Your case has been carefully considered by a Competent Authority following the decision that there were reasonable grounds to believe that you could be a victim of human trafficking. However, after further consideration of your case it has been concluded that while you may have been trafficked to Sweden you were not further trafficked to the United Kingdom. The Competent Authority has concluded that on the balance of probabilities you have not been trafficked to the United Kingdom.”*<sup>263</sup>

In reaching this decision the court considered the fact that the claimant had escaped to the UK from her trafficker in Sweden and then travelled to Norway and finally to the UK. The claimant had disclosed to the social workers in Norway of the threat she had received; consequently, she was placed in foster care. The defendant contended that there was no evidence of deception or coercion to persuade the claimant to come to the UK, there was no evidence that the alleged trafficker had attempted to contact the claimant in

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<sup>261</sup> [2012] EWHC 1927

<sup>262</sup> *Ibid*, para 1

<sup>263</sup> *Ibid*, para 12

the UK, and the Norwegian authorities had not failed in their duty of care to safeguard the claimant by deciding to return her to Ethiopia.<sup>264</sup>

The high court considered the claimant's challenge of the defendant's decision on the following reasonable grounds: does the claimant possess support and health needs as a result of the exploitation, does the claimant need time to recover from their trafficking ordeal, and is the claimant still under the influence of the trafficker? It is also important to point out that a person presenting themselves as a victim must be physically present in the UK to be capable of receiving protection and assistance from a competent authority in the UK under the CoE Convention.<sup>265</sup>

It is submitted that whether a person has been trafficked in the UK or elsewhere is not of utmost importance; the relevant assessment should be whether the circumstances of an individual's case require them to be given protection and assistance under the CoE Convention.

#### **2.4.2 The Law and Its Applicability to Victims – Historical and Location Victims**

It may be contended that the language of the CoE Convention was not written with a view to exclude historical victim and/or location victims. The provision in article 10 particularly at paragraph 2, points to the fact that an individual does not have to be in a current or recent situation of trafficking to fall within the scope of the article. Neither the CoE Convention nor its explanatory report possesses an adequate definition of the term victim. Thus, it is worthwhile to interpret the provision of the CoE Convention in accordance with the Vienna Convention on the Law of Treaties. The Vienna Convention

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<sup>264</sup> Ibid, para 13

<sup>265</sup> UKBA Guidance for the Competent Authorities, p 26

specifies that treaties should be construed in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.<sup>266</sup>

A main aim of the CoE Convention is to protect the human rights and dignity of the victims of trafficking, guarantee gender equality, ensure effective investigation and prosecution, and design a comprehensive framework for the protection and assistance of victims and witnesses.<sup>267</sup>

Failure to acknowledge historical victims and location victims is a deviation from the aims and rights the CoE Convention was created to protect. These two categories of victims may still be experiencing trauma because of the ordeal they have faced in the hands of their traffickers. If the legislation and authorities were to include a provision and system that recognises their special situation; it may ultimately lead to the apprehension of their traffickers and subsequently, a means to curb the criminal act of trafficking. Thus, even if the human trafficking offence had occurred in the distant past, the culprits will be unable to go free without being held accountable for their crimes.

The positive obligation on the part of states to identify victims of THB also implies that historical and location victims may fall into the class of trafficked victims that require protection from the law. Due to the very nature of the offence of trafficking victims are often unable to self-identify themselves at the material time that the trafficking offence is taking place. They are too traumatised to present themselves as victims because of the psychological and physical suffering they have endured.<sup>268</sup>

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<sup>266</sup> Vienna Convention on the Law of Treaties, 1969, art 31 (1)

<sup>267</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 1 (b)

<sup>268</sup> *Rantsev v Cyprus and Russia* (Application No. 25965/04) (2010), para 320

Therefore, identification of victims of THB is vital because of the privileged protection and other ancillary rights that follow under the CoE Convention. The rights conferred on a victim include: the right to information and legal assistance in order to obtain compensation; the right to a minimum 45-days reflection and recovery period during which the person cannot be expelled; the right to psycho-social and material support, including accommodation and emergency medical treatment; the right to be considered for a residence permit either because of the assistance the person can provide in the investigation or because of the person's personal situation.<sup>269</sup> In assessing victim status, the ECHR is also instructive in explaining how individuals are protected under the convention.

### **2.4.3 Victim Status Under the European Convention on Human Rights (ECHR)**

The ECHR is an international convention, created with the intent of providing protection of human rights and political freedoms in Europe. The ECHR may be examined alongside the Vienna Convention to provide some clarity on the application of the CoE Convention. The term victim is defined in article 34 of the ECHR as any person, non-governmental organisation or group of individuals claiming to be a victim of a violation. One important distinction between the CoE Convention and the ECHR is the time limits for application. Under the CoE Convention an applicant may render his or her application inadmissible by not lodging it within six months of the exhaustion of domestic remedies. However, the ECHR does not prescribe any limitation of time within which to file an application. If the claimant files after the six months have lapsed, the person is no less a victim of violation under the terms of the ECHR. The argument of the French government in

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<sup>269</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 15, 13, 12 and 14

*Siliadin v. France*<sup>270</sup> is similar to the position taken by the UKVI in relation to historical and location victims.<sup>271</sup>

The Paris court ruled that the applicant had long escaped the situation of trafficking by the time she lodged her complaint with the court. Her application challenged the inadequate measures the French authorities had taken against those who had exploited her. The trial court opined that the term victim in the context of article 34 of the ECHR referred to the person directly affected by the act or omission in issue.<sup>272</sup> A decision or measure favourable to an applicant is not in principle sufficient to deprive him of his status as a victim unless the national authorities have acknowledged either expressly or in substance and then afforded redress for the breach of the convention. The learned Judge found that the question of victim status was bound up with the substantive issues of the case.

In addition, the European Court of Human Rights (ECtHR) has provided guidance of victim status and how/when this can be lost. The fact that there has been a decision or measure that has been made in the favour of applicants does not in itself deprive them of their status as victims. Even where a matter has been resolved, justifying the striking out of an application does not mean that a person is no longer a victim.<sup>273</sup> This principle was applied in *Stojanovic v Serbia*<sup>274</sup> where the court decided to strike out the applicant's case

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<sup>270</sup> *Siliadin v France* (Application No. 73316/01) (2005)

<sup>271</sup> *E v SSHD* [2012] EWHC 1927

<sup>272</sup> *Siliadin v. France* (Application No. 73316/01) (2005), para 62

<sup>273</sup> European Convention on Human Rights 1950, art 37 (1) (b)

<sup>274</sup> *Stojanovic v Serbia* (Application No. 34425/04) (2009)

but declared that this was because the matter had been resolved under article 37 (1) (b) of the ECHR and not because the victim had lost his victim status under Article 34 ECHR.

The legal consideration of whether a person is a victim for the purposes of the CoE Convention and the ECHR are two distinct issues. The situations are different because, being a victim under the ECHR is not dependent on whether the individual requires protection or assistance as the CoE Convention prescribes. Rather, a person only loses their victim status when the national authorities have acknowledged that they have committed a violation and taken the necessary steps to redress it.<sup>275</sup> It is argued that this notion of a victim is flexible and should apply a fortiori (with strong reason) to victims of trafficking considered under the CoE Convention.

The CoE Convention specifies that a victim shall mean any natural person who is subject to trafficking in human beings as defined in the article.<sup>276</sup> The definition of human trafficking in the convention consists of a situation of exploitation where the means of threat or use of force has imposed on a person.<sup>277</sup> It is submitted that the definition of the term victim in the CoE Convention is inadequate. The definition is inadequate because it does not consider all classes or categories of victims but takes a limited approach in assessing a person's circumstance. The definition of a victim is relevant to the effective implementation of the non-prosecution principle. This is because, the principle is inapplicable to a victim's case unless and until they have been properly identified as a

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<sup>275</sup> Adam Weiss & Saadiya Chaudary, 'Assessing Victim Status under the Council of Europe Convention on Action against Trafficking in Human Beings: the situation of "historical" victims' (2011) J.I.A.N.L 175

<sup>276</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 4(e)

<sup>277</sup> Ibid, art 4(a)

credible victim of human trafficking. Thus, a clear definition of the term victim is required to promote protection from exploitation.

Where the state authorities were or ought to be aware that a person had been or was at real and immediate risk of being trafficked, there is an obligation to remove the individual from that situation or risk.<sup>278</sup> A victim does not lose his or her status because of the mere passage of time. Even when a person's situation has improved due to a change in location, the person may still be at risk of being re-trafficked.

## **2.5 Transition Victim: Victim Turned Perpetrator / Trafficking Offender**

The author of this study defines a transition victim as an individual who has had their status altered from a pure/ideal victim of human trafficking, into a recruiter of other individuals for purposes of exploitation. A transition victim may also be a person who has turned into a perpetrator of serious criminal offences such as murder or manslaughter. The transition victim has undergone a transformation from a vulnerable individual in need of protection into a perpetrator of the offence of THB. Often, the victim turned trafficker is in a difficult situation because in many cases even though they are controlling other victims, they are sometimes being controlled themselves by people who are above them in the hierarchy.<sup>279</sup> An illustration of this criminal set up is the Italian crime groups where the main activities are carried out by women including the recruitment and control of victims.<sup>280</sup> The victim-turned trafficker paradigm is also prevalent among children

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<sup>278</sup> *Rantsev v. Cyprus and Russia* (Application No. 25965/04) (2010) para 286

<sup>279</sup> Kangaspunta K., 'Trafficking in Persons' in Smith C. J, Zhang S. X. and Barberet R. (eds), *Routledge Handbook of International Criminology* (1<sup>st</sup>edn, Routledge 2011) 185

<sup>280</sup> Cauduro A., Di Nicola A., Fonio C., Nuvoloni A. and Ruspini P, 'Innocent when you dream: Clients and Trafficked Women in Italy' in Di Nicola A, Cauduro A, Lombardi M, Ruspini P. (eds), *Prostitution and Human Trafficking, Focus on Clients* (1<sup>st</sup>edn, Springer 2009) 33

forced into trafficking situations at an early age. For the child victim who was sexually exploited, some of them form a close bond with their trafficker such that when they are adults, they assist their former trafficker in recruiting and exploiting other young girls.<sup>281</sup>

The concept of a transition victim has not yet been acknowledged by the courts in England and Wales. Due to this lack of recognition, the transition victim is often treated the same as a pure or ideal victim. It is intended that by contributing to the knowledge in the area of categorisation of victims, a new set of legal rules will be created to apply exclusively to the transition victim's circumstance. Currently, the procedure for prosecuting a transition victim is the same as any credible victim of THB. It is comprised of a three-step process. This three-step process requires that prosecutors should consider first if there is a reason to believe that the person on trial has been trafficked. If so, then consider whether there is clear evidence of a credible common law defence which will result in discontinuing the case on evidential grounds. Thirdly, where the offence may have been committed because of compulsion arising from the trafficking situation, prosecutors are obliged to examine whether public interest will be upheld by prosecuting the parties or not.<sup>282</sup> There is usually no reason not to prosecute a transition victim. That is, the mere fact that the offender was once a trafficked victim does not imply automatic pardon from the court.

In deciding whether to prosecute a transition victim for human trafficking offences, their level of culpability and criminal intent may first be assessed. Broad argues that it is difficult to judge the intricacies of victim-based coercion and how active a part the

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<sup>281</sup>Kizlaite & Anor v. R. [2006] EWCA Crim 1492

<sup>282</sup> *LM & Ors*, [2010] EWCA Crim 2327, para 10

individual has played in exploiting other victims.<sup>283</sup> This is because a strict view of the victim/trafficker dichotomy does not take into consideration the grey area in the law where victimisation and perpetration occur simultaneously. It is difficult to establish how far they are exercising their freewill and consequently determine their level of culpability. Prosecuting the transition victim presupposes that there is an extent to which their previous victimisation may be used as a justification for pardoning their criminal activity. However, the criminal justice system is obliged to consider a line which has been crossed by exploiting other vulnerable individuals for trafficking purposes. A pardon to transition victims based on their past status as victims, is still unknown and not currently applied in the UK criminal justice system. Essentially, despite knowledge of their involvement as victims of trafficking, the legal and moral frameworks lead them to be treated and punished as offenders who have made a free choice.<sup>284</sup>

Closely linked to the theme of previous victimisation is the fact that trafficking by its very nature involves some form of joint effort or group collaboration. It is not an offence that can be executed as a solo effort. Hence, transition victims who commit criminal offences often carry out trafficking violations with someone they are close to. This situation is especially true for female trafficking offenders who have over time formed intimate relationships with their co-defendants. These women find it difficult to give evidence against intimate partners who have been abusive to them, but whom they have nonetheless been complicit with and dependent on.<sup>285</sup>

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<sup>283</sup> Broad R., 'A Vile and Violent Thing': Female Traffickers and The Criminal Justice Response' (2015) 55 BJC 1058, 1066

<sup>284</sup> Ibid

<sup>285</sup> Ibid, 1068

### 2.5.1 Probable Reasons Why Victims Turn into Trafficking Offenders

There are some probable reasons which may turn victims of trafficking into trafficking offenders. Firstly, they may be so used to the business of human trafficking that they are unable to comprehend the existence of any other type of work.<sup>286</sup> Secondly there are those that have been trafficked as child victims into labour exploitation, sexual exploitation or domestic servitude who may be obliged to follow the same career path because they have not recovered from their trafficking experience and are still coping with the outcome of the ordeal.<sup>287</sup> Thirdly, some former victims may find that they are heavily reliant on their exploiter/trafficker such that they are unable to survive without them and are afraid of venturing out on their own.<sup>288</sup> When they make any attempt to start a new life and seek other job opportunities they find that the prospects are few and difficult to obtain. Some transition victims do not even consider that they are doing anything wrong or that they are breaking the law, they see it as a natural extension of their previous employment.<sup>289</sup>

The common cases of transition victims are usually female victims who become offenders. They may have originally started out as victims but are subsequently promoted to the next step in the criminal trajectory. This argument assumes that the offender is working in a team as part of an organized crime group. However, traffickers can be either male or female; they may work as part of a family or business unit, they may be alone or with partners or a member of a crime group.<sup>290</sup> The victim turned trafficker is caught in

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<sup>286</sup> Ibid

<sup>287</sup> Ibid

<sup>288</sup> Ibid

<sup>289</sup> *LM, DG, and MB in LM & Ors v. R.* [2010] EWCA Crim 2327

<sup>290</sup> Kangaspunta K., 'Trafficking in Persons' in Smith C. J., Zhang S. X., and Barberet R. (eds), *Routledge Handbook of International Criminology* (1<sup>st</sup> edn, Routledge 2011) 185

a quagmire because in many cases even though they are controlling other victims, they are sometimes being controlled themselves by people who are above them in the hierarchy.<sup>291</sup> An illustration of this criminal set up is the Italian crime groups where the main activities are carried out by women including the recruitment and control of victims.<sup>292</sup> Apart from Italy, Burma is another country where transition victims have been detected. In 2010 the Burmese police reported that 100 of the human traffickers arrested were once victims of THB.<sup>293</sup> The circumstance of victims turning into traffickers may appear unusual. One would expect that having gone through the traumatic experience of human trafficking; these individuals would be more inclined to help other potential victims rather than recruit them to be trafficked. The police reports established that the victims had been trafficked from Burma into China and Thailand for forced labour, sexual exploitation and forced marriages.<sup>294</sup> Upon discovery of their status as victims of THB they were sent back to Burma and in many cases deported without any monetary compensation or support.<sup>295</sup> Certainly, being returned to their home country without any compensation or support would imply that they will experience financial difficulty and emotional agony. The decision by transition victims to recruit other individuals for exploitation may also be motivated by a type of revenge to get back at the system that had failed to keep them safe when they needed protection.

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<sup>291</sup> Ibid

<sup>292</sup> Cauduro A., Di Nicola A., Fonio C., Nuvoloni A. and Ruspini P., 'Innocent when you dream: Clients and Trafficked Women in Italy' in Di Nicola A., Cauduro A., Lombardi M., Ruspini P. (eds), *Prostitution and Human Trafficking, Focus on Clients* (1<sup>st</sup>edn, Springer 2009) 33

<sup>293</sup> When Victims Become Traffickers <<https://cjaye57.wordpress.com/2010/08/28/when-victims-become-traffickers/>> accessed 13 April 2015

<sup>294</sup> Ibid

<sup>295</sup> Ibid

It may be argued that the lack of support for victims has the inclination to trap them in the trafficking cycle. Some victims may be trafficked repeatedly, re-trafficked and re-victimised so much that it becomes a way of life. If the person is unable to break the trafficking cycle, they may resort to becoming traffickers and offenders themselves.<sup>296</sup> The victim-turned trafficker paradigm is also prevalent among children forced into trafficking situations at an early age. For example, a child victim who was sexually exploited may form a close bond with their trafficker. This close bond may result in the prior child victim assisting their former trafficker in recruiting and exploiting other young people when they grow up into adulthood.<sup>297</sup>

The court considered the public interest requirement in the *LM & Ors* case, when deciding whether to prosecute offenders who were once trafficked victims but had transitioned into traffickers. The accused persons were three female transition victims convicted of the offence of trafficking others for the purpose of prostitution and sexual exploitation. The prosecution's case against them was that although they had originally been victims of THB themselves, they had now assumed the role of exploiting and trafficking others. The evidence clearly disclosed that they had played an active role in introducing the complainants to the sex industry and that they had used sexual abuse, threats, and violence to facilitate compliance from the complainants. The defendant's guilty pleas were accepted by the prosecution on the basis that they had themselves been coerced, trafficked, and beaten into prostitution.

It can sometimes be a difficult task for the court to give judgment on a case where the defendant is a transition victim. This task is even more arduous where the defendant still

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<sup>296</sup> *LM, DG, and MB in R v LM & Ors* [2010] EWCA Crim 2327

<sup>297</sup> *R v Kizlaite & Anor* [2006] EWCA Crim 1492

retains some nexus or connection to the trafficking offence. Since the cycle of abuse can sometimes be hard to break, the trafficking offenders use this to their advantage by turning those who had previously been trafficked into exploiters of others. When such circumstances arise, the prosecution is obligated to examine the case carefully and decide whether the offence committed is serious enough, despite any nexus with trafficking to result in prosecution.<sup>298</sup>

On balance, the pertinent factors to consider in determining how to proceed with a case where a transition victim is involved is the alternatives reasonably available to the defendant, the degree of continuing compulsion and the gravity of the offence committed.<sup>299</sup> The prosecutors in the *LM & Ors* case had been misguided, because after establishing that the defendants had been victims who later became exploiters; they failed to re-examine this fact at a later stage in the course of the proceeding. There is a need to recognise all classes of victims, as refusal by the state to accept any class of victims will be regarded as an injustice and a further infringement on the rights of a trafficked victim. It may be regarded as a further infringement because the trafficking offender has already violated the victim's human rights through the offence of THB, by restricting their free will, freedom of choice and liberty.

An additional discussion on the victim spectrum and its relevance to the different categories of victims is discussed in chapters 5 and 6 of this thesis.

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<sup>298</sup> Ibid, para 14 (v)

<sup>299</sup> Ibid

## Conclusion

Having examined the various legal issues relating to the identification and categorisation of victims of THB, a victim-focused approach is essential. The state and the relevant law enforcement authorities should be fully equipped to combat the offence of THB. The victims of THB should be assisted and supported to acquire access to legal aid, shelter, medical care, and counselling to reduce the trauma they have encountered and successfully re-integrate them back into society. A victim-focused approach will strike a careful balance between the security needs of the state and society's need for the restoration of human rights to the victim.<sup>300</sup> When victims are assured of protection by the state, they may be willing to voluntarily provide information on human trafficking and serve as witnesses. They will be encouraged to tell their stories in court, thereby achieving justice in the process.<sup>301</sup> The best way to foster cooperation of victims is through providing them with protection and assistance at the time they need it the most. When all the relevant parties, including enforcement agencies, can work together successfully with a common goal in sight, the traffickers will be apprehended efficiently, and the victim of THB will be able to continue life as a bona fide member of the society. Further, the evidence suggests that victims are not being identified properly because either the statutory authorities do not recognise them as victim when they are interviewed, they do not view themselves as victims or have decided to stay with their trafficker/exploiter. It has been established in this chapter that there is an inconsistent approach to the proactive work to identify and discover victims of THB; and a greater general awareness of the crime of THB needs to be undertaken.

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<sup>300</sup> Trafficking in Persons Report (United States Department of State, Publication 11407, 2007) 37

<sup>301</sup> Ibid

This chapter has considered the regime of identification and categorisation of victims in furtherance of promoting a better and improved application of the non-prosecution principle. The next chapter will discuss unfulfilled state obligations and victim status in pursuance of promoting a clear understanding of why victims of human trafficking are being prosecuted for illegal activities in the first place.

Unfulfilled state obligations and inadequate victim status attainment have been determined to be two of the main reasons that victims of trafficking are prosecuted for criminal offences which have occurred as a direct consequence of their trafficking circumstance. Chapter three will examine this occurrence and discuss ways of improving the current practices.

## **CHAPTER THREE**

# **THE PALERMO PROTOCOL AND STATE OBLIGATIONS IN INTERNATIONAL LAW**

### **3.1 Introduction**

State obligations in international law is the focus of this thesis. However, reference is made to the MSA in the UK and EU instruments. The MSA, applicable in England and Wales was created using key provisions in the EU Directive and CoE Convention as a basis. Additionally, the Palermo Protocol serves as a foundation for future laws in human trafficking. It is also the basis for the development for international and state laws on protecting victims of THB, and the application of the non-prosecution principle.

THB has evolved over the centuries – from the earliest manifestation of human trafficking during the slave trade era, to the white slave traffic in the twentieth century. As attention and information on the offence of human trafficking increases, policies are frequently reviewed to aid identification of victims and improve understanding of the trafficking offence.

A vital step in preventing prosecution of victims of THB for offences which have occurred as a direct consequence of their trafficking status, is to create an enabling environment for the proper application of international law on human trafficking. A consideration of international law is relevant to the discussion on preventing prosecution of trafficked victims because, most victims identified in the UK and other countries in Europe, are from origin/source countries. Victims of human trafficking may be transported from origin/source countries (sometimes underdeveloped or developing countries) to transit/destination states (for example the UK/other countries in Europe).

Since the problem of THB has both a domestic and an international dimension, international law can be a powerful tool for combating human trafficking, and consequently preventing prosecution of victims of trafficking. Prevention of prosecution of victims of trafficking may be improved through proper identification and prevention measures by states. A prominent international law instrument that provides a legal structure on how to define, prevent and prosecute human trafficking is the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol). The United Nations Office on Drug and Crime (UNODC) created this instrument which has promoted the combat of human trafficking in international law.

The offence of human trafficking can occur within and outside the borders of one state and one legal system. When trafficking takes place within a state, the government of that state may tackle the issue efficiently within its borders. However, when any element of the process relates to a foreign state, the process of protecting the victim can become a little more complicated. For example, when the victim is temporarily crossing from one state to another in the course of their trafficking experience, the state's control over the foreign national's circumstance may become legally limited. This situation makes THB a global issue and indicates the need for international as well as domestic legal regulations to protect victims of human trafficking.

The Palermo Protocol offers some guidance aimed at a better understanding of the offence of trafficking. In particular, the definition of trafficking in the Palermo Protocol has been adopted wholly or in part by the CoE Convention, EU Directive and MSA which

all deal with the non-prosecution of victims of human trafficking.<sup>302</sup> Trafficking is deemed to have occurred following the recruitment, transportation, transfer, harbouring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, fraud, deception, the abuse of power or of a position of vulnerability for the purpose of exploitation.<sup>303</sup> The Protocol also requires states to establish criminal liability for human trafficking and to assist and protect victims of human trafficking.<sup>304</sup>

However, states' obligations regarding the protection of victims of THB are not properly explained and leave the interpretation of state responsibilities to the discretion of authorities. For instance, states are required to protect the privacy and identity of victims of human trafficking, including making legal proceedings confidential in appropriate cases and to the extent possible under their domestic law.<sup>305</sup> This provision does not create a strong incentive for states to implement the protection measure; it appears to be persuasive rather than an obligatory requirement. Other instruments such as the CoE Convention, EU directive and the MSA impose higher standards of protection. They promote a more human rights-centred approach to THB than the Palermo Protocol which possesses a criminal justice approach.<sup>306</sup>

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<sup>302</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 26; European Union Directive 2011/36 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims [2011] OJ L101/1, art 8; and Modern Slavery Act 2015, s 45

<sup>303</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 55/25, 2000 (Palermo Protocol), art 3 (a)

<sup>304</sup> *Ibid*, art 5 and 6

<sup>305</sup> *Ibid*, art 6 (1)

<sup>306</sup> Atak I. and Simeon J.C., 'Human Trafficking: Mapping the Legal Boundaries of International Refugee Law and Criminal Justice' JICJ (2014) 12 (5) 1019, 1024

Whereas there are relevant policies and provisions which uphold the non-prosecution of victims of THB for criminal offences committed as a direct consequence of their trafficking status, there have been instances where the protection system in place has been unable to safeguard these individuals. For example, the system has not worked properly in cases where the competent authority has failed to recognise a person as a victim of trafficking or where the state has failed in carrying out an adequate investigation to determine whether a person has been trafficked or not.<sup>307</sup> There have also been situations where the trafficked individual has been prosecuted against the public interest and an order has been given for them to be returned to their home country where they are at risk of re-trafficking and re-victimisation.<sup>308</sup> Consequently, the question arises: why are victims of THB being prosecuted, when there are mechanisms in place to prevent prosecution. Unfulfilled state obligations have been determined to be one of the main reasons why victims of THB are prosecuted for their involvement in illegal activities. The key focus of this chapter is an assessment of the role state obligations play in international law to prevent prosecution of trafficked victims.

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<sup>307</sup>*LM, DG and MB in R v LM & Ors* [2010] EWCA Crim 2327, para 29, *Rantsev v Cyprus & Russia*, App. no. 25965/04, [2010] 51 E.H.R.R 1

<sup>308</sup>*HD (Trafficked Women)* CG [2016] UKUT454 (IAC), para 1, *Marian v Regional Prosecutor's Office of Ruse, Bulgaria* [2019] EWHC 602 (Admin)

### 3.2 Unfulfilled State Obligations

It is essential to consider the role of unfulfilled state obligations in the discussion of non-prosecution of victims of human trafficking. This is because, unfulfilled state obligations have been recognised as one of the factors that contribute to the prosecution of victims of THB. The non-prosecution principle is contingent on the premise that victims of THB who have committed criminal offences as a direct consequence of their trafficking status, should be absolved from criminal liability and provided immunity from prosecution. Defence lawyers and prosecutors are urged to make proper enquiries in criminal cases involving individuals who may be victims of THB.<sup>309</sup> Where there is credible suspicion that a person has been trafficked, states have a positive obligation to further investigate human trafficking cases. The state is obliged to identify victims of THB, and to ensure that trained and qualified individuals are involved in the process of victim identification including children.<sup>310</sup> In addition, a duty is imposed on member states to investigate or prosecute offences in human trafficking cases even when a victim has withdrawn his or her statement; and irrespective of any report by the victim.<sup>311</sup> The provisions discussed above are directly relevant to member states of the CoE Convention and EU Directive. Specifically, it relates to those states that are signatories to the respective instruments. It is expected that those states that are not bound by the EU Directive or CoE Convention, may focus on their own domestic laws as a guide, to determine the best course of action in human trafficking cases.

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<sup>309</sup>*R v O* [2008] EWCA Crim 2835, para 15

<sup>310</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 10

<sup>311</sup> European Union Directive 2011/36 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims [2011] OJ L101/1, art 9

States are obliged to criminalise any or all acts of human trafficking, especially those affecting women and children. Some states who are reluctant to accept responsibility for trafficking situations, may argue that the primary wrong has been committed by private individuals and not by the state itself in order to be absolved wholly or in part of blame.<sup>312</sup> The Office of the High Commissioner for Human Rights (OHCHR) argues that although determining the responsibility of states may be difficult, there are general duties they are accountable for.<sup>313</sup> States are unable to avoid taking responsibility for the acts of private persons, when there is evidence that they could have prevented a negative outcome (for example, prosecuting a credible victim of trafficking) from occurring. This implies that, the source of responsibility in cases of this nature is not the act itself but the states' failure to take adequate measures of prevention in conformity with the prescribed standard.<sup>314</sup> The prescribed standard in the United Kingdom includes observing the 4 P's in the process of upholding state obligations.<sup>315</sup> The 4 P's consists of a strategy to Pursue (pursue perpetrators of human trafficking and modern slavery crimes), Prevent (prevent individuals from engaging in trafficking activities), Protect (strengthen safeguards against human trafficking and modern slavery by protecting vulnerable people from exploitation) and Prepare (reduce the harm caused by trafficking crimes through improved victim identification and enhanced protection and support).<sup>316</sup> The 4 P's complement each other and are best implemented collectively. To obtain a better

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<sup>312</sup> United Nations Human Rights, Office of the High Commissioner: Human Rights and Human Trafficking (Fact Sheet no. 36, 2014) 11

<sup>313</sup> Ibid

<sup>314</sup> Ibid

<sup>315</sup> 'Modern Slavery Strategy' ([www.gov.uk](http://www.gov.uk), 2014) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/383764/Modern\\_Slavery\\_Strategy\\_FINAL\\_DEC2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/383764/Modern_Slavery_Strategy_FINAL_DEC2015.pdf)> accessed 7 February 2017

<sup>316</sup> Ibid

understanding of the role states' play in reducing the offence of human trafficking and promoting immunity from prosecution for victims, it is pertinent to examine the obligations. This chapter will primarily focus on two obligations – the obligation to prevent human trafficking and the obligation to protect victims of trafficking. The reason for focusing on these areas is to uphold the aims of the thesis. One of the aims of this thesis is to consider ways of promoting immunity from prosecution for victims of human trafficking. Hence, using a victim-centred approach, the goal is to foster greater immunity from prosecution for victims of human trafficking.

### **3.3 Obligation to Prevent Human Trafficking**

An important obligation that states are expected to adhere to is prevention of the offence of THB. Countries that are signatories to the Palermo Protocol are under an obligation to prevent and combat trafficking in persons and protect victims of THB from re-victimisation.<sup>317</sup> They are also expected to co-operate with the non-governmental/civil sector society and endeavour to strengthen measures to alleviate major causes of trafficking such as poverty and under development.<sup>318</sup> Obokata has shown that the nature and extent of the obligations in article 9 of the Palermo Protocol is dependent on whether a state is an origin or destination location.<sup>319</sup> Regarding states of origin, the pertinent obligation is preventing citizens from being trafficked or re-victimised. Specifically, push and pull factors are considered by the state. The push factors of the offence of THB consist of humanitarian crises, poverty, and gender/racial discrimination and these are

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<sup>317</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 55/25, 2000, art 9 (1) (a) and (b)

<sup>318</sup> *Ibid*, art 9 (4)

<sup>319</sup> Obokata T. 'Implementing Human Trafficking Laws' (2015) 2 (2) *SPIJL* 85, 91

predominantly assessed in relation to the State of origin of the trafficked victim.<sup>320</sup> The pull factors are the things which appeal to trafficked victims including the demand for trafficked people; and this is often determined by the States of destination.<sup>321</sup>

### **3.3.1 The Role of Destination Countries in Fulfilling the Obligation to Prevent Human Trafficking**

Destination countries are states that attract victims and/or traffickers due to their wealth, demand for workers and favourable circumstances for better life. A state can become a destination country where a multitude of individuals transmigrate from nearby countries or countries sharing common borders. Situations of THB entail not only nearby countries, but also involves faraway locations, and transit across several country borders. Sometimes passage may comprise of simultaneous crossing over land and sea.

For example, in a report by Joy Ngozi Ezeilo, the special rapporteur on trafficking in persons, especially women and children, on her mission to Italy, observed that the country's geographical location and extended coastline made it a destination and transit country for victims of trafficking.<sup>322</sup> Ezeilo's findings also indicated that anti-trafficking efforts in Italy mainly focused on trafficking for sexual exploitation. In most of these cases, the victims were women and girls from Nigeria and Eastern Europe, mainly Bulgaria, Hungary, Romania and Ukraine who were forced to engage in street prostitution.<sup>323</sup> Victims from Edo State in Nigeria, particularly from Benin City, constituted a large proportion of the persons trafficked for sexual exploitation. The

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<sup>320</sup> Ibid

<sup>321</sup> Ibid

<sup>322</sup> Ezeilo, J.N., 'Report of the Special Rapporteur on trafficking in persons, especially women and children, on her mission to Italy' (2014) United Nations General Assembly A/HRC/26/37/Add.4, 5

<sup>323</sup> Ibid

victims informed the special rapporteur that they had paid their traffickers sums which ranged from 30,000 to 60,000 euros to be transported to Europe.

Most trafficked victims migrate from underdeveloped countries to a seemingly prosperous country, seeking economic and financial advancement. Consequently, a great deal of research has focused on the responsibilities of destination countries. Principal among these studies is Mandel's examination of trafficking in the UK and Israel. Mandel observes that well-developed and flourishing countries of the world often have a high demand for workers.<sup>324</sup> Thus, a great number of trafficked victims are brought into destination countries through international trade channels to fulfil this immense need for workers' demand. Conversely, it may also be argued that while the destination countries appear to have an extensive requirement for workers, they have also seen the greatest success in rehabilitating victims, enforcing and implementing legislation and prosecuting traffickers.<sup>325</sup> Seideman suggests that destination nations have the greatest legislative success against trafficking primarily because they have the financial resources to create effective legislation.<sup>326</sup> They are able to develop adequate laws because they possess a substantial mechanism that aids in advancing their law-making motives. In comparison, impoverished countries that supply the trafficked victim may lack the legislative and financial competence to construct efficient anti-trafficking legislation.<sup>327</sup>

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<sup>324</sup> Mandel, J. W., 'Out of Sight, Out of Mind: The Lax and Underutilized Prosecution of Sex Trafficking in the United Kingdom and Israel' (2012) 21 (1) *Tulane J. of Int'l & Comp. Law*, 206

<sup>325</sup> *Ibid*

<sup>326</sup> Seideman C. A., 'The Palermo Protocol: Why it has been Ineffective in Reducing Human Sex Trafficking' (2015) 9 (5) *Global Tides*, 5

<sup>327</sup> *Ibid*

From the argument by Mandel and Seideman discussed above, it may be deduced that source nations/developing countries are otherwise preoccupied with dealing with their everyday challenges in administering government policies. Therefore, they are unable to focus on proper implementation of human trafficking policies. This also implies, that developing countries that are not able to institute the change in legislation, will also not be in good stead to ensure that the non-prosecution principle is applied correctly to a victim's case. From the foregoing, one may consider what role the underdeveloped / source countries play in protecting victims of human trafficking and promoting the application of the non-prosecution principle to a victim's circumstance. Since source countries are considered to lack the means to develop important anti-trafficking laws to protect victims of human trafficking, then should these countries be exempt from upholding their state obligations?

Dempsey holds the notion that granting these countries any form of privilege or exclusion from upholding their state responsibility, will further encourage them to have noncompliant legislation.<sup>328</sup> He argues that these countries can simply adopt verbatim the definition of trafficking in article 3 of the Palermo Protocol.<sup>329</sup> This direct adoption would imply that there is no further excuse for the states lacking proper laws to continue using their noncompliant anti-trafficking legislation. Importantly, it would also require very little technical expertise to employ the precise wording of the instrument into a state party's domestic criminal code.<sup>330</sup> Dempsey's recommendation has been endorsed by the

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<sup>328</sup> Dempsey M. M., Hoyle C and Bosworth M. 'Defining Sex Trafficking in International and Domestic Law: Mind the gaps' (2012) 26 (1) EILR, 137, 157

<sup>329</sup> Ibid

<sup>330</sup> Ibid

southern African states who are party to the Southern African Development Community (SADC) treaty.

### **3.3.2 The SADC Treaty, Examining Implementation of State Obligations by Developing Nations**

The SADC is composed of fifteen member states (Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe) who are all signatories to the SADC treaty. There are 27 protocols in total that are legally binding on all member states who have signed the 1992 treaty. One of the relevant protocols is the Protocol on Gender and Development (Gender Protocol).

The words in the definition of THB in Gender Protocol are similar to the words used in the definition of human trafficking in article 3 of the Palermo Protocol.<sup>331</sup> Eleven SADC states have ratified the Palermo Protocol, and this may be a pertinent reason why the language defining trafficking is verbatim as the earlier UN instrument in the Gender Protocol. There is also a further provision requiring state parties to enact and adopt specific legislative provisions to prevent human trafficking and provide holistic services to survivors, with the aim of re-integrating them into society.<sup>332</sup>

Despite these developments, the countries in the southern region still face prominent challenges in applying anti-trafficking protocols and consequently the non-prosecution principle. The evolving nature of tactics used by traffickers to recruit unsuspecting victims into human trafficking situations has been recognised as one of the major

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<sup>331</sup> Southern African Development Community Protocol on Gender and Development 2008

<sup>332</sup> *Ibid*, art 20 (5) (a)

challenges being faced.<sup>333</sup> Additionally, the absence of accurate statistics and documentation to provide a comprehensive account of the extent of human trafficking in the southern part of Africa has been viewed as problematic.<sup>334</sup> Most countries in the region do not have reliable statistics on the problem of human trafficking and rely on anecdotal evidence from unofficial sources. The national action plans, which include measures to improve data collection and sharing, and greater cross-border cooperation, are to be incorporated into a regional five-year implementation plan to be developed by the SADC Secretariat. The five-year implementation plan will further be incorporated into a ten-year SADC strategic plan of action on combating trafficking in persons, especially women and children. The time span for the further ten-year plan is expected to run from 2009 to 2019.

The SADC situation illustrates that there may be a problem in relation to application of the action plans by each country in the southern region. The main issue with the region, regarding strategies to combat human trafficking, is an over-reliance on creating plans of action, without putting in place viable procedures to materialise those plans into an operational function. A five-year plan may not be regarded as too lengthy to implement, but a five-year plan incorporated into a further ten-year plan, may lead to distraction or confusion among developing States on the intent and purpose of creating the plan in the first place. Although, the SADC strategic plan of action on combating trafficking in persons was again revised in 2016 to take effect for three years – 2016 to 2019, there is no indication that anything substantial has been done to curb the offence of human

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<sup>333</sup>The Telegraph Reporter, 'Human Trafficking, A Challenge in SADC' (23<sup>rd</sup> March 2017) <<http://www.sundaystandard.info/human-trafficking-challenge-sadc>> accessed 5<sup>th</sup> of July 2019

<sup>334</sup> Ibid

trafficking.<sup>335</sup> It appears to be a situation of constant deliberation on human trafficking issues, with frequent calls on regional action to address the crime, without significant pursuit of a reliable mechanism to achieve the desired goals. For example, in 2018, the SADC secretariat acknowledged that there was a need for a regional action to address the crime of human trafficking because the southern region has a relatively high level of trafficked children and cases of forced child labour.<sup>336</sup> The high population of orphans and vulnerable children in the SADC region further compounds their vulnerability to exploitation by human traffickers. Hence, the need to develop and implement dedicated interventions to prevent and combat trafficking in persons was recognised.

Recognising the need to create measures against trafficking in persons is a good effort; and a determined consideration by states on how to protect children's rights is also commendable. However, there does not appear to be sufficient efforts being put into actualising and realisation of the goals of the action plans. For instance, in the case of Botswana, the United States Department of State (USDS) observed that the government of Botswana does not fully meet the minimum standards for the elimination of trafficking.<sup>337</sup> Nonetheless, the USDS acknowledged that Botswana was making significant efforts to meet the required standards. According to the USDS, the country had demonstrated increased efforts by investigating and prosecuting traffickers and training law enforcement and judicial officers on Botswana's anti-human trafficking act

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<sup>335</sup> SADC: Statement by the SADC Executive Secretary on the occasion of the World Day against Trafficking in Persons (30 July 2018) <<https://www.sadc.int/news-events/news/statement-sadc-executive-secretary-occasion-world-day-against-trafficking-persons/>> accessed 7<sup>th</sup> of July 2019

<sup>336</sup> Ibid

<sup>337</sup> United States Department of State, 2018 Trafficking in Persons Report – Botswana, 28 June 2018 <<http://www.refworld.org/docid/5b3e0b964.html>> accessed 7<sup>th</sup> of July 2019

and sentencing guidelines.<sup>338</sup> Trafficked victims were identified and referred to protective services, and activities raising awareness on the offence of human trafficking were conducted throughout the country. Further, the Botswana government had adopted and launched a national action plan.

Although, the incentives taken to identify and protect victims of human trafficking were relevant, the government did not meet the minimum standards in other key areas. These key areas included the absence of a formal written procedure to guide immigration officers, law enforcement and social services on the prescribed conduct to proactively identify victims of human trafficking.<sup>339</sup> Fewer trafficking victims have been identified due to decreased anti-trafficking law enforcement efforts. The government of Botswana has also not taken any proactive steps to provide full access to law enforcement authorities to conduct labour inspections of private cattle farms where child labour is believed to exist.<sup>340</sup>

The preceding discussion illustrate that developing countries have a prominent role to play in fulfilling the obligation to prevent human trafficking. However, their efforts in this regard have been passive and laid-back in many ways. Developing countries, especially the Southern African States, have shown good intentions to eradicate human trafficking and reduce its prevalence in the region. The evidence of this effort is the strategic plan of action intended to combat THB. The problem that has arisen following the creation and deliberation on the plans is the problem of implementation. As the case

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<sup>338</sup> Ibid

<sup>339</sup> Ibid

<sup>340</sup> Ibid

of Botswana demonstrates, sufficient steps have not and are not being taken to protect victims of human trafficking.

The application of the non-prosecution principle to victims of human trafficking, who are foreign nationals identified as potential victims in the UK, will be relatively straightforward if developing countries play their role of protecting victims effectively. The non-prosecution principle may be better applied in the UK and consequently, England and Wales, if the developing states take dedicated steps to protect victims within their respective regions. The unspoken requirement as Dempsey and Seideman have observed, that the transit/destination states should do majority of the work in relation to human trafficking protective measures is not feasible or realistic. A co-operation between the source/developing states and the transit/destination states is vital to encourage greater protection and improved immunity from prosecution for victims of human trafficking. For example, where conscientious efforts are taken by developing countries to protect their citizens within their states, the offence may be significantly reduced. These efforts may include adequate training of the police and other law-enforcement agencies on the signs of human trafficking. The reduced occurrence of trafficking cases indicates that there will also be a decrease in the number of individuals identified as potential victims of THB from foreign countries. Thus, in situations where the UK decides to deport or return these individuals to their countries of origin, the issue of re-trafficking may be dealt with more effectively. In relation to the non-prosecution principle, the intention of the principle, which is to protect the victims of human trafficking, should be the foremost consideration. A collaboration between the source/developing states and the transit/destination states is essential to achieve improved protection of trafficked victims.

### 3.4 Obligation to Protect Victims of Human Trafficking

Protection of victims of THB should be regarded as a key area of focus for states. It is worthwhile to note that protection obligations are not legally binding or legally enforceable on states. Protection obligations are not legally binding on states because each state may exercise discretion and independent judgement, to choose whether to apply international law to a victim's case or domestic law. This has resulted in conflicting measures being taken depending on state preference and capacity. Hence, gaps have been created in implementation depending on where the victims were identified.<sup>341</sup> Some states such as Thailand, Jamaica and Ghana have specific legislative provisions on protection which include vocational training, compensation, establishment of care centres and a victims' fund.<sup>342</sup> The Palermo Protocol establishes the importance of protecting a victim's privacy, assistance during criminal proceedings and protection of physical and mental well-being of victims, also the possibility of arranging temporary or permanent residence.<sup>343</sup> This is helpful to encourage victims to recover from their trafficking circumstance and decide whether to cooperate with law enforcement authorities to prosecute their traffickers or not.

Although the protection measures evaluated in articles 2, 6 and 7 of the Palermo Protocol seems reasonable in theory, in practice the obligation to protect victims under international law is uncertain in terms of applicability. For example, an evaluation of the phrases – 'shall endeavour to provide', 'shall consider implementing measures' and 'to the extent possible' imply that states will not be held accountable under international law

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<sup>341</sup> Obokata T. 'Implementing Human Trafficking Laws' (2015) 2 (2) SPILJ 85, 90

<sup>342</sup> Ibid

<sup>343</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 55/25, 2000, art 7

even if they do not / cannot act.<sup>344</sup> In essence, states are only required to consider implementing protection measure. During the drafting stage of the Palermo Protocol, international organisations including the International Labour Organization (ILO) emphasised the requirement for a more encompassing provision which would comprise of additional measures such as protection against reprisal of victims from traffickers and access to embassies.<sup>345</sup> Obokota argues that the retention of this language illustrates that states are reluctant to be legally bound by the obligations.<sup>346</sup> Developing states in particular have expressed concerns that they may not have enough resources to provide requisite protection to victims.<sup>347</sup>

The only strict obligation which contains the word ‘shall ensure’ refers to assistance during criminal investigation and proceedings.<sup>348</sup> This gives the impression that victims are merely tools to be used for criminal justice without taking into consideration their personal well-being. This practice undermines the key aim of the Palermo Protocol outlined in article 2, and further alienates victims who are already unwilling to approach the authorities due to enforcement action against them and fear of reprisal by traffickers. States such as Serbia, Croatia and Italy have set a worthy precedent by providing protection to victims without requiring them to participate in trafficking cases.<sup>349</sup> This

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<sup>344</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 55/25, 2000, art 6 and 7

<sup>345</sup> UNODC, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention Against Transnational Organised Crime and Protocols Thereto* (2006) 366

<sup>346</sup> Obokata T. ‘Implementing Human Trafficking Laws’ (2015) 2 (2) *SPILJ* 85, 90

<sup>347</sup> UNODC, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention Against Transnational Organised Crime and Protocols Thereto* (2006) 366

<sup>348</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 55/25, 2000, art 6 (2)

<sup>349</sup> Obokata T. ‘Implementing Human Trafficking Laws’ (2015) 2 (2) *SPILJ* 85, 90

approach should be taken by all states to illustrate their commitment to protect the human rights of trafficked victims.

### **3.5 State Obligations and Article 4 of the European Convention on Human Rights (ECHR)**

Unlike other regional human rights instruments such as the Arab Charter, and the provision in articles 9 and 10, there is no express reference to human trafficking in the ECHR. Article 4 of the ECHR was considered in *Rantsev v. Cyprus and Russia*<sup>350</sup>. Essentially, the Court opined that there is an inherent similarity between slavery and trafficking. THB by its very nature and aim of exploitation is based on the exercise of powers attaching to the right of ownership. Accordingly, just as human beings are treated as commodities to be bought, sold, and put to forced labour, often for little or no payment similarly the movement of trafficked victims is excessively monitored and controlled.<sup>351</sup> This application of slavery to trafficking in the *Rantsev* case correlates to the implication of slavery in the Slavery Convention, 1926 where slavery is defined as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.<sup>352</sup>

In relation to states' obligations to victims of trafficking, the court examined three prominent considerations of what it terms positive obligation. These included the positive obligation to put in place an appropriate legislative and administrative framework; take protective measures; and procedural obligation to investigate potential trafficking.<sup>353</sup> It

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<sup>350</sup> App no 25965/04 (ECHR, 7 January 2010)

<sup>351</sup> *Rantsev v. Cyprus and Russia*, App no 25965/04 (ECHR, 7 January 2010), para 280

<sup>352</sup> Slavery Convention 1926, Art 1(1)

<sup>353</sup> *Rantsev* case, para 300 – 308

must be demonstrated that the state authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an individual had been, or was at real and immediate risk of being trafficked or exploited.<sup>354</sup> In the case of an answer in the affirmative, where the authorities fail to act appropriately within the scope of their powers to remove the individual from that situation or risk, the state will be in violation of article 4 of the ECHR.<sup>355</sup>

Turner argues that in the *Rantsev* case, Cyprus and Russia were in breach of Article 4 by failing to investigate how and where the victim had been recruited.<sup>356</sup> In particular, adequate steps were not taken to identify those involved in the recruitment of the victim or the methods of recruitment used. Turner's argument is relevant to the issue. Turner correctly noted that Cyprus was liable for failing to prevent violations of human rights, because it was the destination state. But Russia was culpable too, to some degree as the source state. Hence, the case was instrumental in emphasising the transnational nature of human trafficking and the obligations imposed on states by international law to cooperate effectively in its prevention.

The court in *Rantsev* held that it is unnecessary to identify whether the treatment that an applicant complains of constitutes slavery, servitude or forced and compulsory labour.<sup>357</sup> The concept of trafficking itself, within the meaning of article 3 (a) of the Palermo Protocol and article 4 (a) of the CoE Convention, falls within the scope of Article 4 of

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<sup>354</sup> Ibid, para 285

<sup>355</sup> Ibid

<sup>356</sup> Turner I. D. 'Positive Obligations and Article 4 of the European Convention on Human Rights: A defence of the UK's Human Rights Act 1998' (2014) 18 (1) IJHR 94, 103

<sup>357</sup> *Rantsev* case, para 281

the ECHR.<sup>358</sup> The court's reasoning in paragraph 281 of the *Rantsev* case of determining that human trafficking falls within the scope of article 4 of the ECHR is only partially correct. The exception to the court's decision is related to sentencing guidelines in human trafficking cases. In this regard, human trafficking should be treated as a separate offence for the purpose of convicting and sentencing offenders. For example, in the MSA, slavery, servitude or forced and compulsory labour, is treated as a separate offence from the offence of human trafficking.<sup>359</sup> It is considered good legal practice to clearly explain and separate legal offences, to promote an easy understanding of criminal liability in legal cases. Therefore, the court's decision of equating human trafficking to slavery, or servitude is incorrect and does not set a good example of proper legal precedent for subsequent cases to emulate.

### **3.5.1 Assessment of State Obligations in the *Rantsev* Case**

The assessment of state obligations, such as the obligation to prevent human trafficking, and protect victims of trafficking illustrate the role of destination states and origin/source states. States are expected to structure administrative and legislative policies to deter the crime of human trafficking. The state has human rights obligations towards people who have been trafficked or who are at risk of being trafficked in the future. The provisions in Article 4 of the ECHR establish that state obligations extend to the prevention of any practice of slavery or servitude, forced or compulsory labour by private individuals. As the Court noted in *Siliadin v. France*, limiting compliance with Article 4 of the ECHR only to direct action by the state authorities would be inconsistent with the international

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<sup>358</sup> Ibid

<sup>359</sup> Modern Slavery Act, 2015, s 1 and 2

instruments specifically concerned and would amount to rendering it ineffective.<sup>360</sup> Accordingly, states have positive obligations to adopt criminal law provisions, which penalise the practices, referred to in Article 4. These positive obligations may comprise the obligation to protect an individual against infringement of their interests by other private individuals, although there are limits on how much the state can do in this regard. The limits on state action, are in part due to financial constraints, especially those experienced by origin/source States.

The decision in the *Rantsev* case is useful in providing important guidance on the human rights aspects of THB. It is worth noting that in that case, Cyprus acknowledged that it had violated its positive obligations towards the applicant and his daughter arising out of Article 4 of the ECHR. The Cypriot Government did not take any measures to ascertain whether the applicant's daughter had been a victim of trafficking in human beings and/or been subjected to sexual or any other kind of exploitation.<sup>361</sup>

### **3.5.2 Distinction between Human Trafficking and Slavery**

Article 4 extends beyond the duty to prosecute and penalise anyone who has engaged in acts aimed at holding another in slavery, servitude or forced labour.<sup>362</sup> Article 4 includes the responsibility to protect the rights of the victims or potential victims of trafficking. States are unable to avoid taking responsibility for the acts of private persons when there is evidence that they could have prevented a negative outcome from occurring. For example, preventing the prosecution of a credible victim of trafficking. The court's

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<sup>360</sup> *Siliadin v. France* App no 73316/01 (ECHR, 26 October 2005), para 89

<sup>361</sup> *Rantsev* case, para 185 (c)

<sup>362</sup> Opinion No. 6/2010 of the Group of Experts on Trafficking in Human Beings of the European Commission, 'Document on the Decision of the European Court of Human Rights in the Case of *Rantsev v. Cyprus and Russia*' (2010) 22 (4) IJRL 675

decision emphasises that THB is prohibited by Article 4 of the ECHR without the need to define it either as slavery, servitude or forced labour. A group of experts on THB support the court's view that THB may be similar to slavery because traffickers exercise powers similar to ownership.<sup>363</sup>

However, Allain contends that the court's determination that human trafficking is based on the definition of slavery is flawed.<sup>364</sup> By equating trafficking in human beings by its nature and aim of exploitation to the exercise of powers attaching to the right of ownership, the court appears to determine that for trafficking to take place, a genuine right of legal ownership must be present. Allain argues that a genuine right of ownership is a legal impossibility. Also, with regards to Article 4 of the ECHR trafficking cannot occur within Europe as there exists no legal right to own a person within the Council of Europe.<sup>365</sup>

While one cannot legally own another person, the contemporary reality is that powers commensurate to ownership are exerted by traffickers.<sup>366</sup> Piotrowicz argues that the court's general finding that THB may breach Article 4 was too broad; it would have been better to provide clear guidance on the precise legal nature of trafficking and how the offence violates Article 4.<sup>367</sup>

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<sup>363</sup> Ibid, 674

<sup>364</sup> Allain J. 'Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery' (2010) 10 (3) HRLR 546, 557

<sup>365</sup> Ibid

<sup>366</sup> Piotrowicz R. 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations' (2012) 24 (2) IJRL 181, 196

<sup>367</sup> Ibid

The writer of this research is of the opinion that human trafficking and slavery are two distinct concepts. Allain and Piotrowicz have expressed a similar opinion. The action of treating trafficking and slavery as a singular offence may lead to a narrow interpretation of the two distinct criminal activities. For example, in relation to human trafficking situations, the constituent elements of trafficking- the means, methods and forms (e.g debt bondage and forced labour) may not be examined in legal matters. That is, the elements of human trafficking may not be examined unless the two offences are acknowledged as separate considerations. This in turn will mean that identification of victims may pose challenges. Improper identification of victims will consequently lead to improper application of the non-prosecution principle.

By determining that Article 4 is a vehicle for considering issues of trafficking, the court appears to have widened the scope of the ECHR by providing for issues beyond slavery, servitude and forced labour.<sup>368</sup> The *Rantsev* case determined that in addition to protecting victims and prosecuting traffickers, member states are also required to regulate businesses which may be used as a cover for human trafficking.<sup>369</sup> Further, immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking.<sup>370</sup>

Importantly, the obligation to protect victims of human trafficking contained in article 6 of the Palermo Protocol may be considered in conjunction with the human trafficking provisions in the EU Directive, CoE Convention and MSA 2015 for victims of trafficking identified in the UK. This approach may be helpful in curtailing the legal uncertainty of

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<sup>368</sup> Ibid

<sup>369</sup> *Rantsev* case, para 283

<sup>370</sup> Ibid

the court equating slavery to trafficking in the *Rantsev* case. Article 8 EU Directive and article 26 CoE Convention collectively provide that member states should take necessary measures not to prosecute victims of trafficking for their involvement in unlawful activities they have been compelled to carry out. In promoting the non-prosecution of victims, section 45 MSA goes further to distinguish between slavery and trafficking; and treats them as two separate offences. A person is not guilty of an offence if the act occurred as a direct consequence of being or having been a victim of slavery or trafficking.<sup>371</sup> The MSA resolves that the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour should be construed in accordance with Article 4 of the ECHR.<sup>372</sup> But at the same time these offences are defined separately in sections 1 and 2 of the MSA. These provisions recognise that different member states have different legal systems for providing essential protection for victims of trafficking. Protection may take the form of non-prosecution or the imposition of an acquittal or discharge after prosecution and conviction of the victim has occurred.<sup>373</sup>

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<sup>371</sup> Modern Slavery Act 2015, s 45 (4) (b)

<sup>372</sup> *Ibid*, s 1 (2)

<sup>373</sup> *L, HVN, THN & T v R* [2013] EWCA Crim 991

### **3.6 Victim Status, a Guide to Promoting Understanding of State Obligations**

Improving immunity from prosecution for victims of human trafficking is contingent on the state fulfilling its obligation to pursue, prevent, protect, and prepare incentives aimed at reducing the offence of THB. In this chapter, it has been established that unfulfilled state obligations is one of the factors that results in the prosecution of victims of human trafficking. It is advantageous at this point to assess victim status, as a guide to promote further understanding of state obligations and how it affects the non-prosecution of victims.

The examination of victim status is often veiled in different mistaken assumptions and fictitious beliefs. Victims are often portrayed as inactive individuals whose arrival in a destination country were involuntary and occurred solely from coercion by the trafficker. They are assumed to be predominantly women and girls, from a poor background and have a low level of education, Skrikantiah refers to this type of victim as the iconic victim.<sup>374</sup> Vijeyarasa proceeds to dispel these myths by asserting that the four assumptions of: the involuntary victim, the poor victim, uneducated and female victim is often an unrealistic view of the typical victim of human trafficking.<sup>375</sup> Hence, the pure victim representation of an innocent, helpless individual is impractical in explaining the different patterns in trafficking situations.

For the first assumption, the involuntary victim is perceived to have been coerced and kidnapped, but often this individual may only be deceived as to the nature or conditions

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<sup>374</sup> Srikantiah J. 'Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law' (2007) 87 (1) BULR, 157, 187

<sup>375</sup> Vijeyarasa R, *Sex, Slavery and the Trafficked Woman: Myths and Misconceptions about Trafficking and its Victims* (1<sup>st</sup>edn, Ashgate Publishing Limited 2015) 9

of work, but on arrival at their destination they may employ some level of autonomous decision making in accepting the terms of their new condition.<sup>376</sup> Vijeyarasa also presents an alternative model to the educated victim, and argues that education and trafficking are directly related.<sup>377</sup> Thus, the more educated a person, the more likely it is they migrate and the more exposed they are to exploitation and trafficking.<sup>378</sup> This dispels the assumption that majority of trafficking victims are non-autonomous or partially autonomous due to low levels of education. On the contrary it appears higher levels of education may lead to human trafficking situations.<sup>379</sup>

In relation to the third myth, although in general terms there is some truth to the female victim model, the non-gendering of male victims is a challenge in trafficking cases. The perception in many countries including Ghana is that trafficking mainly relates to children and in some cases the sexual exploitation of adult women, whereas exploited migrants are often men.<sup>380</sup> Human trafficking is not gender or age specific (victims are male and female, including children, women and men). Hence, there are differences in terms of the extent to which male victims of trafficking are recognised in different countries. There needs to be more research done on male victims and better analysis of their trafficking situation. Regarding the last myth of the poor victim of trafficking, Vijeyarasa's findings suggest that the pursuit of improved economic and social

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<sup>376</sup> Ibid, 96

<sup>377</sup> Ibid, 112

<sup>378</sup> Ibid

<sup>379</sup> Ibid

<sup>380</sup> Ibid, 160

circumstances may lead to trafficking situations rather than the need to address extreme hunger or desperation.<sup>381</sup>

An examination of Vijayarasa's arguments illustrate that the experiences of trafficked victims is varied and inconsistent. Rijken further illustrates this point by observing that in labour exploitation cases for example, victims do not perceive that their employer has done anything wrong by exploiting them.<sup>382</sup> They often assume that it is logical to be treated differently from the host country citizens.<sup>383</sup> This observation implies that individuals who have been trafficked do not consider themselves to be victims. There seems to be a discrepancy between how the authorities view victims and how victims view themselves. Rijken contends that victims think it is justified that they do not receive the same rights as workers from the host country.<sup>384</sup> Accordingly, when they are discovered by the authorities, they do not want to leave their trafficking situation. But may want to continue working for the employer in hopes that they will be paid what they are owed.<sup>385</sup>

Elliot argues that despite the UK being one of the main destination States for victims of human trafficking, it has consistently performed inadequately in securing victims' rights and providing assistance and support to them.<sup>386</sup> One reason for this may be because the

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<sup>381</sup> Ibid, 131

<sup>382</sup> Rijken C., 'Challenges and pitfalls in Combating THB for Labour Exploitation' in Rijken C. (ed), *Combating Trafficking in Human Beings for Labour Exploitation* (1<sup>st</sup> edn, Wolf Legal Publishers 2011) 413

<sup>383</sup> Ibid, 414

<sup>384</sup> Ibid

<sup>385</sup> Ibid

<sup>386</sup> Elliot J., *The Role of Consent in Human Trafficking* (1<sup>st</sup>edn, Routledge 2014) 163

approach to human trafficking cases is not from a victim-centred viewpoint.<sup>387</sup> A victim-centred approach would take into account the effect trafficking and any subsequent exploitation may have on the victim and provide support and rehabilitation for them. Therefore, the drafting and enactment of any legislation dealing with trafficking must cover the protection of victims as well as the prohibition, prosecution, and punishment of traffickers.<sup>388</sup> Legislation that deals with only some of these aspects must be complemented by others to address the gap. The CoE Convention, EU Directive and MSA 2015, are well-suited for this purpose. These three instruments complement each other, and when there are disparities in definition or application of legal principle the MSA may be helpful to clarify the provisions in the CoE Convention and EU Directive. The UNODC Model law against Trafficking in Persons is also useful to provide guidance on any difficulties encountered in applying the non-prosecution principle.<sup>389</sup> The model law has been developed to assist state parties with the implementation of the Palermo Protocol. The model law suggests the inclusion of a provision on the non-prosecution of victims of THB in domestic law.<sup>390</sup>

Victims are persons who have individually or collectively suffered harm including physical or mental injury, substantial impairment of their fundamental rights, economic loss or emotional suffering through acts or omissions that are in violation of criminal laws operating within member states, including those laws prohibiting criminal abuse of

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<sup>387</sup> Ibid

<sup>388</sup> Ibid, 161

<sup>389</sup> United Nations Office on Drugs and Crime, Model Law against Trafficking in Persons, 2009

<sup>390</sup> Ibid, art 10

power.<sup>391</sup> It is important to also point out that a person is considered to be a victim of trafficking if the intention behind their movement and recruitment was exploitation, even if the actual exploitation did not occur.<sup>392</sup> The definition of a victim of trafficking in the Palermo Protocol makes it clear that trafficking occurs once certain acts are carried out for the purpose of exploitation. Hence, it is the purpose, which is the main factor, rather than whether exploitation is present or not. This consideration is relevant for instance in cases of child trafficking where the children are stopped at the port of entry or where there has been a police raid before actual exploitation has taken place.<sup>393</sup> In addition, even if the UK was able to intervene and had successfully prevented exploitation from occurring, victims may have experienced some trauma en-route to the UK, or in their home country and may still be in need of support.<sup>394</sup> In all UK referrals, the Competent Authority (bodies within the UK Modern Slavery Human Trafficking Unit (MSHTU) and the UKVI) are embodied with the task of determining whether a person is a victim of human trafficking or not. In England and Wales, if it is found that a person is not a victim of trafficking, the Competent Authority is required to go a step further and examine whether they are the victim of another form of modern slavery, which includes slavery, servitude and forced or compulsory labour.<sup>395</sup> Since April 2019, the SCA has

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<sup>391</sup> United Nations Human Rights Office of the High Commissioner, 'Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' (Adopted by General Assembly resolution 40/34 of 29 November 1985)

<<http://www.ohchr.org/EN/ProfessionalInterest/Pages/VictimsOfCrimeAndAbuseOfPower.aspx>> accessed 14 March 2016

<sup>392</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 55/25, 2000, art 3

<sup>393</sup> Hooper L. and Thomson K, 'Victims of Trafficking and the Law Session: Victims of Trafficking – Immigration Law' <[http://www.airecentre.org/data/files/Comic\\_Relief\\_Materials/Glasgow/7\\_-\\_Immigration\\_Materials.pdf](http://www.airecentre.org/data/files/Comic_Relief_Materials/Glasgow/7_-_Immigration_Materials.pdf)> accessed 24 February 2017

<sup>394</sup> Ibid

<sup>395</sup> Home Office, 'Victims of Modern Slavery – Competent Authority Guidance' (Home Office 21<sup>st</sup> March 2016)

replaced the previous Competent Authority comprised of the MSHTU and UKVI. The current SCA's functions and responsibilities are predominantly the same as the previous competent authority.

### **3.7 State's Conferral of Victim Status – Determining whether a person is a victim of human trafficking or not.**

An individual may be conferred with victim status by the state, following an assessment of whether they are a credible victim of human trafficking or not. A victim of human trafficking will only receive protection from the state, including applying the non-prosecution principle to their matter when the individual has been properly identified as a victim of THB. The decision to determine whether a person is a credible victim of trafficking or not is called a reasonable grounds decision.<sup>396</sup> The decision is made through the NRM, and the decision may either be positive or negative. A positive grounds decision implies that the victim of trafficking will receive protection from the state including accommodation and housing and they may be granted asylum to stay on in the UK if it is unsafe to return to their own country.<sup>397</sup>

Similarly, a negative decision by the NRM on a victim's application indicates that there are no reasonable grounds to believe that the individual is a victim of human trafficking.<sup>398</sup> A negative decision effectively halts the person's claim for protection from a state. This also means that any other ancillary rights which might arise before a

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<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/509596/Victims-of-modern-slavery-competent-authority-guidance-v3.0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/509596/Victims-of-modern-slavery-competent-authority-guidance-v3.0.pdf)> accessed 28 March 2016

<sup>396</sup>NCA – NRM<<http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism>> accessed March 10 2016

<sup>397</sup> Ibid

<sup>398</sup> Ibid

conclusive decision is reached – such as the 45-day recovery and reflection period, support and legal advice will also be halted.<sup>399</sup> Therefore, it is helpful for the authorities not to dismiss a potential victim’s account of their trafficking situation. Dismissing their account may preclude them from gathering more evidence to support their claims, thereby rendering them ineligible even for interim support.<sup>400</sup> A dismissal of their claims also suggests that they could be returned to their home countries where they may be at risk of re-trafficking and re-victimisation.<sup>401</sup>

In addition, the time frame allotted to process claims of victims of THB is limited. The NRM team has a timeline of five working days from receipt of referrals in which to decide whether there are reasonable grounds to believe that an individual is a potential victim of human trafficking or modern slavery.<sup>402</sup> Following the passing into law of the MSA, the current practice is to assess a person’s situation by examining whether they are a potential victim of trafficking or modern slavery. By using the “I believe but cannot prove” threshold at the reasonable grounds stage the individual’s application is considered.<sup>403</sup> The five working days’ timeframe is insufficient to obtain adequate information of a person’s circumstance or to receive conclusive information and reports from the first responder about a victim’s situation.

Further, if the decision is affirmative, then the potential victim will be assigned a place within Government funded safe house accommodation. This will allow the victim time to begin to recover from their trafficking experience and reflect on what to do next – for

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<sup>399</sup> Ibid

<sup>400</sup> Ibid

<sup>401</sup> Ibid

<sup>402</sup> Ibid

<sup>403</sup> *R (Hoang) v SSHD* [2015] EWHC 1725, para 58

example they may decide to seek asylum in the UK, if they believe it is unsafe to return home. Also, an affirmative decision implies that a victim may receive an opportunity to heal psychologically, enough to give a full account of their trafficked circumstance to the authorities.<sup>404</sup> The time to heal will also foster the possibility of the person assisting the police with investigative work that may lead to prosecution of their exploiters.<sup>405</sup> Accordingly, decision-makers must be mindful of the impact their decision may have on the trafficked victim; and also on any potential prosecution of the trafficker.<sup>406</sup>

### **3.8 Establishing a Nexus between Victim Status and State Obligations**

The offence of human trafficking may be a form of enslavement, where the victim is under the control of another. While the two concepts of trafficking and slavery are similar, there is a danger in using them interchangeably. The reason for this is that human trafficking and slavery are treated as separate offences, though the penalties and sentencing for each offence is similar.

The process of protecting a victim of slavery will be different depending on the circumstance of an individual's case. Hence, the legal concepts of slavery and enslavement are distinct from trafficking.<sup>407</sup> Siller argues that to differentiate the two, one should inquire how the alleged victim was secured and whether some action or process facilitated the criminal actor's ability to obtain their subject before the identified

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<sup>404</sup>*R (FM) v SSHD* [2015] EWHC 844, para 18

<sup>405</sup>*R (Hoang) v SSHD* [2015] EWHC 1725, para 58

<sup>406</sup> *Ibid*, para 77

<sup>407</sup> Siller N., 'Modern Slavery': Does International Law Distinguish between Slavery, Enslavement and Trafficking?' (2016) JICJ 14

exploitation was perpetrated.<sup>408</sup> If the answer is yes, one must look first at whether the person was trafficked.<sup>409</sup>

Importantly, with the enactment of the MSA, the distinction between slavery and trafficking has been made clear. Slavery, servitude and forced or compulsory labour are distinguished from human trafficking. Essentially, a human trafficking offence is committed when a person arranges or facilitates the travel of another person in order to exploit them.<sup>410</sup> Slavery and servitude on the other hand is committed when the ‘circumstances are such that the person knows or ought to know that the victim is being held in slavery or servitude’.<sup>411</sup> This provision read on its own seems confusing and does not give much context of how a reasonable person should recognise a situation of slavery or servitude. Thankfully, subsection 3 of the same section goes further to explain the situations that may amount to slavery. To determine slavery situations, the work or services provided by the person should be considered and whether there is any history of mental or physical illness to make the person more vulnerable to exploitation.<sup>412</sup>

The application of the non-prosecution principle is contingent on a clear definition of the offence of human trafficking. In this regard, it is important to distinguish between human trafficking and slavery because describing trafficking as a form of enslavement does not take into consideration all the elements of the offence of human trafficking (the act, means and purpose). The concept of enslavement also depicts a fictional image of victims

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<sup>408</sup> Ibid

<sup>409</sup> Ibid

<sup>410</sup> MSA, s. 2 (1)

<sup>411</sup> Ibid, s. 1 (1)

<sup>412</sup> Modern Slavery Act 2015, art 1 (3) (a) and (b)

who have been deprived of both their freedom of choice and liberty.<sup>413</sup> This situation may not always be the case at the start of a victim's human trafficking experience. Sometimes, declining economic conditions within the countries of origin is a major motive behind a person's decision to initially agree to a trafficking situation.<sup>414</sup> States often fail to accept a victim's rationale in agreeing to be trafficked; this dismissal only leads to increase in trafficking offences without a corresponding prosecution of traffickers.<sup>415</sup> Efforts of governments and their criminal justice and border agencies are likely to be of limited benefit to victims if they ignore the push factors (lack of access to basic rights, economic marginalization of individuals in impoverished regions especially women) and the regional diversity that persuades victims to cooperate with traffickers.<sup>416</sup> In addition, border control measures aimed at curbing illegal immigration lead to an increase in trafficking activities, because the victims may be returned to their home countries where they are at risk of being re-trafficked. Hence, despite the many anti-trafficking legislation and international treaties, it is usually the trafficked victim rather than the trafficker who experiences the force of the criminal and immigration laws.<sup>417</sup>

While the above analysis suggests that States need to reform their immigration and trafficking policies, destination States need to modify the laws and practices governing the treatment of victims of THB. This is because, destination states enforcement of anti-

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<sup>413</sup> Hussein R. A., 'The existing tensions in the defining of human trafficking at a UK and international level: a critical overview' (2015) 39 (2) *Int. J. Comp. Appl. Crim. Justice*, 129, 135

<sup>414</sup> Hoyle C., Bosworth M., and Dempsey M., 'Labelling the Victims of Sex Trafficking: Exploring the Borderland between Rhetoric and Reality' (2011) 20 (3) *SLS*, 313, 327

<sup>415</sup> Hussein R. A., 'The existing tensions in the defining of human trafficking at a UK and international level: a critical overview' (2015) 39 (2) *Int. J. Comp. Appl. Crim. Justice*, 129, 135

<sup>416</sup> Hoyle C., Bosworth M, and Dempsey M. 'Labelling the Victims of Sex Trafficking: Exploring the Borderland between Rhetoric and Reality' (2011) 20 (3) *SLS*, 313, 321

<sup>417</sup> Hussein R. A., 'The existing tensions in the defining of human trafficking at a UK and international level: a critical overview' (2015) 39 (2) *Int. J. Comp. Appl. Crim. Justice*, 129, 135

trafficking laws is lax, which further promotes of trafficking cases.<sup>418</sup> There are limits to which a state can fulfil their obligations to potential or actual victims of THB due to high demands on state resources. Although the Palermo Protocol does not require states to enact legislation on protection, this is essential from a legal viewpoint. Some states have provided protection outside of legislative frameworks. In Israel for instance, legal aid is provided to victims to encourage them to participate in criminal proceedings against traffickers.<sup>419</sup> India has built child protection cells in major train stations to aid in detecting cases of child trafficking.<sup>420</sup> While there are useful aspects to the state obligations contained in the Palermo Protocol, the ECHR, EU Directive, CoE Convention and MSA, victims are still prosecuted for immigration and criminal offences. Victims are being prosecuted, despite the fact that these offences have occurred as a direct result of their trafficking circumstance. In some cases, trafficked victims may be deported because of their immigration status, with insufficient regard for the gravity of their situation.<sup>421</sup> The implementation of State obligations as regards victim support measures in the UK still does not go far enough in achieving adequate victim protection.<sup>422</sup> To remedy this inconsistency, Elliot contends that a more accommodating approach to treatment and protection of victims should be adopted.<sup>423</sup> It is necessary to weigh up the public interest concerns of immigration control versus giving immediate

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<sup>418</sup> Meyers D. T., 'Victims of Trafficking, Reproductive Rights and Asylum' in Francis L. (ed). *The Oxford Handbook of Reproductive Ethics* (1<sup>st</sup> edn, Oxford University Press 2017) 9

<sup>419</sup> U.S Department of State, *Trafficking in Persons Report (TIP Report 2014)* 216

<sup>420</sup> *Ibid*, 205

<sup>421</sup> Elliot J. *The Role of Consent in Human Trafficking* (1<sup>st</sup>edn, Routledge 2014) 162

<sup>422</sup> *Ibid*

<sup>423</sup> *Ibid*, 218

protection and sympathetic treatment to victims.<sup>424</sup> Also, measures to protect victims from ill-treatment on return to their home countries should be put in place, in order to prevent re-trafficking to destination states.

## **Conclusion**

Unfulfilled State obligations and inadequate victim status attainment are two of the main reasons that victims of trafficking are prosecuted for criminal activities carried out during their trafficking circumstance. The UK is obligated not to prosecute victims of trafficking for offences they have been coerced or forced to commit because of their trafficked status. However, a trafficked person does not obtain automatic immunity from prosecution, nor do they have a substantive defence because of their status as victims of trafficking alone. Nonetheless, culpability may be significantly diminished when the evidence points to the fact that the exploited victim was forced by an individual or a group of individuals to carry out the illegal acts. Where a victim is prosecuted for offences which have occurred as a direct consequence of their trafficking situation, they can appeal the court's decision based on abuse of process and have their conviction quashed.

In assessing victim status all that is required is substantial evidence that points to the fact that a person was exploited and is a credible victim of THB. However, a simplistic view of a victim as blameless is flawed because it does not consider trafficked victims who have displayed some agency or acted as co-conspirators to their trafficking situation. Hence, it is useful to point out that there is no typical victim of trafficking. They are not all naive, simple people who are tricked. Educated individuals with high social status

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<sup>424</sup> Ibid

may also become victims of trafficking because of their desire to earn a living. Importantly, trafficked persons rarely regard themselves as victims. Either due to the shame of having been exploited or fear of retribution, individuals identified by government officials and NGOs are often hesitant to admit that they have been trafficked.

An enhanced approach, to treatment and protection of victims, is required to foster an improved implementation of State obligations. In this regard, determining whether trafficking should be equated to slavery is a good step to promote implementation of State obligations. The decision in the *Rantsev* case is useful in providing further guidance on this. The Court's decision illustrates that THB is prohibited by Article 4 of the ECHR without the need to define it either as slavery, servitude or forced labour. However, the decision that trafficking is based on the definition of slavery is flawed. The MSA treats trafficking and slavery as two distinct concepts. By merging trafficking into slavery as if they were the same, the constituent elements of trafficking (its means, methods and forms including debt bondage and forced labour) results in a narrow understanding of the offence. On balance, the case is helpful in affirming the transnational nature of human trafficking and the obligations imposed on States to cooperate in preventing the offence.

This Chapter has discussed unfulfilled State obligations and inadequate victim status attainment and the conditions that sometimes lead to this circumstance. It has been established in this chapter the importance of improving the current conditions so that vulnerable victims' rights may be protected and preserved. The next chapter will consider the operation of the non-prosecution principle and its implication on victims of human trafficking.

## **CHAPTER FOUR**

# **THE OPERATION OF THE NON-PROSECUTION PRINCIPLE, AND ITS IMPLICATION FOR VICTIMS OF THB**

### **4.1 Introduction**

Trafficking victims are often arrested for charges relating to document offences, immigration offences, drug importation and cultivation, prostitution and other fraudulent crimes including theft.<sup>425</sup> Notable elements which indicate that a person may be experiencing a situation of exploitation include possession of false identity or travel documents, signs of fear or anxiety, distrust of the authorities, fear of revealing immigration status. Other signs that an individual may be a trafficked victim are inconsistent details about the person's age and name, controlled or restricted movement from a third party.<sup>426</sup>

Individuals who have been trafficked, may be reluctant to disclose their trafficking situation, because of a heightened apprehension of prosecution. The person may be concerned that the authorities on uncovering their victim status may proceed to prosecute them for crimes committed during, or as a direct consequence of having been

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<sup>425</sup> Southwell P., 'Defending Victims of Human Trafficking – The Law Society' (Lawsociety.org.uk, 2015) <<http://www.lawsociety.org.uk/news/blog/defending-victims-of-human-trafficking/>> accessed 7 October 2016

<sup>426</sup> Ibid

trafficked.<sup>427</sup> Some level of trust needs to be acquired by the interviewer before the victims become willing to discuss their circumstance. Generally, gaining a victim's trust may include utilising a sensitive approach, asking the right questions in pursuance of acquiring further information and conducting frequent meetings (with the authorities including the police, the decision maker in the NRM or lawyer and claimant – trafficked victim).<sup>428</sup>

Often, victims of THB who have committed criminal offences are presented before the authorities primarily as offenders in the first instance and not as actual victims of trafficking.<sup>429</sup> Punishing victims for crimes directly related to their trafficking situation is a violation of their basic human rights. This is because, it may be contended that these individuals would not have perpetrated the illegal acts if not for their status as trafficked persons. Human rights are the basic rights and freedoms that belong to every person in the world. These rights are based on core principles that include dignity, fairness, equality, respect, and autonomy. Hence, the punishment of victims of human trafficking for crimes directly related to their trafficking circumstance is a violation of their fundamental dignity.

Further, the known overlap between smuggling and trafficking impedes the process of determining a victim's circumstance, such that the authorities are unable to identify a

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<sup>427</sup> 'Victims of Modern Slavery, Competent Authority Guidance' (2016)  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/521763/Victims\\_of\\_modern\\_slavery\\_-\\_Competent\\_Authority\\_guidance\\_v3\\_0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/521763/Victims_of_modern_slavery_-_Competent_Authority_guidance_v3_0.pdf)> accessed 7 October 2016

<sup>428</sup> Southwell P., 'Defending Victims of Human Trafficking – The Law Society' (Lawsociety.org.uk, 2015)  
<<http://www.lawsociety.org.uk/news/blog/defending-victims-of-human-trafficking/>> accessed 7 October 2016

<sup>429</sup> Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking (OSCE/Office of the Special Representative and Co-ordinator for combating Trafficking in Human Beings, 2013) 8

genuine victim and subsequently offer requisite protection. Although the concepts of smuggling and trafficking are separate and clearly defined in the law, the realities of individuals' circumstances are not as easily separated. What can sometimes start as a smuggling arrangement can often result in the subsequent exploitation and control of the individual, effectively turning the relationship into one of trafficking.<sup>430</sup> This is called the "trafficking cycle" or "trafficking trap".<sup>431</sup>

The issue of smuggling is directly relevant to the discussion on the application of the non-prosecution principle. This is because a situation of smuggling and trafficking may overlap. This overlap may consequently lead to a missed opportunity to apply the non-prosecution principle. There is an explanation in this research work in section 2.2.3 and 2.2.4, page 56 to 63 on the overlap between smuggling and trafficking. A smuggled person may discover later that their trafficker seeks to exploit them. The importance of distinguishing between smuggling and trafficking is discussed here because a trafficked victim may be incorrectly identified as a smuggled migrant, or a smuggled migrant may be incorrectly identified as a trafficked victim and so on. Improper identification of a victim may delay or prevent the application of the non-prosecution principle. In these situations where there is an overlap between smuggling and trafficking overlap, the process of determining a victim's circumstance may be impeded. This raises the question of whether these individuals should be treated as victims and provided protection and support, or criminals who are prosecuted and punished for their role.

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<sup>430</sup> Van Reisen M., Estefanos M. and Conny Rijken C., *The Human Trafficking Cycle: Sinai and Beyond* (2<sup>nd</sup> edn Wolf Legal Publishers 2014) 23

<sup>431</sup> *Ibid*, 26

In addition, determining which law is applicable to an individual's specific circumstances may be difficult to ascertain. For example, an individual who was born and raised in Italy but trafficked to Scotland in the UK may have a different set of laws applicable to their case. The legal requirements for this situation may include: Scottish law, European Union (EU) law, and possibly the United Nations (UN) law.<sup>432</sup> A trafficked victim may also seek residence status under UK immigration law, although there is no specific residence category for trafficked victims.<sup>433</sup> The UK has in place an accessible legal structure to protect victims of human trafficking from prosecution and secure their safety when they have been forced into criminal activities. The three instruments that promote the rights of victims of trafficking are the CoE Convention, EU Directive and the MSA.

This chapter aims to discuss the non-prosecution principle under Article 26 of the Council of Europe Convention<sup>434</sup> (CoE Convention), Article 8 of the European Union (EU) Directive 2011/36<sup>435</sup> and Section 45 of the Modern Slavery Act 2015. An analysis of the application of the non-prosecution principle and the implications for victims of human trafficking will be undertaken. In this regard, an examination of a person's age and the relevance of an age assessment in prosecuting child victims of human trafficking has been considered in section 4.4 of this chapter. Subsequently, the application of the non-prosecution principle to child victims of human trafficking and the limitations in applying the principle has been discussed in section 4.8.

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<sup>432</sup> Weiss A., 'The Application of International Legislation: Is the Federalisation of Anti-trafficking Legislation in Europe Working for Trafficked Victims?' in Malloch M. and Rigby P. (eds) *Human Trafficking: The Complexities of Exploitation* (1<sup>st</sup> edn, Edinburgh University Press, 2016), 42

<sup>433</sup> *Ibid*

<sup>434</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005

<sup>435</sup> European Union Directive 2011/36 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims [2011] OJ L101/1

The limitations in applying the non-prosecution principle are linked to the court's procedure for determining whether to prosecute a victim of human trafficking or not. Section 4.5 illustrates that the courts currently use either the three-stage exercise for prosecution or the four-stage approach (after the enactment of the MSA). The process of protecting victims of human trafficking in theory/practice show that the exclusion of offences in schedule 4 of the MSA may have the potential of undermining the effectiveness of the non-prosecution defence in section 45. Hence, the writer has proceeded to examine the distinction between the common law defence of duress and the compulsion element in the non-prosecution principle. A comparison of the two defences (duress and compulsion in the non-prosecution principle) may aid our understanding of the situations that victims of trafficking may sometimes experience. Hence, this comparison is made with the goal of considering ways to improve the protection for victims in legal practice.

## **4.2 Examination of the Principle**

Article 26 of the Council of Europe Convention and article 8 of the European Union (EU) Directive 2011/36 contain useful provisions regarding the non-prosecution principle. The provisions in both the CoE Convention and the EU Directive have now been recreated in the MSA and are fully operational in the domestic law in England and Wales.

Essentially, states or countries who are parties to the CoE Convention are required to provide for the possibility of not imposing penalties on victims of THB for their involvement in unlawful activities “to the extent that they have been compelled to do so”.<sup>436</sup> Similarly, member states of the EU have an obligation to ensure that victims of

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<sup>436</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 26

THB are not prosecuted nor have penalties imposed on them for engaging in criminal activities which they have been compelled to commit as a direct consequence of the fact that they have been trafficked.<sup>437</sup> The MSA also provides a defence for victims of THB who commit an offence as a direct consequence of their trafficking status. The act provides that when a person below or above the age of 18 years is compelled to commit an offence, the person is not guilty of the act where the compulsion is attributable to slavery or exploitation.<sup>438</sup>

The MSA is significant because it expressly gives immunity to both adult and child victims of THB against prosecution for crimes committed directly and due to their trafficking status.<sup>439</sup> Nonetheless, the act has also been criticised as being inadequate in certain areas. One of the foremost defects that have been identified is that the Act over-emphasises the importance of prosecution and lacks a victim protection provision which is an essential element in any successful anti-slavery legislation.<sup>440</sup>

It is submitted that although the MSA may have some shortcomings, the most important consideration should be the effect of implementation of the Act to victims. Also, whether the provisions contained therein will be sufficient to minimise the continued exploitation of innocent victims of the offence of THB. The Act is intended to supplement the provisions of the other two instruments and is helpful where further guidance is required to explain the non-prosecution principle.

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<sup>437</sup> European Union Directive 2011/36 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims [2011] OJ L101/1, art 8

<sup>438</sup> Modern Slavery Act 2015, s 45

<sup>439</sup> Ibid

<sup>440</sup> Skrivankova K., 'Big Step in the Right Direction but Deficiencies Leave us- And Victims of Modern Slavery – Wholly Unsatisfied'  
<[http://www.antislavery.org/english/press\\_and\\_news/news\\_and\\_press\\_releases\\_2009/analysis\\_of\\_modern\\_slavery\\_act.aspx](http://www.antislavery.org/english/press_and_news/news_and_press_releases_2009/analysis_of_modern_slavery_act.aspx)> accessed 11 May 2015

### 4.3 Application of Legislation to Trafficking Cases

In relation to the application of legislation to trafficking cases, Brewer contends that the provisions of the Council of Europe Convention have been misunderstood and misapplied by the courts.<sup>441</sup> For example the definition of “exploitation” in the Convention is not exhaustive and one may argue that the provision could be applied to children as well.<sup>442</sup> Exploitation is defined in article 4(a) of the CoE Convention. “Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs...” Hence, it falls on the prosecution to investigate the victim’s situation and special circumstance to determine whether exploitation has occurred or not. Afterwards, the prosecutor is expected to use this knowledge to determine whether to proceed with prosecution or not. In some legal jurisdictions, such as the US for example, the prosecutor is vested with an unchecked discretionary power which he employs to decide who will be charged and what charge will be filed, who will be offered a plea bargain and what type of bargain will be offered.<sup>443</sup> Conversely, in the UK and in particular England and Wales, prosecutors are guided by the Code for Crown Prosecutors. The code gives direction to prosecutors on the general principles to be applied when making decisions about prosecutions.

Accordingly, prosecutors are required to act in accordance with the Prosecution of Offences Act 1985 and apply the principles of the ECHR and Human Rights Act 1998 at

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<sup>441</sup> Brewer M., ‘The Prosecution of Child Victims of Trafficking’ (2012) 4, Arch. Rev., 5

<sup>442</sup> Ibid

<sup>443</sup> Spohn C., ‘The Non-Prosecution of Human Trafficking Cases: An Illustration of implementing legal reforms’ (2014) 61 (2) Crim. Law Soc. Change, 169

each stage of a case.<sup>444</sup> The effect of these principles on the prosecution's case include: upholding and protecting the human rights of victims, witnesses and defendants in the criminal prosecution process.<sup>445</sup> The victim's rights to be protected consist of the right to life, prohibition of torture, prohibition of slavery and forced labour, right to liberty and security and the right to a fair trial.<sup>446</sup> An examination of a victim's circumstance by the prosecution often culminates in the decision of whether to prosecute or not. In human trafficking cases, the prosecution's decision is often determined by the level of coercion and compulsion exercised by the trafficker in exploiting the victim.<sup>447</sup> This consideration was the basis for the court's decision in *R v N*.

The court in *R v N* dismissed the appeal against conviction. The rationale for that decision was that there had been insufficient evidence of compulsion to challenge the decision to prosecute.<sup>448</sup> Hence proceeding to prosecute did not amount to an abuse of process or a breach of article 26 of the CoE Convention. Neither the defence nor the CPS was provided with adequate evidence which would suggest that the appellant, who was a child – under 18 years had been trafficked into England or that he fell within the protective ambit of article 26.<sup>449</sup> Rather, the evidence presented connoted that the appellant was a willing participant who volunteered to be smuggled into England to make a better life for himself. In addition, he had a family member who would have been happy to have him

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<sup>444</sup> Crown Prosecution Service: Legal Guidance, Ethical Principles for the Public Prosecutor (2<sup>nd</sup> November 2009), s 2

<sup>445</sup> Crown Prosecution Service: Legal Guidance, Human Rights and Criminal Prosecutions: General Principles <<https://www.cps.gov.uk/legal-guidance/human-rights-and-criminal-prosecutions-general-principles>> accessed 14th May 2019

<sup>446</sup> Human Rights Act 1998, sch 1, art 2, 3, 4, 5, and 6

<sup>447</sup> *R v N* [2012] EWCA Crim 189, para 90

<sup>448</sup> *Ibid*, para 56

<sup>449</sup> *Ibid*

live with her at home. Consequently, the appellant was an illegal immigrant in a vulnerable position who had been exploited by others while working in the cannabis factory. Based on the guidance to prosecutors, and examining the facts that had been presented, the court opined that the decision to prosecute rather than to conduct further investigations did not involve a misapplication of the prosecutorial discretion.

Brewer argues that in giving this judgment, the court ought to have applied the EU Directive on Preventing and Combating THB or any other international instrument to assist in interpreting the provisions of the Convention.<sup>450</sup> She argues that the definition of exploitation as it applies to children was misunderstood and misapplied by the court. A thorough interpretation of the term may have been obtained with recourse to the provisions in the International Labour Organization (ILO) Convention No. 182<sup>451</sup> and Articles 32 and 33 of the United Nations (UN) Convention on Rights of a Child 1989. These instruments expressly provide that the worst forms of child labour comprise the use of children in the production of and trafficking of illicit drugs; and all appropriate measures including educational, administrative, social and legislative measures should be taken to protect them from this illegitimate activity. Primarily, Brewer's argument is that if the court had used the ILO Convention, the UN Convention on Rights of a Child in addition to the provision in Article 26 of the CoE Convention the court might have concluded a different judgment. Further, the EU Directive also provides that the exploitation of a person shall include exploitation for criminal activities, although this provision is not restricted to children. The implication when applied to children indicates that the recruitment, transportation, transfer, harbouring or receipt of children for the

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<sup>450</sup> Brewer M., 'The Prosecution of Child Victims of Trafficking' (2012) 4, Arch. Rev., 4

<sup>451</sup> ILO Convention No. 182, 1999, art 3 (c)

exploitation of criminal activities will amount to trafficking. The requirement of force or coercion is not a necessary element with regards to children before they are entitled to protection as victims of THB.<sup>452</sup>

Nonetheless, contrary to Brewer's argument, the court's assessment of article 26 of the CoE Convention on its own and without recourse to the EU Directive or any other international instrument, ought to have been sufficient to obtain a conclusive judgment. An examination of the circumstances of the case revealed that the appellant was not a clear victim of forced labour. Yet, this evidence did not imply that the conviction was unsafe and constituted an abuse of process; neither did it violate the United Kingdom's Convention obligations.<sup>453</sup> On the other hand, as Brewer contends, if the EU Directive or any other international instrument was applied in addition to the provision in Article 26 of the CoE Convention, would the assessment of the appellant's vulnerable position have resulted in a mitigated sentence, and would the court indeed have submitted a different decision?

It is submitted that the court's decision would have been unchanged based on the circumstance of the victim's case and the evidence presented. The fresh evidence tendered on appeal, indicated that the appellant chose to work in the factory when a safe home with a family member was available to him on arrival in England.<sup>454</sup> Therefore, the appellant was not compelled to work in the factory and could not be regarded as a credible victim of forced labour. The appeal against conviction was dismissed and rightly so. The

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<sup>452</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 4 (c)

<sup>453</sup> *R. v N* [2012] EWCA Crim 189, para 91

<sup>454</sup> *Ibid*

writer holds the opinion that the court's decision was reasonable in relation to the evidence presented.

While there is a positive obligation on the prosecutor to cause further investigation into the circumstance of the victim who has been arrested, there is also a responsibility on the police to investigate the matter properly before apprehending the victims.<sup>455</sup> In reviewing the case the prosecutor must consider the extent to which the victim was compelled to undertake the unlawful activity.<sup>456</sup> Although the Crown Prosecution Service (CPS) has provided a guide to prosecutors regarding application of the non-prosecution principle,<sup>457</sup> it is contended that compliance is inconsistent and irregular.<sup>458</sup> This inconsistency in compliance is particularly evident in relation to prosecution of child victims of human trafficking.

#### **4.4 Prosecuting child victims of human trafficking**

As previously discussed in chapter two of this thesis, identification of victims is a necessary step before purposeful application of the non-prosecution principle to a potential victim's case. Often in court proceedings, the court is expected to determine the age of a person before deciding whether to continue prosecution of the individual's case or not. The criminal justice system treats children and young people differently from adults and serious weight is attached to the age of a person if they are a child or young

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<sup>455</sup> Bowen P., *Protecting Against the Criminalisation of Victims of Trafficking: Relevant CPS Legal Guidance for Adults and Children*, in Chandran P. (ed), *Human Trafficking Handbook: Recognising Trafficking and Modern-day Slavery in the UK* (LexisNexis 2011), 401

<sup>456</sup> *Ibid*

<sup>457</sup> Crown Prosecution Service, *Policy for Prosecuting Cases of Human Trafficking* (2011) 30

<sup>458</sup> Bowen P., 'Protecting Against the Criminalisation of Victims of Trafficking: Relevant CPS Legal Guidance for Adults and Children' in Chandran P. (ed), *Human Trafficking Handbook: Recognising Trafficking and Modern-day Slavery in the UK* (LexisNexis 2011), 402

person under 18 years of age.<sup>459</sup> In deciding whether to prosecute a child the crown prosecution will consider the best interests and welfare of the child or young person. This consideration will also include whether a prosecution is likely to have an adverse impact on their future prospects that is appropriate to the seriousness of the offence.<sup>460</sup> As a general rule, the younger the suspect, the less likely it is that a prosecution is required. However, there may be circumstances which indicate that even though the person is under 18 or lacks maturity, prosecuting the person is in the public's interest. These circumstances may include: a serious offence that has been committed, the individual's past record suggests that there is no suitable alternative to prosecution or where out-of-court programmes that might have addressed the offending behaviour are unavailable.<sup>461</sup>

In human trafficking cases and prior to the application of the non-prosecution principle, an age assessment may be undertaken of the potential victim of THB. The criminalisation of victims of trafficking for acts they were forced or compelled to perform by their traffickers is an important legal consideration. Carter and Chandran have argued that certain groups of victims of trafficking in the UK continue to be subjected to the acts of prosecution and punishment for trafficking-dependent crimes.<sup>462</sup> The legal implications of this issue are numerous; and specific concern has been raised with regards to penalizing child victims of THB.<sup>463</sup>

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<sup>459</sup> The Crown Prosecution Service, 'The Code for Crown Prosecutors' (CPS, 26 October 2018) <<https://www.cps.gov.uk/publication/code-crown-prosecutors>> assessed 11 May 2019

<sup>460</sup> Ibid

<sup>461</sup> Ibid

<sup>462</sup> Carter P. and Chandran P., 'Protecting Against the Criminalisation of Victims of Trafficking: Representing the Rights of Victims of Trafficking as Defendants in the Criminal Justice System in Chandran P.(ed), Human Trafficking Handbook: Recognising Trafficking and Modern-day Slavery in the UK (LexisNexis 2011) 407

<sup>463</sup> Ibid

When the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age.<sup>464</sup> Additionally, if an unaccompanied child is considered a victim, they shall be provided for representation by a legal guardian, organisation or authority and their best interests should always come first.<sup>465</sup> The United Nations Convention on the Rights of the Child also specifies that the best interests of the child should be considered when deliberating on whether to apply the non-prosecution principle or not.<sup>466</sup> Prosecutors are obligated to examine the likely consequences for any children, be they victims or witnesses before proceeding with a prosecution.<sup>467</sup> Thus, the factors for and against prosecution should be carefully considered by the court. These factors may include whether preventative action aimed at tackling child trafficking was put in place by the relevant authorities prior to the presentation of the case in court or not.

In determining whether a claimant has in fact been a victim of THB it is important to ascertain whether he was able to resist involvement in the criminal activities he is being accused of. Generally, the first step in this consideration is an assessment of the person's case from the moment he was arrested.<sup>468</sup> When a young person is arrested, the police are expected to take the person's age into account. A difficulty relating to a person's age usually arises where the young person has entered the United Kingdom illegally and has

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<sup>464</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 10 (3)

<sup>465</sup> *Ibid*

<sup>466</sup> The United Nations Convention on the Rights of the Child 1989, art 3 (1)

<sup>467</sup> The Crown Prosecution Service, Safeguarding Children as Victims and Witnesses <[http://www.cps.gov.uk/legal/v\\_to\\_z/safeguarding\\_children\\_as\\_victims\\_and\\_witnesses/#a05](http://www.cps.gov.uk/legal/v_to_z/safeguarding_children_as_victims_and_witnesses/#a05)> accessed 11 March 2014

<sup>468</sup> *L, HVN, THN & T v R* [2013] EWCA Crim 991, para 19

no genuine passport or any relevant identifying documentation. Often, when a young person without adult supervision or without a parent present is brought to the attention of a local authority, for example, the UKVI, as an illegal entrant, the authority is obligated to determine whether he is a child in need or not.<sup>469</sup> If he is determined to be a child in need, he is entitled to several services including the provision of accommodation. Consequently, the pertinent questions for consideration are whether the defendant is a child victim of THB by deducing the defendant's age; and whether there is credible evidence that points to the fact that he/she is in fact a victim of THB. If there is compelling evidence that the person is a victim of THB, it is important to establish the extent in which the offence is a direct result of his exploitation as a victim of human trafficking. It is important to point out that this consideration is relevant to both adult and child cases of victims of trafficking.

Establishing a victim's age may not be possible based on the appearance of the person alone, sometimes a medical examination may be necessary to ascertain the age of the defendant. The Court's ruling in *R (B) v. London Borough of Merton*<sup>470</sup> provides some guidance, although the case concerns an asylum claim only and not a trafficking situation. In that case the claimant a 17 year old asylum-seeker argued that there was procedural unfairness being employed in the case, because the defendant had not made a suitable determination of the claimant's age but simply adopted the conclusion of the home secretary that the applicant was 18 years old.<sup>471</sup> The defendant countered the claimant's argument by contending that the assessment process had been rational, adequate and

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<sup>469</sup> Ibid

<sup>470</sup> [2003] EWHC 1689

<sup>471</sup> Ibid, para 17

lawful because the decision was based on a question of fact.<sup>472</sup> According to him, in cases of this nature, the applicant is not required to produce any documentary evidence of his date of birth or age. His age may be determined by his behaviour, physical appearance and the history he gives in evidence.<sup>473</sup>

The court opined, that the decision maker cannot determine age solely because of the appearance of the applicant. Rather, his general background including educational training, activities undertaken in the preceding years, the applicant's family circumstances and history as well as ethnic and cultural information should all be considered.<sup>474</sup> If there is any reason to doubt the applicant's statement regarding his age, the decision maker will have to make an assessment of his credibility and ask questions designed to test his credibility.<sup>475</sup> Thus, the social services department of a local authority cannot simply adopt a decision made by the Home Office. It must decide whether an applicant is a child in need, hence whether the applicant is a child and if so whether he or she is in need within the meaning of Part III of the Children Act 1989.<sup>476</sup> When the local authorities, and other agencies are successful in implementing an efficient preventive mechanism, these definitive measures will aid in reducing the vulnerability of potential victims.<sup>477</sup>

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<sup>472</sup> Ibid, para 18

<sup>473</sup> Ibid, para 20

<sup>474</sup> Ibid, para 37

<sup>475</sup> Ibid

<sup>476</sup> Ibid, para 39

<sup>477</sup> Scullion D., 'A Critical Analysis of Legal Responses to Trafficking: A Case Study of Child Domestic Work' (PhD Thesis 2011) 79

In England and Wales, the CPS 2018 guidance states that where a suspect is arrested for minor criminal offence and there is evidence to show that they may be a victim of trafficking, the police must refer them to the NRM to confirm their trafficking status if they are a child.<sup>478</sup> If, after investigation, there is clear evidence that the defence in section 45 MSA may apply, the custody officer may decide not to charge. In all other cases, the CPS will make the decision. In cases referred to the CPS for a charging decision and for which a defence under section 45 MSA could apply, a prosecutor will require proper information to inform a decision on whether to charge the child victim of THB or not.<sup>479</sup> However, no charges will be brought if there is a conclusive grounds decision under the NRM that a suspect is a victim of trafficking or slavery, there is evidence that proves that on a balance of probabilities the other conditions in section 45 MSA have been met.<sup>480</sup> These conditions include: whether the suspect is an adult or child, and the offence is not an excluded offence under schedule 4 of the MSA. If the offence is excluded, the CPS would still have discretion on whether to proceed with prosecution or not.

In the context of prosecuting a defendant under 18 years of age, although the best interests of the victim are a primary consideration, this is not and cannot be the only relevant element to consider.<sup>481</sup> Despite the fact that, a person's status as a trafficked victim may provide substantial mitigation, victims of THB are not automatically protected from prosecution or punishment for offences which are connected to their trafficking situation. What is required for the prosecutorial decision to proceed is a level of protection from

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<sup>478</sup> Crown Prosecution Service, 'Human Trafficking, Smuggling and Slavery: Suspects who might be Victims of Trafficking or Slavery (cps.gov.uk, 10<sup>th</sup> December 2018) <<https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery>> accessed 12<sup>th</sup> May 2019

<sup>479</sup> Ibid

<sup>480</sup> Ibid

<sup>481</sup> *L, HVN, THN & T v R* [2013] EWCA Crim 991, para 14

prosecution for trafficked victims who have been compelled to commit criminal offences.<sup>482</sup>

## **4.5 Factors Which Determine Prosecution**

### **4.5.1 Has the defendant has been trafficked within the meaning of the CoE Convention, EU Directive or MSA?**

Generally, a criminal court can rely upon the expertise of the NRM system set up by the Government to identify and support trafficking victims. An important innovation that has taken place in human trafficking cases is the court's acceptance of the positive decisions by the NRM that defendants in a trafficking case have genuinely been trafficked. The criminal court in *L, HVN, THN & T v R* is one of the first cases to endorse NRM conclusions.<sup>483</sup>

The findings of the Court in the afore-mentioned case are relevant. This is because, the court determined that prior to prosecution, it is pertinent to consider whether the defendant was recruited, transported, transferred, harboured or received for the purpose of exploitation. In this regard, exploitation may consist of, forced labour or services, sexual exploitation, criminal activities or the removal of organs.<sup>484</sup> Establishing the existence of exploitation in a trafficking victim's circumstance, implicitly relates to the issue of consent. The court opined that, when the issue of consent is raised; the consent of the victim to the exploitation, intended or actual is irrelevant. The immateriality of consent in a victim's case, is often a fact overlooked in the situation of smuggled migrants

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<sup>482</sup> Ibid

<sup>483</sup> [2013] EWCA Crim 991

<sup>484</sup> Palermo Protocol, art 3 (a)

who appear willing to be exploited. Thus, a smuggled migrant may fall prey to exploitation during their transportation or after arrival in the UK.<sup>485</sup> Determining where smuggling ends and trafficking begins is a useful examination, which may aid proper identification of a victim of trafficking. Hence, a victim's case should be carefully examined to determine whether they have been simply smuggled or exploited by a trafficking offender.

The appeals in *R v L* deal with four unconnected cases in which there are three children and one adult, who were victims of human trafficking, prosecuted and convicted for their illegal activities.<sup>486</sup> In the case of *HVN in R v L* an age assessment was carried out on the day of arrest and the Court settled that he was a child (17 years) by the time he made his first appearance in Court.<sup>487</sup> With regards to the age of the victim, this is a critical issue which determines the question of trafficked status. Hence if the defendant is found to be a child the requirement that the act of trafficking be achieved by means of the threat or use of force, deception, abuse of power, or coercion is not applicable. The child is entitled to special protection, including a child in need under the Children Act 1989.<sup>488</sup> In child cases, proof of coercion to commit the criminal offence charged is also not a requirement. However, since most children trafficked from foreign countries do not possess valid identification documents, age assessments in the criminal courts are increasingly difficult.<sup>489</sup>

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<sup>485</sup> Hoyano L., 'Case Comment, *R v L*: People Trafficking – Guidance' (2014) Crim L.R. 154

<sup>486</sup> *L, HVN, THN & T v R*, para 1

<sup>487</sup> *Ibid*, para 19

<sup>488</sup> *Ibid*

<sup>489</sup> *Ibid*

A person is presumed to be a child when the true age of the individual remains uncertain after domestic procedures on assessment of age have been conducted.<sup>490</sup> Despite a Merton – compliant age assessment indicating that a trafficked victim was underage, the judge in the Court of Appeal case charged a Vietnamese male with cannabis cultivation after concluding that he was at least 18. As has been discussed previously in this chapter, a Merton test entails assessing the credibility of the claimant by asking questions designed to test his credibility.<sup>491</sup> Accordingly, the underage victim was prosecuted in the crown court and served his sentence in an adult prison. Proof of coercion to work in a Cannabis factory was not required for the Vietnamese appellant but in the case of L an adult woman in the sex industry, proof of coercion was an important factor that was examined. Undeniably, the criminal courts have a duty to comply with the requirement of properly determining the true age of a defendant. However, the prosecution and defence also need to actively seek relevant evidence for their respective cases because the criminal court is not equipped to conduct its own investigations. *HVN's* conviction was later quashed on appeal on the basis of new evidence that determined that he was a trafficked child and his criminal activities were integral to the circumstances in which he was a victim.<sup>492</sup> If the new evidence had been available when the original decision to prosecute the appellant was made, on the basis of public interest in the context of trafficked children, *HVN* would not have been prosecuted.<sup>493</sup> Also, if he had instituted an abuse of process argument prior to this appeal, his abuse of process application would have succeeded. Hence, the

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<sup>490</sup> European Union Directive 2011/36 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims [2011] OJ L101/1, art 13 (2)

<sup>491</sup> *R (B) v. London Borough of Merton* [2003] EWHC 1689, para 37

<sup>492</sup> *R. v L*, para 45

<sup>493</sup> *Ibid*

evidence in a trafficking case is important especially when it concerns trafficked child victims.

#### **4.5.2 Does the defendant's status as a trafficked victim afford him automatic protection from prosecution for the offence charged?**

Undoubtedly, the mere fact that a victim has been exploited for human trafficking purposes does not confer on them automatic immunity from prosecution. However, the pertinent question here is does any of the legislation – CoE Convention and EU Directive or MSA prohibit the prosecution of a trafficked victim for criminal activity? There is some confusion as to whether Article 26 of the CoE Convention is directed at the decision to sentence a criminal offender rather than the decision to prosecute or relates to both sentencing and prosecution.<sup>494</sup> Member states of the EU are required to take necessary measures to ensure the competent national authorities are entitled not to prosecute or impose penalties on victims of THB for their involvement in criminal activities.<sup>495</sup> Nonetheless, it is argued that the phrase “entitled not to prosecute” is itself unclear and difficult to fully comprehend. Recital 14 is easy to comprehend and directs that, victims of THB, in accordance with the basic principles of the legal systems of the relevant member states, should be protected from prosecution or punishment, for criminal activities they have been compelled to commit, as a direct consequence of their trafficked status.<sup>496</sup>

Consequently, to be eligible for protection the defendant's involvement in criminal activities must be a direct consequence of being subjected to trafficking; and in the case

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<sup>494</sup> Ibid, para 23 and 35

<sup>495</sup> European Union Directive 2011/36 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims [2011] OJ L101/1, art 8

<sup>496</sup> Ibid, Recital 14

of adults, they must have been compelled to commit the offence.<sup>497</sup> Thus, there must be a direct causal connection between the trafficking and the offence the defendant has been charged for. There is also a requirement that there should be a manifestation of the exploitation or an adequate proof that the alleged crime was consequent on or integral to the exploitation of which the defendant or victim has complained.<sup>498</sup> However, it is important to point out that the manifestation interpretation does not take into cognisance the fact that trafficking may be an ongoing process whereby the victim could adapt to the situation and accept it as a normal occurrence. Therefore, a victim may appear willing to commit an offence but in actual fact has been exploited to such an extent that he becomes helpless and is unable to take any positive steps to improve the situation.<sup>499</sup> Therefore, due care and skill is required to ensure that the victims of THB are not rushed nor urged too early in the process to provide information about their experiences without first being evaluated properly to determine the extent of trauma they have been exposed to.

It is argued that despite the existence of these legal provisions and guidelines on the appropriate course to avoid prosecuting victims of THB, in practice the provisions and guidelines are not followed strictly as one would expect. Bowen contends that victims of trafficking continue to be prosecuted for offences resulting out of their situation of trafficking because criminal defence lawyers and prosecutors lack sufficient awareness and understanding of the issues affecting trafficked victims.<sup>500</sup> These victims seem to be

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<sup>497</sup> *Ibid*, art 8

<sup>498</sup> *L, HVN, THN, T v R*, para 20 and 23

<sup>499</sup> *Ibid*

<sup>500</sup> Bowen P., 'Protecting against the Criminalisation of Victims of Trafficking: Relevant CPS Legal Guidance for Adults and Children' in Chandran P. (ed), *Human Trafficking Handbook: Recognising Trafficking and Modern-day Slavery in the UK* (LexisNexis 2011), 402.

unaware of the available defences arising from situations of trafficking including duress<sup>501</sup> and the right to seek refuge in a country culminating in illegal entry there on.<sup>502</sup>

Alternatively, it may be argued that their continued prosecution is due to the fact that there are no substantive provisions setting out clear guidelines and obligations in relation to “when to” prosecute and “when not to” prosecute victims of THB.<sup>503</sup> However the English courts have provided some helpful guidance to this uncertainty by emphasizing that when victims of trafficking participate or become involved in criminal activities, the trafficked individual should not expect immunity from prosecution, just because he/she was, or has been trafficked.<sup>504</sup> Instead, the prosecution is responsible for deciding whether to prosecute or not; thereafter the court reviews the decision to prosecute through the exercise of the jurisdiction to stay the proceedings.<sup>505</sup> The steps used to determine whether to prosecute or not (that is, prosecution or protection) is discussed further later in this chapter.

The CPS is responsible for prosecuting criminal cases investigated by the police in England and Wales. Primarily, the CPS is empowered with prosecutorial discretion to decide whether to proceed with the prosecution of a defendant or not based on the

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<sup>501</sup> Liff F., ‘Challenging the Treatment of Victims of Trafficking in Immigration and Criminal Proceedings in the UK’ (Duncan Lewis Law Publication, 10 August 2012) <[http://www.duncanlewis.co.uk/publiclaw\\_news/Challenging\\_the\\_Treatment\\_of\\_Victims\\_of\\_Trafficking\\_in\\_Immigration\\_and\\_Criminal\\_Proceedings\\_in\\_the\\_UK\\_\(10\\_August\\_2012\).html](http://www.duncanlewis.co.uk/publiclaw_news/Challenging_the_Treatment_of_Victims_of_Trafficking_in_Immigration_and_Criminal_Proceedings_in_the_UK_(10_August_2012).html)> accessed 11 March 2014.

<sup>502</sup> Asylum and Immigration Act 2004, art 31

<sup>503</sup> Liff F., ‘Challenging the Treatment of Victims of Trafficking in Immigration and Criminal Proceedings in the UK’ (Duncan Lewis Law Publication, 10 August 2012) <[http://www.duncanlewis.co.uk/publiclaw\\_news/Challenging\\_the\\_Treatment\\_of\\_Victims\\_of\\_Trafficking\\_in\\_Immigration\\_and\\_Criminal\\_Proceedings\\_in\\_the\\_UK\\_\(10\\_August\\_2012\).html](http://www.duncanlewis.co.uk/publiclaw_news/Challenging_the_Treatment_of_Victims_of_Trafficking_in_Immigration_and_Criminal_Proceedings_in_the_UK_(10_August_2012).html)> accessed 11 March 2014

<sup>504</sup> *L, HVN, THN, T v R*. [2013] EWCA Crim 991, [2014] 1 All E.R. 113.

<sup>505</sup> *Ibid.*

evidence that is presented before it. If the defendant or victim of THB is unable to advance duress as a defence, the court will determine if they fall under the protective ambit of article 26 of the CoE Convention. The court may exercise its power to stay proceedings on grounds of abuse of process where a credible defence is tendered.<sup>506</sup> Hence the pertinent point to consider is the process of applying the relevant legislation to trafficking cases and how this application can affect the trafficked victim.

#### **4.6 Victim or Perpetrator**

It is sometimes difficult to distinguish between criminal acts performed by a victim of THB and those carried out by the perpetrator. The succinct distinction between the two circumstances can sometimes be hard to reach effectively. Even in situations where it would appear obvious that the victim of a trafficking offence was an unwilling participant, the criminalisation of trafficked persons is still commonplace.<sup>507</sup> Generally, the criminalisation of these victims is linked to an inability to correctly identify victims of trafficking. Hence, the trafficked persons are detained and subsequently charged as smuggled, irregular, or undocumented migrant workers rather than as victims of THB. The trauma for the victims of THB even continues upon their return to their home or originating countries where they are further penalized for unauthorized and unlawful departure. The defendant or victim of THB in some cases may possess the requisite mens rea to commit the illegal acts; and may have every intention of carrying out the criminal activity in order to escape circumstances perceived as more life threatening or harsher in their home country. For example, the appellant in *R v N* left his home country Vietnam

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<sup>506</sup> *LM & Ors. v. R.* [2010] EWCA Crim 2327, para 15

<sup>507</sup> Office of the United Nations High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking - Commentary (United Nations Publication 2010) 129

due to fears his family had about his personal safety because of his father's political activities. N had concerns about his safety after his father had demonstrated against the Vietnamese government, in order to escape this life-threatening situation, he escaped to England in search of a better life and to improve his financial situation.<sup>508</sup> Therefore the pertinent question is, at what point does the victim of THB lose the simple title of victim and transform or develop into a perpetrator.

It has been opined by the appeal court in *R v LM & Ors*<sup>509</sup> that a defendant may retain the status of victim while still being labelled by the criminal law as an offender. The three defendants in the above case had originally been victims of THB but subsequently assumed the role of controllers of others through prostitution. The evidence presented before the court was that they had not simply taken a lead role in showing the inexperienced prostitutes the ropes of the business, they had also resorted to sexual abuse, violence and threats in order to achieve compliance.<sup>510</sup> Although the defendants had little choice in the matter as they had been coerced to carry out their actions, the court ruled that the evidence of active threats and violence was such as to justify prosecution even though the defendants had themselves been exploited as trafficked victims in the past.<sup>511</sup>

From the foregoing it is important to consider the implicit difference between duress and mere coercion. When the defendant in a trafficking case claim that they had been coerced or forced into carrying out an alleged criminal act, how does the court assess the degree which is acceptable as a defence of duress and undue influence? Rix LJ provided a test

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<sup>508</sup> [2012] EWCA Crim 189, [2013] Q.B. 379

<sup>509</sup> [2010] EWCA Crim 2327

<sup>510</sup> *Ibid*, para 27

<sup>511</sup> *Ibid*

with four questions to determine when a credible defence of duress will be accepted by the court.

Was the defendant driven or forced to act as he did by threats which he genuinely believed would lead to serious bodily harm or death?<sup>512</sup> In situations where the person has been coerced by force or threats, then the defence fails. Secondly, would a reasonable person of the defendant's age and background have been driven or forced to act as the defendant did? Third, could the defendant have avoided acting as he did without harm coming to the family? Finally, did the defendant voluntarily put himself in the position in which he knew he was likely to be subjected to threats?

These questions raised by the learned Judge appear to be valid and reasonable principles in assessing whether duress was involved in the action of an accused person. Adults of sound mind are ordinarily held responsible for the crimes which they commit; the exception to this rule is where the person has been forced or compelled to do so against their will by the threats of another.<sup>513</sup> When duress is successfully proven, it may not lead to an automatic dissolution of the legal element of the crime neither does it justify the conduct of the defendant. However, it is a defence which if pleaded correctly may excuse criminal conduct to some extent.<sup>514</sup> It is important to note that where the evidence in the proceedings is sufficient to raise an issue of duress, the burden is on the prosecution to prove to the criminal standard that the defendant did not commit the crime which he is charged with under duress.<sup>515</sup> Where there is credible evidence that the trafficking victim has a clear defence of duress the prosecutors are instructed to discontinue the prosecution

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<sup>512</sup>*Regina v. Hasan* [2005] UKHL 22, para 14

<sup>513</sup> *Ibid*, para 17

<sup>514</sup> *Ibid*, para 18 and 19

<sup>515</sup> *Ibid*, para 20

on evidential grounds.<sup>516</sup> In light of the foregoing, it is essential to assess how the law determines whether a victim should be prosecuted or protected.

#### **4.7 Prosecution or Protection – Guidance in *R v N***

Prosecution for an offence one was exploited and coerced to commit risks the further victimisation of the already vulnerable individual. Further victimisation of a trafficking victim may be viewed as a penalty.<sup>517</sup> Thus before the victim is charged a close analysis of the evidence of the nexus between the alleged offence and the coercion is required in every case. This principle was examined in *R v N*, where the court used the CPS guidance for prosecutors opining that when reviewing a case, it is important to determine whether the trafficked victim is a credible one or not. A credible victim is one who the investigating officers have reason to believe has genuinely been trafficked. Prosecutors must consider whether the public interest is best served in continuing the prosecution in respect of the offence. Additionally, the case should be discontinued on evidential grounds where there is clear evidence that the defendant has a credible defence of duress.

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<sup>516</sup> Crown Prosecution Service, Policy for Prosecuting Cases of Human Trafficking (May 2011)

<sup>517</sup> Hoyano L., 'Case Comment, *R. v. N*: Abuse of Process – Prosecution – Decision to prosecute' (2012) Crim. L.R. 958

### 4.7.1 The Three-stage Exercise for prosecution

Prosecutors are required to apply a three-stage exercise to determine whether a victim should be prosecuted or not. The first question to consider is: is there a reason to believe that the person has been trafficked?<sup>518</sup> If so, then if there is a clear evidence of a credible common law defence the case will be discontinued in the ordinary way on evidential grounds.<sup>519</sup> Importantly, even where there is no clear evidence of a credible common law defence, but the offence may have been committed as a result of compulsion arising from the trafficking, prosecutors should consider whether the public interest lies in proceeding to prosecute or not.<sup>520</sup>

In analysing the preceding, the three-stage exercise, it is argued that the decision given by the court in *R v N* regarding prosecution was misplaced and given per incuriam. The court's focus on the evidence indicating that the appellant had not been trafficked into the UK failed to fully appreciate the provisions of the CoE Convention. In cases where the victims are children under 18 years, recruited and harboured by a criminal gang, to exploit their labour for an illegal industry, neither coercive means nor absence of consent need to be proven.<sup>521</sup> Nevertheless, the court reasoned that the evidence of consent to the illegal entry and to working in the cannabis factory was not an insignificant consideration in the context of the prosecutorial discretion. The appeal court conceded that going by the evidence obtained, both children had been subjected to varying degrees of exploitation by the cannabis factory owners. It is important to point out that evidentially

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<sup>518</sup> *R v LM & Ors* [2010] EWCA Crim 2327, para 10

<sup>519</sup> *Ibid*

<sup>520</sup> *Ibid*

<sup>521</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 4 b - d

trafficking cases can be difficult depending as they often do on the defendant's own account. The expectation that trafficked defendants have only one opportunity to instruct their legal advisers might be an unrealistic one, due to the oppressive and relentless way traffickers intimidate their victims. Similarly, the requirement to partake in a legal process soon after being taken into custody is not the best approach to encourage the victimized person to open and speak freely as they may still be in shock due to the recent ordeal. A simpler approach to decision making should be implemented by the EU Directive's policy of non-prosecution where trafficking is construed in its fullest sense. The factors which determine prosecution should be straightforward and aid in achieving the relevant goal of upholding public policy, thereby protecting the best interests of the victim.

#### **4.7.2 The four-stage approach to the prosecution decision after the enactment of the MSA 2015.**

Following the enactment of the MSA 2015, the CPS has updated the prosecution process for cases of THB from a three-stage exercise to a four-stage approach. Hence, the approach adopted by the Court in *R v LM* while still valid, will be somewhat different in application currently. The new four-stage exercise entails asking the following questions: firstly, is there a reason to believe that the person is a victim of trafficking or slavery?<sup>522</sup> Secondly, is there clear evidence of a credible common law defence of duress? If the answer to this question is yes, then the case should not be charged or should be discontinued on evidential grounds. The third question the prosecutors need to ask is: is there clear evidence of a statutory defence under section 45 of the MSA? If the answer

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<sup>522</sup> Crown Prosecution Service, 'Human Trafficking, Smuggling and Slavery: Suspects who might be Victims of Trafficking or Slavery (cps.gov.uk, 10<sup>th</sup> December 2018) <<https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery>> accessed 12<sup>th</sup> May 2019

to this third question is yes, then the case should not be charged. The fourth question the prosecution needs to consider is: whether it is in the public interest to prosecute or not. Even where there is no clear evidence of duress and no clear evidence of a section 45 defence, or where section 45 does not apply (because the offence is excluded under schedule 4 of the MSA) this must be considered. As with the previous three-stage exercise, prosecutors should consider all the circumstances of the case, including the seriousness of the offence and any direct or indirect compulsion arising from their trafficking situation.<sup>523</sup>

When prosecuting human trafficking cases, the prosecutor is obligated to be aware of the legal standard that should be adhered to in implementation of the non-prosecution principle. This legal standard requires the prosecutor to consider the case of an adult and child separately when deciding whether to prosecute or not. In deciding whether to prosecute a person who might be a child victim of human trafficking or slavery, the prosecutor is obligated to consider whether the child under 18, has done the act as a direct consequence of being a victim of slavery, human trafficking or exploitation.<sup>524</sup> In the case of an adult victim of trafficking or slavery, the prosecutor is required to determine whether the person has been compelled to commit the criminal offence as a direct consequence of their trafficking or slavery situation.<sup>525</sup> The prosecutor's obligations arise under Article 4 of the ECHR which prohibits slavery and forced labour, Article 26 of the CoE Convention and Article 8 of the EU Directive.<sup>526</sup>

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<sup>523</sup>*R v LM & Ors* [2010] EWCA Crim 2327

<sup>524</sup> Crown Prosecution Service, 'Human Trafficking, Smuggling and Slavery: Suspects who might be Victims of Trafficking or Slavery (cps.gov.uk, 10<sup>th</sup> December 2018) <<https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery>> accessed 12<sup>th</sup> May 2019

<sup>525</sup>*Ibid*

<sup>526</sup>*Ibid*

Section 45 of the MSA creates a defence for victims of THB or slavery who commit certain offences when they are compelled to do so (in the case of adults) or when they commit them as a direct consequence of being a victim of slavery / exploitation, if a reasonable person in the same situation would do the relevant act (in the case of children). The defence in section 45 is applicable to cases being decided on or after the 31<sup>st</sup> of July 2015. For offences committed by victims before the above date, stages 1, 2 and 4 of the four-stage approach to the prosecution decision will apply to the trafficking case.

#### **4.8 Limitations in Applying the Non-Prosecution Principle**

Some limitations have been encountered in legal practice while applying the non-prosecution principle. The non-prosecution principle contained in section 45 of the MSA was created using the common law defence of duress as a model. An assessment of the court's interpretation of the non-prosecution principle reveals that its application is limited. A comparison of the two defences (duress and non-prosecution principle) also exemplifies the restrictive nature of the common law defence and explains why the provision in section 45 MSA is incapable of fully protecting the victim of THB from criminal prosecution. These limitations will be discussed in this section of the chapter.

#### **4.8.1 The Common Law Defence of Duress and the Compulsion Element in the Non-Prosecution principle:**

Section 45 of the MSA 2015 provides a statutory defence for victims of human trafficking or slavery who have been charged with criminal offences. For the defence to be pleaded / raised successfully in a competent court of law, the person must prove / provide satisfactory evidence that they were compelled to commit the offence he has been charged for.<sup>527</sup> The interpretation of the word ‘compelled’ in the section is entrusted to the judge, defence lawyers and prosecution to construe its meaning. The meaning is not instantly evident. For example, one could assume that compelled may directly relate to the English common law defence of duress or it may be construed in a broader sense depending on the circumstance of the case. Lord Bingham in the case of *R v Hasan*, a leading case on duress in English law, treated the common law defence of duress and compulsion as one and the same.<sup>528</sup> It is unsatisfactory for compulsion in the context of victims of human trafficking and the defence in section 45 to be limited to the general criminal law defence of duress. To ensure that victims of human trafficking are protected, and that the non-prosecution principle is applied correctly in trafficking cases, it may be useful to distinguish between the compulsion requirement in human trafficking cases and the general criminal law defence of duress.

In this regard, the requirements for the general defence of duress include showing a threat to inflict death or serious bodily harm has been made and that the threat was unavoidable.<sup>529</sup> On the contrary, in trafficking cases, the circumstances in which

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<sup>527</sup> Modern Slavery Act 2015, s 45 (1) (b)

<sup>528</sup> *R v Hasan* [2005] 2 A.C. 467, para 17 (Bingham LJ)

<sup>529</sup> *Ibid*, para 14

trafficking victims have committed offences may not have involved an immediate threat of serious bodily harm or death.

An examination of the cases of *R v N* (trafficking case) in comparison to *R v Hasan* (Case of Duress) is instructive in further assessing the interpretation of compulsion to trafficking cases. In *R v Hasan*, the defendant claimed in defence to aggravated burglary that he had been ambushed by two men with a reputation for violence and was demanded to burgle a house. One of the men said he had a gun and the other said that if the defendant did not carry out the burglary, he and his family would be harmed.<sup>530</sup> As trafficking victims may be ordered by their traffickers to execute criminal offences, such as the production of controlled drugs or theft, without direct supervision, the legal requirement of an immediate threat of death or serious bodily harm in order to apply the defence of duress appears inappropriate.<sup>531</sup>

Conversely, in the case of *R v N*, the defendant had been convicted of production of a controlled drug in a cannabis factory on residential premises.<sup>532</sup> After he had served his sentence, the UK Border Agency (formerly UKBA, now UKVI) found that he had been trafficked from Vietnam. The court of appeal, hearing the appeal against conviction, noted that on one occasion the defendant left the factory for three days. While absent from work, he made a telephone call to the man who had offered him the job at the cannabis factory, informing him that he no longer wished to work there. The recruiter threatened the defendant to the effect that if he stopped working, he might be killed. Such

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<sup>530</sup> Ibid, para 17

<sup>531</sup> ‘Section 45 Modern Slavery Act : Compulsion’ ( UK Human Trafficking Law Blog, 4 August 2017) <<https://ukhumantraffickinglaw.wordpress.com/2017/08/04/compulsion-under-section-45-modern-slavery-act/>> accessed 16 April 2019

<sup>532</sup> [2012] EWCA Crim 189

a threat in this trafficking circumstance appears far less immediate than that which occurred in the duress case of *R v Hasan*.

It appears that in practice the word compelled in section 45 (1) (b) of the MSA will be construed in a broader sense than the circumstances giving rise to the defence of duress. Per Lord Justice Hughes in *R v LM* the Court of Appeal recognised that the meaning of the term compelled in article 26 of the CoE Convention was indeed broader than the English common law defence of duress.<sup>533</sup> Although section 45 of the MSA and its explanatory notes do not explicitly define the meaning of ‘compelled’ it is expected that the courts will interpret it in a broad sense to include a wide range of victim’s circumstances.

#### **4.8.2 Excluded Offences in Schedule 4 of the MSA**

Another limitation to successful application of the non-prosecution principle is the list of excluded offences in schedule 4 of the MSA. As previously discussed, there are two defences contained within section 45 of the MSA. The first defence is applicable to individuals over the age of 18 and the second defence applies to persons under 18. Schedule 4 of the MSA, lists about 100 offences that are so serious that they have been excluded from the scope of the act. The UK Government’s motive for excluding these serious offences is predicated on schedule 15 of the Criminal Justice Act (CJA) 2003 which already lists those serious offences that can attract extended sentences.<sup>534</sup> Surprisingly, some of the excluded offences are not found in schedule 15 of the CJA

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<sup>533</sup>*R v LM* [2010] EWCA Crim 2327, para 11

<sup>534</sup> Impact Assessment IA, Summary Intervention and Options (Home Office document accompanying the modern slavery bill, 2014)  
<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/371057/MSB\\_IA.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/371057/MSB_IA.pdf)> accessed 16 April 2019

2003. For example, the offence of assisting unlawful immigration to a Member State contained in Section 25 of the Immigration Act 1971 is not found in Schedule 15 of the CJA. Similarly, the offence of blackmail is included in Schedule 4 of the MSA but is not a specified violent or sexual offence for the purposes of the CJA 2003. It therefore appears to be an incorrect claim for the Government to state that it only seeks to exclude serious sexual and violent offences.

A vital reason why the MSA was created was to ensure offenders are prosecuted effectively and to promote deterrence. The goal was to ensure that the law is clear and straightforward to apply. However, at the time of creating the MSA, the law was contained in three different Acts (Sexual Offences Act 2003, Asylum and Immigration Act 2004, and the Coroners and Justice Act 2009). Hence, there was a need to promote clarity and simplicity, as the existing fragmentation of the law in three different acts was unhelpful.<sup>535</sup> Although the MSA 2015 was enacted to promote clarity and simplicity, the exclusion of so many offences implies that potential victims of human trafficking and slavery may be precluded from receiving protection from the Act.

The implication of the above is that many victims of slavery and human trafficking are forced to rely on the common law defence of duress if their criminal offences are serious according to the MSA. This is a contradiction, given that the common law defence was insufficient to deal with defendants who were also victims of trafficking or slavery in the first place. The consequence of this limitation on the applicability of section 45 of the MSA is that victims of trafficking or slavery may not be any better off than they were prior to the enactment of the act. Ultimately, reliance may be placed on prosecutorial

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<sup>535</sup> Centre for Social Justice, *It Happens Here: Equipping the United Kingdom to fight modern slavery*, March 2013, 152

discretion to ensure that victims of trafficking and slavery are not wrongfully criminalized. In part, this limitation occurred due to the UK Government's concern that the statutory defence in section 45 MSA may be pleaded by serious criminals and not by victims of trafficking and slavery.<sup>536</sup> However, this line of reasoning is implicitly conflicting because an individual may be compelled to commit a serious criminal offence but at the same time genuinely be a victim of trafficking or slavery. Thus, it is incorrect to assume that a person is a serious criminal simply because he has carried out acts that fit the definition of a serious criminal offence.<sup>537</sup> He may have committed those acts under compulsion and still be a credible victim of human trafficking.

Overall, the outcome of the exclusion of the list of offences seems to be inconsistent with the purpose of enacting the law in the first place. The MSA was enacted to promote victim protection and support. The protection and support of victims may be aided by the victim's cooperation in human trafficking cases. The cooperation of a victim in trafficking cases is useful for two reasons.

Firstly, victim cooperation is often essential in securing conviction of slave drivers and preventing others from becoming victims in the future.<sup>538</sup> Secondly, it is one of the ways through which abused and vulnerable people may re-enter society and rebuild normal

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<sup>536</sup> Modern Slavery Bill Committee Debate, 9<sup>th</sup> Sitting: House of Commons, Chaired by Crausby D. and Pritchard M., 11<sup>th</sup> September 2014, col. 365  
<<https://publications.parliament.uk/pa/cm201415/cmpublic/modernslavery/140911/pm/140911s01.htm>> accessed 12<sup>th</sup> of May 2019

<sup>537</sup> Laird K, 'Evaluating the Relationship between Section 45 of the Modern Slavery Act 2015 and the defence of duress: An opportunity missed?' [2016] Crim. L. R 6, 395, 397

<sup>538</sup> Impact Assessment IA, Summary Intervention and Options (Home Office document accompanying the modern slavery bill, 2014)  
<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/371057/MSB\\_IA.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/371057/MSB_IA.pdf)> accessed 16 April 2019

productive lives.<sup>539</sup> This is providing relevant information leading to the prosecution of a trafficking offender may be therapeutic for the victim's trafficking recovery process.

Considering that victims are often fearful and vulnerable, the criminal justice system needs to provide victims with the courage to come forward and help the law enforcement authorities. Evidence provided by a pre-legislative scrutiny committee suggests that victims have not yet been given the confidence to come forward by law enforcement authorities.<sup>540</sup> In particular, the exclusion of the offences in Schedule 4 of the MSA has the potential to undermine the effectiveness of the non-prosecution principle defence in section 45.

#### **4.9 Protecting Victims of Trafficking: Theory / Practice**

Section 45 of the MSA is intended to uphold and enforce the non-prosecution principle. The non-prosecution principle is a legal standard that specifies that, individuals should not bear criminal responsibility for acts they were forced to commit whilst under the control of others. It represents the domestic incorporation of Article 26 CoE Convention and Article 8 of the EU Directive. Article 26 of the CoE Convention was adopted by the UK's Crown Prosecution Service (CPS) in 2007, when the UK signed the Convention. Article 8 of the EU Directive prohibits not only the conviction, but also the charging of trafficked victims for criminal offence. Under the CPS guidelines, an individual should not be charged where they are entitled to engage a statutory defence their matter.

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<sup>539</sup> Ibid

<sup>540</sup> House of Lords and House of Commons, Joint Committee on the Draft Modern Slavery Bill Report, HC 1019, oral evidence from Boucher D., Director of Parliamentary Affairs, CARE (Christian Action Research and Education), Pinter I., Policy Adviser, Children's Society and the Refugee Children's Consortium, Worsley A., Deputy Director, Barnado's and Dottridge M. Consultant, Tuesday 25 February 2014

The stages which victims of trafficking go through, from arrest to trial, indicate that at almost every stage, there have not been sufficient proactive steps taken to protect the victim of THB. There is a widespread ignorance of section 45 of the MSA and the issues surrounding it amongst judges, criminal defence lawyers, prosecutors and police officers.<sup>541</sup> For example, the college of policing authorised professional practice has failed to provide a clear link between the statutory defence of section 45 MSA and other offences for which victims of trafficking are commonly arrested (including document forgery and immigration law infringements).<sup>542</sup> Police training for rank and file officers largely consists of a 40 minute e-learning module on trafficking within which only two segments relate to Section 45.<sup>543</sup> In addition, the module is not compulsory in many forces and where it is, there is often no supervision by the senior ranking officer / training team of whether the contents have been received by the attendees or completed in full. Similarly, a key finding of a police inspectorate report published in October 2017 reveals that there is a general lack of knowledge of the section 45 defence and poor awareness by police officers of trafficking indicators across all victim types.<sup>544</sup>

The situation illustrated above is unacceptable for two reasons. First, the police are the first point of contact in most human trafficking cases. It is expected that the case handlers in the police force should be fully informed and conversant of trafficking indicators to foster adequate protection to victims of human trafficking. In the absence of a thorough

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<sup>541</sup> Ofer N. 'Prosecuting Victims of Trafficking in the UK: The difference between Law and Practice (University of Oxford, Faculty of Law, 11 February 2019) <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2019/02/prosecuting>> accessed 15<sup>th</sup> May 2019

<sup>542</sup> College of Policing, Authorised Professional Practice, Modern Slavery Index, Major Investigation and Public Protection: Risk and Identification (5<sup>th</sup> June 2016)

<sup>543</sup> Her Majesty Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS), Stolen Freedom: The Policing Response to Modern Slavery and Human Trafficking (2017) 80

<sup>544</sup> Ibid

understanding of the section 45 defence, the victim of trafficking may be wrongfully convicted for criminal activities when they should have received protection from the State. Secondly, where the potential victim of trafficking is not properly identified by the police at the interview stage, it signifies that the case may become unnecessarily lengthy. But if the victim had been identified in the first instance, then the NRM may have shortened the process by referring the potential victim of modern slavery and ensuring that they receive appropriate support.

In practice, it is not only the police who are uninformed of the statutory provision and implementation of section 45 MSA. Research conducted by Nogah Ofer exploring the trafficking of victims in England revealed that many criminal defence solicitors also do not identify trafficking indicators and are unaware of the section 45 defence.<sup>545</sup> This situation is prevalent even when full accounts of trafficking are given by their clients. The findings of the report emphasize that when a trafficking defence is spotted, legal aid lawyers operating on low cost / fixed fees per case often fail to make timely representation to the CPS that the prosecution should be discontinued before trial. Further, the CPS inspectorate also notes that CPS lawyers themselves have limited knowledge of section 45 MSA.<sup>546</sup>

From the foregoing, it is sad to note that the state has repeatedly failed to protect the victim of human trafficking through the offices of the Police, defence lawyer and CPS lawyers. This failure to protect the victims of THB has occurred due to a lack of

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<sup>545</sup> Research findings reported in, Ofer N. 'Prosecuting Victims of Trafficking in the UK: The difference between Law and Practice (University of Oxford, Faculty of Law, 11 February 2019) <<https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2019/02/prosecuting>> accessed 15<sup>th</sup> May 2019

<sup>546</sup> Her Majesty's Crown Prosecution Service Inspectorate, The CPS Response to the Modern Slavery Act 2015 (2017) 27

awareness and understanding of the implementation and application of the non-prosecution principle contained in section 45 to the victim's situation. However, the state has additionally failed to protect the victim of THB by remanding the individual in custody as a flight risk pending further enquiries. In some cases, even when trafficking concerns have been identified by the police, victims of trafficking are remanded in custody, although there would otherwise be insufficient evidence to charge.<sup>547</sup> Once charged, their cases are not reviewed by the CPS until the NRM mechanism makes a conclusive decision on victim status. Even if solicitors acting for the trafficked victim and charities repeatedly submit evidence of trafficking, no action is taken until a decision is reached by the NRM regarding the victim's trafficking status. In the meantime, the solicitor's client / trafficked victim remains behind bars, usually for many months pending the conclusive decision by the NRM. According to a National Audit Office Report, the average time for a non-EU citizen's conclusive decision is almost six months.<sup>548</sup> Sometimes, the length of time spent on remand can often be as long as would have been served as a custodial sentence, in cases where the trafficked victim is not convicted.<sup>549</sup> In other cases that are not dropped pre-trial, where both prosecution and defence lawyers proceed without raising the defence in section 45, judges seem uninterested in a potential victim's status as a person who has been exploited.<sup>550</sup>

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<sup>547</sup> Crown Prosecution Service, 'The Code for Crown Prosecutors' (CPS Publication, 26 October 2018) <<https://www.cps.gov.uk/publication/code-crown-prosecutors>> accessed 17 May 2019

<sup>548</sup> National Audit Office Report, Reducing Modern Slavery (HC 630, Session 2017-2019, 2017) 11

<sup>549</sup> Burland P. 'Villains Not Victims? An Examination of the Punishment of Vietnamese Nationals Trafficked for Cannabis Cultivation in the United Kingdom' <<http://un-act.org/publication/view/villains-not-victims-examination-punishment-vietnamese-nationals-trafficked-cannabis-cultivation-united-kingdom/>> accessed 17 May 2019

<sup>550</sup> Ibid

The experience of victims of human trafficking suggests that, despite the good intentions of the UK Government at policy level, without adequate funding and protection of victims given high priority, the law may not be implemented effectively. Further research by academics, campaign by NGO's and other legal practitioners is required to create widespread awareness on the implementation and application of the non-prosecution principle. A thorough understanding of the implication of non-prosecution principle is required to ensure that victims of THB are not prosecuted unjustly.

## **Conclusion**

It may be expected that the instrument providing for the non-prosecution of victims of human trafficking, should be clear and easy to comprehend. This is the expectation, but the implementation of the non-prosecution principle illustrates that there is some difficulty in ascertaining situations of exploitation. The EU Directive in comparison to the CoE Convention is relatively straightforward and self-explanatory. Further, the MSA is helpful in explaining the areas of the non-prosecution principle that are not clearly spelt out in the other two instruments. The provisions of the statute are the first step in determining the question of when to prosecute and when not to. Every trafficking case is different, and the facts of each case should be assessed based on the merits, the evidence provided, and the special circumstances presented before the court.

The non-prosecution principle when applied correctly, may enable the state to improve its prosecution rates for perpetrators of human trafficking. This improvement will occur while ensuring critical respect for the dignity and safety of all victims of trafficking who would not have committed the offences in the first place, but for their situation as trafficked victims. Nonetheless, some victims have every intention of carrying out the illegal activity, to escape a life-threatening situation in their home country, as the

circumstance of N in the case of *R v N* illustrates. Therefore, examining the point in which an individual loses the title of victim and becomes a perpetrator is useful in discussing the application of the principle. It is possible to retain the status of a victim while still being labelled by criminal law as an offender. For instance, although the three defendants had originally been victims in the *R v LM & Ors* case, they had subsequently become controllers of others for prostitution thereby becoming transition victims. The evidence presented during the case suggested that they had not only played a major part in showing the other inexperienced prostitute the ropes of the business, but they had also resorted to violence, threats, and sexual abuse themselves to achieve compliance. Although the defendants had little choice in the matter as they had been coerced to carry out those actions. Thus, state authorities when dealing with offences committed by trafficked victims have a duty to protect the victims of trafficking especially in cases where they ought to be aware of an individual's status as a victim but did not attach the appropriate significance to it.

This chapter has considered the application of the non-prosecution principle and its implication for victims of human trafficking. This consideration involved an examination of the application of the non-prosecution principle, factors which determine prosecution and the limitations which may be encountered in applying the theoretical aspect of the law to legal practice. One of the foremost limitations discussed is the exclusion of offences in schedule 4 of the MSA. The writer argues that the exclusion of so many offences in the MSA 2015 has the potential of precluding victims of human trafficking from receiving the requisite protection that they may be entitled to. This implies that when a trafficked victim has committed a serious offence, they may have no alternative other than to rely on the common law defence of duress. This situation may be viewed as a contradiction, given that the common law defence was insufficient to deal with

defendants who were also victims of trafficking or slavery in the first place. The consequence of this limitation on the applicability of section 45 of the MSA is that victims of trafficking or slavery may not be any better off than they were prior to the enactment of the act. The implication of this circumstance will be explored in the next chapters. The next chapter will examine the court's treatment of location victims prosecuted in England and Wales.

## **CHAPTER FIVE**

### **THE LOCATION VICTIM AND THEIR TREATMENT BY THE COURTS IN ENGLAND AND WALES.**

#### **5.1 Introduction**

This chapter represents the author's original contribution to knowledge. The term location victim has been created by the author to explain a new class/category of victims of human trafficking. In addition to creating a new terminology for this class of victims, the author has also created a definition for the location victim, to discuss their circumstance and treatment within the judicial system in the UK. Due to their specific circumstance, the location victim is often treated as an offender, and prosecuted in England and Wales. The author of this thesis argues that the location victim should be treated as a pure/ideal victim at the start of a case proceedings, pending further evidence and witness statements. The location victim should be offered support and protection by the state where possible.

It has already been settled in this thesis that a victim of human trafficking is an individual who has been subjected to the offence of THB. Or, a person who the competent authorities, including the designated non-governmental organisations where applicable, reasonably believe is a victim of trafficking in persons.<sup>551</sup> The authorities may determine a person to be a credible victim of THB, regardless of whether the trafficking perpetrator is identified, apprehended, prosecuted or convicted.<sup>552</sup> In the same vein the CoE

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<sup>551</sup> United Nations Office on Drugs and Crime, Model Law Against Trafficking in Persons, Vienna 2009, art 5 (1) (v)

<sup>552</sup> Ibid

Convention defines a victim as any natural person who is subject to trafficking in human beings as defined by the article. Therefore, he is anyone subjected to the combination of the elements of action, means and purpose.<sup>553</sup>

Human trafficking situations occur in different ways. Women and children, usually girls, may be trafficked into prostitution; others, usually teenage boys, but sometimes young adults, may be trafficked into cannabis farming or other illegal activities.<sup>554</sup> Occasionally, these victims of THB are trafficked into the UK from other jurisdictions, or may enter the UK lawfully and are exploited after their arrival. Whether these individuals are trafficked from home or overseas, or within cities or towns in the UK, these persons are all victims of crime and should be treated as such.<sup>555</sup>

The exploitation and abuse which victims of human trafficking encounter also take different forms. On some level, the exploitative situation may amount to slavery, servitude or forced or compulsory labour. Article 4 of the ECHR and article 4 of the Human Rights Act prohibits activities of this kind. This implies that there is a range of exploitative circumstance, which victims of THB experience. The range of trafficking circumstances is referred to as a victim spectrum. This spectrum assessment is an important consideration, particularly in relation to the prosecution of trafficked victims. The victim spectrum examination is important, because it provides a template for further understanding of the offence of human trafficking and protecting victims of THB. The categorisation of victims is a first step in this regard.

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<sup>553</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 4 (e)

<sup>554</sup> *R v L & Ors* [2013] EWCA Crim 991, para 2

<sup>555</sup> *Ibid*

The concept of a pure/ideal victim often describes a person lacking any culpability, therefore someone who appears to have carried out illegal acts due to coercion, threat or use of force. This definition of a victim of THB as a person lacking culpability, may be regarded as the general rule in relation to human trafficking cases. This definition may provide suitable markers for distinguishing between a victim of human trafficking and an illegal migrant. The evaluation of an ideal victim's characteristics is useful in determining whether the non-prosecution principle may be applied to cases that are exceptions to the general rule. These exceptions may include situations where for example, it is unclear to the authorities whether a person is an offender of immigration laws, a victim of human trafficking or both.<sup>556</sup> The non-prosecution principle therefore becomes applicable to cases where the court decides that a person is a credible victim of human trafficking. This decision may be based on the NRM's positive conclusive grounds decision on a person's trafficking status.

However, victims do not fall within one distinct category; neither do they all have the same experience and needs. Instead, there is a spectrum of experiences. These include an individual who is trafficked and exploited, the evidence suggests that he is clearly a victim – provided protection (not prosecuted). Another situation is that of an individual who is trafficked and exploited, viewed as a clear victim – (prosecuted) for their part in illegal activity or for immigration infringements. A third circumstance may arise where a person is trafficked and exploited in a different jurisdiction, viewed primarily as an asylum claimant not a victim – (not prosecuted) transferred to another State for determination of their claim. A fourth occurrence may be the case of a person trafficked and exploited, later becomes a trafficker themselves. In this case, they are viewed

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<sup>556</sup> *R (Minh) v SSHD* [2016] EWCA Civ 565

primarily as an offender / trafficker – (prosecuted) for exploiting others for trafficking purposes. Therefore, there are different categories of victims and shades of grey within a broad continuum or spectrum. These range from pure and historical victims of human trafficking to the location and transition victim. This chapter will examine the trafficking circumstance of the location victim. There is a gap in knowledge concerning this class of victims, and examining this gap represents original contribution to knowledge.

## **5.2 The Non-Prosecution Principle and the Location Victim**

As has been discussed in previous chapters of this thesis, the CoE Convention, EU Directive and the MSA are the three instruments that deal with the non-prosecution principle and sets out the process for protecting victims of human trafficking. Victims of human trafficking may commit offences whilst they are being coerced by another individual.

Given that the consideration of the location victim represents the author's contribution to knowledge, the author suggests that the public interest should be weighed when deciding whether to prosecute the location victim or not. Thus, while reviewing cases where exploitation has been used to get the vulnerable person to carry out illegal acts, prosecutors should consider whether the public interest is best served by continuing to prosecute the trafficked victim.<sup>557</sup> Where there is sufficient evidence that the suspect is a credible victim or a location victim of human trafficking, then prosecutors must consider the public interest before proceeding. The term credible in relation to the victim of trafficking is an individual who the investigating officer have reason to believe has been

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<sup>557</sup> 'CPS Policy for Prosecuting Cases of Human Trafficking' (cps.gov.uk, 2011)  
<[http://www.cps.gov.uk/publications/docs/policy\\_for\\_prosecuting\\_cases\\_of\\_human\\_trafficking.pdf](http://www.cps.gov.uk/publications/docs/policy_for_prosecuting_cases_of_human_trafficking.pdf)>  
accessed 10 May 2016

exploited by another. In addition, where there is clear evidence that the victim has a reasonable defence of duress, the case should be discontinued on evidential grounds.<sup>558</sup>

The writer of this thesis surmises that the legal standard for prosecutors in England and Wales may also be applied to the case of the location victim. The legal standard required of prosecutors in the England and Wales is an observance of the four-stage approach after the enactment of the MSA in 2015 (formerly the three-stage exercise). The three-stage exercise involved a consideration of whether there is a reason to believe that an individual has been trafficked. If so, then is there is a clear evidence of a credible common law defence of duress? If the answer to this question is yes, then the case should not be charged or should be discontinued on evidential grounds. Thirdly, even where there is no clear evidence, but the offence may have been committed due to compulsion arising from trafficking, prosecutors should consider whether the public interest lies in proceeding to prosecute or not.<sup>559</sup> With the enactment of the MSA in 2015, there is a new four-stage approach which includes the first two steps discussed above. But in addition, the prosecutor is required to ask whether there is clear evidence of a statutory defence under section 45 of the MSA, if the answer to this third question is yes, then the case should not be charged. The prosecutor is also required to consider whether it is in the public interest to prosecute or not. Further discussion of the legal standard of the prosecutor in England and Wales is examined in chapter four of this thesis.

Essentially, the non-prosecution principle is implemented with regard to public policy. It does not provide blanket immunity from prosecution, nor does it create an automatic defence from prosecution for a trafficked victim. However, the application of the non-

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<sup>558</sup> Ibid

<sup>559</sup> *R v LM & Ors* [2010] EWCA 2327, para 10

prosecution principle is dependent on the specific circumstance of each case. The authorities are required to carefully consider whether public policy calls for prosecution and punishment of the victim or not based on the evidence submitted in the case.<sup>560</sup> The element of compulsion needs to be proven by the defendant and defence team, to show that the individual was forced to commit criminal activities due to their status as trafficked victims.

The case of a location victim (identified in the UK but trafficked or exploited in a different jurisdiction) is sometimes unclear because it is not always easy to distinguish between a pure victim and a historic victim of trafficking. In deciding whether a location victim is a victim of human trafficking, the test of “I suspect but I cannot prove” may be applied. This is the reasonable grounds test where the decision maker appointed by the National Referral Mechanism (NRM) concludes ‘from the information available so far I suspect but cannot prove’ that the individual is a potential victim of trafficking. The NRM process and identification of victims has been discussed in Chapter two of this thesis.

Although the location victim has migrated to the UK to escape their trafficking situation, the country where the trafficking offence has occurred is distinct from the state the victim has lodged an asylum claim. In the UK and specifically in England and Wales, the claim of the location victim is often examined under the Dublin III Regulation. This is in relation to a victim who was born or holds citizenship from an EU member state. There are separate procedures for individuals from other legal jurisdictions. This research will focus on individuals originating from EU member states.

The location victim of human trafficking may seek asylum in the UK while an investigation as to whether they are a potential victim of human trafficking or not is

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<sup>560</sup> Ibid, para 13

ongoing. If it is discovered that they are indeed a credible victim of human trafficking, but their exploitative experience occurred in a different EU State, their claim of asylum may be referred to the EU State where the actual trafficking exploitation occurred.

### **5.2.1 Location Victims as Asylum Seekers**

Location victims or individuals who claim to have been trafficked but exploited in a different country or EU jurisdiction, often come to the attention of the authorities as asylum seekers. This was the experience of the trafficked victim in the *R v SSHD* case.<sup>561</sup> Following an asylum interview, the claimant's case may be referred to the NRM for further determination of a reasonable and conclusive grounds decision of whether the person is a credible victim of human trafficking or not.<sup>562</sup> This decision will be considered by the court in the trial stage when assessing the circumstances of a victim's case. A further discussion of the NRM stages and identification of victims of THB is taken in chapter two of this thesis.

In the first instance, for the non-prosecution principle to be applied to a victim's case, the court is required to determine whether the person is a credible victim of human trafficking or not. This examination on a potential victim's status usually commences with an assessment of the definition of human trafficking. It will be considered whether the definition of human trafficking is applicable to the victim's circumstance and consequently whether the non-prosecution principle is relevant to the case or not. In this regard, the court will consider the core element of the act, means and purpose which are

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<sup>561</sup> *R (on the application of EL) v SSHD* [2018] EWHC 968 (Admin), para 1

<sup>562</sup> *Ibid*, para 7

in the definition of human trafficking.<sup>563</sup> The Palermo Protocol, often regarded as the first universal instrument that addresses all aspects of human trafficking defines the offence of THB as:

“... 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 the giving or receiving of payment or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation ...”<sup>564</sup>

The act explains what may have been done to the victim which could include: the act of recruiting, transporting, transferring, harbouring or receiving persons. The means describes how the act was executed -through the means of threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability or giving payments or benefits to a person in control of the victim. The purpose or the goal explains why the act is done which is: for the purpose of exploitation which includes exploiting the prostitution of others, other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery and the removal of organs. In the case of child trafficking, a child will be deemed to have been exploited when the act and the purpose are present, it is not necessary that any of the specified means was used.<sup>565</sup>

As the concept of a location victim has not yet been established in legal considerations, the writer of this thesis suggests that the court may also assess the location victim’s case

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<sup>563</sup> United Nations Convention Against Transnational Organized Crime 2001 (A/RES/55/25 Annex II), Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Palermo Protocol), art 3 (a)

<sup>564</sup> Ibid

<sup>565</sup> UNODC, Legislative Guides for the Implementation of the UN Convention Against Transnational Organized Crime and the Protocol Thereto (New York, 2004) 5, 268

using the definition of human trafficking in section 2 of the MSA. The definition of the offence of human trafficking in section 2 of the MSA, may be considered prior to applying the statutory defence of non-prosecution in section 45. Section 2 of the MSA defines human trafficking as arranging or facilitating the travel (to, from or within any country) of another person for the purpose of being exploited.<sup>566</sup> The exploitation may involve a sexual offence, servitude or forced labour, or otherwise coercing or deceiving the person into providing some service or benefit.<sup>567</sup>

Following a consideration of whether a person is a victim of human trafficking or slavery, the court may subsequently examine the location victim's application for asylum under the Dublin III Regulation (formerly Dublin II, Council Regulation (EC) 34/2003).<sup>568</sup> The objective of the regulation is to prevent asylum seekers from being sent from one EU country to another; and also to avoid abuse of the process whereby an asylum seeker may submit several applications for asylum to increase their chances of approval.<sup>569</sup> The Dublin III establishes the criteria and mechanisms for determining the member state responsible for examining an application for international protection (an asylum claim) lodged by a third-country national or a stateless person.<sup>570</sup> The regulation aims to prevent 'asylum shopping' where an individual moves between states to seek the most attractive regime of protection, and the phenomenon of 'refugees in orbit' where no single State permits access to an asylum procedure. Article 3 of the regulation provides that: Member

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<sup>566</sup> Modern Slavery Act 2015, s 2

<sup>567</sup> *Ibid*

<sup>568</sup> Regulation (EU) 604/2013 of the European Parliament and the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national or a stateless person (recast), [2013] OJ L180, art 3

<sup>569</sup> *Ibid*

<sup>570</sup> *Ibid*

States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them.<sup>571</sup> The application shall be examined by a single Member State using the criteria set out in Article 7. This criterion requires an assessment of the individual's situation when he first lodged his application for protection with the Member State, available evidence regarding the presence of family members, relatives, or any other family relations of the applicant on the territory of the member state.<sup>572</sup> Further, a consideration of whether the applicant had made a previous application in which a decision had already been concluded upon.<sup>573</sup>

Before a decision is made on whether to proceed with prosecuting a location victim, victim of human trafficking / slavery, or to transfer the victim to another state, a personal interview is conducted to assess their circumstance.<sup>574</sup> However, the Dublin III regulation does not make these personal interviews compulsory in all circumstances. Article 5 (2) of the regulation anticipates situations where the personal interview may be omitted altogether. For instance, when the applicant has already provided the relevant information for determining the member state responsible by other means, there is no obligation to conduct the interview.<sup>575</sup>

In relation to child victims of THB, the regulation requires states to take their best interests into consideration.<sup>576</sup> Article 6 requires Member States to cooperate closely with each other and consider the minor's well-being and social development, family

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<sup>571</sup> Ibid, art 3 (1)

<sup>572</sup> Ibid, art 7 (1), (2) and (3)

<sup>573</sup> Ibid

<sup>574</sup> Ibid, art 5

<sup>575</sup> Ibid, art 5 (2)

<sup>576</sup> Ibid, art 6 (3)

reunification possibilities, maturity where there is a risk of the minor being a victim of human trafficking.<sup>577</sup>

Hence, the provision requires states to examine the case of a child carefully, especially when there is risk of exploitation or that the child might be a potential victim of human trafficking. Although the best interests of the child are of utmost concern in the regulation, the consequence of implementing the provision is not clearly spelt out, and the regulation is also silent about trafficked adults. This absence of a resultant outcome following the application of article 6 indicates that the immigration officer may encounter difficulty in administering the provisions. This difficulty stems from differentiating between situations where protecting the trafficked victim is a higher priority than enforcing immigration laws. The provision can be improved by including a requirement for residence permits to be granted when there is a real risk that the victim of trafficking may be re-trafficked on return to the member state where the exploitation occurred.

Even where the Secretary of State acknowledges that a person is a credible victim of trafficking, he is nonetheless entitled to refuse to grant the individual discretionary leave to remain if they are unable to meet the criteria for entitlement to a residence permit.<sup>578</sup> Thus, a person will not ordinarily qualify for discretionary leave to remain solely because they have been identified as a victim of modern slavery (including trafficking).<sup>579</sup> Even where a positive conclusive grounds decision has been obtained, there is no automatic grant of discretionary leave. Although, leave to remain may be granted in specific

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<sup>577</sup> Ibid

<sup>578</sup> *R (on the application of K) v SSHD* [2015] EWHC 3668, para 1

<sup>579</sup> Section 3.5, Asylum Policy Instruction Discretionary Leave, Version 7.0' ([www.gov.uk](http://www.gov.uk), 2015) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/460712/Discretionary\\_Leave\\_2\\_v7\\_0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/460712/Discretionary_Leave_2_v7_0.pdf)> accessed 22 March 2017

situations, such as the personal circumstance of the individual or if they are co-operating with the police and authorities to prosecute the trafficker / offender.<sup>580</sup> There is no automatic entitlement to a grant of discretionary leave to remain even where a victim of THB has obtained a positive conclusive grounds decision from the authorities that he/she is a credible victim of trafficking.<sup>581</sup> Victims of slavery, servitude and forced labour who are conclusively recognised by the NRM will be eligible for discretionary leave based on the same criteria as victims of human trafficking.<sup>582</sup>

### **5.3 The Non-Prosecution Principle and its Relevance to the definition of Human Trafficking**

The courts in England and Wales do not yet recognise the concept of a location victim. Often, the location victim is treated as a person in the same position as a pure/ideal victim of human trafficking or modern slavery. Though the circumstances of both victim categories differ, because of the location where the situation of exploitation has occurred. In most cases involving a victim of THB, the court will apply the non-prosecution principle after a thorough examination of the victim's circumstances is carried out. This assessment of the victim's situation must clearly indicate that they are a credible victim of human trafficking. Hence, the person's trafficking situation must comply with the definition of human trafficking/slavery, to successfully apply the non-prosecution principle to the victim's case. Consequently, the court in *R (BG) v SSHD* considered the

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<sup>580</sup> Ibid

<sup>581</sup> Ibid

<sup>582</sup> Home office, 'Victims of Modern Slavery – Frontline Staff Guidance Version 3.0' ([www.gov.uk](http://www.gov.uk), 2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/509326/victims-of-modern-slavery-frontline-staff-guidance-v3.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/509326/victims-of-modern-slavery-frontline-staff-guidance-v3.pdf)> accessed 22 March 2017

definition of human trafficking and its application to the claimant's case.<sup>583</sup> The court also sought to determine whether the claimant's detention was unlawful, and the relationship between the Dublin regulation for the return of asylum seekers within the EU vis-a-vis international human trafficking instruments.<sup>584</sup> The international human trafficking instruments being considered are article 4 of the ECHR and provisions in the CoE Convention. The purpose of assessing this case is to determine whether the non-prosecution principle was applicable to the claimant's circumstances, and whether her categorisation as a location victim would have resulted in a different outcome.

The first issue for consideration in this case was whether the claimant was a credible victim of human trafficking or not. The claimant's experience with her boyfriend (K) suggests that the requisite mens rea and intention to exploit her was present from the beginning of their relationship. Three trafficking indicators were existent which should have alerted the authorities to the fact that the claimant was a credible victim of trafficking for sexual exploitation. Trafficking in human beings consists of a combination of three basic components given in the definition of human trafficking - the action, means and purpose.<sup>585</sup>

In the current case, five means were involved in compelling the claimant to carry out the instructions of K – threat, use of force, coercion, deception and abuse of a position of vulnerability. K coerced the claimant by threatening her and her family, and she was afraid of the implications if her strict family found out she had a boyfriend.<sup>586</sup> She was

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<sup>583</sup> *R (BG) v SSHD* [2016] EWHC 786

<sup>584</sup> *Ibid*, para 1

<sup>585</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, 55/25 2000 (palermo protocol), art 3, Explanatory report on the Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 2005, para 74

<sup>586</sup> *R (BG) v SSHD* [2016] EWHC 786, para 33

deceived into moving to Tirana with K because she thought it would be an opportunity to live with her boyfriend without her parents' control, and to return to school to complete her studies. For the last means, K abused the claimant's position of vulnerability when he took advantage of her trusting nature, sheltered upbringing and lack of experience in negotiating complex social situations.<sup>587</sup> The abuse of a position of vulnerability entails any situation in which the person has no real or acceptable alternative other than to submit to the abuse.<sup>588</sup> The vulnerability may be of any kind, whether family-related, social, economic, physical, psychological or emotional. The situation of vulnerability might involve insecurity, economic dependence, illegality of the victim's administrative status, or can involve any state of hardship, which induces an individual to accept an exploitative situation.

The claimant's experience also meets the action component of transfer in the definition of trafficking, as K had moved her from Shkodra to Tirana in Albania. In addition, on a smaller degree he also ensured her movement from the flat she shared with him to different hotels for prostitution purposes. Under the CoE Convention, transporting an individual need not be across a border only to be a constituent of trafficking in human beings.<sup>589</sup> Finally, the claimant's situation is evident of sexual exploitation through prostitution, thereby meeting the exploitation portion of the definition. Accordingly, all constituent elements in the trafficking definition were present in her claim.

The preceding analysis indicates that the court per Cranston LJ, was incorrect to dismiss the location victim's application and to reject the challenges to the decision of the

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<sup>587</sup> Ibid

<sup>588</sup> Explanatory report to the Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 2005 (CoE Convention), para 83

<sup>589</sup> Ibid, para 80

competent authority that the claimant was not a victim of human trafficking. The non-prosecution principle should have been applied to the claimant's situation from the initial commencement of the case. Hence, the case should have been discontinued on grounds of an abuse of process and contrary to public policy. The court's decision to continue with the proceedings amounted to an injustice and an infringement of the claimant's rights.

The indicators of trafficking in this case could potentially be misidentified as simply a severe form of domestic abuse, in which a man forces his girlfriend into prostitution to earn money. However, the fact that K stopped all pretence of a relationship with the claimant once the exploitation began signifies his intention to exploit her all along. It is respectfully submitted that the court did not take into adequate consideration the trafficking expert's report which stated that all the trafficking indicators were present, and that the claimant should be identified as a victim of trafficking for sexual exploitation.<sup>590</sup>

### **5.3.1 Unlawful Detention and whether Article 4 ECHR and CoE Convention overrides the Dublin Regulation**

The non-prosecution principle is centred upon protecting victims of human trafficking and the state is required to refer potential victims to the NRM for determination of their victim status. In the instant case of *R (BG) v SSHD*, the claimant contended that her detention for the period of 45 days from 20<sup>th</sup> April 2013 to 4<sup>th</sup> June 2013 was unlawful.<sup>591</sup> As a potential victim of trafficking, the claimant should have been provided protection

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<sup>590</sup>*R (BG) v SSHD* [2016] EWHC 786, para 33

<sup>591</sup> *Ibid*, para 71

by the authorities and not detention. It may be argued that those 45 days of detention, ought to have been the 45 days recovery and reflection period if she had been identified as a victim of human trafficking in a timely manner. However, because the Secretary of State had certified the location victim's asylum claim on third country grounds, she was detained.<sup>592</sup> This action by the State (In this case the United Kingdom, specifically England and Wales) was inconsistent with the intention of the non-prosecution principle. The intention of the principle is the protection of the victim of trafficking. Following her screening interview, the location victim should have been entitled to receive a reasonable grounds decision. But the victim did not receive a reasonable grounds decision, because at the time, she had not been identified as a potential victim of trafficking. The court opined that although the claimant's account contained several indicators of trafficking, her explanation of circumstances leading to her arrival in the UK, lacked credibility.<sup>593</sup> Hence, the loopholes in her story led to her detention.

Also, neither the CoE Convention nor article 4 of the ECHR could affect the operation of the Dublin Regulation. This is largely because on one hand, the CoE Convention has not been incorporated by legislation into UK law.<sup>594</sup> Although it assists in interpreting UK legal instruments, it imposes no legal duties, nor does it confer rights on individuals. The Dublin regulation has direct legal effect in the UK and supersedes any rights and duties derived from the Secretary of States' policies. Consequently, although the CoE Convention has been given effect through the Secretary of State's policies, it cannot be invoked as a source of freestanding rights and duties.<sup>595</sup> As for article 4 of the ECHR,

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<sup>592</sup> Ibid

<sup>593</sup> Ibid, para 72

<sup>594</sup> Ibid, para 65

<sup>595</sup> Ibid

there was no suggestion that the Secretary of State's policies were non-compliant with the state obligations in *Rantsev v Cyprus*.<sup>596</sup> The *Rantsev* case provides guidelines relating to the identification of trafficked victims, the procedure for the authorities and first responders to refer potential victims to the NRM.<sup>597</sup> In the claimant's case, having first arrived in the EU in Italy and because the exploitation complained of happened in Albania, her case was treated as a third-country case. It was only after the Poppy Project (at the time a named first responder) decided not to refer her to the NRM that she was certified on safe third-country grounds.<sup>598</sup> Once judicial review proceedings had begun, she was referred to the NRM.<sup>599</sup> Therefore, as the conclusive grounds decision had been negative, there was no reason for the Secretary of State to reconsider the safe third-party certification.

This case is one which exemplifies the state's failure to protect a victim of human trafficking and to apply the non-prosecution principle to the victim's circumstance. The decision by the Secretary of State to certify the location victim's case on safe third-country grounds prior to the determination of a trafficking claim had been unlawful. Further, the Secretary of State's obligations under the CoE Convention and art 4 of the ECHR had overridden the provisions of the Dublin Regulation. From the stage, where there had been indication that the individual may have been a victim of trafficking, the operation of the Dublin Regulation should have been suspended pending referral to the NRM. Although, at the initial stage the claimant's account of her circumstances had not

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<sup>596</sup> *Rantsev v Cyprus* [2010] ECHR 25965/04

<sup>597</sup> *Ibid*, para 155 – 156

<sup>598</sup> *R (On the application of BG) v SSHD* [2016] EWHC 786, para 66

<sup>599</sup> *Ibid*

given clear proof that she was a credible victim of trafficking, there should have been further investigation into her circumstances to determine her status as a victim.

#### **5.4 The Location Victim and Entitlement to receive Protection in the United Kingdom: *R (on the application of E) v SSHD* [2012] EWHC 1927**

In the afore-mentioned case, the court in determining whether to apply the non-prosecution principle to the location victim's case, first considered whether the claimant is a credible victim of human trafficking or not. The defendant issued a conclusive decision on 13<sup>th</sup> January 2012. This decision stated that on the balance of probabilities, the claimant had not been trafficked to the UK.<sup>600</sup> Therefore, the claimant was not entitled to protection in the UK as a victim of trafficking, and would be returned to Norway under the Dublin regulation.<sup>601</sup> The protection afforded in the UK for victims of trafficking only applies to those who have been trafficked in the UK, and the claimant had clearly been trafficked in a different location.<sup>602</sup> The claimant argued that the defendant - Secretary of State's line of reasoning is contrary to the CoE Convention and contrary to the defendant's published policy on protection of victims of trafficking. The defendant countered the claimant's argument by stating that the court cannot look at the terms of an international instrument not incorporated into domestic law.

There are situations when a competent authority believes that someone may have been a victim of trafficking, but at the time their case is referred, concludes on the facts of the case that the individual is no longer in need of the protection or assistance offered by the

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<sup>600</sup> Ibid, para 10

<sup>601</sup> Ibid

<sup>602</sup> Ibid, para 14

UK. The person's circumstance may have changed so much since the trafficking instance occurred. It is worthy to note that a negative grounds decision in such cases is not a denial of the fact that they have been a victim of trafficking previously, rather the decision signifies that at the time of the assessment they did not meet the CoE Convention Criteria or no longer require protection and assistance from the UK government.

There are some factors that should be considered when determining whether a person is a victim of trafficking for the purposes of the CoE Convention, EU Directive and MSA. At the time the case was referred to the competent authority for a decision, the provision of services for the victims of crimes are to be based on an assessment of individual need.<sup>603</sup> Therefore, as one of the aims of the three instruments is to offer protection to victims of modern slavery and trafficking, it is relevant to consider if the person is still in need of protection or assistance at the time that the referral is made. In the instant case, based on the circumstances of the claimant it may be reasonable to conclude that she had been free from her traffickers for a long period of time. Although, the claimant no longer requires protection from the UK, it is unclear if she has recovered and moved on with her life. The claimant escaped from her trafficker in Sweden, travelled to Norway and then onward to the UK.<sup>604</sup> Further there was no evidence to suggest that any form of deception or coercion was used to persuade the victim to come to the UK, nor had the trafficker attempted to contact her since her arrival in the UK.<sup>605</sup>

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<sup>603</sup> Ibid, para 28

<sup>604</sup> Ibid, para 13

<sup>605</sup> Ibid

Other factors to examine in determining the case of a location victim are, whether the person was under the influence (either directly or indirectly) of traffickers at the point at which they came to the attention of the UK authorities.<sup>606</sup> Whether the person requires a period to recover from the influence of traffickers or not, whether the person has suffered physical or emotional wounds from the trafficking experience and requires time to recover.<sup>607</sup> Consider also, if the person requires more time in which to decide whether to co-operate with the authorities in respect of a trafficking related criminal investigation.<sup>608</sup> The decision on whether to cooperate with the competent authorities or not does not exclude the obligation to testify when it is required by a Judge.<sup>609</sup> Hence, a person who is legally required to testify will be unable to refuse and cannot rely on article 13, paragraph 1 of the CoE Convention as a basis for refusal. Consequently, the paragraph specifies that its provisions are “without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular, when investigation and prosecuting the offences concerned.”<sup>610</sup> Essentially, it is imperative to consider all a person’s circumstances at the time a case is referred to the NRM. A location victim may still require the protection of the authorities even if only one of the factors discussed above is present in their case.

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<sup>606</sup> Explanatory report to the Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 2005 (CoE Convention), art 13

<sup>607</sup> Ibid

<sup>608</sup> Ibid

<sup>609</sup> Ibid, para 176

<sup>610</sup> Ibid

## **5.5 The Court's assessment of the element of Exploitation in a Location victim's circumstance: *R (on the application of Y) v SSHD* [2012] EWHC 1075**

The Poppy Project acting as first responder in this case concluded that there were strong indications that Y had been a victim of trafficking. They acknowledged that Y had been raped and sexually exploited on her journey to the UK, and subsequently for seven months following her arrival.<sup>611</sup> Nonetheless, the relationship between the victim and her partner M did not appear to have been exploitative and there does not seem to be a subsisting link between M and the smuggling gang that brought her into the UK.<sup>612</sup> The Poppy project assessed that despite the strong indications of trafficking, they would be unable to support the victim because she did not meet the requisite criteria to promote their continued support.<sup>613</sup>

A report by the Anti-Slavery International, dated 15 June 2009 determined that the claimant might face danger if she was removed from the UK and returned to China, whether with or without M.<sup>614</sup> Further, the fact that Y was able to enter a non-violent, loving relationship with M is particularly important. Y and M formed a family unit, and they had a son together.<sup>615</sup> This is significant because it represents a good opportunity to fully recover from the traumatic experience of trafficking, regain control over her life and lead a normal life again. Some victims of trafficking may not get a chance to

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<sup>611</sup> Ibid, para 4

<sup>612</sup> Ibid

<sup>613</sup> Ibid

<sup>614</sup> Ibid, para 6

<sup>615</sup> Ibid

overcome the trauma they have faced and may remain vulnerable to further exploitation.<sup>616</sup>

At the time this case was concluded Y had been free of the claimants for over two years. There was no suggestion that they had objected to her leaving, neither did they try to pursue her.<sup>617</sup> Hence, she no longer qualified for assistance and protection from the state. Again, in this case as in the other cases considered, the court assessed whether the Court was bound to follow the terms and guidance contained in an international treaty (the CoE Convention) not incorporated into domestic law.<sup>618</sup> The UK Government's policy is to give effect to its obligation under the treaty, specifically the ones that may have consequences in domestic administrative law. Failure to apply the provisions of the treaty to cases where the Government's policy allows may result in a judicial review claim.<sup>619</sup>

### **5.5.1 Application of the Non-Prosecution Principle**

In deciding whether to apply the non-prosecution principle to the location victim's case in the current case, the court first assessed the element of exploitation in the victim's circumstance. The purpose of conducting this assessment was to first determine whether the claimant was a credible victim of trafficking. To fully determine the claimant's circumstance, two situations were assessed. Firstly, was Y's transportation or harbouring for the purpose of exploitation or for smuggling purposes? Thus, was the exploitation Y experienced incidental to the smuggling arrangement?<sup>620</sup> Secondly, was the defendant (the Secretary of State) correct to investigate the claimant's circumstances to decide

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<sup>616</sup> Ibid

<sup>617</sup> Ibid, para 38

<sup>618</sup> Ibid, para 40

<sup>619</sup> Ibid

<sup>620</sup> Ibid, para 31 (a)

whether she was still in December 2009, a victim of trafficking and entitled to protection and assistance by the UK?<sup>621</sup>

For the first situation and the purpose of Y's exploitation, from the beginning of her relationship with the Snakeheads gang, the claimant thought the purpose of her involvement with them was to smuggle her into the UK. The goal of smuggling led her to consent to her movement from country to country by the smuggling gang. After the initial travel from China to Sweden, she experienced two further travel phases resulting in 18 months in an unknown European Country and seven months in the UK after arrival.<sup>622</sup> In each of these phases, the gang members sexually exploited the Claimant and forced her to do housework. Nonetheless, the defendant argued that although the incidence of rape was traumatic, K was not commercially exploited for sexual or labour services.<sup>623</sup> Also, the defendant contended that the fact that there were 30 to 40 individuals and lorry shipments of eight at a time suggest that the purpose of keeping the group was not for exploitation but for smuggling objectives only.<sup>624</sup>

The argument given by the defendant is not a cogent one because the definition of trafficking in the Palermo Protocol, CoE Convention, EU Directive or MSA does not make any mention of commercial exploitation. These four instruments provide that exploitation shall include the exploitation of the prostitution of other or other forms of sexual exploitation, forced labour or services.<sup>625</sup> Using the commercial element as a

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<sup>621</sup> Ibid, para 31 (b)

<sup>622</sup> Ibid, para 32

<sup>623</sup> Ibid, para 33

<sup>624</sup> Ibid

<sup>625</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 55/25, 2000 (Palermo Protocol) art 3, Council of Europe Convention on Action Against Trafficking in

defence to K's experience is not helpful to absolve the defendants of liability. Further, the claimant was forced to do housework while she was living with the snakeheads gang, this circumstance amounts to forced labour and servitude, because she was compelled against her will to do the house chores. The MSA also explains exploitation to mean a situation when A arranges or facilitates V's travel with a view to V being exploited. The person intends to exploit V (in any part of the world) during or after the travel or the person knows or ought to know that another person is likely to exploit V (in any part of the world) during or after the travel."<sup>626</sup> Although there was no attempt to prostitute Y and profit from her prostitution, neither was there an attempt to re-traffic her. Yet, her experiences while transiting to the UK and upon arrival are consistent with exploitation.

Concerning the second examination, the sexual and other exploitation experienced by the claimant in the unknown foreign country was not for harbouring, as provided in the trafficking definition; therefore, Y was not a victim of human trafficking.<sup>627</sup> Although the three stages of the journey from China to UK are related to people-smuggled, the period in the UK was indicative of human trafficking. Within a month of arrival in the UK, it must have been clear that the claimant had lied when she said that her father would pay her fees on arrival.<sup>628</sup> It must have also been clear that she had lost contact with her father.

Yet, she was detained (harboured in the terms of the CoE Convention, EU Directive and MSA trafficking definition) for a further six months during which she was forced to

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Human Beings CETS No. 197, 2005 (CoE Convention) art 4 (a), European Union Directive 2011/36 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims [2011] OJ L101/1 (EU Directive) art 2 (3), Modern Slavery Act (MSA) 2015, s 2 (4)

<sup>626</sup> MSA 2015, s 2 (4)

<sup>627</sup> *R (on the application of Y) v SSHD* [2012] EWHC 1075, para 35

<sup>628</sup> *Ibid*, para 36

submit to sex and to work in the house without pay.<sup>629</sup> The smuggling process had by then ended and the only reasonable conclusion is that the Snakeheads gang decided to use her by way of punishment or payment in kind. This means that she was being kept for the purpose of exploitation and this circumstance signifies that she was trafficked.

## **5.6 Inconsistencies in a Location Victim's Account may result in the court's inability to apply the Non-prosecution Principle: The *Tabot* Case in *R v LM & Ors* [2010] EWCA Crim 2327**

Inconsistencies in a location victim's account of their trafficking experience may result in the court being unable to apply the non-prosecution principle. This situation was evident in the *Tabot* Case where the claimant pleaded guilty to possessing a false identity document with criminal intent contrary to section 25 of the Identity Cards Act 2006.<sup>630</sup> On entering the country, she presented a false identity card, which she said she had found in the street in France shortly before her journey. By the time, she was arraigned in the crown court, she had written to the Judge stating that she had been tricked into leaving Cameroon to go to France.<sup>631</sup> The man, who brought her to London to work as a prostitute, had also forced her to work as a prostitute for nearly three years in France. She told the Judge that her possession of false documents was a desperate measure to escape to safety.<sup>632</sup> After her conviction, different bodies including the Home Office concluded that she was a victim of human trafficking. The court examined the findings by the

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<sup>629</sup> Ibid

<sup>630</sup> *R v LM & Ors* [2010] EWCA Crim 2327, para 35

<sup>631</sup> Ibid, para 36

<sup>632</sup> Ibid

different bodies and opined that their findings were not credible, as they were made without any knowledge of the account the claimant had given to her counsel.<sup>633</sup>

The claimant's account in the letter to the Judge was inconsistent with the account she gave to her counsel. When her counsel asked her to tell him about her trafficking situation and experience of forced prostitution, she was unable to give him any account at all.<sup>634</sup> When he asked her to tell him about her escape and beating, she could tell him nothing including whether or not she had been in hospital and told someone about the beatings.<sup>635</sup> She said she had been in Manchester (not London as her letter stated) during her few days in England but was unable to say whether she had done any work as a prostitute there.<sup>636</sup> The explanation given to her counsel was that although her trafficker under compulsion had brought her from France to the UK, she had travelled within the country on the same identity card that she found.<sup>637</sup> The appeal was dismissed based on the inconsistencies in her account.

If the claimant was indeed a trafficked person attempting to escape and using false documents for that purpose then the non-prosecution principle (contained in article 26 CoE Convention, article 8 EU Directive and section 45 MSA) would be applicable to her situation. That would imply that there was a breach of the UK Government's policy because the court did not consider whether it was in the public's interest to prosecute the Claimant.<sup>638</sup> Nonetheless, the inconsistencies in her account of events leading up to her

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<sup>633</sup> Ibid, para 38

<sup>634</sup> Ibid, para 37

<sup>635</sup> Ibid

<sup>636</sup> Ibid

<sup>637</sup> Ibid

<sup>638</sup> Ibid, para 39

arrival in the UK, her inability to give any circumstantial history and the uncertainty that she was trafficked to England illustrate that there was no breach of the CoE Convention or any other relevant policy.<sup>639</sup>

### **5.6.1 The *Tijani* Case in *R v LM & Ors***

In the *Tijani* case, a similar situation of inconsistency in a location victim's trafficking account occurred. The claimant pleaded guilty to two offences. The first was of using a false identity document (a forged Nigerian passport) contrary to section 25 of the Identity Cards Act 2006.<sup>640</sup> The second offence was of fraud by producing a false national insurance card. She had presented both documents when applying for a full-time job in a care home in Sussex.<sup>641</sup> During her interview she maintained that she had come from Nigeria on a valid passport, having paid a woman to bring her to the UK to find a job.<sup>642</sup> She had lived with that woman in London for two years from 2005 to 2007.

Her description of events during the interview and her account to her solicitors was not consistent. Her account to her solicitors was that she had run away from Nigeria, leaving her two children there, in order to escape from domestic abuse.<sup>643</sup> In a church she was introduced to a woman who she paid 1000 pounds to transport her to the UK. Once in the UK the woman imprisoned her and forced her to engage in prostitution for a period of more than a year. She was drugged daily, sexually assaulted and abused several times each day. She was beaten or left without food if she objected or tried to leave.

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<sup>639</sup> Ibid

<sup>640</sup> Ibid, para 41

<sup>641</sup> Ibid

<sup>642</sup> Ibid, para 42

<sup>643</sup> Ibid, para 43

Essentially, the claimant's account was not credible, even if her assertion of trafficking was true. For some months before the current offences were committed, she had been entirely free of any exploitation and was already living independently of her trafficker. While she was an illegal immigrant at the time of her arrest, she was not a trafficked victim, and the offences she was arrested for were not carried out as a direct consequence of her trafficked status. She did not commit the offences in an effort to escape her trafficking exploitation, because she had been free of it for a long time.<sup>644</sup> It may be argued that she committed the offences because she wished to continue to live in England unlawfully and to work in the country when she was not entitled to do so.<sup>645</sup> Therefore, the offences were not committed under the compulsion because of her previous trafficking situation.<sup>646</sup> A mitigated / reduced sentence was given to the claimant to allow for the real possibility that she had indeed been a victim of trafficking at an earlier stage in history.<sup>647</sup> The earlier sentence of 9 months in prison was reduced to 4 months, the recommendation for deportation was quashed and her immigration affairs were referred to the relevant authorities.<sup>648</sup>

In relation to the Tabot and Tijani case in *R v LM & Ors*, and the other three cases assessed, one may observe that the non-prosecution principle does not provide blanket immunity from prosecution for trafficked victims. The provision in article 26 of the CoE Convention, article 8 of the EU Directive and section 45 of the MSA does not imply that

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<sup>644</sup> Ibid, para 45

<sup>645</sup> Ibid

<sup>646</sup> Ibid

<sup>647</sup> Ibid, para 47

<sup>648</sup> Ibid

trafficked victims should not be prosecuted, regardless of the offence committed.<sup>649</sup> Nor does it indicate that trafficked victims should not be prosecuted when the offence is in some way connected with or arises out of trafficking.<sup>650</sup> The non-prosecution principle contained in these three instruments requires that careful consideration should be given in each case to decide whether public policy requires a prosecution of the victim or not. Additionally, regard should be given to whether the claimant is a trafficked victim and whether the offence was committed under compulsion. There is normally no reason not to prosecute, even if the claimant has previously been a trafficked victim.<sup>651</sup>

In addition, the prevailing role of the courts in England and Wales is not to decide whether a person ought to be prosecuted or not. Their predominant task in the first instance, is to decide whether a claimant has committed an offence or not. Subsequently, they may have to decide whether a legal process to which a claimant is entitled, or to which he has a legitimate expectation has been neglected to his disadvantage.<sup>652</sup>

It is important that defence lawyers' advise their clients to give a consistent account of their trafficking experience throughout the trial and determination of their case. This is because; a consistent account of trafficking experience may lead to timely application of the non-prosecution principle to the victim's circumstance. A stay of proceedings or moving the case to another court may have occurred if the non-prosecution principle had been raised at an early stage in the proceedings. Some of these cases may not have needed

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<sup>649</sup> Ibid, para 13

<sup>650</sup> Ibid

<sup>651</sup> Ibid, para 14 (iv)

<sup>652</sup> Ibid, para 15

to get to the trial stage at all, if the evidence presented clearly pointed to the fact that the person had been trafficked.

### **5.7 Assessing whether victims of Human Trafficking should be granted Leave to Remain: *R (On the application of KTT) v SSHD* [2021] EWHC 2722 (Admin)**

Due to the exploitation experience of the location victims, they may sometimes request for leave to remain in England, when they are in the process of escaping their trafficking situation. The consideration of their asylum application may first be determined, prior to the assessment of the applicability of the non-prosecution principle to their case. In the *KTT* case, the claimant a Vietnamese national aged 33 had had a complex immigration history. For approximately six months in 2016, the claimant was forced to work as a prostitute in Vinh City before being trafficked into England in November 2016. For a period of 21 months after her arrival in England, the claimant was subjected to forced labour. She worked as a prostitute and on cannabis farms. A positive reasonable grounds decision was made in her case and on 31<sup>st</sup> October 2019, the defendant accepted that she was a victim of modern slavery.

The circumstance of the claimant in this case is a clear situation of a location victim. This is because, the claimant had been exploited in Vietnam, Russia, Ukraine, unconfirmed countries, France and the UK during the period of 2015-2018. The conclusive grounds decision indicated that the claimant had been sexually exploited and undergone forced labour and forced criminality. Yet the claimant's asylum and human rights claims were refused on the 23<sup>rd</sup> of April 2021.

The claimant made claims for asylum and human rights protection based on a fear of being re-trafficked if she was returned to Vietnam. Justice Linden upheld the claimant's

case and ruled that she should be granted leave to remain on the basis that it was necessary due to her personal situation. Her personal situation relates to her ability to pursue asylum and human rights claims. Linden J held that the home office policy on discretionary leave for victims of modern slavery breached article 14 of the CoE Convention and was therefore unlawful. The claimant was unable to work, claim universal credit or gain training and education unless granted leave to remain. Article 14 of the CoE Convention deals with residence permit. It provides that each party shall issue a renewable residence permit to victims of human trafficking if the competent authority considers that their stay is necessary owing to their personal situation or if their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings. The residence permit for child victims, when legally necessary, shall be issued in accordance with the best interests of the child, and where appropriate renewed under the same conditions.

A look at the chronological outline of KTT's passage through the legal channels in England and Wales, would show that the state had numerous opportunities to protect the claimant but was unable to do so. The claimant first encountered the police soon after arrival in the back of a lorry in November 2016. Thereafter, she was transferred into the care of Bedfordshire social services on the basis that she claimed to be a minor. From November 2016-March 2018, the claimant was subjected to forced labour through cannabis production and sexual exploitation in brothels. The claimant was re-encountered by the authorities on the 20<sup>th</sup> of March 2018 and returned to the care of social services. The state failed in their duty to protect the victim. KTT's situation raises two important questions. Firstly, why did the claimant plead guilty to conspiring to produce cannabis? Secondly, why was the claimant subsequently sentenced to 28 months' imprisonment after pleading guilty.

The answer to these questions is perhaps rooted in a general misunderstanding by the prosecution team and defence lawyer in this case, of the indicators that point to an exploitative occurrence. A thorough investigation into the claimant's experience of forced labour and sexual exploitation should have resulted in a stay of proceedings and the immediate application of the non-prosecution principle to the claimant's matter. Thus, there would have been no need to institute an appeal at the administrative court in London. The circumstance in this matter represents another case of a missed opportunity to apply the non-prosecution principle. The case illustrates a situation where proper categorisation of victims becomes relevant. If the victim had been given the terminology of a location victim from the start of the case, it is likely that the non-prosecution principle would have been applied early on. The experience of being trafficked in different countries are clear markers of a location victim circumstance.

**5.8 Whether the single competent authority's assessment of a person's victim status is admissible as evidence in a criminal trial:  
*R v Brečani* [2021] EWCA Crim 731**

The court in this case presided over by Lord Burnett had two legal matters to consider. The first legal consideration was whether a conclusive grounds decision made for administrative purposes by the single competent authority, on a person's victim status was admissible as evidence in a criminal trial. The second issue was whether the expert evidence of Craig Barlow commissioned by the appellant should have been admitted at trial.<sup>653</sup> The judge excluded both issues. A further question for deliberation was whether the judge should have severed the indictment and delayed the trial of the appellant.

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<sup>653</sup> *R v Brečani* [2021] EWCA Crim 731 para 1

The appellant was convicted of conspiracy to supply cocaine, a class A drug on the 26<sup>th</sup> of March 2020. At the time of his conviction, he was aged 17. There were 13 co-defendants on the case, ten of whom pleaded guilty to the same count. Two of the defendants were convicted and one acquitted. The appellant was sentenced to three years detention. He relied upon section 45 (4) of the MSA 2015 as a defence. He argued that he did the act as a direct consequence of being, or having been, a victim of slavery or a victim of relevant exploitation and that a reasonable person in the same situation and having his relevant characteristics would do that act.<sup>654</sup> Relevant characteristics refers to physical or mental illness or disability; age, and sex. Relevant exploitation means exploitation, which is attributable to the exploited person being, or having been, a victim of human trafficking.

A person who establishes that he or she has been trafficked into the UK is treated differently for immigration purposes from others and may be entitled to various forms of support. The evidence presented in this case show that the appellant had been exploited in Albania from 2016-2019, three years prior to arriving in the UK.<sup>655</sup> On arrival in the UK, the appellant was further exploited in 2019. The appellant's situation is a clear case of a location victim circumstance. However, there was nothing to show that the appellant's status as a victim of trafficking was given much weight. This indicates that the competent authority needs to assess the credibility of the potential victim and other evidence during the decision-making process. The state may continue to fail to protect victims of trafficking and apply the non-prosecution principle correctly, if a potential victim's account of trafficking is not considered when making the reasonable and

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<sup>654</sup> Modern Slavery Act 2015, s 45 (4)

<sup>655</sup> *R v Brečani* [2021] EWCA Crim 731 para 12

conclusive grounds decision. The impact trauma is likely to have on the individual's ability to recall events should be taken into account. Thus, all relevant information should be critically and objectively examined when assessing the credibility of a case. Good practice should be observed when working with vulnerable people and individual who have experienced trauma. This is because, the competent authority decisions may affect prosecutorial discretion on whether to prosecute, and the different standards of proof.<sup>656</sup>

The competent authority has often struggled to keep up with an ever-increasing case load. The expanding case load has resulted in unwelcome delays. In this case, for example, there was a gap of four and half months between the reasonable and conclusive grounds decision.<sup>657</sup> Although part of the delay was caused by the appellant's solicitors seeking an extension of time and being given four extra weeks to provide information. The delays had an impact on the court proceedings. The impact on proceedings is connected to the CPS waiting to know the outcome of a referral to the competent authority. Where it is suggested that the offence was committed because of relevant trafficking or coercive behaviour, the CPS will wait to know the outcome of the referral before deciding to continue proceedings or charge the victim of human trafficking. However, the first intimation that a person has been a victim of human trafficking or modern slavery may arise after being charged with a criminal offence. This is the situation that occurred in this case. Other times, a person's status as a victim of trafficking may be discovered after the first appearance at court. This discovery will subsequently facilitate the matter being referred to the competent authority during the court proceeding. The expectation is that the criminal proceeding will await the outcome of the referral because that outcome will be considered by the CPS in deciding whether to proceed. In the current case, the trial

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<sup>656</sup> Ibid, para 8

<sup>657</sup> Ibid, para 9

was underway before the conclusive grounds decision was made. The CPS was aware of the appellant's likely defence to the conspiracy to supply cocaine. The prosecution had explored the appellant's circumstances in detail, including a full examination of his phone. Both the specialist prosecutor who dealt with potential modern slavery cases and the counsel were confident that the prosecution could disprove the defence.<sup>658</sup> On receipt of the conclusive grounds decision, they reviewed the matter but decided to continue with the prosecution. Lord Burnett held that the Judge in this case prior to the current appeal was right to exclude the conclusive grounds decision, the annex attached to it and Mr. Barlow's evidence. The court dismissed the current appeal and stated that the previous conviction of the appellant was appropriate given the circumstances.<sup>659</sup> Leave was granted to the appellant to make a further appeal on evidential grounds subsequently, if necessary.

### **5.9 Judicial Review Claim by a Location Victim: *R (on the application of AM) v SSHD [2021] EWHC 1373 (Admin)***

This case concerned an individual who had the characteristics of both a location victim and a transition victim. The claimant possessed the traits of a location victim because the location in which the alleged human trafficking experience occurred is a different legal jurisdiction from the UK. Also, the claimant, *AM*, had further traits of a transition victim because he had committed a serious offence in Albania which he had served prison time for.

*AM* is an Albanian national who arrived in the UK on a fishing boat alongside 69 other immigrants on the 18<sup>th</sup> of November 2020. On arrival he was identified as an illegal

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<sup>658</sup> Ibid, para 10

<sup>659</sup> Ibid, para 76

immigrant and arrested by the police. He was detained under immigration powers in schedule 2 to the Immigration Act 1972 at southend police station.<sup>660</sup> At the time the judgment in this case was given, the claimant had spent six months in detention. AM made an asylum claim and a claim to be a victim of human trafficking. It was discovered during the proceedings that AM had been convicted of murder in Albania and served 12.5 years in prison there.<sup>661</sup>

AM instituted a judicial review claim challenging the lawfulness of his detention on the 15<sup>th</sup> of February 2021. In the claim, he sought his immediate release from detention, damages for false imprisonment and an interim relief. The honourable Michael Ford sitting as deputy high court judge dismissed the application for judicial review and set out the reasons for the failed application.<sup>662</sup> One of the reasons was the overriding public protection factors. The immigration authorising officer argued against the release of AM stating that his detention was proportionate and appropriate. If AM has been convicted of murder in UK, the public protection factors would prevail. Further information had been received from Albania which indicated that AM had been convicted for theft and had received an additional eight-month sentence while serving his prison sentence.<sup>663</sup> This indicated that he was a persistent offender. AM's denial of guilt for the offences he had been convicted for, increased the risk that he may re-offend in the future. Arguing on behalf of the claimant, Mr Allan Briddock (instructed by Duncan Lewis solicitors) contended that the murder conviction could not in itself justify detention, pointing out

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<sup>660</sup> *R (on the application of AM) v SSHD* [2021] EWHC 1373 (Admin), para 1

<sup>661</sup> *Ibid*, para 2

<sup>662</sup> *Ibid*, para 91

<sup>663</sup> *Ibid*, para 38

that AM had volunteered the information of his conviction and said he was wrongfully convicted.

## **5.10 Treatment of location victims in England and Wales**

The cases discussed in this chapter depict the treatment of location victims in England and Wales. It is interesting to note that there hasn't been a significant change in the treatment of location victims by the courts in England and Wales, in the time frame of 11 years. The *R v LM* case was decided in 2010 and the location victim cases discussed above were concluded in 2021. In this 11 years' time span, the categorisation of victims has not yet been treated as relevant or prioritised by the authorities. There is still no notion of a location or transition victim, or what the inclusion of these classes of victims may mean for the treatment of victims of human trafficking prosecuted in England and Wales. The situation of a transition victim is considered in the next chapter.

The examination of all the classes of victims, including the location and transition victims in human trafficking cases, may result in an improved application of the non-prosecution principle. This is because, from the moment the evidence and facts of a case are presented, it will be clear what category a potential victim belongs to. The class of a potential victim of human trafficking will subsequently hasten the decision on whether to prosecute the trafficked victim or not. Consequently, depending on the victim's specific circumstances, the decision on whether to apply the non-prosecution principle to a victim's case will also be determined.

The cases discussed in this chapter represent missed opportunities to apply the non-prosecution principle to the victim's situation. Similarly, in the cases of *Regina (MN) v SSHD*; *Regina (IXU) v SSHD*, the court failed to realise that the claimants were location

victims of human trafficking who had experienced situations of exploitation.<sup>664</sup> The two separate appeal cases were heard together because they both raise issues about the correct approach to decide whether someone is a victim of human trafficking for the purpose of the process established under the NRM. Both cases concern foreign nationals who had entered the UK and alleged that they had been trafficked. Both claimants were referred to the competent authority to determine whether they were credible victims of human trafficking. In both cases, the competent authority initially made a positive reasonable grounds decision in the claimant's favour but, after further consideration, made a negative conclusive grounds decision.

The evidence presented indicated that both claimants were location victims who had been exploited in a different jurisdiction outside of the UK. *MN* is an Albanian national who was forced to work as a prostitute in Italy. Further, *IXU* is a Nigerian national who was trafficked in her home country and on arrival in the UK, was expected to become a prostitute. After escaping from her traffickers, she agreed to marry an EU national, but the marriage was prevented by the immigration authorities. On the 9<sup>th</sup> of April 2014, she was convicted of an offence of conspiracy in relation to the proposed marriage and sentence to two years' imprisonment. Following her sentence, she was served with a notice of liability to automatic deportation.

Allowing the appeals in part, the court held that the home office guidance on the operation of the NRM should be construed to give effect to the UK's obligations under the CoE Convention and EU Directive.<sup>665</sup> However, where a compatible construction was not possible, or appropriate remedies were not otherwise available, obligations under

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<sup>664</sup> *Regina (MN) v SSHD; Regina (IXU) v SSHD* [2021] 1 WLR 1956, [2020] EWCA Civ 1746

<sup>665</sup> *Ibid*, para 85

Chapter III of the CoE Convention would be directly enforceable. The obligations under Chapter III of the CoE Convention would be directly enforceable to the extent that they correspond to the positive obligations under article 4 of the ECHR.<sup>666</sup> Per Underhill LJ, the court quashed the competent authority's decision, with the result that the application should be determined afresh by a different decision-maker.<sup>667</sup>

The *MN* and *IXU* cases demonstrate that victims of human trafficking continue to be treated as criminals or offenders by the courts in England and Wales, and not as trafficked victims. Even though the indicators and patterns of trafficking were evident in both cases, these factors were overlooked at key stages during the court proceedings. The cases exemplify the relevance of categorisation of victims to aid the timely application of the non-prosecution principle. The state and authorities ought to assist and protect victims of THB for criminal activities, when it is shown that those criminal acts occurred due to the individual's trafficking circumstance.

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<sup>666</sup> Ibid, para 92 – 100

<sup>667</sup> Ibid, para 353

## **5.11 Missed Opportunities to Apply the Non-Prosecution Principle to the Cases Discussed Above**

There is a continuing failure by the authorities (the police, the court, the single competent authority and the crown prosecution service) to identify and avoid prosecuting victims of trafficking and modern slavery. Currently, there are no official data on the number or experiences of victims of trafficking who are wrongly prosecuted for offences carried out due to exploitation. This inhibits a thorough assessment of the extent to which criminal justice agencies are executing their legal responsibilities towards victims of trafficking who present as offenders.

Evidence collated by the Prison Reform Trust and Hibiscus Initiatives suggest that, despite police and prosecution guidance, there is an alarming rate of failure to identify, protect and support victims of trafficking at an early stage.<sup>668</sup> The report signifies that, authorities have been unable to avoid prosecuting victims for offences committed because of their exploitation by traffickers. The College of Policing guidance specifies that where an individual raises the non-prosecution principle defence in section 45 of the MSA before a police interview, the person should be offered a separate interview about their experience of trafficking and an NRM referral should be made.<sup>669</sup> However, the guidance fails to specify that where this is raised during a police interview the same approach should be taken.

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<sup>668</sup> Prison Reform Trust and Hibiscus Initiatives, *Still No Way Out: Foreign National Women and Trafficked Women in the Criminal Justice System* (Prison Reform Trust 2018) 12

<sup>669</sup> College of Policing, *Authorised Professional Practice, Modern Slavery Index, Major Investigation and Public Protection: Risk and Identification* (5<sup>th</sup> June 2016)

In the situation of a location victim and as the cases discussed indicate, the court will not apply the non-prosecution principle until it is determined whether an individual is a credible victim of human trafficking or not. Assessing a person's victim status is a vital first step before the application of the non-prosecution principle. One reason for this may be the fact that the location victim's exploitation occurred in a different EU jurisdiction prior to their arrival in England and Wales, in the United Kingdom. Therefore, the court will only examine the non-prosecution principle after assessing the location victim's circumstance.

Another reason for the courts not applying the non-prosecution principle promptly to a victim's case may be because defence lawyers often do not ask the right questions to establish whether their client has indeed been a victim of trafficking. In practice, some defence lawyers fail to advise individuals where appropriate about the non-prosecution principle defence in article 26 CoE Convention, article 8 EU Directive and section 45 of the MSA. For example, in the *R v S* case, at the time of his trial, S had received a conclusive decision from the competent authority that there were insufficient grounds to believe that he was a victim of THB.<sup>670</sup> His solicitor convinced him to plead guilty to the charge of producing a controlled drug of Class B (cannabis) levelled against him. For some inexplicable reason, the solicitor had taken the view that the competent authority's decision was irrevocable, and S was sentenced to 12 months' imprisonment. Singh LJ allowing the appeal noted that there were conflicting witness statements from S's trial solicitor. These conflicting statements meant it was unclear whether S fully understood that he could use the provision in section 45 of the MSA to his defence.<sup>671</sup> Further, it was

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<sup>670</sup> *R v S* [2020] EWCA Crim 765

<sup>671</sup> *Ibid*, para 38

also unclear whether S was made aware that this defence under section 45 could be pleaded, notwithstanding the negative conclusive grounds decision of the competent authority.

Mennim observes that the section 45 statutory defence was introduced with the specific consideration of protecting individuals being trafficked for cannabis cultivation.<sup>672</sup> The observation has been made due to the stipulation in the modern slavery bill factsheet. The factsheet indicates that the section 45 defence will “cover the offences that victims of modern slavery are typically forced to commit such as cannabis cultivation, offences related to prostitution, and immigration offences...”<sup>673</sup> Even though this is the specific reason why the defence was created, trafficked victims who encounter the authorities with these same trafficking markers are being prosecuted. Trafficked victims who present with these types of exploitation are being criminalised, due to law enforcement failing to recognise their trafficked status. The failure to correctly identify victims of human trafficking will undoubtedly impact the successful application of the non-prosecution principle to victim’s circumstances.

A stay of proceedings may be pleaded by a victim’s defence team pending the outcome of their trafficking status. Although it may be difficult for a defence lawyer to successfully apply for proceedings to be stayed or moved to a different court (due to the requirement of proving probable cause), it is essential that the lawyer pleads a stay of

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<sup>672</sup> Mennim S., ‘Trafficked Victims and Appeals against Guilty Plea Convictions: R v S [2020] EWCA Crim 765’ (2021) 85 (1) JCL, 66, 69

<sup>673</sup> Home Office: Modern Slavery Bill Factsheet: Defence for Victims (Clause 45) (2014)

proceedings to protect their client. Difficulties in obtaining suitable bail accommodation may also lead to location victims being remanded in custody.<sup>674</sup>

All the cases examined in the case law analysis section of this chapter are clear cases of location victims who were not treated as victims of trafficking at all, but primarily as third-country nationals referred to the Dublin III Regulation process for consideration. In the cases discussed, the claimants came to the authorities primarily as asylum seekers and not as victims of THB. In almost all the situations examined, a considerable lapse in time was taken before their circumstance was referred to the NRM. Interestingly after referral to the NRM, the deliberation on whether each case should be considered under the Dublin Regulation continued. It is submitted that this is an erroneous procedure. When there is any suspicion that a person may be a victim of human trafficking, the deliberation under the Dublin Regulation should be discontinued pending further investigations.

In the cases discussed above, none of the location victim's / claimant's matter should have proceeded to the trial stage at all. The non-prosecution principle ought to have been applied in all instances from the beginning of each individual case, to ensure that the claimant was protected and given all the support that they required. There are several disparities in the court's assessment in the cases of location victims that have examined. First, given the fact that the claimants were clearly location victims due to their trafficking occurrence happening in a different EU jurisdiction other than the UK, their cases should have been referred to the NRM from the onset and the non-prosecution principle applied to their case. From the point where it was noted that they had been

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<sup>674</sup> Prison Reform Trust and Hibiscus Initiatives, *Still No Way Out: Foreign National Women and Trafficked Women in the Criminal Justice System* (Prison Reform Trust 2018) 12

exploited in a different jurisdiction, their fundamental human rights should have been upheld.

The location victim should not be detained on remand pending the outcome of their asylum claim / Dublin III Regulation consideration. Rather, they should be given protection, by giving them adequate shelter to foster recovery and reflection. Importantly, the examination of the Dublin III Regulation should be discontinued once it is established that a person is a location victim. A thorough assessment should be made by the NRM to settle whether they are credible victims of THB or not. After this assessment is done, they should be given medical attention if required to improve their sexual and mental health. Subsequently a full report of their victim status, physical, mental and sexual health assessment should be prepared and sent to the nominated third-country charged with the consideration of the location victim's claim.

The cases discussed signify the importance of establishing when to apply the non-prosecution principle and specifically when all the components of the definition of trafficking are met. A person's trafficking experience or exploitation may not have occurred at the time of transportation or recruitment, but at the time of harbouring, as the case of *R (BG) v SSHD* illustrates.<sup>675</sup> The *R (BG) v SSHD* case signifies the relevance of this assessment where the alleged trafficking victim was initially in a romantic relationship with the would-be-trafficker and that relationship develops over time into one of trafficking. One of the basic strategies of sex traffickers is to target vulnerable individuals, especially women, and develop a relationship with them. In the case of vulnerable women, the would-be trafficker will gain their trust, before exploiting them.<sup>676</sup>

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<sup>675</sup> *R (BG) v SSHD* [2016] EWHC 786, para 20

<sup>676</sup> *Ibid*

It may be observed that the court and the Home Office as the competent authority or single competent authority are unwilling to categorise the early grooming stages of a typical sex-trafficking relationship as trafficking. This reluctance by the authorities to categorise early grooming of a potential victim as a trafficking situation is especially evident in situations where the alleged victim has freedom of movement during their proposed exploitative experience.

Therefore, it is essential for victims of trafficking including location victims to clearly establish that they have undergone an exploitative experience from the commencement of their case. If a victim's trafficking experience is well-established at an early stage in the court proceedings, then there is a high likelihood that the non-prosecution principle will be applied on time to the victim's case. The court will be unable to apply the non-prosecution principle unless there is clear evidence that a person is a credible victim of human trafficking.

## Conclusion

Victims of THB are often forced to commit serious criminal offences during their situation of exploitation, including irregular immigration status, recruitment of other victims, cannabis cultivation, benefit fraud and shoplifting. It is noteworthy that few persons are identified and assigned the title of victim, with even fewer traffickers being brought to justice. Even in situations where it would appear obvious that the victim was an unwilling participant in the illegal activity, the prosecution of trafficked individuals is prevalent.<sup>677</sup> As the case of *R v N* illustrates, the claimant was sentenced to 20 months imprisonment for cannabis cultivation even though a conclusive decision by the competent authority had identified him as a victim of trafficking.<sup>678</sup>

The probable factors that contribute to prosecution of victims have been discussed in chapter three of this thesis. Notable among these are unfulfilled state obligations - particularly the obligation to prevent the offence of human trafficking and protect victims of THB, states' refusal to confer victim status and equating trafficking to slavery as exemplified by the court in the *Rantsev* case.<sup>679</sup> The MSA has shown that human trafficking and slavery are two distinct offences, because it discusses them separately and provides different sentencing procedure for both.<sup>680</sup> Further, Jovanovic argues that the open-ended list of types of exploitation in the definition of trafficking is another reason for the continued prosecution of victims.<sup>681</sup> Exploitation includes sexual exploitation or

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<sup>677</sup> Gallagher A. T., *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (1<sup>st</sup> edn, United Nations 2010) 129

<sup>678</sup> *R v N* [2012] EWCA Crim 189

<sup>679</sup> *Rantsev v. Cyprus and Russia*, App no 25965/04 (ECHR, 7 January 2010)

<sup>680</sup> Modern Slavery Act 2015, s 1 and 2

<sup>681</sup> Jovanovic M., 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance' (2017) 1 JTHER, 41, 44

the exploitation of the prostitution of others, forced or compulsory labour, slavery or practices similar to slavery, servitude or the removal of organs.<sup>682</sup>

Despite the seemingly unlimited types of exploitation in the definition of trafficking, this is not entirely a bad thing, because it allows for new forms to be covered as our knowledge of the offence develops.<sup>683</sup> Nonetheless, the Palermo Protocol does not define the concept of exploitation itself; neither does it provide a criterion that may be used to determine other practices that could also fall within its ambit.<sup>684</sup> Again, the MSA is helpful in reconciling this irregularity. The different types of exploitation are explained in Section 3. For example, sexual exploitation is interpreted to mean a situation when something is done to or in respect of a person which involves the commission of an offence under section 1 (1) (a) of the Protection of Children Act 1978 (indecent photographs of children), or Part 1 of the Sexual Offences Act 2003 (sexual offences).<sup>685</sup> This section implies that sexual exploitation would be deemed to have occurred when a person is raped, sexually assaulted or forced to engage in sexual activity without consent. In the case of child victims of sexual exploitation, the offence is committed when a position of trust is abused resulting in sexual activity with a child. Sex offences with children may also include indecent photographs.

The victim spectrum is crucial to the discussion of the location victim because it explains the different experiences a trafficked victim encounters during their exploitative situation. A location victim is often found in an unusual circumstance where, while their

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<sup>682</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 55/25, 2000, art 3; Modern Slavery Act 2015, s 3 (1) (2) and (3)

<sup>683</sup> Jovanovic M., 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance' (2017) 1 JTHER, 41, 45

<sup>684</sup> Ibid

<sup>685</sup> Modern Slavery Act 2015, s 3 (3)

case is being determined, they may be detained by the state – immigration detention pending the determination of their claims. Sometimes, they are not prosecuted for the offences they have committed after their trafficking situation ended. Instead, they are sent to a safe third country (as provided for by the Dublin III Regulation) for a decision on their case to be reached. The law currently considers location victims as individuals who are no longer in need of protection and assistance from the state. Importantly, because their trafficking offence was committed in a different jurisdiction from the UK, or because their trafficking experience may be historic, they are unable to claim the full privileges of a pure / current victim of human trafficking. These privileges include the 45 days recovery and reflection period, housing and medical benefits provided for by the state. In addition, if the offences that led to their arrest was not committed under compulsion, then they may be eligible to receive a mitigated / reduced sentence because of their past trafficking experience.

This chapter has discussed the location victims and their treatment by the courts in England and Wales. The next Chapter will consider the transition victims and include a case law analysis assessing their criminal liability for offences committed.

## **CHAPTER SIX**

# **PROSECUTION OF TRANSITION VICTIMS, ASSESSING CRIMINAL LIABILITY FOR OFFENCES COMMITTED**

### **6.1 Introduction**

The assessment of a transition victim's circumstance represents the author's original contribution to knowledge. The writer of this thesis argues that the categorisation of victims of THB should be made a legal requirement in human trafficking cases. This is because, adequate categorisation of victims of human trafficking may lead to proper application of the non-prosecution principle. Therefore, recognising the transition victim and their unique position in the victim spectrum may further this goal of efficiently applying the principle to a victim's circumstance.

The author acknowledges at the outset of this chapter that there is limited research related to the nuances and situations that may motivate an individual to become a human trafficking offender. Some evidence is provided and discussed in this chapter which points to childhood abuse and trauma as the catalyst that may cause a person to progress onto offending. This progression onto offending is particularly linked to sex offending or sexual exploitation. However, there is currently limited research in relation to individuals who are responsible for human trafficking/modern slavery offences. Hence, there is inadequate proof to support some of the assertions that have been presented in this chapter. These assertions are in connection to the process a person may undergo, which may eventually lead to their development from a pure/ideal victim into a criminal offender. Since the research on which one may begin to understand the transition victim's inspiration for offending is scarce or missing, this implies that there may be some

limitations on the conclusions that are arrived at in some parts of this chapter. Further research into the transition victim circumstance is necessary to explain the conditions that may foster the creation of this class of victims.

A transition victim is an individual who has had their status altered from a pure/ideal victim, into a trafficking offender/perpetrator of the offence of THB. The transition victim may also have committed a serious offence such as murder or manslaughter, either while they were a victim of human trafficking or after their exploitative experience had ended. The situation of a transition victim may sometimes be unclear, because of the overlap that occurs between the offender and victim trajectory when a person transforms from a victim into an offender. The circumstance that leads an individual to transform from a victim into a perpetrator is not easy to determine, unlike the case of a pure and historical victim which is easier to distinguish.

The pure/ideal victim and historical victim's circumstance is easier to determine because of the apparent markers that can be used to identify them. These markers have been discussed in chapter two of this thesis, which focuses on the identification and categorisation of victims of human trafficking. In that chapter it has been resolved that an ideal victim/pure victim of human trafficking is one who has been coerced into the trafficking situation, through force or fraud.<sup>686</sup> The force, coercion or fraud must be so serious that an investigator or prosecutor will consider the victim a good witness for the consequent prosecution of their human trafficker.<sup>687</sup> Hence, the authorities will consider a person to be an ideal/pure victim of THB if their circumstance falls on all fours (is

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<sup>686</sup> Srikantiah J. 'Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law' (2007) 87 (1) BULR, 157, 187

<sup>687</sup> Ibid

identical or so close) with the definition of human trafficking. In particular, the person is in a suitable position to fully cooperate with legal enforcement investigations due to their trafficking experience.

Contrarily, a historical victim is a person who has successfully disentangled themselves from their trafficking situation or escaped from their trafficker.<sup>688</sup> The case of *Y v SSHD* illustrates that when a person has been free of their exploitative situation for two years, the case may be viewed as historic or a historical occurrence by the authorities and the court.<sup>689</sup> The authorities (the NRM and the court) may inform a historical victim that though they may have been victims in the past, they are not considered a victim for the purpose of the definition of trafficking and therefore cannot enjoy the benefits that victim status confers. Ultimately, the authorities conclude that they do not require any protection or assistance from the state.

The conditions discussed above are the clear markers that may easily distinguish a pure/ideal victim from a historical victim. However, in the case of a transition victim – one who has transformed from a pure victim into a recruiter of others for purposes of exploitation, the situation may be difficult to ascertain. This is because, as Jovanovic points out, a person's situation as a lawbreaker and a victim of crime can sometimes become blurred.<sup>690</sup> In this regard, a transition victim may also have committed a serious criminal offence, such as murder or manslaughter during their trafficking circumstance. This situation may cause further uncertainty, resulting in difficulty in determining a

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<sup>688</sup> *Y. v. SSHD* (2012) EWHC 1075, para 51

<sup>689</sup> *Ibid*

<sup>690</sup> Jovanovic M., 'The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance' (2017) 1 *JTHE*, 41, 47

person's status. Thus, the distinction between the person's position as a victim and that of an offender may become unclear.

## **6.2 First Group of Victims: Victim in Childhood developing into an Offender in Adulthood**

Research findings conducted by Plummer and Cossins suggests that the prevalence of trafficking or exploitation in some childhood victims of trafficking or other forms of abuse may result in the individual growing up to become an exploiter of others.<sup>691</sup> The cycle of violence hypothesis is one of the most influential conceptual models for antisocial behaviour in the social and behavioural sciences. Essentially, the cycle of violence model asserts that various forms of neglect, trauma, and violence exposure during childhood create significant developmental problems and increase the likelihood of violent behaviours later in life.<sup>692</sup> For example, a history of childhood sexual and/or physical victimisation has been identified more frequently in sexual offenders compared to nonsexual offenders. Links have also been established between childhood sexual victimisation and sexual preferences for children in adulthood. Although sexual or other forms of victimisation in childhood is not a necessary precursor for later offending or reoffending behaviour, it is a factor that may influence developmental pathways into offending for some individuals.<sup>693</sup>

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<sup>691</sup> Plummer M. and Cossins A., 'The Cycle of Abuse: When Victims Become Offenders' (2018) 19 (3) TVA, 286, 300

<sup>692</sup> DeLisi M., Kosloski A. E., Vaughn M. G., Caudill J. W. and Trulson C. R., 'Does Childhood Sexual Abuse Victimization Translate into Juvenile Sexual Offending? New Evidence' (2014) 29 (4) Violence and Victims, 620

<sup>693</sup> Dennison S. and Leclerc B., 'Developmental Factors in Adolescent Child Sexual Offenders: A Comparison of Nonrepeat and repeat Sexual Offenders (2011) 38 (11) Criminal Justice and Behaviour, 1089, 1091

Plummer and Cossins further observed that a significantly higher prevalence of historical abuse among offenders who victimised children compared with those who victimised adults. For example, in the case of sexual abuse results have led to the development of the sexually abused-sexual abuser hypothesis which postulates that there is a link between sexual victimisation in childhood and subsequent sexual perpetration.<sup>694</sup> Also, children less than 12 years of age who had been sexually exploited, sexually or physically abused or neglected were at a higher risk of committing a sex related crime in adulthood.<sup>695</sup> This logic may be extended to individuals who have been sexually exploited for human trafficking purposes. That is, childhood victims of sexual exploitation, may gradually develop into offenders.

The crimes they are likely to commit include exploitation of the prostitution of others and other sexual related offences. Sometimes, a close relationship between a person and their offender (such as a teacher/pupil relationship) may also affect the transition from victim to offender. This is because, a close, dependant relationship with an authority figure may result in feelings of powerlessness on the part of the victim.<sup>696</sup> These feelings of powerlessness may cause trust and betrayal issues in the relationship dynamic between the victim and offender. The trust and betrayal issues may subsequently become key factors in the situation of victimisation or human trafficking occurrence.

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<sup>694</sup> Plummer M. and Cossins A., 'The Cycle of Abuse: When Victims Become Offenders' (2018) 19 (3) TVA, 286, 300

<sup>695</sup> Ibid

<sup>696</sup> Ibid

### **6.3 Second Group of Victims: Not all Victims of Crime become Offenders**

The class of victims discussed above may be regarded as the first group of victims. There is a contrary argument relating to a second to the group of victims. The contrary argument considers that while there is a group/class of victims who may become offenders/traffickers, there is another class of individuals that do not. That is, not all offenders have a history of exploitation or abuse. Hence, previous history of exploitation is not a precondition for engaging in criminal offences as an adult.

Empirical studies demonstrate that there is a second group of individuals who do not become offenders despite their previous experience as victims. Although being a victim of trafficking and other types of exploitation may increase the risk of offending, not all victims of trafficking go on to become offenders or traffickers.<sup>697</sup> In fact, some victims do not go on to perpetuate abuse. Furthermore, not all offenders have a history of exploitation or abuse. There are some individuals who break from this victim-offender cycle. Hence, previous history of exploitation is neither a sufficient nor a necessary condition for engaging in criminal offences as an adult.<sup>698</sup> Those individuals who break from this victim-offender cycle are viewed as resilient because they could resist conditions that may lead them to committing offences in adulthood or future situations.<sup>699</sup> The transition victim of human trafficking falls into the first group of individuals who developed into an offender due to a previous trafficking/exploitative experience. The

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<sup>697</sup> TenEyck M. and Barnes J. C., 'Exploring the Social and Individual Differences Among Victims, Offenders, Victim-Offenders, and Total Abstainers' (2018) 13 (1) V&O 66,

<sup>698</sup> Lambie I. And Johnston E., "I Couldn't Do It to a Kid Knowing What It Did to Me": The Narratives of Male Sexual Abuse Victims' Resiliency to Sexually Offending (2016) 60 (8) IJOTCC 897, 898

<sup>699</sup> Ibid, 899

evaluation discussed above illustrates that the victim-offender cycle in criminal and human trafficking cases is often difficult to establish. Sometimes, the victim turned trafficker may not be aware that they are doing anything wrong because they have become accustomed to living a life of exploitation and will recruit other vulnerable individuals for the same purpose. This chapter aims to assess the case of a transition victim and consider the criminal liability of victims who commit criminal activities during their transition stage.

#### **6.4 The Effect of the Non-Prosecution Principle on the Transition victim**

The non-prosecution principle may be used as a mechanism to overcome the difficulty encountered in distinguishing between the pure/ideal victim and the transition victim. In this respect, the author of this study suggests that the transition victim may be treated the same as a pure/ideal victim at the beginning of the court proceedings, pending further presentation of evidence on the matter. That is, the same expectation for a pure victim of trafficking, may be adapted to the transition victim's circumstance for the purpose of considering the application of the non-prosecution principle to their case.

An examination of the non-prosecution principle contained in article 26 of the CoE Convention and article 8 EU Directive may reveal that, although the words of both instruments appear to be similar, the effect of the two is substantially different. Whereas article 26 provides for 'the possibility of not imposing penalties' on victims, article 8 of the EU Directive considers the entitlement 'not to prosecute or impose penalties' on victims. A careful consideration of the phrasing of the two instruments will indicate that article 8 of the EU Directive has a wider scope than the CoE Convention. By including competent national authorities in its definition, the directive thereby involves the police

and public prosecutor in the process of non-punishment of victims.<sup>700</sup> Further, Section 45 of the MSA maintains an even broader approach in comparison to the other two instruments.

In addition to the possibility or entitlement of not imposing or prosecuting victims of trafficking, the MSA extends its reach by including supplementary offences. Hence, the MSA provides for three offences in total, these are: slavery, servitude and forced or compulsory labour,<sup>701</sup> human trafficking<sup>702</sup> and commission of an offence with the intention to commit human trafficking.<sup>703</sup> In particular, Section 45 of the MSA includes the reasonable man's test in determining whether the offence has occurred, which in turn will establish whether the statutory defence of non-prosecution may be applied or not. The reasonable test requires that 'a reasonable person in the same situation as the person having the person's relevant characteristics' would have no realistic alternative other than to carry out the offence, and someone else in a similar situation would have no other choice than to do same.<sup>704</sup> The implication of the reasonable man's test in this provision requires that the objective and subjective will need to be applied in deciding the outcome of each individual case. Therefore, the important consideration will be the state of mind (or will) of the person who committed the offence.

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<sup>700</sup> Ibid

<sup>701</sup> MSA 2015, s 1

<sup>702</sup> Ibid, s 2

<sup>703</sup> Ibid, s 4

<sup>704</sup> Ibid, s 45 (1) (d)

Further, when it comes to the type of wrongdoing a victim might be involved in, the CoE Convention refers to ‘unlawful activities’ while the EU directive is focused on criminal activities.<sup>705</sup> Accordingly, the EU Directive potentially excludes from its scope activities that may contravene legislation other than criminal law, such as administrative law or immigration law.<sup>706</sup> In relation to the scope of application of the principle and specifically the link between the victim’s offence and trafficking experience, the EU Directive is more precise as it requires a criminal offence to be committed as a direct consequence of having been a victim of human trafficking. Though, such a causal connection between the offence committed occurring as a direct consequence of victim status is not expressly explained in the CoE Convention definition.

Essentially, both the CoE Convention and EU Directive provide for the possibility of not imposing penalties or prosecuting victim of THB. It is unclear whether the implication of both instruments is that member states should simply adopt the non-prosecution principle into their respective legislations, or whether the provisions impose a more binding obligation on relevant authorities.<sup>707</sup> Naturally, these disparities may lead to varying levels of protection to victims in different jurisdictions and there is a potential that in practice different interpretations and application of the non-prosecution principle may be given.

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<sup>705</sup> Council of Europe Convention on Action against Trafficking in Human Beings CETS No. 197, 2005 (CoE Convention), art 26 and European Union Directive 2011/36 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims [2011] OJL101/1, art 8

<sup>706</sup> Jovanovic M., ‘The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance’ (2017) 1 JTHER, 48

<sup>707</sup> Ibid

The foregoing implies that the transition victim may not receive protection from the state or have the non-prosecution principle applied to their case unless, they are able to prove a causal connection between the offence committed and status as a trafficked victim. This implicitly relates to the burden of proof in trafficking cases.

## **6.5 Burden of Proof in trafficking cases**

To promote clarity and to understand the court's treatment of victims of THB, a consideration of the legal burden of proof in trafficking cases will be undertaken. This assessment will determine where the burden of proof lies. Does the legal burden rest on a defendant when the non-prosecution principle is raised or does the evidential burden rest with the prosecution? The appeal court per Burnett L.J explained that, for the purpose of section 45 MSA, the burden of proof on the defendant is evidential. The defendant is expected to present evidence for each element of the non-prosecution defence and in turn the prosecution is required to disprove one or more of those elements beyond reasonable doubt.<sup>708</sup> Based on the evidence presented by both the victim of human trafficking/defendant and the prosecution, the court will then decide how best to proceed with the case in the interest of public policy.

The defence in section 45 is available to slavery/trafficking victims. In cases involving adults, after it has been established that the person is aged over 18 years, the court must first assess whether the defendant/potential trafficking victim committed the act which constitute the offence under compulsion. Following this assessment, the defendant's victim status becomes relevant in determining whether the act done under compulsion was a direct consequence of the person being or having been a victim of slavery or human

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<sup>708</sup>*R v MK; R v Gega* [2018] EWCA Crim 667 para 45, [2019] QB 86

trafficking. The court's approach when the defence is raised is to consider two pertinent questions. These are: is or was the defendant a victim of slavery or human trafficking at the time the offence was committed? Secondly, if so, is there a direct causal link between the defendant's status as a victim and the act done under compulsion?<sup>709</sup>

In relation to the relationship between duress and section 45, the court of appeal contended that in some instances the prosecution may experience some difficulty in disproving to the criminal standard the defendant's account of their trafficking circumstance.<sup>710</sup> This is because, in addition to the narrative of the defendant's action and the compulsion element that precipitated the act, the objective test also needs to be applied to the victim's case. The objective test requires the prosecution to disprove in for example, the case of an adult that, any adult in the defendant's position and sharing the same relevant characteristics as the victim would have no realistic alternative other than to commit the act. For children under the age of 18, the objective test is the same with the exception that the availability or otherwise of a realistic alternative is irrelevant. The objective test is essential and was designed with the intention to protect credible victims of human trafficking. This protection entails ensuring that the defendant does not make a false claim about being a victim of trafficking when he has in fact not experienced any exploitative situation.

The court's ruling in *R v MK* on the burden of proof in trafficking cases is instructive because it upholds the rationale of protecting, rather than criminalising victims of THB. Thus, when deciding whether to initiate or proceed with a prosecution, careful consideration should be given to the availability of the section 45 defence to the

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<sup>709</sup> Ibid, para 27

<sup>710</sup> Ibid, para 37 and 38

defendant, and whether there is sufficient evidence to disprove the defence beyond reasonable doubt. This legal standard also implies that no charges will be brought against the trafficked victim where there is sufficient evidence that: the suspect is a genuine victim of trafficking or slavery, the other conditions in section 45 relating to whether the suspect is an adult or child is met, and the offence is not an excluded offence under Schedule 4 of the Act.

The legal standard and burden of proof in trafficking cases is relevant to all the four classes of victims (pure, historical, location and transition victims). In all instances, the court is required to consider all the relevant pre-requisites discussed above before deciding whether to continue prosecuting a victim. Following the assessment of the main elements that should be present when determining whether to proceed with the prosecution of a victim of THB, an examination of the criminal liability of transition victims will be considered.

## **6.6 Criminal Liability of Transition Victims – Assessment of the S. And ` Mehak Case**

Although the current case is decided in a Dutch court, the case is relevant to explain the effect of the non-prosecution when a prior victim commits a serious crime. The defendant in the instant case was on trial for committing the crime of manslaughter. A person who commits the offence of manslaughter may be regarded as a transition victim, because they come to the attention of the authorities primarily as offenders of a serious crime rather than as trafficked victims. The issues considered in this case were whether S was criminally liable for the manslaughter of Mehak and whether the non-prosecution principle was applicable to the case because she was a victim of THB.

The accused person, S, a victim of human trafficking was charged with the offence of complicity to commit murder and premeditated assault. The assault was performed on an infant child to control a supposed evil spirit disturbing the baby.<sup>711</sup> She tied the deceased child with one or more scarves to a playpen and beat her repeatedly. S had come to the Netherlands at a young age from India and had stayed with her co-defendants R and P without schooling for the period of her stay.<sup>712</sup>

In deciding whether S is criminally liable for the manslaughter of Mehak and whether she should receive immunity from prosecution due to her status as a victim of human trafficking or not, the court examined the non-prosecution principle in the CoE Convention and EU Directive. As previously established the collective connotation of article 26 of the CoE Convention and article 8 EU Directive is that the offence committed should be a direct consequence of the victim's trafficking status. Accordingly, a causal

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<sup>711</sup> *S and Mehak Case*, Case number 22-000412-08, ECLI: NL: GHSGR: 2010: BK9410

<sup>712</sup> *Ibid*

link should exist between the crimes committed and the human trafficking/exploitative situation the victim has experienced.<sup>713</sup>

In England and Wales, the prosecutor is empowered with discretionary powers to decide when to prosecute a victim, since victims of trafficking are not entitled to automatic immunity from prosecution.<sup>714</sup> The factors to be considered in the English courts in deciding whether to prosecute a trafficked victim include: the interest of public policy, the evidence and the gravity of the offence. In addition, the character of the offender or the circumstances under which the offence was committed will also be looked at.<sup>715</sup> The factors which the court will consider in England and Wales is related to the facts presented in evidence in a trafficking case. Similarly, in the Netherlands, where S's case was considered, a judge is expected to make sentencing decision based on the facts presented in evidence in the case. Hence, the victim's prosecution may be halted where there is reasonable evidence that the offence was committed under compulsion.<sup>716</sup>

In view of this requirement, the defence team argued that S had been under duress when the crime was committed, because she had only assaulted Mehak on the instructions of R, who was also violent towards her. The judge was asked to take the non-punishment principle into account in his sentencing decision and to consider not to punish S. The Court rejected this argument and ruled that the manslaughter of Mehak was not a direct consequence of S's trafficked circumstance. Further, the crime of manslaughter was so

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<sup>713</sup> EU Directive, art 8

<sup>714</sup> CPS, 'Decision to Charge, Role of the Crown Prosecution Service' <[https://www.cps.gov.uk/victims\\_witnesses/reporting\\_a\\_crime/decision\\_to\\_charge.html](https://www.cps.gov.uk/victims_witnesses/reporting_a_crime/decision_to_charge.html)> accessed 10 May 2017

<sup>715</sup> *R v LM & Ors* [2010] EWCA Crim 2327, para 14

<sup>716</sup> Dettmeijer-Vermeulen C. and Esser L., 'The Victim of Human Trafficking as Offender: A combination with grave consequences: A reflection on the criminal, Immigration and Labour Law procedures involving a victim of Human Trafficking in the Dutch Mehak Case' (2017) 1 JTHe, 77, 82

serious that the non-prosecution principle defence was inapplicable to her case.<sup>717</sup> Neither the CoE Convention, nor EU Directive addresses which crimes the non-punishment principle concerns specifically. Thus, states are required to decide which crimes the principle is applicable to and whether those crimes extend to cases of manslaughter or not.<sup>718</sup>

Consequently, S was convicted for her role in the assault and eventual death of the infant girl. Although the Court of Appeal acknowledged that she was a victim of human trafficking and was exploited by R and P during the period when the acts occurred, she was not offered any protection by the state. Also, her requests to be granted a residency permit were repeatedly denied.

### **6.6.1 The Theory of Coercive Control as a Partial Defence in the *Mehak* case**

The outcome of the *Mehak* case demonstrates the injustice that may arise to a trafficked victim, when the state fails to provide a partial defence for victims of trafficking who are compelled to commit murder or manslaughter due to their trafficking situation. In the *Mehak* case, the judge's decision did not take into consideration the fact that S was fearful for her life and safety. Thus, this fear preceded her action of harming the baby which eventually led to the child's death.

The Dutch case has been examined to set an example of the court's treatment of transition victims in jurisdictions outside England and Wales and the United Kingdom. If the case

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<sup>717</sup> The Hague Court of Appeal 19 January 2010, ECLI:NL:GHSGR:2010:BK9410

<sup>718</sup> Dettmeijer-Vermeulen C. and Esser L., 'The Victim of Human Trafficking as Offender: A combination with grave consequences: A reflection on the criminal, Immigration and Labour Law procedures involving a victim of Human Trafficking in the Dutch *Mehak* Case' (2017) 1 *JTHE*, 77, 87

had been decided in England and Wales for example, S would still be convicted of the offence of manslaughter because of the exclusion of serious offences under schedule 4 to the MSA. This indicates that there is a need to provide a partial defence for victims of human trafficking who commit serious offences including murder and manslaughter. According to Thomas CJ in *R v Joseph*, the international obligations of states are met through the common law of duress/necessity defences, prosecutorial discretion guidelines and the power of the court to stay a prosecution for abuse of process.<sup>719</sup> However, the absence of a partial defence in serious cases including murder and manslaughter fails to recognise the unfairness in convicting a credible victim of human trafficking.<sup>720</sup>

To ensure that S, a credible victim of human trafficking was protected, the Dutch court could have considered applying the theory of coercive control to the victim's case. This is because the victim's circumstance possesses all the characteristics of a coercive control situation. The theory of coercive control is a concept in sociology which describes a pattern of behaviours intended to undermine the victim's autonomy, through a controller's micro-regulation of a person's everyday behaviours, resulting in punishment if resisted by the person.<sup>721</sup> Evan Stark, a prominent proponent of the theory equates coercive control to a gender specific occurrence. The delivery, consequences and construction of coercive controlling strategies is often exercised by men, over women. Though, a woman can also achieve dominance over a subject when she has an advantage

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<sup>719</sup> *R v Joseph* [2017] EWCA Crim 36, para 6

<sup>720</sup> Wake N., 'Human Trafficking and Modern Day Slavery: When Victims Kill' (2017) 9 Crim. L. R., 658, 662

<sup>721</sup> Stark E., *Coercive Control: How Men Entrap Women in Personal Life* (1<sup>st</sup> edn, Oxford University Press, 2007) 5

such as income or social class. This circumstance is true of S in the Mehak's case because R and P jointly exploited the victim and undermined her autonomy by intensely regulating her everyday life and behaviour. Victims who experience psychologically focused coercive control may be denied a reduction of moral responsibility when they commit crimes as a result of being subject to it. Coercive control affects moral blame and should affect a defence in the context of victim who commit serious offences.

A person is only criminally responsible for their chosen action, which they had a fair opportunity to avoid. When applied to victims of trafficking, it may be argued that their capacity for choice was eroded by coercive control. Further, the fair opportunity to choose the action they took was overridden by duress.<sup>722</sup> In England and Wales, criminal responsibility is reduced from a charge of murder to manslaughter based on capacity issues relating to medical conditions and a loss of control. This same legal requirement could be extended to victims of trafficking. Not extending this moral responsibility to victims of human trafficking where capacity is severely affected by a controller's behaviour is a sign of an unfair and inconsistent criminal law framework.<sup>723</sup>

The Mehak case illustrates that arguing duress in respect of a trafficked victim who commits serious offences will be insufficient to protect their judicial rights. Hence, the author argues that in addition to the non-prosecution defence, a further partial defence to serious crimes may be required to ensure that fairness and justice is achieved in a victim's case.

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<sup>722</sup> Midson B. 'Coercive Control and Criminal responsibility: Victims Who Kill Their Abusers' (2016) 27 (4) Criminal Law Forum 417, 434

<sup>723</sup> Bettinson V. 'Aligning Partial Defences to Murder with the offence of coercive or controlling behaviour (2019) 83 (1) J. Crim. L., 71, 78

## **6.6.2 The Concept of Diminished Responsibility and the Transition Victim**

The concept of diminished responsibility was introduced into English law by section 2 of the Homicide Act 1957. The act provides that if a person kills or is a party to the killing of another, such a person is not to be convicted of murder if they were suffering from an abnormality of mental functioning which has occurred due to a recognised mental condition.<sup>724</sup> The abnormality of mental function may have affected the defendant's ability to understand the nature of their own conduct, affected their ability to form a rational judgment or to exercise self -control.<sup>725</sup> The special defence of diminished responsibility was amended by section 52 of the Coroners and Justice Act 2009 which changed the definition of the partial defence of diminished responsibility and applies to defendants charged with murder where the acts of omissions resulting in the death of the victim took place on or after the 4<sup>th</sup> of October 2010.

Abnormality of mental function may mean a state of mind so different from that of the everyday person or an ordinary human being that a reasonable person would term it abnormal. It covers the ability to exercise willpower or to control physical acts in accordance with rational judgment. The impairment must also be substantial. Thus, minor lapses of lucidity will not be enough. The question of whether this is the case in a defendant's circumstance or not will be for the jury to decide. This decision may be made following a direction from the judge having heard expert medical evidence.<sup>726</sup> However, while the jury are not bound to accept medical evidence if there were no other

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<sup>724</sup> Homicide Act 1957, s 2

<sup>725</sup> *Ibid* (1A)

<sup>726</sup> *R v Kooken* [1981] 74 Cr App Rep 30, *R v Campbell* [1987] Crim LR 257

circumstances to consider, unequivocal, uncontradicted medical evidence favourable to a defendant should be accepted by a jury and they should be so directed.<sup>727</sup> Where there is unchallenged medical evidence of diminished responsibility and no other evidence which is at least capable of rebutting the defence, the trial judge should withdraw a charge of murder from the jury.<sup>728</sup> The burden of proving these factors lies with the defence and the standard required is of the civil standard, based on the balance of probabilities.

The author argues that when the case of the transition victim is being determined it may be worth considering the concept of diminished responsibility and how this may improve the victim's chances of facilitating the application of the non-prosecution principle to their case. Hence, when the transition victim's claim is being heard by the court, there should ultimately be a three-step evaluation. These steps will relate to victims of trafficking who may have committed serious offences in the course or duration of their trafficking circumstance. The three-step evaluation may consist of an assessment of the non-prosecution principle in the first instance, secondly an examination of the theory of coercive control and how it may be raised as a partial defence. Thirdly a determination should be carried out of whether the concept of diminished responsibility is applicable in any way to the victim's case. This evaluation will depend on the specific circumstance of the victim's case and may be assessed on a case-by-case basis. The inclusion of a three-step evaluation to a transition victim's circumstance may mitigate the problem of excluded offences in schedule 4 of the MSA 2015. A consideration of the applicability of the concept of diminished responsibility and coercive control will be discussed further in section 6.7.3. of this chapter. Importantly, it may be useful to consider the victim to

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<sup>727</sup> *R v Brennan* [2014] EWCA Crim 2387

<sup>728</sup> *Ibid*

offender paradigm and whether a transition victim who becomes an exploiter of others will be entitled to a three-step evaluation or not.

### **6.7 Victim to Offender (Prior Victim of Trafficking, Transformed into an Exploiter of others): *Regina v Vilma Kizlaite***

Apart from situations where victims of human trafficking commit serious offences, there are also other instances where a prior victim of human trafficking may transform into a perpetrator of the offence. The *Regina v Vilma Kizlaite* is one of the first notable cases decided in England and Wales to consider this occurrence.<sup>729</sup> The main issue for determination in this case was whether the appellants Ms. Kizlaite (K), Axhemi (A) and the co-accused person Emiljan (E) were guilty of the offence of intentionally facilitating and arranging the travel into the UK of another for purposes of sexual exploitation.

The first appellant - K, pleaded guilty to the offence of intentionally arranging or facilitating the arrival in the UK of another person for the purposes of sexual exploitation.<sup>730</sup> K, had falsely assured S that she will not be harmed in any way on arrival in the UK or during her stay thereon. K admitted that she was afraid that if she did not do as requested, they (Sigis and Jolanta) would harm her in some way.<sup>731</sup> K was fearful because these two men were responsible for trafficking her into the UK.

The court affirmed that the total sentence which the judge passed in the first case was a severe one, but emphasised that it was appropriately severe because, it would serve as a deterrent to individuals in Lithuania, or other Eastern European Countries who desire to

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<sup>729</sup> [2006] EWCA Crim 1492

<sup>730</sup> *Ibid*, para 13

<sup>731</sup> *Ibid*

exploit innocent victims for trafficking purposes in the UK. The observations of the Court in the first case, prior to this appeal were adopted. Hence, the appeal against the sentencing of the appellants was dismissed.

### **6.7.1 First-hand Knowledge by the Transition Victim of a Potential Trafficking Occurrence of a vulnerable Person**

In the instant case, the first appellant K, fully understood that Sigis and Jolanta had every intention of sexually exploiting S on arrival in the UK. In fact, in her written plea to the court she admitted that these two individuals were responsible for trafficking her into the UK in a similar manner. Hence, she was privy to first-hand knowledge of the kind of work and activity they were engaged in. With the information, available to K (her own trafficking experience with Sigis and Jolanta), she should have taken measures to protect S or at the very least warn her of her impending fate. Although, it may be argued that K's telephone conversation with S was not the best opportunity to alert her, because at that time S was in their home in Lithuania. There is a high likelihood that the calls S made were monitored since she was under their control at the time.

Also, the difficult experience of the first complainants V and E in the first case before this appeal should have prompted K to make proactive attempts to warn S. In the previous case, V was forced to have sex with A against her will.<sup>732</sup> He would often slap her in the face before forcing her to have sex with him.<sup>733</sup> K had also used force in getting V to comply with the demands of the co-accused persons. For example, when V had told K of

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<sup>732</sup> [2006] EWCA Crim 1492, para 9

<sup>733</sup> Ibid

her plans to run away, K threatened her, pulled her hair and attempted to drag her into a nearby park.<sup>734</sup>

The first appellant's situation illustrates an obvious case of a transition victim. K knew how serious the offence of trafficking was, not only because of her earlier trial at Sheffield but because she was also a victim of human trafficking through sexual exploitation.<sup>735</sup> She had been subjected to the same violence and degradation that she had administered to the complainants.<sup>736</sup> She had also been brutalised and suffered from post-traumatic stress disorder because of her previous trafficking experience. The judge observed that there was no doubt that the appellant had been heavily influenced by the men in charge and that she had also suffered from the treatment she received, however he gave her some credit for entering a guilty plea.<sup>737</sup> He also considered K's sad childhood and upbringing and noted that she had not gained financially from the trafficking offence.<sup>738</sup> The co-accused person in the first case E controlled K and the money that she earned. The court also assessed the age of K, the fact that she was in a foreign country and had already received a long sentence.<sup>739</sup> In view of this, the judge decided that the appropriate sentence to pass on the appellant was a concurrent sentence.

This case clearly illustrates that in evaluating the position of a transition victim, the court will consider the overall circumstances of the victim including previous good behaviour of the individual, before sentencing or convicting the person. In this case, the judge

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<sup>734</sup> Ibid

<sup>735</sup> Ibid, para 14

<sup>736</sup> Ibid, para 11

<sup>737</sup> Ibid, para 14

<sup>738</sup> Ibid

<sup>739</sup> Ibid, para 14

affirmed that the accused persons were young and had previous good character.<sup>740</sup> However, they had been trafficked as young women into the UK for prostitution, sexual exploitation and controlling the prostitution of another for gain.<sup>741</sup> The complainants had been tricked into coming into the UK, they had been threatened, spoke no English, had been transported like cattle and then imprisoned before being forced into prostitution.<sup>742</sup> They were repeatedly and violently raped, then the accused persons had forced them into prostitution for their collective gain.<sup>743</sup>

### **6.7.2 Sympathetic Disposition of the Court towards the Transition Victim**

The court was noticeably sympathetic to the first appellant's situation than the other two co-accused persons. The judge considered K to be a prior victim of exploitation – transition victim, and still under the control of her traffickers even at the time of instituting this appeal. To illustrate this sympathetic disposition, the judge recognised that K had been treated with the same violence and degradation that she had given to the complainants. He also confirmed that she had been brutalised and suffered from post-traumatic stress disorder.<sup>744</sup> Further, he opined that she had told the jury the truth throughout the trial.<sup>745</sup> Yet in the case of the second appellant (A) and co-accused person (E), the judge described them as sexual slave traders, stating they had no moral values

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<sup>740</sup> Ibid, para 10

<sup>741</sup> Ibid

<sup>742</sup> Ibid

<sup>743</sup> Ibid

<sup>744</sup> Ibid

<sup>745</sup> Ibid

and no compassion.<sup>746</sup> He surmised that they were liars and had no place in normal society.<sup>747</sup>

Based on the strength of the above (K's truthful account during the trial and past trafficking experience), her sentence was mitigated in comparison to the other appellant and co-accused person. The first appellant Ms Kizlaite (K) who has been established to be a transition victim was sentenced to concurrent terms of four years' detention in a Young Offender Institution for offences of trafficking into the UK for sexual exploitation.<sup>748</sup> She was also sentenced to five years' detention for offences of false imprisonment, consecutive six years' detention for causing a person to engage in sexual activity without consent, and a further two years' detention for causing or inciting prostitution for gain and controlling prostitution for gain.<sup>749</sup> Hence, K's sentence was 6 years' detention in total to be served concurrently.

The second appellant's sentence Axhemi (A) was more severe compared to K due to his crimes and the charges levelled against him. A and was sentenced to six years' detention in a Young Offender Institution also, for the offence of trafficking another for sexual exploitation.<sup>750</sup> Seven years' concurrent terms for false imprisonment, twelve years' concurrent detention for offences of rape, nine years' consecutive term detention for causing a person to engage in sexual activity without consent and a further three years'

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<sup>746</sup> Ibid, para 10

<sup>747</sup> Ibid

<sup>748</sup> Ibid, para 2

<sup>749</sup> Ibid

<sup>750</sup> Ibid

detention for causing or inciting prostitution for gain and controlling the prostitution of another for gain.<sup>751</sup>

The judgment in this case indicates that the evidence and circumstances of an accused person may aid in receiving a mitigated sentence. Thus, as this case illustrates where a transition victim is still undergoing some level of control from their previous traffickers and they are willing to give a truthful account of their situation and past trafficking experience, the Court may be swayed to give a mitigated sentence in their favour. The court of appeal in London agreed with the judgment of the Sheffield crown court, consequently the appeals against conviction were dismissed.

It may be argued that the court's treatment of the second appellant was reasonable, given that the evidence was indisputable regarding A's offence. The evidence pointed to the fact that the second appellant was a trafficking offender and had been exploiting vulnerable individuals through sexual exploitation. He was controlling the prostitution for another for monetary purposes.

However, in the situation of the first appellant, Ms Kizlaite, the court missed an opportunity to apply the non-prosecution principle to her case. Further, the court failed to consider whether she was entitled to any sort of protection from the state or not. The findings of a study led by researchers at Kings College London suggests that trafficking survivors experience medium to long term physical, sexual and mental health problems. These problems may comprise of post-traumatic stress disorder (PTSD), anxiety, depression, sexually transmitted infections (STIs) and long-term injuries.<sup>752</sup> The court

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<sup>751</sup> Ibid

<sup>752</sup> Oram S. et al (2016), 'Human Trafficking and Health: A Survey of Male and Female Survivors in England' *AJPH* 106 (6) 1073, 1076

should have made enquiries regarding K's health, to determine whether counselling and medical attention was required to protect the victim or not.

### **6.7.3 Considering the Applicability of the Theory of Coercive Control, Diminished Responsibility, and the Reasonable Man's Test to the Transition Victim's Case**

The author of this study proposes that, when deciding whether to apply the non-prosecution principle to a victim's circumstance, the court may apply the theory of coercive control, diminished responsibility and the reasonable man's test to the transition victim's case. This may be a suitable mechanism to ensure that transition victims are treated fairly during their criminal trials.

For example, in relation to K's circumstance, in the *Kizlaite* case, in addition to acknowledging that she was a prior victim of exploitation, the court should have also assessed whether she was still experiencing any sort of trauma. A person experiencing post traumatic symptoms may require medical attention. This is because, an assessment of the victim's state of mind at the time the act was committed would have taken into consideration K's ability to make an informed choice. Examining the victim's mental state will also determine whether a reasonable person under the same circumstances would have acted in the same way. This examination will further reveal whether the coercive control she experienced as a victim, affected her decision to commit the offence. and whether she was experiencing coercive control at the time of committing the act.

When a victim's autonomy is compromised, feelings of helplessness and entrapment may arise. Victims in this situation should not be held morally culpable for their actions because those acts occurred due to coercive control. Coercive control affects moral blame and should be extended to transition victims when they commit the offence of exploiting other vulnerable individuals. However, this defence should only succeed when the burden of proof in trafficking cases is suitably discharged.

The issue of diminished responsibility may be examined in respect of the transition victim's case using four stages. Firstly, was the defendant suffering from an abnormality of mental functioning? Secondly, if they were, did it arise from a recognised mental condition? Thirdly, did this recognised mental condition impair the defendant's ability either to understand the nature of his conduct or to form a rational judgment or to exercise self-control (or any combination)? Lastly, does this substantial impairment provide an explanation for the defendant's conduct?

Determining whether the concept of diminished responsibility will be applicable to a transition victim's situation may require an understanding of the meaning of the word 'substantial.' The supreme court has opined in *R v Golds* that there are at least two distinct meanings of the word 'substantial' in statutory and legal use.<sup>753</sup> It could mean having some substance as opposed to illusory or fanciful, or it could mean weighty or important. After an examination of the case law, the court held that in the context of diminished responsibility the word was intended to be used in the second sense of important. Thus, the transition victim's impairment must be such as is judged by the jury to be substantial based on ordinary usage of the term in connection to something weighty or important.

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<sup>753</sup> *R v Golds* [2016] UKSC 61, para 38

The law does not yet recognise transition victims as victims at all; they are primarily treated as offenders and nothing more. This must change. Transition victims should be assessed in the first instance as ideal/pure victims and their situation considered carefully before the decision to prosecute them is taken. The consideration should include a determination of whether, they are still suffering any psychological trauma or not, whether they are still under the control of their traffickers or not, and whether they are wilfully engaging in the act of exploiting other vulnerable individuals or not. Thus, an evaluation of their state of mind at the time of the proceedings should be assessed and recorded. This assessment of the victim's state of mind will result in a determination of whether the theory of coercive control or diminished responsibility is at all relevant to the transition victim's case.

The writer suggests that ultimately the transition victim should be subjected to the same process as if they were in the position of an ideal / pure victim. This implies that the public policy assessment may also be applicable to a transition victim's case. For example, if it is determined that they have wilfully exploited another without being in a vulnerable position themselves, then the court should assess whether it is in the best interest of public policy to proceed with their prosecution.

## **6.8 Preclusion from Prosecution due to Prior Trafficking Experience by the Courts: *LM, DG and MB in R v LM & Ors*.**

The court adopted a similar approach as the *Kizlaite* case in *LM, DG and MB*. The main issue for determination in this case was whether the accused persons previous situation as trafficked victims would preclude them from prosecution for their current trafficking of others through sexual exploitation. Three women were accused of human trafficking through sexual exploitation by controlling prostitution for the gain of themselves or another, contrary to section 53 Sexual Offences Act 2003.<sup>754</sup> The complainants were two women (MN and MM) who were working as prostitutes in two linked brothels in Manchester and Birmingham, apparently under coercion.<sup>755</sup> They were both from an Eastern European EU country and were treated throughout as exploited trafficked victims.<sup>756</sup>

The accused persons/defendants came from the same EU country. At the time of their arrest, they were found to be in a position of control in the brothels. During their interview, none of the three women suggested that they had been previous victims of trafficking; one of them even claimed that she had originally come to the UK voluntarily to work as a prostitute.<sup>757</sup> Nevertheless, a CPS pre-charging note asserted that the police believed that the women were trafficked into the UK themselves.<sup>758</sup>

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<sup>754</sup> *R v LM & Ors* [2010] EWCA Crim 2327, para 24

<sup>755</sup> *Ibid*, para 25

<sup>756</sup> *Ibid*

<sup>757</sup> *Ibid*, para 26

<sup>758</sup> *Ibid*

The case against the three accused persons was that although they had originally been trafficked victims, they had assumed the role of controllers of prostitution of others.<sup>759</sup> There was also evidence that they had not merely acted as more experienced prostitutes than the complainants, but they had taken a leading part in introducing them to what was required.<sup>760</sup> They had also used threats, violence, and sexual abuse to achieve compliance.<sup>761</sup>

The individuals responsible for running the brothels and for bringing the complainants and other women to the UK – about three men were not physically present on the premises at the time of the accused persons arrest.<sup>762</sup> Initially the Court justified prosecution of the accused persons because of the evidence of threats and violence against the complainants and the fact that they had arrived in the UK as trafficked victims who had previously been exploited.<sup>763</sup> In due course the three women made it clear by their defence statements that their case was no different from the complainants except that they had been in the UK for a longer period of time. They denied any active threats or violence and claimed that they had sexually exploited the complainants and collected their earnings only under the coercion of the men running the brothels.<sup>764</sup>

At a late stage in the court proceedings the three accused persons entered guilty pleas on the basis that there had been no violence, threats or sexual abuse as stated by the complainants. But on the contrary, they had been trafficked, beaten and coerced into

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<sup>759</sup> Ibid, para 27

<sup>760</sup> Ibid

<sup>761</sup> Ibid

<sup>762</sup> Ibid, para 25

<sup>763</sup> Ibid, para 27

<sup>764</sup> Ibid, para 28

prostitution themselves, and anything which had amounted to controlling the prostitution of others had been done under pressure.<sup>765</sup> Their guilty plea was accepted by the court, but it appears the court did not consider their previous trafficking experience as a basis for non-prosecution of the accused persons. Also, the CPS did not avert their minds to the question of, whether considering the changed circumstances, there was a public interest in continuing with the prosecution or not.<sup>766</sup>

For the non-prosecution principle to be applied, the individual in question must first be correctly identified as a victim of human trafficking or a suspected trafficked victim. However, in the case of a transition victim because they come to the authorities primarily as offenders, the issue of identification is eliminated at first contact. Their previous trafficking experience is not often determined until their interview with their defence counsel or sometimes at the later stage of their case.<sup>767</sup> Sometimes even in cases where they are identified as transition victims, they are seldom given a mitigated sentence unless they have been of previous good character and have been truthful throughout the trial proceedings.<sup>768</sup>

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<sup>765</sup> Ibid, para 29

<sup>766</sup> Ibid, para 30

<sup>767</sup> *LM, DG and MB in R v LM & Ors* [2010] EWCA Crim 2327, para 29

<sup>768</sup> *Regina v Vilma Kizlaite* [2006] EWCA Crim 1492, para 10

### **6.8.1 Test for determining the Prosecution of a Victim**

The test for determining the prosecution of a victim is contingent on two main factors. Firstly, has the claimant been trafficked within the meaning of the CoE Convention and the EU Directive? The pertinent consideration should be whether the claimant was recruited, transported, transferred, harboured or received for the purpose of exploitation, such as forced labour or services, sexual exploitation, criminal activities or the removal of organs.<sup>769</sup> If we apply this first evaluation to the case of the three accused persons, at the time the three defendants were interviewed, none suggested that they had been trafficked into the UK for purposes of sexual exploitation. One of them even suggested that she had come to the UK voluntarily to work as a prostitute. Hence the only evidence of their trafficking status at the beginning of the case, was the CPS pre-charging note that suggested that although none had asserted it, the police believed that the women had probably been trafficked into the UK. A belief, suggestion, or assumption is insufficient to conclude that an individual has been trafficked.

The Second factor to consider is; whether the claimant's status as a trafficked victim affords him automatic protection from prosecution for the offence charged. Undoubtedly, the mere fact that a victim has been exploited for human trafficking purposes does not confer on them automatic immunity from prosecution. What is required in the context of the prosecutorial decision to proceed is a level of protection from prosecution or punishment for trafficked victims which have been compelled to commit criminal offences.<sup>770</sup> Consequently, to be eligible for protection the defendant's involvement in

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<sup>769</sup>Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children 55/25, 2000 (Palermo Protocol) art 3 (a)

<sup>770</sup> *R. v. L*, para 14

criminal activities must be a direct consequence of being subjected to trafficking; and in the case of adults they must have been compelled to commit the offence.<sup>771</sup> Thus, there must be a direct causal connection between the trafficking and the offence the defendant has been charged for. There is also a requirement that there should be a manifestation of the exploitation or an adequate proof that the alleged crime was consequent on or integral to the exploitation of which the defendant or victim has complained.<sup>772</sup>

In the instant case, there was a breach of the non-prosecution principle in the CoE Convention by ever prosecuting the women in the first place. There was also a specific breach of article 10 CoE Convention by failing to identify the accused persons as victims of human trafficking. The three women were not referred to the MSHTU, UKVI during the case, so that they could be assessed with a view to identification as credible victims of trafficking who satisfied the reasonable grounds test. The counsel for the accused persons argued that the prosecution should have advised the solicitors for the defendants of the availability of these referral agencies.<sup>773</sup> He contended that these failures rendered the decision to prosecute unlawful and justified the quashing of the convictions of the accused persons.<sup>774</sup>

The court rejected the submission of the defence counsel by establishing that a breach of article 10 does not by itself, render a prosecution unlawful nor does it imply that a stay of proceedings is imminent.<sup>775</sup> Also it is not the duty of the prosecution or CPS to refer

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<sup>771</sup> EU Directive 2011/36 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims [2011] OJ L101/1, Art 8

<sup>772</sup> *R. v. L*, para 20 and 23

<sup>773</sup> *Ibid*, para 31

<sup>774</sup> *Ibid*

<sup>775</sup> *Ibid*, para 32

the defendants or their counsel to the competent authorities responsible for identification of victims of THB. It is often the obligation of the police to remind solicitors of the availability of the identification agencies. However, the police cannot refer persons against their own wishes unless they are unrepresented by a legal team in the case.<sup>776</sup>

The appeal of the accused persons was allowed, and their convictions quashed because the court had ignored the non-prosecution principle at the time when their trafficking circumstance had been revealed.<sup>777</sup> The situation of the three accused persons illustrates that when the court in a trafficking case is informed that the defendants may be victims of THB, the court is obliged to consider and apply the non-prosecution principle before proceeding with the case depending on the circumstances. Human trafficking conditions could sometimes be an ongoing process, whereby the victim may get used to their trafficking experience and accept it as a normal occurrence. A victim may appear willing to commit an offence but may still be under the control of their exploiters.

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<sup>776</sup> Ibid

<sup>777</sup> Ibid, para 34

## 6.9 Developments in England and Wales since the enactment of the MSA 2015: *Regina v DS* [2021] 1 WLR 303

The case concerns an appeal by the CPS contesting a stay of proceedings on the basis of an abuse of process. On the first day of the trial, the defendant had applied to stay the proceedings as an abuse of process, relying on a conclusive grounds decision that they were a victim of THB. The judge found that the conclusive grounds decision was sound and ruled that there should be a stay of proceedings. This led the CPS to appeal the decision.

Allowing the appeal per Lord Burnett, the court held that section 45 of the MSA adequately gave effect to the UK's obligations under article 8 of the EU Directive and article 26 of the CoE Convention. Prior to the enactment of the MSA, the courts had expanded the scope of the jurisdiction to stay proceedings as an abuse of process where a defendant was found to have been a victim of THB. However, that was no longer necessary in light of the section 45 defence. In a case to which the MSA applied, the prosecution could only be stayed on the conventional abuse of process grounds, that a fair trial was impossible or there had been some state misconduct in bringing the prosecution. Therefore, the prosecution of the victim should not have been stayed since neither of the conventional abuse of process grounds applied.<sup>778</sup>

The implication of the court's judgement is that the responsibility for deciding the evidence relevant to a person's status as a victim of THB is now placed in the hands of the jury. Formerly, there was a gap in this regard, which the courts sought to fill by expanding the notion of abuse of process, which required the judge to make the

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<sup>778</sup> *Regina v DS* [2021] 1 WLR 303, para 47

decision.<sup>779</sup> This practice is no longer necessary, and cases to which the MSA apply may be stayed if an abuse of process as conventionally defined is found. This involves two categories of abuse. The first is that a fair trial is not possible, and the second is that it would be wrong to try the defendant because of some misconduct by the state in bringing about the prosecution. Accordingly, neither of these two situations of an abuse of process affected this case, the court ruled that the stay of proceedings should not have been granted.<sup>780</sup> Since the decision-making function in relation to the issue of exploitation is now placed on the jury by virtue of section 45 (4) (b) of the MSA, it follows that nexus and compulsion will need to be proven in the case of the transition victim. In fact, for all the four classes of victims (ideal, historical, location and transition victims) there is a need to show that there is a connection between the offence committed and the compulsion element, before the non-prosecution principle may be applicable to the case.

### **6.10 Establishing Compulsion in Trafficking Cases: *R v O*; *R v N* [2019] EWCA Crim 752**

Two cases were heard together because they both sought a retrospective review of decisions to prosecute the defendants who claimed to have been the victims of THB. In the first case, the defendant, O, did not raise the issue of being a trafficked victim until after serving a custodial sentence of five years. O had been convicted by a jury of two offences of controlling the prostitution of others for gain (transition victim). The judge had granted an extension of time and leave to appeal her sentence. In the second case, the defendant, N, had raised the issue at the outset, but had subsequently pleaded guilty to the cultivation of cannabis and was sentenced and had served his custodial term.

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<sup>779</sup> Ibid, para 40

<sup>780</sup> Ibid

The issues in the two cases were whether O and N's convictions were unsafe. In respect to O's circumstance, O had failed to establish compulsion in her case at the relevant time. Although O had been a victim of THB at the time she arrived in the UK, she had been complicit in trafficking others thereafter and not by reason of coercion. O appeared to have demonstrated free will in the operation of her business as a sex worker. She had created a simple accounting system for the earnings of other prostitutes and had obtained an ability to accumulate money.<sup>781</sup> While there were some misgivings regarding O's status as a victim of trafficking (due to her transition victim status), she had been given the benefit of the doubt on the issue by being granted leave to appeal. At the time the case was heard, public interest had required prosecution. Hence, the judge would have dismissed any abuse of process argument suggesting otherwise. Since the offence had preceded the enactment of the MSA, the jury would not have been able to consider the defence afforded by section 45 of the MSA.

Per Lady Justice Marcur, N's appeal was allowed but O's appeal was dismissed. The court found that N had been a credible victim of THB and opined that the public interest had not required prosecution.<sup>782</sup> N's conviction was deemed to be unsafe and was therefore quashed. The court found that O's culpability withstood the finding of her victim status and the sentence imposed was neither excessive nor flawed.<sup>783</sup>

Both cases discussed illustrate that there is a need to prioritise the categorisation of victims in human trafficking cases. This categorisation should also comprise of a classification of the victims of human trafficking. Victims continue to be prosecuted for

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<sup>781</sup> *R v O; R v N* [2019] EWCA Crim 752, para 63

<sup>782</sup> *Ibid*, para 35

<sup>783</sup> *Ibid*, para 64

human trafficking offences even where there is clear evidence of the compulsion element, as shown in the case of N's circumstance.

The present case may be considered alongside the case of *R v EK* which also involved an application for leave to appeal by a victim of THB.<sup>784</sup> The victim was prosecuted for her involvement in criminal activity, including conspiracy to control prostitution for gain. In that case the offender (K) and her co-accused boyfriend (S) were involved in a Europe-wide network to traffic women for the purposes of prostitution. K had assisted S by controlling the complainants' work, including telling them about their appointments and collecting money from them. K's basis of plea that she was a victim of THB and a prostitute working under the same conditions as the complainants was rejected. K was found guilty and sentence to a total of 30 months' imprisonment. Following a series of immigration decisions, a ruling by the first-tier tribunal held that K was at all times a victim of THB, under the control of S.

K made an application for extension of time in which to apply for leave to appeal against conviction and adduce fresh evidence. The fresh evidence adduced included medical evidence pertaining to a complex form of post-traumatic stress disorder. The evidence of the disorder was provided to explain the controlling relationship between K and S.<sup>785</sup> The court of appeal while accepting K's victim status was unable to conclude that the decision to prosecute was flawed and found that the conviction was safe. Gross LJ stated that although K's culpability was reduced, it was not extinguished or so diminished as to cast doubt on the decision to prosecute.<sup>786</sup> Further, it was unfortunately not infrequent

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<sup>784</sup> *R v EK* [2018] EWCA Crim 2961

<sup>785</sup> *Ibid*, para 35

<sup>786</sup> *Ibid*, para 50

that those convicted of criminal offences had been subjected to ‘a malign, sometimes controlling influence’.<sup>787</sup> But in K’s situation, she had demonstrated sufficient autonomy and had reasonable opportunities to extricate herself. Her misfortunes as a victim of human trafficking were to be reflected by way of a mitigation of sentence.

The cases discussed illustrate the importance of establishing a victim’s compulsion at an early stage in a court’s proceedings. All the victims in the cases considered had served their respective sentences before the issue of leave to appeal was raised. It is surprising to note that the non-prosecution principle and the defence in section 45 of the MSA was not argued by the defence counsels for the respective victims. Although the courts admitted that the individuals may have been victims of THB at some time during their trafficking trajectory, it is unfortunate that they were unable to use this defence to their advantage.

The writer of this thesis proposes for a structure to be created for treating the four different classes of victims, separately and individually. This treatment may for example, comprise of applying the reasonable man’s test and theory of coercive control to the transition victim’s circumstance as previously discussed in this chapter. The transition victim may also be entitled to receive mitigated sentencing for offences committed. This approach may improve the application of the non-prosecution principle. None of the victims should not have been prosecuted in the first place. But, in the situations where prosecution was necessary, the respective individual’s status as trafficked victims should have been taken into consideration by the court. It is regrettable that victims continue to be prosecuted and convicted for engaging in criminal activity. The state needs to make

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<sup>787</sup> Ibid

categorisation of victims a priority to improve the application of the non-prosecution principle.

## **Conclusion**

The victim-offender cycle in criminal and human trafficking cases may not always be a clear situation to establish. Some studies have shown that being a victim of trafficking and other types of exploitation may increase the risk of offending, but not all victims of trafficking go on to become offenders or traffickers. Some victims do not go on to perpetuate abuse. Furthermore, not all offenders have a history of exploitation or abuse. Hence, previous history of exploitation is neither a sufficient nor a necessary condition for engaging in criminal offences as an adult.

The circumstance that leads an individual to develop from victim to perpetrator is sometimes difficult to recognise, whereas the case of a pure and historical victim is easy to establish. Often, the victim turned trafficker may not be aware that they are doing anything wrong because they have become used to their way of life. In evaluating the position of a transition victim and deciding whether to apply the non-prosecution principle to their case or not, the Court will consider the overall circumstances of the victim. For the non-prosecution principle to be applied, the individual in question must first be correctly identified as a victim of human trafficking or a suspected trafficked victim. Nonetheless, in the case of a transition victim because they come to the authorities primarily as offenders the issue of identification is eliminated at first contact. Their previous trafficking experience is not often determined until their interview with their defence counsel, or sometimes at a later stage in the case proceedings. Sometimes even in cases where they are identified as transition victims, they are seldom given a mitigated

sentence unless they have been of previous good character and have been truthful throughout the trial proceedings.

In the case of *LM, DG and MB* in *R v LM & Ors*, the appeal of the accused persons was allowed and their convictions quashed because the court had failed to apply the non-prosecution at the time when their trafficking circumstance had been revealed.<sup>788</sup> The situation of the three accused persons illustrates that when the court in a trafficking case is informed that the defendants may be victims of THB, the court is obliged to consider and apply the non-prosecution principle before proceeding with the case depending on the circumstances. It is also useful to point out that trafficking may be an ongoing process whereby the victim may get used to the situation and accept it as a normal occurrence. A victim may appear willing to commit an offence but may still be under the control of their exploiters.

Similarly, in *Regina v Vilma Kizlaite* she had also been brutalised and suffered from post-traumatic stress disorder because of her previous trafficking experience. The judge observed that there was no doubt that the appellant had been heavily influenced by the men in charge and that she had also suffered from the treatment she received, however he gave her some credit for entering a guilty plea. He also considered K's sad childhood and upbringing and noted that she had not gained financially from the trafficking offence. The co-accused persons controlled the money that she made. The Court took all of the above into consideration and passed a mitigated sentence to K. The judgment in this case indicates that the evidence and circumstances of an accused person may aid in receiving a mitigated sentence. Where the evidence indicates that a transition victim is still undergoing some level of control from their previous traffickers and they are willing to

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<sup>788</sup> Ibid, para 34

give a truthful account of their situation and past trafficking experience, the court may be swayed to give a mitigated sentence in their favour.

It is submitted that in addition to giving a mitigated sentence, a stay of proceedings should be made when it is discovered that an individual is a prior victim of trafficking. The cases to which the MSA apply may be stayed if an abuse of process as conventionally defined is found. This involves two categories of abuse. These are when a fair trial is not possible, and when it would be wrong to try the defendant because of some misconduct by the state in bringing about the prosecution. A full mental health evaluation should be carried out before deciding whether to proceed with the prosecution of a transition victim or not. The assessment of a transition victim's mental health may culminate in an examination of the applicability of the theory of coercive control and diminished responsibility to the victim's case where this is deemed relevant. In addition, the interest of public policy should also be considered.

This chapter has assessed the transition victim and the application of the non-prosecution principle to the victim's case. The next chapter will consider the rights of trafficked victims and the support regime available to them. It will also include a consideration to improve and reform the current support regime for trafficked victims.

## **CHAPTER SEVEN**

# **BARRIERS TO THE SUCCESSFUL APPLICATION OF THE NON-PROSECUTION PRINCIPLE AND THE TRAFFICKED VICTIM'S ACCESS TO COMPENSATION/LEGAL REDRESS.**

### **7.1 Introduction**

Human trafficking is a criminal offence that connotes a serious violation of a victim's basic human rights. The human rights of the trafficked victim that are infringed by perpetuating the offence of THB include: the right to just and favourable conditions of work, the right to an adequate standard of living and the right to social security. Other rights that are infringed upon are, the right of children to special protection, the right to the highest attainable standard of physical and mental health, the right to freedom of association, and the right to freedom of movement. Additional rights a person may be entitled to consist of; the right not to be subjected to torture and/or cruel, inhuman, degrading treatment or punishment. The right to be free from gendered violence, the right not to be submitted to slavery, servitude, forced labour or bonded labour. The right to life, the right to liberty and security, the right to a fair trial.

Human rights usually act negatively/vertically against the state. That is, freedom from torture (by the state). But some rights such as torture, life and slavery act positively/horizontally against non-state actors. This assessment relates to who is at fault when discussing human rights. The UK does not engage in human trafficking so it's the positive element of the rights' violation, by a non-state actor, not the negative element.

When the positive element is engaged, that is, the state is not directly to blame for the right's violation, the liability imposed on the state is significantly reduced.<sup>789</sup> Nonetheless, as discussed in chapter three of this research, the state is unable to avoid taking responsibility for the acts of private persons when there is evidence that they could have prevented a negative outcome from happening.

The investigation, prosecution and punishment of offenders are core aspects of an effective national response to trafficking offences. Prosecutions help to ensure justice for individuals who have been trafficked including access to remedies. Prosecuting THB also helps to prevent perpetrators from continuing to engage in the offence. Hence, a comprehensive criminal justice response to human trafficking should include measures for the protection and support of trafficked victims alongside measures to prosecute human traffickers. Victims of human trafficking are often reluctant to cooperate in criminal investigation due to their fear of the traffickers, lack of alternatives to the trafficking situation, feelings of shame and distrust of law enforcement. Hence, victim protection and support policy measures should not be contingent on a trafficked victim's willingness to cooperate with law enforcement officers in their criminal investigations. Distrust of the authorities also implies that the trafficked victim may provide unreliable evidence, thereby making it difficult for the prosecution to prove the elements of the crime and to secure the right punishment in relation to the severity of the crime that offenders have committed.

While the non-prosecution principle provides a relevant structure for protecting the victim of THB from trafficking related crimes and promoting their basic human rights, certain barriers to the successful application of the non-prosecution principle have been

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<sup>789</sup> *N v The United Kingdom* [2008] (Application no. 26565/05)

identified. This chapter aims to consider these barriers to the successful application of the non-prosecution principle with a view to evaluating ways of improving its application. In addition to the protection afforded the victim through the non-prosecution principle, this chapter also intends to assess the pure/ideal victim, historical, location and transition victim's access to compensation and legal redress.

## **7.2 The UK's Dualist System and Human Trafficking Cases**

The UK operates a dualist system; this implies that municipal law and public international law are separate entities. The relationship between international law and municipal law has been a subject of debate, which has resulted in two schools of thought. While the dualists argue that municipal law will prevail in a case of conflict; the monists contend that international law will prevail where conflict arises.<sup>790</sup> However, in situations where the UK incurs an internationally binding obligation not to prosecute somebody for something, a prosecution brought in breach of international obligations is liable to be halted.<sup>791</sup> This doctrine applies to human trafficking cases. The UK is urged not to prosecute victims of human trafficking for offences they have been coerced or forced to commit because of their trafficked status. Where a victim of trafficking is prosecuted for offences which have occurred as a direct consequence of their trafficking situation, they can appeal the court's decision on the basis of abuse of process and have their conviction quashed.<sup>792</sup> Hence, in the first instance, the evidence that is presented before the court determines what decision the court will take regarding a victim's circumstance. The

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<sup>790</sup> Borchard E., 'Relation Between International Law and Municipal Law' (1940) 27(2) VLR 137

<sup>791</sup> Spencer, J. R., 'International Law, People Trafficking and the Power to Stay Criminal Proceedings for Abuse of Process' (2014) 73 (1) C.L.J, 13

<sup>792</sup> *R v L & Ors* [2013] EWCA Crim 991

evidence must be compelling and should clearly indicate that the individual has been a exploited, therefore is a credible victim of human trafficking.

The non-prosecution principle is contained in Article 8 of the EU Directive, Article 26 CoE Convention and Section 45 MSA 2015. Article 8 and Article 26 of the EU Directive and CoE Convention respectively, jointly provide for the possibility of not prosecuting or imposing penalties on victims of human trafficking for their involvement in unlawful, criminal activities which they have been compelled to commit. Although the provisions in both instruments are worded or written in a similar manner, it would be incorrect to state that the two instruments are the same with regard to non-prosecution. This is because, the EU directive is broader in terms of its application. Ultimately, the provisions recognise that different Member States have different legal systems for providing for the necessary protection for victims of trafficking, and that this may take the form of non-prosecution.<sup>793</sup>

Similarly, Section 45 of the MSA equips the victim of human trafficking-related offences with a defence for slavery or trafficking. The section provides that a person is not guilty of an offence if an individual carries out an act under compulsion in exploitative circumstances or circumstances similar to slavery with no alternative than to carry out the said act.<sup>794</sup> The principle is usually implemented<sup>795</sup> by the exercise of the prosecutorial discretion which enables the Crown Prosecution Service (CPS) decide whether it will be improper to prosecute a defendant or not.<sup>795</sup> Notably, if a defendant is unable to use duress as a defence but falls within the protective ambit of either Article 26 of the CoE

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<sup>793</sup> Ibid, para 9

<sup>794</sup> Modern Slavery Act 2015, s 45, (b) (c)

<sup>795</sup> *R v N* [2012] EWCA Crim 189, para 13

Convention, Article 8 of the EU Directive or Section 45 MSA, the CPS is required to determine whether to proceed with prosecution or not.<sup>796</sup> This examination of the CPS duty is important because it illustrates the role the court plays in the prosecution of a victim of human trafficking. To appreciate the effects of the CPS discretion in prosecuting a victim, we must examine in some detail the court's role in the process.

### **7.3 Judgment of Prosecutorial Discretion**

No matter how strong the evidence may be, the judgment of prosecutorial discretion is for the CPS, not the court. However, the court may intervene in an individual case if its process is abused, by granting a stay of proceedings.<sup>797</sup> The burden of showing, that the process is being, or has been abused, on the basis of the incorrect exercise of the prosecutorial discretion, rests on the defendant.<sup>798</sup> The court, may also implement the non-prosecution principle, by sentencing the defendant/victim of trafficking, in a way that does not constitute punishment; by ordering an absolute or a conditional discharge.<sup>799</sup> Hence, following the prosecution and conviction of a trafficked victim, the individual is entitled to a discharge, when new evidence is presented on appeal.

Although, most of the emphasis has been on the role of the CPS and the Court, Gerry argues that the lawyers representing the victims, also have a role to play, in ensuring that the non-prosecution principle is properly implemented. Gerry reasons that justice systems should ensure that victims of THB are protected not prosecuted. Also, the

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<sup>796</sup> Ibid

<sup>797</sup> Ibid, para 21

<sup>798</sup> Ibid

<sup>799</sup> Ibid

victims' lawyers should work tirelessly to expose human trafficking crimes.<sup>800</sup> Essentially, credible evidence should be gathered by defence lawyers of trafficked victims that point to the fact that their client is a human trafficking victim. A lawyer's priority is to secure a significantly reduced sentence or an acquittal by properly researching a case with their client and alerting the court and prosecutors of all available evidence relevant to the case.<sup>801</sup>

It has previously been stated in this thesis that trafficked persons do not obtain automatic immunity from prosecution, nor do they have a substantive defence based on their status as victims of trafficking alone. Nonetheless, a mitigated sentence may be obtained when the evidence points to the fact that the exploited victim was forced by an individual or a group of individuals to carry out the illegal acts in question. This implies that any other acts that are unconnected with a victim's trafficked status will not give the defendant protection from prosecution either. Although, where the evidence indicates that the victim has been trafficked, a mitigated sentence may be entered in respect of the other offences. Sometimes, these other offences may be unrelated to the victim's exploitative circumstance.

Thus, the first step in accurately assessing a victim's case, is establishing whether they have been trafficked as defined in the Palermo Protocol, CoE Convention, EU Directive and MSA. The relevant examination will consist of an assessment of whether the defendant "was recruited, transported, transferred, harboured or received for the purpose

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<sup>800</sup> Gerry F., 'Lawyers Duties to Trafficked Victims' (2014) 178(29) CL & J weekly, 444

<sup>801</sup> Ibid

of exploitation, such as forced labour or services, sexual exploitation, criminal activities or the removal of organs.”<sup>802</sup>

## **7.4 Prosecution versus Civil Litigation, In Promoting Victims’ Rights**

### **7.4.1 Prosecution/Criminal Proceedings**

An academic debate has been instituted which presupposes that prosecution may not be the best approach to tackle the offence of trafficking. A prominent aspect of these debates is an examination of whether human trafficking litigations are a waste of time and money; as it appears to divert attention from other important responses.<sup>803</sup> The pro-prosecution group argue that developing capable criminal justice systems to litigate trafficking offences is an indispensable approach; and is useful in charting a victim centred path.<sup>804</sup> They contend that prosecution reduces trafficking occurrences, because a credible risk of criminal sanction will deter traffickers from persisting in exploiting vulnerable individuals. Hence, the rationale for their argument is predicated on the premise that if the UK justice system is flawed, it should be improved in order to function better and not eliminated as the anti-prosecution group suggest.

The anti-prosecution group contend that arrests, prosecutions and penalties are not the answer to resolving trafficking cases, as this approach tends to take attention away from the needs of the victims and survivors.<sup>805</sup> Contrary to the positive expectation of a victim-centred approach in litigating trafficking cases, prosecutions are, by their very nature, not

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<sup>802</sup> Palermo Protocol, Art 3 (a)

<sup>803</sup> Boutros V. and Richmond J.C., ‘Investments in Human Trafficking Prosecutions are Indispensable’ (2016) 6 ATR 107

<sup>804</sup> Ibid

<sup>805</sup> D’Adamo K., ‘Prioritising Prosecutions is the Wrong Approach’ (2016) 6 ATR 111

victim-centred at all.<sup>806</sup> For example, upon conviction a trafficker may receive a prison sentence, while the victim is in a sense rendered unemployed, with no good prospect of housing or shelter. Essentially, in some criminal prosecutions the victim is used as a tool to apprehend the trafficker rather than given protection and security to prevent them from being re-trafficked. Further, D'Adamo posits that the process of prosecution does more harm than good to the victims, recounting traumatic events may re-open wounds and re-traumatise the victims who are trying to recover from their trafficking experience.<sup>807</sup>

French and Liou counter D'Adamo's argument and acknowledge that while prosecution may sometimes aggravate victim traumatisation, it can also help victims obtain judicial exoneration and mitigated sentences.<sup>808</sup> Importantly, prosecuting trafficking crimes should predominantly be about securing victims' rights. The evidence in most human trafficking cases points to the fact that prosecution does not yet fulfil this role of securing victims' rights. Vandenberg argues that this failure can be addressed in part by enhanced training programmes aimed at building the capacity of prosecutors to protect victims' rights; and improve legal representation of trafficking victims.<sup>809</sup>

The writer's perspective on the differing views regarding prosecution of human trafficking cases is leaning towards the pro-prosecution group. The writer views prosecution as an invaluable mechanism in correcting the wrongs done to victims of human trafficking by the perpetrators of the offence. It is also a suitable means of reassuring the trafficked victim that their rights are important and that the state and

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<sup>806</sup> Ibid

<sup>807</sup> Ibid

<sup>808</sup> French S. and Liou C. C., 'The Importance of Strategic, Victim-Centred Human Trafficking Prosecutions' (2016) 6 ATR 114

<sup>809</sup> Vandenberg, M. E., 'Palermo's Promise: Victim's Rights and Human Trafficking' (2016) 6 ATR 138

authorities are willing to protect their interests. By holding the perpetrator of trafficking crimes accountable for their actions, the victim's faith in the criminal justice system and legal process may be restored. Often, individuals who have experienced situations of exploitation, have lost hope in the system and are certain that the authorities do not intend or are unwilling to protect them.

Prosecution of human trafficking cases is also a suitable method of promoting awareness and understanding of the offence. This is because, a victim's evidence of their trafficking experience may lead to judicial documentation of the strategies employed by traffickers to exploit vulnerable individuals. Judicial documentation may in turn, result in improving ways of tackling the offence by the authorities and the State. In addition, judicial precedent of appropriate sentencing / penalty for the trafficking offender will be created. For example, in the case of *R v Iyamu*, the account of the victims in relation to their trafficking situation, revealed a calculated system of manipulation and tactical approach used by their trafficker to ensure compliance.<sup>810</sup> In that case, the accused person was convicted of five offences of arranging or facilitating the travel of another person with a view to exploitation, contrary to section 2 of the MSA. She was also convicted of the offence of perverting the course of justice. Counts one to five took place between 1 May 2016 and 25 August 2017 and involved five identified victims. During the trial, Iyamu gave evidence that she was not a trafficker, but did not dispute that the victims had been trafficked. Although the accused person denied being involved in any trafficking related activity, the court found that there was a persistent campaign of exploitation, motivated

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<sup>810</sup> *R v Iyamu (Josephine)* [2018] EWCA Crim 2166

by financial gain. The victims were particularly vulnerable and severely affected by their experience.

The evidence presented indicated that the level and methods of control exercised over the victims were significant. The traffickers forced the victims to swear juju oaths which heightened their ties to the trafficker.<sup>811</sup> Davies LJ noted that the way in which the rituals were conducted left the victims psychologically detained as well as physically and psychologically scarred.<sup>812</sup> Iyamu engaged this method of control, to economically trap the victims and ensure their secrecy and obedience. The accused knew this method of control would work because juju and witchcraft are an integral part of the Nigerian culture.<sup>813</sup> The vulnerability of the victims, alongside the consistent tactic of sexual exploitation and threats, signifies that the victims would have been reluctant to contact the authorities.<sup>814</sup> This reluctance to contact the authorities may have also been due to a deep-rooted fear of possible detainment due to unlawful immigration status and illegal entry into the country.<sup>815</sup>

The court noted that there were still no definitive sentencing guidelines and relatively little guidance in relation to the appropriate sentencing range for offending under the MSA.<sup>816</sup> The decision in the Iyamu case may be considered alongside the judgment of

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<sup>811</sup> Ibid, para 12

<sup>812</sup> Ibid, para 44

<sup>813</sup> Ibid, para 11

<sup>814</sup> Mennim S., 'Sentencing and the Modern Slavery Act 2015' (2018) 82 (6) JCL, 438

<sup>815</sup> *R v Iyamu (Josephine)* [2018] EWCA Crim 2166, para 45

<sup>816</sup> Ibid, para 50

the Court of Appeal in *R v Zielinski*.<sup>817</sup> The Zielinski case involved sentencing for the trafficking of persons for the purposes of forced labour.

In both cases – *R v Iyamu* and *R v Zielinski*, the Solicitor General (SG) sought leave under section 36 of the Criminal Justice Act 1988 to challenge the accused person’s sentence on the ground that it was unduly lenient. In the Zielinski case, the accused person was convicted of two counts of arranging or facilitating the travel of another for exploitation, contrary to section 2 (1) of the MSA (counts 1 and 2), and a count of conspiring with others to require another to perform forced or compulsory labour, contrary to section 1 of the MSA (count 4). He was then sentenced to twelve months’ imprisonment on each of counts 1 and 2, and sentenced to four years’ imprisonment on count 4; all counts intended to run concurrently. In addition, he was made subject to a ten-year slavery and trafficking prevention order. Following the SG’s application, the court of appeal increased the previous sentences on counts 1 and 2 to sentences of two and a half years imprisonment, and the sentence on count 4 to seven years’ imprisonment, all sentences to run concurrently. The slavery and trafficking prevention order for ten years was unchanged.

Similarly, in the Iyamu case, after the SG’s application to review the offender’s sentence given by the court, the accused person’s prior sentence was increased. The prior sentence of 14 years was increased to 18 years imprisonment.<sup>818</sup> The court in reviewing the previous sentence pointed out that there was a need for deterrence by the imposition of a severe sentence to offenders and traffickers.

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<sup>817</sup> *R v Zielinski* (David) (2017) EWCA Crim 758

<sup>818</sup> *R v Iyamu* (Josephine) [2018] EWCA Crim 2166, para 52

The interpretation and application of the sentencing guidelines in both cases illustrates the need for uniform sentencing guidelines in future cases involving THB under the MSA.<sup>819</sup> In both cases there is a stark difference in sentencing procedure. The offences committed in both situations are similar and it is expected that the sentence applicable for each circumstance will be the same. However, this is not the case. In the first sentence given by the trial court for the Zielinski case, the accused person was sentenced to 4 years in total. In contrast, in the Iyamu case the accused person was sentenced to 14 years imprisonment. There is a major difference between 4 and 14 years and there needs to be a clear set of rules defining the sentencing approach by the courts in human trafficking cases; especially for offences provided for in the MSA. A definitive sentencing guideline will prevent the courts from having to develop principles on a fragmented case-by-case basis.

The non-prosecution principle was created with the intention of protecting the victim of human trafficking, from criminal prosecution, for illegal criminal activity that are directly related to their trafficking experience. Hence, if the goal of the non-prosecution principle is to protect victims, it may be argued that having a uniform sentencing guideline for trafficking offences will aid in the promotion of protection of trafficked victims. This is because; the victim will be informed of the possible outcome of prosecuting the trafficker – 14 to 18 years imprisonment depending on the counts and charges. Having a specific approach to sentencing and prosecuting trafficking offenders may also encourage the victim to give evidence in court proceedings. The victim's evidence given in trafficking cases may promote improved awareness and understanding of the offence of human

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<sup>819</sup> Mennim S., 'Sentencing and the Modern Slavery Act 2015' (2018) 82 (6) JCL, 438

trafficking. This awareness and understanding will mainly relate to style, system and strategy used by trafficking offenders to exploit vulnerable individuals.

### **7.4.2 Civil Litigation**

In the absence of criminal proceedings in trafficking cases, civil litigation is a legal alternative to victims of trafficking who seek compensation and redress from the courts for their exploitation. Research conducted by the trace consortium has shown that it is difficult for victims to receive compensation either in private legal actions or during criminal proceedings.<sup>820</sup> Typically, the outcome of legal proceedings is uncertain and may take a long time to conclude. Private legal actions on the other hand are expensive and may not be a suitable option for victims of trafficking due to their personal and financial situation at the time of obtaining their freedom from exploitation.

While, civil litigation may be a good alternative, where the government does not prosecute a trafficking case, it does not guarantee complete protection for the victim, nor does it physically prevent the traffickers from victimising other vulnerable individuals. Civil litigation enables a victim to hold a trafficker personally accountable for his actions though funding for legal representation to pursue a civil compensation claim is often a bar to this course of action.<sup>821</sup> The trafficked victim may also be unsure of the exact location of his offender thereby making it difficult to bring the person to justice. Vandenberg argues that collecting damages and locating assets is also challenging in civil

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<sup>820</sup> Trace Consortium - Trafficking as a Criminal Enterprise, Tracing Human Trafficking (Trace Project 2016) 17

<sup>821</sup> Muraszkievicz J., 'How do we compensate victims of human trafficking in the UK?' (Stop the Traffik, 5 April 2016) <<https://stopthetraffik.wordpress.com/2016/04/05/how-do-we-compensate-victims-of-human-trafficking-in-the-uk/>> accessed 19 May 2016

cases.<sup>822</sup> Additionally, a thorough estimate of the level of damages may be difficult because of the gravity of the offence.<sup>823</sup> Thus, judges often find it hard to award damages, thereby resulting in a lack of uniformity.<sup>824</sup>

In England and Wales, victims of trafficking seeking legal aid can obtain compensation in civil courts and Employment tribunals by using the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) or through Section 47 of the MSA 2015. The Criminal Injuries Compensation Authority (CICA) is also an option for the victim to explore; CICA is applicable to victims of violent crime in Scotland, England or Wales.

The CICA compensates victims of crime for personal injuries and gives awards to immediate family members of a victim where fatal injury occurred as a result of a violent crime.<sup>825</sup> Unlike the MSA and LASPO, with the CICA legal aid is not available for victims of trafficking. Hence, a victim who is unsure of his trafficker's location may only have the option of using the CICA to enforce his rights. A victim employing the CICA route may discontinue pursuit of their rights at an early stage, due to the absence of legal aid; or a general view that the legal process is complicated and tedious.<sup>826</sup> Thus, criminal proceedings are arguably the most suitable option, as the worry of finances and locating the trafficker is eradicated. All that is required, is credible evidence that points to the fact that a person was exploited and has attained victim status.

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<sup>822</sup> Vandenberg, M. E., 'Palermo's Promise: Victim's Rights and Human Trafficking' (2016) 6 ATR 138

<sup>823</sup> Ibid

<sup>824</sup> Muraszkievicz J., 'How do we compensate victims of human trafficking in the UK?' (Stop the Traffik, 5 April 2016) <<https://stopthetraffik.wordpress.com/2016/04/05/how-do-we-compensate-victims-of-human-trafficking-in-the-uk/>> accessed 19 May 2016

<sup>825</sup> The Criminal Injuries Compensation Scheme 2012, para 6

<sup>826</sup> Muraszkievicz J., 'How do we compensate victims of human trafficking in the UK?' (Stop the Traffik, 5 April 2016) <<https://stopthetraffik.wordpress.com/2016/04/05/how-do-we-compensate-victims-of-human-trafficking-in-the-uk/>> accessed 19 May 2016

### **7.4.3 Further Compensation and Legal Redress Available to the Trafficked Victim**

Pursuant to Article 15 of the CoE Convention, victims of human trafficking can obtain compensation and legal redress, either from the state or from the perpetrators of human trafficking. The article provides that each party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand.<sup>827</sup>

GRETA notes that there is in general a scarcity of available information on compensation awarded to victims of trafficking for the purpose of labour exploitation.<sup>828</sup> In many countries in Europe there is no recorded information on any compensation received by victims of trafficking and several countries still lack state compensation schemes accessible to victims of trafficking. Nevertheless, some countries have provided examples of compensation awarded to victims of trafficking for the purpose of labour exploitation. For example, in the Republic of Moldova, the authorities referred to a sentence by the Buiucani court (Chisinau municipality) of 17 October 2014, by which 14 Moldovan citizens who were recruited to work in the Russian Federation in 2012 were each awarded compensation from the perpetrators of 32,160 MDL (equivalent to 1430 Euros).<sup>829</sup> Similarly, in France, a trafficked victim received compensation of 13000 Euros from the perpetrator for six years of labour exploitation.<sup>830</sup>

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<sup>827</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 15 (1)

<sup>828</sup> GRETA, 'Annual Report for 2017 – 7<sup>th</sup> General Report on GRETA's Activities, covering the period from 1 January to 31 December 2017' (Council of Europe 2018), 63, para 185

<sup>829</sup> *Ibid*, reported in GRETA 2<sup>nd</sup> report on the Republic of Moldova, para 137

<sup>830</sup> *Ibid*, reported in GRETA 2<sup>nd</sup> report on France, para 210

In Belgium, there has also been an increase in compensation awards to victims of trafficking during criminal proceedings. For example, compensation was awarded in cases of labour exploitation in a bakery (March 2013, Brussels Criminal Court), construction worker (June 2013, Charleroi Criminal Court) and an equestrian centre (April 2014, Antwerp Court of Appeal).<sup>831</sup> Further, in a trafficking case tried by the Brussels criminal court in 2015, the defendant charged with trafficking for economic exploitation was ordered to pay to the victims, compensation of 21, 5189.99 Euros.<sup>832</sup> However, in this case the compensation could not be paid as no assets were seized during the investigation and the defendant had no property which could be confiscated.

The situations discussed above, illustrate the progress that has been made in the area of compensation by other countries in Europe. The UK may emulate or replicate similar conditions, that would enable the trafficked victim receive compensation for their experience of exploitation. In the UK, victims of trafficking for the purpose of domestic servitude and forced labour can bring a case before an employment tribunal, to recover unpaid wages. Previously, irregular migrant workers used to be unable to access compensation for unpaid wages under employment law due to the doctrine of illegality, because of their immigration status. However, the Supreme Court in *Hounga v Allen* reversed the decision of the court of appeal in this case by deciding that to uphold the defence of illegality runs contrary to the greater public policy interest in combating human trafficking and protecting its victims.<sup>833</sup> This judgment by the Supreme Court is

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<sup>831</sup> Ibid, 64, para 186

<sup>832</sup> Ibid

<sup>833</sup> *Hounga v Allen* [2014] UKSC 47

an important one, because it safeguards the human rights of trafficked persons and protects them against discrimination.

In addition to this judgment by the supreme court in the case discussed above, the High Court also ruled in favour of six Lithuanian men who had been trafficked into the UK, in a civil case against a British company.<sup>834</sup> The claimants instituted a civil claim against the gang master firm that employed them. They alleged that they had been subjected to severe exploitation, including threats and assaults, forced to work long shifts for little or no pay, working and living in inhuman and degrading conditions, denied sleep and toilet breaks. Due to the lack of a specific remedy of human trafficking in UK legislation, the litigation in this case was highly complex and the lawyers representing the men had to argue a variety of claims. The High Court ruled that the men should be compensated by the gang master for its failure to pay the agricultural minimum wage, unlawfully withholding wages, depriving the workers of facilities to wash, rest, eat and drink, and charging prohibited work-finding fees.<sup>835</sup>

One of the victims in this case commented on the judgment and stated what it means to them. In his words: "... it means at last that some justice has happened. We've waited four years and it's been really hard being forced to remember the experience all the time to prove they did wrong ..."<sup>836</sup> Although the victims in this case, succeeded in obtaining compensation, the legal battle faced to achieve this goal, was a challenging and difficult one. After the men escaped their trafficking experience, they were referred to the NRM

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<sup>834</sup> *Galdika & Ors v DJ Houghton Catching Services Ltd & Ors* [2016] EWHC 1376 QB

<sup>835</sup> *Ibid*, para 75

<sup>836</sup> Lawrence F., 'Court finds UK gangmaster liable for modern slavery victims – Landmark civil ruling finds in favour of six trafficked Lithuanian men who were exploited by Kent chicken-catching firm' (The Guardian 10 June 2016) <<https://www.theguardian.com/global-development/2016/jun/10/court-finds-uk-gangmaster-liable-for-modern-slavery-victims-kent-chicken-catching-eggs>> accessed 25 June 2019

and properly recognised as victims of human trafficking. They cooperated with the police, but no criminal charges were ever brought against their traffickers. The victims were not introduced to lawyers who could advise them about compensation and as a result, it took over two years before they were able to make a compensation claim against their exploiters. In March 2015, the victims also applied for legal aid, but only four of the six clients in this case received free legal assistance. The victims had to wait four years to obtain compensation due to the lack of information and the lengthy legal process. In the meantime, they have faced significant difficulties, including risk of destitution and loss of benefits due to the lack of long-term support from UK authorities. On one hand, this case illustrates the importance of justice to victims and represents an important step forward in promoting victim's rights. However, it also demonstrates the difficulties faced by trafficked victims and points to the fact that, despite their legal right to remedy, few victims obtain compensation for the abuse committed against them.

Section 8 of the MSA requires criminal courts to consider making a slavery and trafficking reparation order in all cases where a person has been convicted of human trafficking, slavery, servitude or forced labour and committing an offence with intent to commit human trafficking. The court must consider making an order whether reparation was requested by the prosecution or not, and any decision by a judge not to grant a reparation order must be explained. The trafficked victim may also obtain compensation through a slavery and trafficking reparation order. For the victim to obtain compensation using this method, the perpetrator must have been convicted under the MSA and a confiscation order must have been made against the person. Despite the increase in prosecution in recent years, the high criminal threshold of proof makes it difficult to successfully prosecute, and in many cases, prosecuting is not possible due to a lack of

evidence. The slavery and trafficking reparation orders are therefore only available to a limited number of victims of human trafficking.

## **7.5 The Implication of the Current Legal Regime on the four classes of Victims**

The preceding discussion in sections 7.1 to 7.4 of this chapter on the current legal regime obtainable in England and Wales indicates that there may be obstacles to successful prosecution of human trafficking cases. Obstacles to the successful prosecution of human trafficking cases may also imply that the four classes of victims (pure/ideal, historical, location and transition victims) may not be fully or adequately protected by the state. This is because, human trafficking in adults and children alike has mainly been evaluated as an indication of transnational organised crime.<sup>837</sup> This evaluation places the focus primarily on legal measures to prohibit the crime. The consequence of this strategy is that prosecution and conviction of traffickers is emphasized as a principal response in combating human trafficking.<sup>838</sup> Consequently, political pressure is being applied at both the national and international levels to increase convictions and to ensure severe penalties.<sup>839</sup> Hence, high conviction rates are taken to indicate that states are successful in their efforts, and low conviction rates are taken as a sign that the state is not committed to the task of preventing and punishing human trafficking.<sup>840</sup>

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<sup>837</sup> Lindholm J. and Cederborg A-C., 'Legal Assessments of Child Victims of Human Trafficking for Sexual Purposes' (2016) 34 (1) Behav. Sci. Law 218

<sup>838</sup> Ibid

<sup>839</sup> Ibid

<sup>840</sup> Constantinou A.G., 'Human Trafficking on Trial: Dissecting the Adjudication of Sex Trafficking Cases in Cyprus' (2013) 21 Fem. Leg. Stud. 163, 180

However, prosecuting human trafficking cases has proven difficult, and in several countries the estimated number of victims far outweighs the number of prosecuted traffickers. There are several challenges in attempting to prosecute traffickers, including persuading victims to testify as witnesses.<sup>841</sup> Victim testimony is vital for criminal prosecution, but victims must be seen as having a credible and substantiated legal case for their testimonies to be accepted. Victim testimonies are often discredited on grounds that, their statements lack clarity or contain contradictions.<sup>842</sup> Particularly, it seems that what is required for successful criminal prosecution is an altogether ideal, innocent and passive human trafficking victim who is rescued by the police, and once rescued acts as a good victim in full cooperation with all law enforcement agencies.<sup>843</sup> Yet, the reality is that victims of trafficking do not always match this model.

The writer argues that promoting adequate protection for the four groups/classes of victims should be the state's foremost objective. Recognising the different classes of victims through proper categorisation may lead to an enhanced recognition of victim protection as the key focus to enable successful application of the non-prosecution principle. The current instruments dealing with human trafficking – the CoE Convention, EU Directive and MSA, all contain a range of mechanisms to protect the rights of victims of trafficking. The protection mechanisms include the 45 days recovery and reflection period among others. These instruments are an essential first step in fostering awareness on the offence of trafficking because they examine the different ways and possible circumstances that lead to THB. As this awareness develops, human traffickers are

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<sup>841</sup> Ibid, 171

<sup>842</sup> Ibid

<sup>843</sup> Srikantiah J., 'Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law' (2007) 87 (1) BULR, 157, 187

employing other techniques to recruit victims for exploitative purposes. Evidence suggests that traffickers purposely urge victims of THB to commit criminal offences thereby exposing them to the risk of criminalisation.<sup>844</sup> These offences are directly connected to or occur because of their trafficking circumstance. Yet, when they come to the attention of the authorities, they are considered primarily as offenders and not victims.<sup>845</sup> Accurate identification of victims and proper investigation of trafficking offences is necessary to protect the rights of victims and consequently aid the efficient application of the non-prosecution principle.

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<sup>844</sup>*L, HVN, THN, T v. R [2013] EWCA Crim 991*

<sup>845</sup> Gerry F. and Pottle E., 'Defending Victims of Human Trafficking' (2014) CL & J

## **7.5 Consequences of the NRM’s decision on the rights of the four classes of victims**

The non-prosecution principle is inapplicable to a victim’s case, unless and until a person has been properly identified as a victim of human trafficking. The task of identifying a trafficked victim is carried out by the NRM. The support regime for victims of trafficking under the NRM is the identification of a potential victim<sup>846</sup>. Subsequently, a reasonable grounds decision is reached<sup>847</sup>. The reasonable grounds decision is substantiated information that a person is a credible victim of human trafficking.

The process of determining a victim’s case, commences when the competent authority receives a referral to determine whether a person is a potential victim of human trafficking or not<sup>848</sup>. The competent authority must determine whether the available information is a victim of THB. The First test applied in determining if someone is a victim is “I suspect but cannot prove” in the UK<sup>849</sup>. If a reasonable person having regard to the evidence in the mind of the decision maker, would think there are sensible grounds to believe the individual had been a victim of THB<sup>850</sup>.

The indicators of human trafficking are very similar around the UK, even though there may be variances in Scotland, England and Wales. The process of determining the authenticity of the information of human trafficking by the competent authority may not

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<sup>846</sup> *R (Galdikas) v SSHD* [2016] 1 WLR 4031

<sup>847</sup> *Ibid*, para 4

<sup>848</sup> Home Office, ‘Victims of Modern Slavery – Competent Authority Guidance’ (Home Office 21<sup>st</sup> March 2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/509596/Victims-of-modern-slavery-competent-authority-guidance-v3.0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/509596/Victims-of-modern-slavery-competent-authority-guidance-v3.0.pdf)> accessed 28 March 2016

<sup>849</sup> *Ibid*, para 4

<sup>850</sup> *Ibid*, 51

be clear initially. Therefore, the competent authority, now SCA will come to a positive reasonable grounds decision on based on the information at their disposal. However, the reasonable grounds must consider substantiated claims which are accurate and up to date information of specific evidence relating to the concerned person<sup>851</sup>.

If there is a resolution based on the reasonable grounds, the third stage of NRM will entail a minimum of 45-days recovery and reflection period<sup>852</sup>. The 45-day recovery and reflection period will be agreed upon after a discussion process as the reasonable ground decision is further substantiated. If the decision is not made within a 45-day period, the support provided will be extended<sup>853</sup>. The 45-day recovery and reflection period is a benefit meant to support THB victims. The recovery and reflection period supports the victim to come to terms with their trafficking experience and proceed to gain some normalcy/restitution. After the outcome of the case of *NN and LP*, there have been calls to replace the current 45 days rule.<sup>854</sup> This is because, as noted by the home secretary in 2019, recovery time may vary from individual to individual and cannot be delimited by time alone.

As previously discussed in earlier chapters of this thesis, NRM fourth stage is the ‘conclusive grounds decision’<sup>855</sup>. The conclusive grounds decision has sufficient information to ascertain the claims of the victim. This decision should be made within the 45-day period. However, further extensions could made if the conclusive grounds

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<sup>851</sup> Ibid, 51

<sup>852</sup> Ibid, para 4

<sup>853</sup> Ibid, para 4

<sup>854</sup> *NN and LP v SSHD* [2019] EWHC 1003

<sup>855</sup> Ibid, para 5

decision has not been made. The process of arriving at the conclusive grounds' decision may include reasonable grounds test and any relevant evidence<sup>856</sup>.

The Salvation Army provides a 14-day support for victims of human trafficking who have received a positive conclusive grounds decision<sup>857</sup>. The challenge most victims of THB experience is the timeline to which conclusive grounds decisions are reached and the case-by-case process which the Home Office has adopted for the extension of support. The period of reacting to the needs of the victims has been viewed as slow<sup>858</sup>. The Salvation Army does not have the capacity to assess the required needs of trafficked victims. This is based on the contract and guidance the Salvation Army has with the Home Office. Within the 45-day recovery and reflection duration, the UK also provides support for Discretionary Leave to Remain<sup>859</sup>. The support and assistance provided in some cases has not been sufficient. Also, extending the 45-day recover and reflection period is subject to the discretion of the Competent Authority<sup>860</sup>. When the supporting days end before the resolution has been reached, the Salvation Army may exercise its right to tender extensions on behalf of the victim. This is because in most cases, the support expires before the conclusive decision has been reached.

The UK government has stated that its policy is to give effect to its obligations under the CoE Convention and the EU Directive. Failure to apply the provisions of these instruments may give rise to a successful claim for judicial review. A claim for judicial review may be instituted, not because the treaty has any direct effect, (because it does

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<sup>856</sup> Ibid, 51

<sup>857</sup> Ibid, para 6

<sup>858</sup> Ibid, para 6

<sup>859</sup> Ibid, para 6

<sup>860</sup> Ibid, para 6

not) but because the government has failed to apply its own published policy.<sup>861</sup> The competent authority should be taken to have the intention of protecting the rights of trafficked victims, combating human trafficking, promoting international cooperation, thereby advancing a human rights-based approach. These are all objectives identified in the CoE Convention, EU Directive and the MSA.

Hence, to ensure that trafficked victims are properly protected and assisted, it is important to identify them correctly. Using the NRM's procedure for identifying victims, the SCA assesses the different circumstances in which they can consider whether a person is victim of THB or not.

The court in *R (SF) v SSHD*<sup>862</sup> examined the Secretary of State and the competent authority's compliance with the guidance in the three instruments in its assessment of the evidence provided. The definition of trafficking provides guidance on how the evidence should be assessed. Potential victims of trafficking may provide inconsistent evidence or there might be delays in the evidence they give in their favour. Their evidence may be inconsistent due to the shock or trauma that they have experienced because of their trafficking situation. Consequently, inconsistency and lack of details given by a potential victim of trafficking should not lead the decision-maker to conclude that the evidence given is incorrect or made up. In assessing the credibility of the claim there may be mitigating reasons why a potential victim of trafficking is inconsistent, incoherent or delays giving details of material facts. Certain factors must be taken into consideration when assessing the credibility of their claim. These factors include mental, psychological, or emotional trauma; inability to express themselves clearly; mistrust of

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<sup>861</sup>*R (Y) v SSHD* [2012] EWHC 1075, para 40

<sup>862</sup> [2015] EWHC 2705

authorities; feelings of shame; painful memories-particularly those of a sexual nature.<sup>863</sup> In the case of children, they may be unable to disclose or give a consistent credible account due to such factors as their age; on-going nature of abuse throughout childhood; and fear of traffickers, violence or witchcraft.

A victim's delayed disclosure of a trafficking circumstance may often arise as a result of post-traumatic stress. A key symptom of post-traumatic stress is an avoidance of trauma triggers, or those that cause unpleasant physical and psychological experiences, flash backs or frightening memories.<sup>864</sup> These symptoms may cause a person to be unable to fully explain their experience until they have reached a minimum level of psychological stability. A delay in disclosure of facts is not necessarily a manipulation or a statement of untrue facts. In most cases, this delay is due to an insufficient recovery period and the lack of trust with the person they are disclosing the information to.<sup>865</sup> The material facts of past and present events (material facts are those which are serious and significant nature that should be accorded sufficient weight) which may indicate whether a person is a victim of trafficking or not.<sup>866</sup>

The reasonable grounds decision has consequences for the potential victim in terms of protection and support (and potential further stay in the UK if they are subject to immigration control.) The competent authority decision may need to be subject to external scrutiny by human trafficking experts involved in trafficking cases or judicial

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<sup>863</sup> Council of Europe Convention on Action Against Trafficking in Human Beings CETS No. 197, 2005, art 12 (b)

<sup>864</sup> Home Office, 'Victims of Modern Slavery – Competent Authority Guidance' (Home Office 21<sup>st</sup> March 2016) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/509596/Victims-of-modern-slavery-competent-authority-guidance-v3.0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/509596/Victims-of-modern-slavery-competent-authority-guidance-v3.0.pdf)> accessed 28 March 2016

<sup>865</sup> Ibid

<sup>866</sup> Ibid

review at the request of the potential victim's lawyer. Consequently, the competent authority's decision should be of the highest possible standard. The decision should take into account the expert views and opinion of trafficking professionals, and the facts and circumstances of each individual case. In addition, in situations where staff at the competent authority are unsure about their decision, they must seek guidance and assistance from their SCA manager and request more information from the first responder concerning the potential victim.

## **7.6 The Non-Prosecution Principle in the MSA and Cases decided in the UK after its Enactment.**

From the year 2000 a series of international conventions were agreed upon by Member States to deal with the problem of trafficking in humans for the purposes of exploitation. These instruments have imposed obligations on the UK in respect of those individuals who have been trafficked. In 2009, upon the ratification of the CoE Convention, the UK government established the NRM. Within the NRM, the SCA was established to determine whether those who claim to have been trafficked for the purposes of exploitation have in fact been victims of exploitation as they claimed. Until 2015, when the MSA was enacted, there was no statutory provision which embodied into the law of England and Wales, the obligation of the UK under the CoE Convention and EU Directive. Hence, prior to 2015 in cases where the defence of duress was not likely to be applicable, the judiciary and the CPS were solely left with the task of exercising their independent prosecutorial discretion to develop a legal regime for England and Wales.<sup>867</sup> This legal regime would include the international obligations as they were being developed through judicial precedence and subsequently giving effect in the domestic

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<sup>867</sup> Ibid

laws of England and Wales. For cases decided in the UK which were within the scope of the 2015 act, the law is clearly set out in section 45 and schedule 4.<sup>868</sup> Section 45 sets out the conditions which must be met for a defence to arise for adults and children respectively; this defence can be used where there is a nexus or a direct connection between a person's status as a victim of human trafficking and the crime or illegal act committed. To the offences to which the defence does not apply as set out in schedule 4, thus cases examined in the UK from 2017 onwards, the MSA will now be used as the legal framework for deciding them.

Section 45, MSA provides a defence for slavery or victims of human trafficking who have been exploited and have committed an offence, because of their trafficking status. A person may be compelled to do something by another person or by the person's circumstances.<sup>869</sup> Compulsion is attributable to or exploitation through human trafficking only if it is a direct consequence of a person being a victim of slavery or a victim of exploitation.<sup>870</sup> The offences to which the defence in section 45 does not apply are the common law offences of false imprisonment, manslaughter, kidnapping, murder, piracy and perverting the cause of justice.<sup>871</sup> Other offences which the defence does not apply also include soliciting murder, threat to kill and malicious wounding among others.

The MSA was not drafted to provide retrospective protection (that is protection for victims of THB in cases decided before the enactment of the 2015 act).<sup>872</sup> Hence, the system of examining and deciding cases which involve the exploitation of victims of

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<sup>868</sup> Ibid, para 3

<sup>869</sup> MSA 2015, s 45 (2)

<sup>870</sup> Ibid, s 45(3)

<sup>871</sup> MSA 2015, schedule 4

<sup>872</sup> Ibid, para 4

THB, developed by the court in judicial precedent, will continue to apply to cases not within the scope of the Act. Accordingly, individuals who claim that there is a nexus between the crime which they are charged with and their status as victims of trafficking for the purposes of exploitation will be treated fairly by the court subject to the judicial precedent in place. Although, there is a high expectation that the status of the person who claims to be a victim of THB will be solved through close co-operation between the CPS and the SCA there may be cases where this resolution is not feasible. For example, there may be cases to be resolved where either their claim to be a victim of trafficking has only been made after conviction or where there is an issue relating to the nexus between the offence committed and the trafficking circumstance. Alternatively, there may be cases where the crime is so serious that it will not be in the public interest to prosecute the trafficked person.

## **7.7 Barriers to Successful Identification of victims**

Certain barriers have been noted which prevent successful identification of victims in the UK. These barriers have led to an inability to apply the non-prosecution principle to a victim's case. The rationale for the inability to apply the non-prosecution principle is predicated on the fact that proper identification of victims of trafficking may result in successful application of the non-prosecution principle where relevant. One of the barriers to successful identification of victims is the perceived flaw in the NRM process.

The previous NRM process had been termed to be flawed and there has been a call for its re-structuring almost since its inception.<sup>873</sup> Elliot argues that in some cases the structure of the NRM and the bodies involved in victim identification has been unable to

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<sup>873</sup> The Anti trafficking monitoring group, 'wrong kind of victim? One year on: an analysis of UK measures to protect trafficked persons' (June 2010) <<http://lastradainternational.org/lisidocs/uk.pdf>> accessed 10 October 2017

adequately fulfil their duties.<sup>874</sup> Some specific problems observed include the possibility that some UKVI case workers were rejecting asylum claims and NRM decisions. There was a general lack of appreciation of a person's refugee status or status as a trafficked victim.<sup>875</sup> There is also a lack of understanding and awareness that refugee status and trafficked victim status should be treated as two different decisions and require different evidence and information.<sup>876</sup> It is difficult for the UKVI staff to identify both situations and deal with them, as they require full separation of two issues which are inextricably inter-twined.<sup>877</sup> In this regard, it has been observed that the same paragraph in a negative asylum decision may also be read in a negative NRM decision. Thus, it appears that the person who is an asylum case worker in charge of asylum appeals may also be responsible for competent authority decisions. This situation is a cause for concern because there ought to be a different person in charge of asylum claims, and competent authority decisions in the NRM. The two issues should be treated separately in such a way that the evidence can be determined and considered based on the unique circumstances of a person's case.

This situation in the previous NRM process suggests that there might have been a conflict of interest in the execution of the competent authority role by the UKVI. It raises the question as to whether the UKVI is an appropriate agency to deal with the status of individuals as trafficked victims or not. Also, it is highly problematic that the same person is empowered to make the decisions relating to victimhood of trafficking and asylum

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<sup>874</sup> Elliot J., 'The National Referral Mechanism: Querying the Response of 'first responders' and competence of Competent Authorities' (2014) 30 JIANL 9, 14

<sup>875</sup> Ibid

<sup>876</sup> Ibid at 20

<sup>877</sup> Ibid

queries.<sup>878</sup> This leads to a situation where some victims are not identified until a late stage in the court proceedings. Some may not be identified until they have already set prison time for offences committed as a direct consequence of having been trafficked.<sup>879</sup> A case worker once observed that while they were determining whether a person was a victim of trafficking or not, they also have the task of assessing whether their asylum claim should succeed or not. The case worker in question had noted that the victim of THB had claimed asylum. The case worker then decided that he would consider the reasonable grounds decision and asylum claim concurrently. He is reported to have stated: “they’ve [trafficked person] claimed asylum, will make the decision with the asylum claim, will make the two together...”<sup>880</sup>

In this instance, the decision-maker who is also a case worker on an asylum claim of a trafficked victim, recognises that he has two separate decisions to deal with. However, he has chosen to treat them as one claim, thereby underestimating the importance of correct determination in two distinct circumstances. These circumstances, relate to identifying a person as a victim of THB; and that person being entitled to leave to remain within the UK.<sup>881</sup> In this regard, the ATMG has asserted that the authority for deciding on an individual’s immigration or asylum status should not also be responsible for deciding whether that person is also trafficked, enslaved, exploited or a victim of human

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<sup>878</sup> Weiss & Saadiya, ‘Assessing victim status under the council of Europe convention on action against trafficking in human beings: The situation of ‘historical’ victims’ (2011) 2 IANL 169.

<sup>879</sup> Elliot J., ‘The National Referral Mechanism: Querying the Response of ‘first responders’ and competence of Competent Authorities’ (2014) 30 IANL 9, 19

<sup>880</sup> Ibid, 22

<sup>881</sup> ATMG, ‘The National Referral Mechanism: A five-year review’ (ATMG 2014) 19  
<<http://webarchive.nationalarchives.gov.uk/20141202113524/https://nrm.homeoffice.gov.uk/wp-content/uploads/2014/08/ATMG.pdf>> Accessed 10 October 2017

trafficking.<sup>882</sup> It will be better that the Court should determine based on the evidence before it whether the person making an asylum claim is also an enslaved trafficked or exploited person and not that the NRM should deal with both assessments.

Case law discussed in chapter five indicates that decisions on asylum applications and status as a trafficked victim can adversely affect each other. Law enforcement officers sometimes delegate trafficking investigations which have an immigration component to the UKVI. It may be argued that the UKVI is not up to the task of investigating cases of human trafficking on a serious level, because their staff are not properly trained in investigating human trafficking cases.<sup>883</sup> In addition, the UKVI staff is being put under daily pressures to assess a high number of cases in a short time. The responsibility of deciding a high volume of cases within a short time indicates that they may be unable to identify a trafficked victim correctly. Importantly, they may not have sufficient time and resources to focus fully on the task at hand. There is also a suggestion that since the MSHTU joined with the NCA trafficking is no longer a high priority within the agency.<sup>884</sup>

The OSCE, Office for Democratic institutions and human rights (ODIHR) has affirmed the importance of separating a person's status as a victim of human trafficking and immigration status.<sup>885</sup> Essentially, the NRM procedure should apply irrespective of

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<sup>882</sup> ATMG Section 15, 'Modern slavery, human trafficking and human exploitation bill' - Alternative to the modern slavery bill (April 2014)  
<[http://www.antislavery.org/wpcontent/uploads/2017/01/atmg\\_alternative\\_modern\\_slavery\\_bill.pdf](http://www.antislavery.org/wpcontent/uploads/2017/01/atmg_alternative_modern_slavery_bill.pdf)>  
Accessed 10 October 2017

<sup>883</sup> The Anti trafficking monitoring group, 'wrong kind of victim? One year on: an analysis of UK measures to protect trafficked persons' (June 2010), p 59  
<<http://lastradainternational.org/lsidocs/uk.pdf>> accessed 10 October 2017

<sup>884</sup> Elliot J., 'The National Referral Mechanism: Querying the Response of 'first responders' and competence of Competent Authorities' (2014) 30 JIANL 9, 21

<sup>885</sup> Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking (OSCE/ Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, 2013) 15

immigration status. Further, the CoE Convention, EU Directive and MSA provide for assisting any victim of THB. It does not deal with the residence conditions of the victim of THB in the territory of other member states. Therefore, victim status in the UK should not be undermined or affected by the NRM identification mechanism. The NRM is designed to deal exclusively with identifying victims of trafficking and not to distinguish between individuals who should be granted residence permit/leave to remain and those who should not.<sup>886</sup>

## **7.8 UKVI as a First Responder and Competent Authority**

A further barrier to the successful identification and subsequent application of the non-prosecution principle, is the fact that the UKVI acts as both a first responder and a competent authority. This implies that the UKVI makes referrals for identifying victims of THB and it also makes reasonable and conclusive ground decisions as to whether a person is a victim of trafficking or not. This is confusing and indicates that victim identification may be problematic for the decision maker. It has been argued that the structure of the UKVI as both the first responder and competent authority is not victim friendly.<sup>887</sup> There is also a high level of responsibility placed on UKVI staff. In its role as competent authority, the UKVI is responsible for determining the victim status of cases originating from outside the UK, EU and European Economic Area (EEA).<sup>888</sup>

The UKVI victim identification system may be regarded as not victim centred because of the pressures experienced by UKVI staff. There is a requirement to decide on a

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<sup>886</sup> Chandran P., 'The identification of victims of human trafficking' in Parosha Chandran (ed), *Human Trafficking Handbook: Recognising trafficking and modern day slavery in the UK* (Butterworths, Lexis Nexis 2011) 41.

<sup>887</sup> *Ibid*, 22

<sup>888</sup> *Ibid*

person's case within 5 days. This means that there might not be sufficient time to focus on the victim's human trafficking circumstance. Also, it is contended that using two different and separate bodies to identify victims-dependent upon the country of origin of that victim is incompatible with a victim centred approach. Further, the CoE Convention, EU Directive and MSA provide for assistance of any victim of human trafficking. These instruments do not deal with the conditions of residence of the victim of THB in the territory of the Member States. Immigration staff may encounter a potential victim of trafficking as part of an asylum screening interview, or during law enforcement activities. Thus, the possibility for lines to become blurred between decision-making on trafficking cases and asylum cases when these are carried out by the same body is clear.

There may also be a problem with incorporating human trafficking decisions with asylum decisions. There are better ways of ensuring that the NRM provides for the needs of victims in an appropriate manner. These two decisions should not be linked. This is because; the test for a conclusive grounds' decision in relations to victims' status is different and arguably higher than the test used to determine whether someone applying for refugee status should be granted or refused.<sup>889</sup> The differences in this test signify, that the victim of THB has a higher hurdle to overcome than refugee applicants. Therefore, an asylum decision does not elicit the required information for a trafficking decision, and it is important that a trafficking interview should be treated as relating to a potential trafficking status and nothing more. This is because, there is an over emphasis on immigration status in the decision-making process when it comes to the identification of victims.

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<sup>889</sup> Home Office, interim review of the National Referral Mechanism for victims of human trafficking (2014)  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/360482/Interim\\_review\\_of\\_the\\_NRM\\_for\\_victims\\_of\\_human\\_trafficking.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/360482/Interim_review_of_the_NRM_for_victims_of_human_trafficking.pdf)> Accessed 26<sup>th</sup> October 2017

It is expected that the structure of the new SCA will remedy some or most of the flaws of the previous NRM process. Successful application of the non-prosecution principle may be improved when the system of identifying victims is updated. One may conclude that the intended goal of the updated NRM process is to surpass the outcomes of the previous structure. An individual whose exploitative situation fits into the profile of a trafficked victim with the action, means and purpose elements present, should receive support and protection from the state.

## **7.9 An Examination of the State's obligation to protect the Victim's Human Rights: VCL and AN v UK**

An important judgment which examines the state's obligation to protect the victim's human rights is the VCL case.<sup>890</sup> The Strasbourg court identified multiple flaws in the UK's criminal justice system processing of two child victims of human trafficking. It found breaches of article 4 and article 6 of the ECHR. The most significant aspect of the Strasbourg court's guidance may be that the early identification of victims and potential victims of human trafficking is of paramount importance.<sup>891</sup> Early identification is relevant, in order for prosecutions to comply with article 4 of the ECHR. A person's victim status will affect whether their prosecution is in the public interest and whether there is sufficient evidence to prosecute. Therefore, a trafficking assessment should be made by an expert body before a prosecution decision. The assessment is important in respect of children due to their state of vulnerability.<sup>892</sup>

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<sup>890</sup> *VCL v United Kingdom* (application nos. 77587/12 and 74603/12) [2021]

<sup>891</sup> *Ibid*, para 36

<sup>892</sup> *Ibid*, para 37

According to the court:

“Once a trafficking assessment has been made by a qualified person, any subsequent prosecutorial decision would have to take that assessment into account. While the prosecutor might not be bound by the findings made in the course of such a trafficking assessment, the prosecutor would need to have clear reasons which are consistent with the definition of trafficking contained in the Palermo Protocol and the Anti-trafficking convention for disagreeing.”<sup>893</sup>

The decision in this case signifies the requirement to develop investigative duties and a reliable legal and administrative framework to protect victims of THB.<sup>894</sup> In the current case, despite the existence of credible suspicions that both applicants had been trafficked, neither the police nor the CPS had initially referred them to a competent authority for assessment. Although the CPS subsequently reviewed both cases, it had disagreed with the competent authority’s conclusions that both applicants had been trafficked without giving clear reasons capable of undermining those conclusions. Under these circumstances the state had not fulfilled its positive obligations under article 4 to take operational measure to protect the applicants. The state had failed to protect the victims either initially as potential victims of trafficking, or subsequently as persons recognised by the competent authority as credible victims. There had been a violation of article 4 in both cases.

Accordingly, when it is discovered that an individual is a credible victim of human trafficking, the non-prosecution principle should be applied to their case as early as possible in the proceedings. The non-prosecution principle may be better applied when victims are classed into the four different groups: pure/ideal victim, historical victim,

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<sup>893</sup> Ibid, para 38

<sup>894</sup> Gregory C., ‘VCL and AN v United Kingdom: Human Trafficking and Criminal Prosecutions’ (2021) 3 E.H.R.L.R 309, 316

location, or transition victim. The classification of victims into the four different groups may aid the relevant agencies – the police, the SCA, the court and other law enforcement authorities, to protect victims in a timely manner.

## **Conclusion**

Protecting the rights of victims, combating trafficking promoting international cooperation, and fostering a human rights-based approach are all objectives contained in the CoE Convention, EU Directive and now the MSA. The UK Government has stated that its policy is to give effect to its obligations under the CoE Convention, EU Directive; failure to apply the provisions of these instruments may give rise to a successful claim for judicial review. A claim for judicial review may be instituted not because the treaty has any direct effect, (because it does not) but because the government has failed to apply its own published policy. Hence, to ensure that trafficked victims are properly protected and assisted, it is important to identify them correctly. Through the identification process, the competent authority assesses the different circumstances in which they can consider whether a person is victim of THB or not.

Potential victims of trafficking may provide inconsistent evidence or there might be delays in the evidence they give in their favour. Their evidence may be inconsistent due to the shock or trauma that they have experienced because of their trafficking situation. Consequently, inconsistency and lack of details given by a potential victim of trafficking should not lead the decision-maker to conclude that the evidence given is incorrect or made up. In assessing the credibility of the claim there may be mitigating reasons why a potential victim of trafficking is inconsistent, incoherent or delays giving details of material facts. Certain factors must be taken into consideration when assessing the credibility of their claim. These factors include mental, psychological, or emotional

trauma; inability to express themselves clearly; mistrust of authorities; feelings of shame; painful memories-particularly those of a sexual nature. In the case of children, they may be unable to disclose or give a consistent credible account due to such factors as their age; on-going nature of abuse throughout childhood; and fear of traffickers, violence or witchcraft.

A delay in disclosure of facts is not necessarily a manipulation or a statement of untrue facts. In most cases, this delay is due to an insufficient recovery period and the lack of trust with the person they are disclosing the information to. The delayed disclosure may often arise because of post-traumatic stress. A key symptom of post-traumatic stress is avoidance of trauma triggers, or those that cause unpleasant physical and psychological experiences, flash backs or frightening memories. These symptoms may cause a person to be unable to fully explain their experience until they have reached a minimum level of psychological stability. The material facts of past and present events (material facts are those which are serious and significant nature that should be accorded sufficient weight) which may indicate whether a person is a victim of trafficking or not.

## **CHAPTER EIGHT**

### **CONCLUSION AND RECOMMENDATION**

The key focus of this study is an assessment of circumstances that result in the prosecution of victims of THB. Basically, the question is raised - why are victims of THB being prosecuted in the first place. To consider this research question, the thesis examines the four classes of victims – pure/ideal victim, historical, location and transition victim and assesses the court’s treatment of them, particularly in relation to the application of the non-prosecution principle.

This thesis has examined the arguments on the research topic and original contribution to knowledge to promote improved application of the non-prosecution principle. It has positioned this research in terms of the attainment to date of current academic research. This research evaluates whether the categorisation of victims of THB is important to establish the non-prosecution principle. Further, whether victim identification and categorisation will improve the application of the non-prosecution principle or not. The findings of this research and contribution to knowledge and practice are discussed in this chapter.

## 8.1 Findings

The thesis establishes that victims of THB do not fall into one distinct category; neither do they all have the same experiences. Instead, there is a spectrum of experiences. These include: an individual who is trafficked and exploited = clearly a victim – provided protection (not prosecuted); an individual who is trafficked and exploited = clearly a victim – prosecuted for their part in the activity or for immigration infringements; individual trafficked and exploited = not prosecuted – but later commits a serious offence for example, murder or manslaughter. Further, a person who was formerly a victim of human trafficking may overtime develop into a human trafficker or transition victim. The diverse circumstances that victims of trafficking sometimes encounter indicates that, there are situations where they may be presented to the authorities as offenders and not victims.

The protection of victims of human trafficking from exploitation and criminal prosecution is limited to the understanding of law enforcement authorities on the problem of human trafficking. Defence lawyers, the CPS, the court and the police, all have prominent roles to play in protecting trafficked victims from prosecution and exploitation. In cases where the relevant authorities, do not have sufficient knowledge or information on the categorisation of victims of human trafficking, the trafficked victim may not receive the protection they are entitled to. For example, the prison reform trust has observed that in some cases where the statutory defence in section 45 is applicable to a victim's case, defence lawyers do not argue this defence in the proceedings.<sup>895</sup> This

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<sup>895</sup> Prison Reform Trust and Hibiscus Initiatives, *Still No Way Out: Foreign National Women and Trafficked Women in the Criminal Justice System* (Prison Reform Trust 2018) 12

implies that there is a continuing failure on the part of relevant authorities and law enforcement agencies to protect trafficked victims from exploitation and prosecution.

The author suggests that categorising victims of human trafficking into the – pure/ideal victim, historical, location or transition victim may aid the relevant authorities and legal practitioners in easily detecting a case of human trafficking or exploitation. In situations where an individual's circumstance possesses some or all the characteristics of a victim of trafficking, the ease of identification, may lead to timely intervention and protection where necessary. Categorisation of victims is an area of possible improvement that may aid our understanding of the problem of human trafficking. Categorising victims may also promote improved protection from exploitation and criminal prosecution for victims of human trafficking. This is because, if the relevant agencies and authorities are properly informed on categorisation of victims, it may lead to the institution of protection mechanisms for the victims, at the early stage of investigating a victim's claim.

The location victim often comes to the attention of the authorities as an asylum seeker. This implies that at the first point of contact, they do not present as victims of trafficking. Therefore, evidential burden of proof may be higher in a location victim's case because there is a need to show that they have indeed been trafficked as they claim. In the case of the transition victim or victim turned trafficker, the individual's circumstance is one which may cause confusion. This is because in many cases even though they are controlling other victims, they are sometimes being controlled themselves by people who are above them in the hierarchy.<sup>896</sup> An illustration of this criminal set up is the Italian crime groups where the main activities are carried out by women, including the

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<sup>896</sup> Kangaspunta K, 'Trafficking in Persons' in Smith C. J, Zhang S. X. and Barberet R. (eds), *Routledge Handbook of International Criminology* (1<sup>st</sup> edn, Routledge 2011) 185

recruitment and control of victims.<sup>897</sup> The Victim-turned trafficker paradigm is also prevalent among children forced into trafficking situations at an early age. For the child victim who was sexually exploited, some of them form a close bond with their trafficker such that when they are adults, they assist their former trafficker in recruiting and exploiting other young girls.<sup>898</sup>

The procedure for prosecuting a pure/ideal victim of human trafficking is comprised of either a three-step or four-stage approach. The three-step process requires that prosecutors should consider first, if there is a reason to believe that the person on trial has been trafficked; if so, then consider if there is clear evidence of a credible common law defence which will result in discontinuing the case on evidential grounds. Thirdly, where the offence may have been committed, because of compulsion, arising from the trafficking, prosecutors are obliged to examine whether the public interest will be upheld by prosecuting the parties or not.<sup>899</sup> With the enactment of the MSA, a four-stage approach has been created, which includes the first two steps discussed above. But the third step in the four-stage approach will be to consider whether there is clear evidence of a statutory defence, under section 45 of the MSA. If the answer to this question is in the affirmative, then the case should not be charged. Fourthly, the prosecution is required to consider whether it is in the public interest to prosecute the case or not. There is usually no reason not to prosecute a victim of trafficking. That is, the mere fact that a person is a victim of trafficking does not imply automatic pardon from the court. But in some cases,

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<sup>897</sup> Cauduro A, Andrea Di Nicola, Fonio C, Nuvoloni A. and Ruspini P, 'Innocent when you dream: Clients and Trafficked Women in Italy' in Di Nicola A, Cauduro A, Lombardi M, Ruspini P. (eds), *Prostitution and Human Trafficking, Focus on Clients* (1<sup>st</sup> edn, Springer 2009) 33

<sup>898</sup> *Kizlaite & Anor v. R.* [2006] EWCA Crim 1492

<sup>899</sup> *LM & Ors*, [2010] EWCA Crim 2327, para 10

they might receive a mitigated sentence where they have been of previous good behaviour and given truthful evidence to the court.

Victims may now be categorised as either pure victims, historical victims or location victims and transition victims to enable easy understanding and analysis of how the law applies to each class of individuals. The identification and categorisation of victims of THB is pertinent because of the privileged protection and other ancillary rights that they are entitled to. The rights conferred on a victim include: the right to information and legal assistance in order to obtain compensation; the right to a 45-days recovery and reflection period during which the person cannot be expelled; the right to psycho-social and material support, including accommodation and emergency medical treatment; the right to be considered for a residence permit either because of the assistance the person can provide in the investigation or because of the person's personal situation.

## **8.2 Contribution to Knowledge and Practice**

This research work has critically examined the non-prosecution principle and its application to victims of human trafficking. This examination has been pursued in order to understand the situations and circumstances that may result in the prosecution of a victim of human trafficking. The assessment of a victim's circumstance indicates that there may be some problems associated with the implementation and application of the non-prosecution principle. These problems are mainly due to insufficient information on the spectrum of experiences that trafficked victims may sometimes encounter. The specific legal provisions on the non-prosecution principle are contained in three instruments. These three instruments are the CoE Convention, EU Directive and MSA. Using these three instruments, the author has considered relevant ways of improving the application of the non-prosecution principle. The writer argues that when the relevant

provisions in these three instruments are applied correctly by the courts, it may encourage trafficked victims to give evidence in criminal proceedings. Trafficked victims may be encouraged to give evidence, if they are persuaded that the trafficking offenders will be brought to justice, and that as victims of human trafficking they will be protected from prosecution.

In this work, the writer has created a terminology to categorise each different class of victims of trafficking according to their individual circumstance. The creation of additional terminology has resulted in the use of the terms: ‘pure victim’, ‘location victim’, ‘historical’ and ‘transition victim’ to explain diverse circumstances. These terms are used in the research to explain categorisation of victims. This categorisation is important to establish the implementation and application of the law to the different classes of victims of THB. The assessment of the different classes of victims has culminated in a detailed analysis of the location and transition victim, and their treatment by the courts has been undertaken. These two classes of victims represent an unclear area in the application of the non-prosecution principle. Specifically, the court does not yet acknowledge these additional classes of victims. It may be relevant to include them to the discussion on human trafficking in order to improve the protection regime available. An examination of whether the non-prosecution principle is applicable to this class of individuals is assessed and analysed.

This research aims to contribute to the emerging academic literature on the non-prosecution of victims of THB and importantly intends to promote a better understanding of the offence of human trafficking. To carry out this objective, an examination of the non-prosecution principle, its implication and application to victims of THB is carried out. Using the template of state obligations in international law, the writer examines the

court's treatment of victims of human trafficking and provides recommendations to improve the protection of victims from prosecution. Areas for further improvement have been identified in relation to the location and transition victims. This classification may aid our understanding of the offence of human trafficking and promote improved protection for trafficked victims using the non-prosecution principle. This research examines this area for possible improvement by critically analysing this class of victims and ascertaining how the law applies to the location and transition victim. In addition, whether a location victim should be referred to another state to decide the person's claims, and in cases where this is done consider whether this is a good legal practice and if the person's rights are being upheld through this medium. An assessment of the standards and expectations that are applied to the framework dealing with THB has been carried out, culminating in an evaluation of the existing practices in relation to human trafficking cases.

The thesis accordingly makes a significant and original contribution to the existing literature and knowledge. The relevant sections of the thesis that specifically discuss the original contribution to knowledge are contained in chapter one, section 1.7 and chapter two at section 2.4, where the terminology of the location and transition victims are first introduced. The original contribution to knowledge is further built on in Chapters 5 and 6 where an examination of the circumstances of the location and transition victim is undertaken. Using case law analysis as a template in these chapters, the author examines different legal approaches aimed at improving the protective measures for victims of human trafficking. This assessment of protection of victims is taken into consideration, using the four classes of victims that have been established in the thesis. The inter-relationship between state obligations in international law and the application of the non-prosecution principle to a victim's circumstance is addressed throughout the research.

Chapters 7 and 8 also discuss the findings of the thesis which includes a consideration of the original contribution to knowledge. Essentially, the candidate has focused on four main areas to highlight the original contribution to knowledge. Firstly, a simple terminology has been created to explain two additional classes / categories of victims of human trafficking. The term 'location' and 'transition' victim has been created to explain the new class of victims. Secondly, the author has defined these terms and explained the usual contexts in which victims of human trafficking may fall under these categories of victims. This examination has been undertaken, while making a comparison of the situation of the pure/ideal and historical victims – Chapters 2, 3 and 4. Thirdly, using human trafficking case studies and case law, the treatment of the introduced classes of victims has been considered. This assessment is in relation to the prosecution of the location and transition victims in England and Wales. The assessment has also been undertaken using the pure/ideal victim and the historical victim as a standard for the discussion – Chapters 5 and 6. Lastly, the author recommends a plan of improvement on the current approach by the authorities of the treatment of victims of human trafficking – Chapters 7 and 8.

### **8.3 Recommendation**

The rights of the victim should always be the foremost concern, even in cases where they have committed illegal activities. In the author's legal opinion, where it is found that those illegal acts are a direct consequence of their trafficking status, then the prosecution should proceed in the interest of public policy. Thereby placing the best interest of the trafficked victim at the forefront of the legal proceedings. Regardless of whether the individual is a pure victim, historical, location or transition victim, the rights of the person should be protected as much as it is possible to do so.

The UK Government should consider reforming the current NRM system with a view to remedying the structure in place for identifying victims of trafficking. The SCA was created for this purpose. The previous competent authority system has been re-structured to include clear functions for each body in the NRM. In particular, the confusion of the UKVI being a first responder and Competent Authority at the same time needs to be re-assessed. Perhaps, it may be better to have the UKVI carry out just one function instead of two.

The decisions made by the competent authority on a victim's case may be applied, after careful consideration of the facts and all evidence concerning the case. This is to ensure that if, a review or re-assessment of a case is done there will be sufficient cause to conclude that due process had been followed according to the Competent Authority guidance. The current situation which empowers the same individual working on an asylum case to also be responsible for conclusive grounds decision of whether a person is a victim or not is disturbing. Asylum claims and human trafficking claims should be treated as two separate evaluations and not hurriedly assessed as one consideration. Although the two issues usually occur simultaneously in many cases, the answer is not

to immediately combine two separate considerations into one major decision. It is either two different personnel are contracted to handle the issues, or the same person handles both but indicates the strategy used to treat the problem and clearly states the system used for each situation separately.

Improve training and practice for Government officials and workers in the NRM structure including the staff of the single competent authority to ensure that they can easily spot the signs of trafficking and act on it in a timely fashion. Importantly, when these signs of trafficking situations are spotted, they should not be disregarded or dismissed by the NRM staff.

Sometimes, even when there are clear signs of trafficking as the cases discussed in this thesis illustrate, no action is taken by authorities to correct the situation. A neutral, non-biased committee or body should be appointed by the Government to guarantee that all the necessary steps are being taken to protect vulnerable victims of human trafficking. The neutral body will work in a similar manner as an auditing company by checking the books (in this case, checking the report of the reasonable grounds and conclusive grounds decision) to ascertain that no evidence was omitted in the report. Also, all the evidence provided by a victim of human trafficking should be examined, regardless of whether it is deemed to be irrelevant information or not. This way, if for example it is discovered that during an asylum consideration interview, a person also makes claims that he/she was trafficked, then this new piece of evidence should be included in the report.

The need to self-identify should be eliminated from the process of assessing whether a person is a credible victim of human trafficking or not. This thesis has established that there are several factors which make self-identification as a victim of trafficking difficult. These factors may include language barriers, psychological trauma due to the trafficking

experience, mental health, state of mind and general well-being of the victim, fear of punishment by the authorities or prosecution by the courts. Hence every piece of evidence gathered at every stage of the determination of a potential victim's case should be taken into account. If it is discovered at the late stage of the Court proceedings that a person is a credible victim of human trafficking, then a stay of proceedings may be pleaded based on duress and abuse of process.

The application of the non-prosecution principle to trafficking cases may be better improved by recognising all classes of victims including the location and transition victims. This will aid in improving the practice of victim protection in the UK and promote prosecutorial justice for victims of human trafficking in the long run. Overall, the instruments on the non-prosecution of victims of trafficking needs to be interpreted by the courts with a view to ensuring that the non-prosecution principle is applied to all the four different classes of victims in furtherance of encouraging prosecutorial justice and upholding the rights of victims of THB.

## **8.4 Implications for further research**

Chapters One to Eight have provided an essential groundwork for further research on human trafficking and the application of the non-prosecution principle. Further discussion of the categories of victims needs to be continued now that the terminology has been created. As the case law unfolds there will be different situations where the Court will consider the two new classes of transition and location victims. It is hoped that protecting their rights will be encouraged and assessing the further rights they may hold as the law unfolds is a useful evaluation.

The impact of the non-prosecution principle on victims' rights is evolving. With the enactment of the MSA and its development on the provisions of the principle in the CoE Convention and EU Directive, it will be of great benefit to examine the cases that will be decided by the Courts using the MSA. Importantly, it will be useful to examine the provision of the MSA in section 1, 2 and 4, which provides for three separate offences of human trafficking; slavery, servitude forced labour and practices similar to slavery; and intention to commit human trafficking. These provisions will be decided upon by the Court through judicial precedent as time goes on. The decisions taken on these sections will further highlight the position of the UK Government in relation to modern slavery – human trafficking and slavery and explain the best practices to employ in these situations to further develop the application of the law. The decisions taken on these offences will further lead to a better implementation of the non-prosecution principle to the four classes of victims of trafficking because an assessment of the elements of the different offences may promote prosecutorial justice for victims.

The non-prosecution principle, when correctly applied, may enable the court to improve its prosecution rates of human trafficking offenders, while ensuring the maximum dignity, respect, and safety of all victims of trafficking. These individuals would not have committed the illegal offences in the first place but for their exploitative situation as trafficked victims. Nonetheless, some victims may have intended to carry out the illegal activity in order to escape a more life-threatening situation in their home country, as the circumstance of N in the case of *R v N* illustrates.<sup>900</sup> Therefore, examining the point in which an individual loses the title of victim and becomes a perpetrator is useful in discussing the application of the principle. This examination is relevant because it is possible to retain the status of a victim while still being labelled by criminal law as an offender.

This study has considered the case of victims of human trafficking prosecuted in England and Wales. Using case law and legal judgments heard in the courts of England and Wales, the writer has brought to light instances of missed opportunities in applying the non-prosecution principle. It has been shown that even where there is sufficient evidence in a case to show that a person has been exploited for human trafficking purposes, the person may still be prosecuted. For example, in the case of *R v Breçani*, discussed in chapter five of this thesis, the evidence presented before the court indicated that the appellant had been exploited in Albania for three years prior to their arrival in the UK.<sup>901</sup> The appellant's circumstance was a clear example of a location victim circumstance. However, the appellant's status as a potential victim of trafficking was not given relevant consideration. The *Breçani* case illustrates the importance of categorisation of victims

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<sup>900</sup> *R v N* [2012] EWCA Crim 189

<sup>901</sup> *R v Breçani* [2021] EWCA Crim 731, para 12

for both the decision maker and the court in human trafficking cases. For the decision maker, categorisation of victims into the pure/ideal victim, historical, location and transition victim may aid the decision of whether a person is a credible victim of human trafficking or not. Consequently, categorisation may result in the court staying proceedings where possible, in order to determine a victim's status before prosecuting them for criminal acts committed. Additionally, categorisation may enable defence counsels to protect trafficked victims by proving early on during the case proceedings, that their client has been subject to exploitative circumstances.

Having examined the procedure for prosecuting victims of trafficking in England and Wales, the implication for further research may include an examination of the non-prosecution principle and its application in Scotland and Northern Ireland. Scotland and Northern Ireland are legal jurisdictions within the UK, and they both have specific laws and legal documents which apply to them. Hence, an examination of the application of the non-prosecution principle in these regions may further improve the protection regime available to victims of human trafficking. An improved protection regime for the trafficked victim may subsequently promote an extensive understanding of the offence of human trafficking by the relevant authorities.

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