



TRAFFICKING

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A. What trafficking is not.

The most common confusion is between trafficking and smuggling. They are two separate things.

Smuggling is the clandestine movement of people across borders. It is a crime against the State. People hide in vehicles, or use false documents, to cross borders. Many are brought by an agent or smuggler and disrupting smuggling routes is a key concern of those involved in migration control. Article 31 of the 1951 Refugee Convention says that countries should not impose penalties on people fleeing persecution who have had to use clandestine methods of entry to flee. This does not prevent States from taking action against the person who did the smuggling.

Trafficking is the movement of people in order to exploit them. It is a crime against the individuals concerned. It need not involve clandestine measures: some people move on their own passports.

It is sometimes said that it can be difficult to distinguish trafficking and smuggling. This is not a conceptual difficulty: see above, the differences are clear. However, when looking at factual situations, it is true that it can be complex to sort out what is going on. Imagine my friend and I wish to flee. The smuggler's charge is £10,000. I can pay, and I do. Once I get to the destination, I never see or hear of the smuggler again. My friend cannot pay. The smuggler says that he will still bring her to the destination, but she will have to pay back the £10,000 once she gets here. So far so good, neither I nor my friend have been trafficked. But if she works for the smuggler once she gets here, if the smuggler can *control* her actions because of her debt and uses that control to exploit her, we are getting close to a trafficking situation – see below.

There is also a confused idea that trafficking has something to do with refugees. It does not.

Trafficking need have nothing to do with refugees. Some people who are trafficked come on a visitor's, or student, visa. Some never come into contact with the immigration authorities at all. There are two key points of contact between trafficking and refugees:

- i) Traffickers may get people into a country by getting the people to claim asylum;
- ii) Trafficked people found in a country may, for reasons that may or may not be related to their experience of being trafficked, claim asylum.

B. What trafficking is.

Trafficking is a **human rights abuse**.

For those concerned with the trafficking of children, trafficking is first and foremost about **child abuse** and responses are about **child protection**.

A country may be a source country for trafficked people or a destination country, or a transit country, one to which people arrive to be moved on elsewhere.

B.1 International Law

Trafficking is defined in the November 2000 "Palermo Protocol" to the UN Convention Against Transnational Organised Crime. The full title of the Protocol is the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*". The definition of trafficking is:

"3)a) the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Exploitation shall include, at the minimum, the exploitation or 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.

b) *The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant when any of the means set forth in subparagraph (a) have been used;*

c) *The recruitment, transportation, transfer harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article."* (emphasis added)

Some points to notice:

- Trafficking is not just about crossing borders. It is a process. Those receiving a person for exploitation are as culpable as those transporting them.
- Trafficking can be for all forms of exploitation

See also the UN *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 2002.

B.2 The Council of Europe Convention Against Trafficking in Human Beings

This Convention will enter in force on 1 August 2008 for States who are parties to it. At the moment, both the UK and Ireland have signed but not yet ratified the Convention.

The Convention defines a trafficked person as “any natural person who is subject to trafficking in human beings” (Article 4(e)).

Thus a State’s obligations are incurred once a person is subject to trafficking, not following their being recognised as so subject.

Some the key obligations are:

- To make provision in law for reflection periods for people who have been trafficked (Article 13):

Article 13 – Recovery and reflection period

1 Each Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities. During this period it shall not be possible to enforce any expulsion order against him or her. This provision is without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating and prosecuting the offences concerned. During this period, the Parties shall authorise the persons concerned to stay in their territory.

Thus this period must be at least 30 days and during that period there is a prohibition on expulsion. It must be longer if longer is needed to recover, escape the influence of traffickers or make an informed decision on cooperation.

- In addition, under Article 14:

Article 14 – Residence permit

1 Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both:

a the competent authority considers that their stay is necessary owing to their personal situation;

b the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.

2 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.

3 The non-renewal or withdrawal of a residence permit is subject to the conditions provided for by the internal law of the Party.

4 If a victim submits an application for another kind of residence permit, the Party concerned shall take into account that he or she holds, or has held, a residence permit in conformity with paragraph 1.

5 Having regard to the obligations of Parties to which Article 40 of this Convention refers, each Party shall ensure that granting of a permit according to this provision shall be without prejudice to the right to seek and enjoy asylum.

- **Article 15** states

‘1 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.

2 Each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law.

...’

Relevant procedures will include those relating to reflection periods and residence permits, as well as to asylum and subsidiary protection.

- **Article 15** also makes provision for compensation.
- Provision is also made to identify people who have been trafficked, in **Article 10**:

10(1) Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention.

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

3. 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.

4. As soon as an unaccompanied child is identified as a victim, each Party shall:
- a provide for representation of the child by a legal guardian, organisation or authority which shall act in the best interests of that child;
 - b take the necessary steps to establish his/her identity and nationality;
 - c make every effort to locate his/her family when this is in the best interests of the child.

But who is protected, and who decides? ILPA reads ‘competent authorities’ in Article 10, as in a number of other international conventions, to be a synonym for the State and so it is used in other UK legal instruments in a range of different legal fields. The examples given in paragraph 129 of the Explanatory Memorandum to the Convention of authorities who may come into contact with those who have been trafficked:

129. By “competent authority” is meant the public authorities which may have contact with trafficking victims, such as the police, the labour inspectorate, customs, the immigration authorities and embassies or consulates.

It is essential that these have people capable of identifying victims and channelling them towards the organisations and services who can assist them.

The reference to ‘a competent authority’ in Article 14 of the Convention is a reference to ‘the competent authority in question’ in the particular case.

The reference to ‘reasonable grounds’ in Article 10 does not in ILPA’s view describe one level of evidence constant over time, but is a reference to how a competent authority should behave on the basis of the information available. It is clear from the wording of Article 10 that there can be ‘reasonable grounds’ to identify a person as trafficked before the identification process is complete. What is reasonable after five minutes may be different from what is reasonable after three months; what is reasonable for a person in a place of safety may be different from what is reasonable for a person at risk; what is reasonable for a person whose mental/physical state is good may be different from what is reasonable from one whose physical/mental state gives cause for concern. The wording of Article 10 indicates clearly that creating the conditions for disclosure is an obligation throughout the process of identification. Any State body coming into contact with, or having referred to them, a person who may have been trafficked must take the necessary action to protect, including creating the conditions for disclosure and refer on and must have people capable of doing this.

- **Article 12** imposes obligations to make provision in law for support for people who have been trafficked.

Caselaw of the European Court of Human Rights is also relevant. The leading case is *Siliadin v France*. 26 July 2005, ECtHR. Application No. 73316/01, case on domestic servitude. Ms Siliadin was brought to France while a child and subjected to forced labour (domestic servitude). The case was brought under Article 4 of the ECHR. Article 4 was held to give rise to positive obligations on States, consisting in the adoption and effective implementation of criminal law provisions making the practices set out in Article 4 a punishable offence. It was held that the criminal-law legislation in force at the material time in France had not afforded the applicant specific and effective protection against the actions of which she had been a victim.

B.3 European Union

The European Union produced a *Council Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities* 2004/81/EC of 29 April 2004, having to be transposed into national law by 6 August 2006. (the UK opted out). Sets out criteria for issuing a residence permit to victims of trafficking. The residence permit envisaged falls somewhere between the reflection periods and residence permits for which provision is made in the Council of Europe Convention. Criteria are more restrictive here. People must show a clear intention to co-operate with the authorities. The permit is to be issued for at least 6 months. The Directive provides that trafficked people should be informed of the possibility of obtaining this residence permit and be given a period in which to reflect on their position. Member States must provide trafficked people with subsistence, access to emergency medical treatment and attend to the special needs of those most 'vulnerable' during a reflection period. Those holding a residence permit should be authorised to access the labour market, vocational training and education according to rules set out by national governments.

Also relevant is the European Union's work on illegal working and related topics, because attempts have been to make this a vehicle for workers rights in ways that could enhance protection for people who have been trafficked. For example the *Proposal for a Directive of the European Parliament and of the Council providing sanctions against employers of illegally staying third country nationals* Council document 9871/07, Com (2007) 249 final, SEC (2007) 604. Under Article 14, this would allow foreign nationals to register complaints and have protection against exploitative working conditions. Its ambit is wider than trafficking, but it is not useless.

B.4 Extra-territorial reach of domestic law

Sections 29 to 31 of the UK Borders Act 2007 came into force on 31 January 2008 (S.I. 2008/99). These provisions amend the existing UK legislation, the Sexual Offences Act 2003 ss 57 to 60 and the Asylum and Immigration Treatment of Claimants etc Act ss 4-5 to increase the reach of the crimes of trafficking under UK law with. Before the 2007 Act came into force, the previous legislation meant that acts in the UK were crimes, as were acts outside the UK by people holding any form of British passport. The amendments effected by the 2007 act extended the extraterritorial reach of the sections so that acts outside the UK are now crimes, regardless of the nationality of the person committing them. In the end questions of *forum conveniens* and logistics decrease the likelihood in practice of the prosecution of foreign nationals for acts committed outside the UK. However, one can imagine the extensions being of relevance where a person has committed criminal acts both in and outside the UK and is apprehended within the UK – it will be possible for the UK courts to reach all the crimes committed along the way.

B.5 How traffickers control their victims

- Violence. Threats of violence to the trafficked person or, not uncommonly, to family members including those overseas.

Violence is not the only method.

- Debt bondage
- Restrictions on freedom of movement. These include physical confinement, confiscation of documents, equipping the trafficked person with a mobile phone.
- Instilling a fear of authority – saying national police are in the pay of traffickers, or that if the trafficked person goes to the police s/he will be imprisoned/deported (alas, the latter are not so far-fetched)
- Isolation
- Emotional attachments.
- In certain cases, from certain countries, the purported use of religion and magic with initiation ceremonies and threats of harm if the person seeks to escape the bond with the traffickers. Be aware that some churches have (allegedly) been implicated in trafficking.

All these mechanisms help to ensure that the trafficked person cannot escape, and is unlikely to cooperate with the authorities.

B.6 What the trafficked person knows (and doesn't know)

Not everyone who has been trafficked knows it; especially where the authorities have intervened before any exploitation could take place. Not everyone wants to believe that they have been trafficked when this possibility is suggested to them.

The trafficked person may be aware that s/he has been brought to a country, for example, to work in prostitution or to work illegally. S/he may see this as an unpleasant time but as leading to a desired outcome; an ability to pay off debts, freedom from the traffickers, earnings and a life in that country.

Fear of reprisals, including against family members back home, may lead to the trafficked person prioritising cooperation with the traffickers over his/her rescue.

In documented cases from West Africa, those who have been trafficked have been subject to initiation ceremonies. They believe that if they break the link with the trafficker they are cursed. A person in these circumstances who has been “rescued” or separated from the trafficker may attribute every toothache, every household accident, to the curse and may thus prioritise cooperation with the trafficker.

B.7 The politics and practices of trafficking

Trafficking can be viewed through a number of different prisms.

However, be aware that some people do not talk about trafficking but about the rights of migrant workers¹. Some find it insidious to seek to carve out one group of people who cross the world, driven by poverty and despair, from others.

¹ See Anti-Slavery International's *The Migration-Trafficking Nexus: Combatting Trafficking through the protection of migrants' human rights*, 2003 available on www.antislavery.org.uk

A popular image of traffickers is as multi-national gangs, making millions of pounds of profit through an enormous trade. But be prepared to find also, for example in a case of domestic slavery, a much smaller, and less wealthy network of people involved in trafficking: one family exploiting another, for example.

It is generally assumed that the victim of trafficking, or his/her family are deceived into the trafficking situation. In some cases matters are not this simple (see above): the trafficked person may be aware of the basic agreement, but may find, for example, that earnings are eaten up in grossly inflated expenses. In other cases, while the person is deceived, the family members are not. In some of the patriarchal societies of countries such as Albania, family members have knowingly handed girls over to traffickers.

Asylum is one route by which trafficked people, and in particular, trafficked children, are brought into a country. For example, a child may be brought by the trafficker, or met at the airport, or may arrive alone, be treated as an unaccompanied minor, and then contacted post arrival, including after being taken into the care of social services.

While the victim's fear of the consequences of going to the authorities because one has no legal immigration status is one method of control used by traffickers (see above), it is not the only one. For this reason it cannot be assumed that a person is safe from traffickers once granted indefinite or limited leave to remain in the destination country.

C. Some realities of being trafficked

These do not necessarily all apply to everyone.

- Feeling trapped with no way out
- Working in an informal, often illicit sector
- Having limited knowledge of your rights and options
- Having limited personal freedom
- Being moved from place to place or traded between establishments
- Having experienced physical, sexual or psychological abuse or threats of abuse against yourself and your family
- Having no legal rights to stay in the country, no papers and being worried about removal
- Being in debt or under complex obligations to powerful people
- Being used to discrimination: ethnic, social and on the grounds of gender
- Adopting self-protective mechanisms including under-estimation of risk; demonstrating symptoms of extreme stress, including risky behaviours
- Feeling hostile to some elements of your situation, but not all
- Feeling hostile to some of your traffickers, but not all
- Not feeling trafficked

D. Some realities of life once out of the trafficked situation

These do not necessarily apply to everyone.

- Lots of things don't change from being trafficked
- Continuing to feel and/or being under continued surveillance of traffickers or people connected to them

- Traffickers thinking you still owe them money
- Fearing retribution
- Fearing removal from the country and/or detention as an illegal worker
- Feeling, and/or being socially stigmatised by what has happened and at risk of rejection by family and community
- Extreme stress reactions may set in now you no longer feel on guard all the time
- It may be humiliating to talk about past humiliation; frightening to talk of past fears
- Feeling thwarted in your efforts to build a life for yourself; you would have got through the trafficking, now you fear removal. Perhaps people at home will be angry
- Feeling you have let people down

E. How do I identify a person who has been trafficked and/or is being exploited?

All too often, the answer is “with great difficulty”². One question to ask is – is anyone controlling the actions of this person? However, in the case of children you can answer that one in the affirmative for most children who are with a parent or guardian, or relying on a friend.

Another question to ask is – is this person afraid of someone? However, for most refugees, and indeed many people under immigration control under immigration control, the answer to that question is yes, without their having any involvement in trafficking.

Think domestic violence and child protection, and all the factors that might lead you to ask whether a person is being abused. In particular, those familiar with organised crime against children, paedophile rings, people using gangs of children to steal or do difficult work, can draw on that experience. In addition, the following factors have been of assistance:

- Profiles of those being trafficked. Knowledge is scanty, but some trafficking source countries (and towns); traffickers; trafficking routes, contacts in the UK and destinations are known. See further reading at end. Knowledge of these may help you to identify children who may have been trafficked. In some cases there will be distinctive evidence: particular scarring, or juju charms. However, they are only a partial guide: trafficking methods change frequently and just because a person does not fit a known profile, does not mean that they have not been trafficked.
- Think outside stereotypical situations. It is not only women who are trafficked, and trafficking is not solely for the purposes of sexual exploitation.
- People who stick to a wildly improbable and clearly untrue story about their journey, have a reason for not telling the truth. One possible reason is that they have been trafficked.
- People who say they have just arrived, but appear to know English expressions or habits, suggesting to you that they may have been here longer, may have a reason for this. One possible reason is that they have been trafficked.

² See *What the professionals know: the trafficking of children into and through the UK for sexual purposes* C.Somerset, ECPAT UK, 2001 and *Cause for Concern? London Social Services and Child Trafficking* Carron Somerset ECPAT UK, March 2004, which found social workers lacking in information, training and resources: suspecting trafficking was taking place, but unable to get to the bottom of this or to respond.

- People whose documents have been confiscated (other than those whose documents are held by the authorities)
- In known cases of trafficking, people have entered countries with mobile phone numbers on them, or known to them, or social services have been contacted by third parties claiming to be legal representatives, shortly after arrival.

A concern that a person may have been trafficked is most likely to be confirmed by the person's disclosure. In other cases, disclosure will be your first hint that a person has been trafficked. Therefore the most important means of identifying people who have been trafficked, are actions taken to facilitate disclosure. A few key reminders of such actions:

- A relationship of trust;
- Clear information about policies on confidentiality;
- Confidentiality in practice;
- Opportunities to express concerns. This is particularly important when a person communicates through an interpreter. The interpreter may be involved in the trafficking, or his/her discretion may not be trusted, or the person may be afraid of humiliation etc., in disclosing his/her actions through an interpreter.

Just because a person is involved in prostitution, or working illegally, does not mean that s/he has been trafficked. Refugees and migrants may find it difficult to survive and employ risky survival strategies that leave them vulnerable to exploitation and abuse. Many similar considerations as apply to work with trafficked people apply in these cases, but they are not trafficking cases.

F. Where people have been identified as trafficked

F.1 Solicitor' duty of confidentiality

A solicitor may reveal confidential information to the extent that s/he believes that this is necessary to prevent the client or a third party committing a criminal act that the solicitor reasonably believes is likely to result in serious bodily harm or where the threat to a child's life or health, from abuse that they are suffering or inflicting or that a third party is suffering or inflicting, is sufficiently serious to justify a breach of confidentiality. These situations could arise where you acting for people who have been trafficked, or people who are involved in trafficking³. This approach is also reflected in the new Rule 44 – Confidentiality and Disclosure in the 2007 Solicitor's Code of Conduct, approved 25 January 2007 and now in force.

A client's consent to make a disclosure should be sought in all cases where this is practicable.

F.2 Reporting a crime

As a matter of good practice, clients should always be urged to consider reporting crimes of which they have been victims, and this is all the more the case when the criminals continue to act and to inflict harm on others (as to your own duties, see above).

³ In the UK see Rule 44 – Confidentiality and Disclosure in the 2007 Solicitor's Code of Conduct

F.3 Practicalities – including for high-risk situations.

- Child protection procedures apply in cases of children.
- Maintain strict confidentiality.
- This is a crime and you should bear in mind the possibility of an eventual prosecution. Records should be of a standard that could be produced to a court. Publicity may prejudice the chances of a successful conviction. The person may be asked to be a witness.

Not all trafficking cases will involve high risk situations, but a few may do so. The following are some steps it may be necessary to take in high risk situations. The list is not exhaustive and nor will every measure be applicable in every case.

- Lock all records, and try to keep them separate from a person's name, linked by a number, for example.
- Any notes on computers should be password protected.
- Do not use email communication.
- Phone calls should only take place where you cannot be overheard.
- The aim should always be to have the minimum possible number of people knowing about such a case; with each knowing what they need to, and no more.
- People do not leave unsafe situations where there is no viable alternative. Joint working, e.g. in the case of children with social services, with the consent of the person and clear confidentiality agreements, is likely to be necessary to identify a viable alternative for that child.
- Ad hoc rescue attempts can place people in danger and rarely offer access to lasting solutions. In situations of danger, social services may decide to take out Emergency Protection orders in cases of children and, very rarely, a police protection order may be used.

G. What protection is there for people who have been trafficked?

People who have been trafficked are identified when they are in different situations. Some may have claimed asylum, and perhaps been accommodated as people seeking asylum. Some are then identified when the trafficker attempts to contact them. Others may be picked up in a police/immigration raid on a brothel, factory or agricultural setting. In some cases, trafficked people are identified after their deaths.

G.1 Physical protection, and protection of physical and psychological integrity

Where trafficked people are discovered in the course of, for example, a raid on their place of exploitation, there is a risk that they will be returned before their situation has been fully examined. That they have been trafficked, rather than simply that they are working illegally, may not immediately be apparent. They may express a wish to return, without having through the consequences of this (see below).

The quality of protection available for a person who has been trafficked depends to a large extent on the knowledge and awareness of trafficking of the people involved in the

case: lawyers, where they are involved, social services, police, the immigration service and voluntary organisations.

G.2 Legal protection

A trafficked person may want nothing more than to go home. However, hasty returns, especially following a raid on a place of exploitation, may be full of risks. The person may be unaware of the extent to which people at home were complicit in the trafficking. There may be a risk that the person is being returned into the hands of the traffickers. Measures need to be put in place to ensure that a return is safe and sustainable. This should be done with all possible expedition. Where people have been willing to testify against traffickers there have been occasions where they have been brought back to the country to which they were trafficked to do this.

Without a reflection period where a person knows they are safe from the threat of removal, there will continue to be a reluctance to give evidence against traffickers. Hence provision for reflection periods in the Council of Europe Convention on action against Trafficking in Human Beings.

Some trafficked people will have an extant asylum claim, because making such a claim was part of the mechanism to get them to the destination country.

A few considerations:

G.2.i Is a trafficked person a refugee?

There is no one answer to this. The 1951 Refugee Convention protects people from risk of persecution *on return*. What is the risk if the person goes back to their country of origin?

The 1951 Refugee Convention protects only those persecuted for one of the Convention reasons: race, religion, nationality, political opinion or membership of a social group. “Membership of a social group” has been identified as a relevant reason in trafficking cases. UK (and other countries) case-law establishes that a social group must be identifiable without any reference to the persecution suffered. Thus “young women from Albania” looks like a plausible social group, “trafficked young women from Albania” does not (although some decisions look pretty muddled on this point.).

The interpretation of the provisions relating to social group in EC Council Directive 2004/83/EC of 29 April 2004 on *Minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection*, was considered by the UK House of Lords in *Secretary of State for the Home Department v K, Fornah v Secretary of State for the Home Department* [2006] UKHL 46. Article 10 (1)(d) of the Directive states:

(d) a group shall be considered to form a particular social group where in particular:

- (i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

(ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;”

Controversy has surrounded the use of the word “and”. The additional requirement that the group be perceived as different is not in line with the UNHCR *Guidelines on international protection*⁴ and UNHCR had criticised its inclusion in the Directive, saying that the two grounds should be alternative rather than cumulative⁵. The UK had been urged⁶ not to transpose the word “and” but to use “or”, which would also be in line with the leading UK cases on the definition of a particular social group, most notably the House of Lords own decision in *Shah and Islam* [1999] UKHL 20.

The House of Lords made short work of the point. Lord Bingham, giving the leading judgment, set out the text of Article 10(1)(d) and also made reference to the Directive’s expressly permitting member states to apply standards more favourable to the applicant than the standards laid down⁷. He said:

“Read literally, this provision is in no way inconsistent with the trend of international authority...If, however, this article were interpreted as meaning that a social group should only be recognised as a particular social group for the purposes of the Convention if it satisfies the criteria in both of sub-paragraphs (i) and (ii), then in my opinion it propounds a test more stringent than that laid down by international authority.”

He cited the UNHCR *Comments* on the Article⁸. And that is that. Not a line of text is wasted in debating whether or not, if the Directive is not in line with international authority, the national court is bound by the Directive. There is no agonising about whether or not the matter should be referred to the ECJ. The principles of purposive interpretation are applied to read the Directive in a manner consistent with international authority.

There was no dissent from this in the other (concurring) judgments and Lord Brown expressed his assent in terms:

*“...I entirely accept the definition of a particular social group contained in paragraph 11 of the UNHCR 2002 Guidelines as set out in para 15 of Lord Bingham’s speech. The EU Council Directive 2004/83/Ec...and any regulations brought into force under it will, I conclude, have to be interpreted consistently with this definition.”*⁹

Note that if “young women from Albania” is the group at risk, this covers both those who have been trafficked, and who have not. The risks of falling into the hands of traffickers on return may be relevant to a wider group of people than those who have

⁴ “Membership of a particular social group” within the context of Art. 1 A para. 2 of the Refugee Convention and/or its 1967 Protocol HCR/GIP/02/02 7 May 2002

⁵ UNHCR *Annotated Comments on the EC Council Directive...on Minimum Standards for the Qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted* January 2005

⁶ By ILPA, amongst others, see *ILPA Response to Home Office Consultation on the Implementation of the Refugee Definition Directive* August 2006. This also describes the 31 July 2006 meeting at the Home Office where ILPA and others argued against “and”.

⁷ Paragraph 16 of the Judgment. The reference to “standards more favourable” is a reference to Article 3 of the Directive, which qualifies this approach by a reference to those more favourable standards not being incompatible with the aims of the Directive.

⁸ *Op. cit.*, note 2.

⁹ Paragraph 118 of the judgment.

already been trafficked, although in many countries there is specific evidence on the risks of re-trafficking.

Some possibilities are:

- The trafficked person is a refugee for reasons wholly unconnected to the trafficking
- The trafficked person is a refugee because if returned s/he risks being trafficked again; that is bad enough (rape, slavery etc) to amount to persecution and a Convention reason can be identified for this persecution;
- The trafficked person is a refugee because if returned s/he will face treatment in his/her own country that will amount to persecution (e.g. social ostracism, with no other available assistance for survival) and a Convention reason can be identified for this treatment.

G.2.ii Is the trafficked person entitled to subsidiary protection?

Article 3 of the European Convention on Human Rights prohibits torture, inhuman or degrading treatment or punishment. Those at risk of such treatment *on return* can qualify for subsidiary protection under national law. There is no need for an equivalent of a “Convention reason” in these cases.

Article 4 of the European Convention on Human Rights prohibits any person being held in slavery or servitude, or required to perform forced or compulsory labour. It can be argued that if a trafficked person is at risk of such treatment *on return* humanitarian protection should be given. When one looks at the rationale in the *Soering v UK* case in the European Court of Human Rights the salient features of Article 3 as set out in paragraph 88 of the judgment also apply in the case of Article 4. The prohibition expressed by the article is absolute. There are no exceptions to the text of Article 4(1). No derogation from Article 4(1) is permitted (see Article 15).

G.2.iii Is the trafficked person entitled to a residence permit because s/he has been trafficked?

See discussion of residence permits above.

G.2.iv Is the trafficked person entitled to any other form of leave?

In some cases representatives have successfully argued for clients given leave on compassionate grounds to be given indefinite rather than limited leave. Medical and other evidence is likely to be required.

G.3 Compensation for people who have been trafficked.

This may be possible through schemes set up to ensure that victims receive payments from the proceeds of crime, or from more general criminal injuries compensation schemes, and indeed some form of compensation is an obligation under the Council of Europe Convention.

See the Council of Europe Convention on the Compensation of Victims of Violent Crimes 1983 and e.g. the Victims of Violent International Crime (Arrangements for Compensation) (European Communities) Regulations 2005 (SI 2005/3395, in force as of 1 July 2006), the UK provides access to compensation in cross-border situations in EU

Member States.

There may be particular problems where the victims of trafficking have been working in prostitution or cannabis farming as some schemes are not opened to those involved in criminal activities. This was the case in UK with the Criminal Injuries Compensation Scheme, but it has been challenged and overcome.

H. Expert evidence in trafficking cases

Expert evidence may be needed on the country situation: prevalence of trafficking, profile of those at risks, risks of re-trafficking, as well as details of the methods used by traffickers to corroborate aspects of the clients' account.

Expert medical evidence may also be needed on the effect of the treatment a person has suffered upon them.

When instructing an expert:

- Select your expert carefully – personal recommendations are best.
- Set a clear timescale for the report
- Be clear about fees from the outset
- Be clear about what you want the expert to do – phrase the specific questions you wish them to answer.
- Provide, with the client's consent, all relevant information that you have.
- Always ask experts to confirm the objectivity of their report in the report.
- Always ask experts to set out their qualifications and experience.
- In the case of medical reports, experts should be asked to detail diagnosis, the methodology used and prognosis, as well as to respond to the specific questions you have posed.
- The expert provides an objective opinion, but this does not mean that you cannot negotiate with them over the final text of their report. For example, if they have strayed into assessments of credibility then it is perfectly acceptable to request that they excise these passages.

I. Interest in trafficking: the media, parliament; campaigners and research

Trafficking is a fashionable interest. Organised crime; child victims; cross-border movements, sex or other violence, etc. Media, research and campaigning have important roles to play in raising awareness of trafficking. Coverage can alert parents and carers in destination countries to the risks that the person offering to take their child to Europe is a trafficker. It can publicise trafficking and tell us more about it, thus increasing the chances that trafficked children will be identified and that those involved will behave safely. However, for the individual trafficked person, who is subject to or seeking to recover from abuse, coverage brings with it increased risk and a different type of exploitation. Note the following:

- Identification of a person, or an organisation helping them may increase the chances of the trafficker identifying a person who has disclosed their experiences. This may put the person at risk from the trafficker: of being moved on out of the country or even of being killed.

It is difficult to conceive of a risk assessment that would determine that it was safe and ethical to facilitate media/campaigning contact with a person who has been trafficked and has not escaped from their trafficker. The World Health Organisation guidance (see Further References) outlines the ethical considerations militating against interviews, even for research purposes, when a woman is in this situation. Rarely, if ever, is one in a position to identify circumstances in which a trafficked person, other victims of the same trafficker or family members back home, are now safe from a trafficker. A person who is now safe from their trafficker is not the only person to consider. But even for that person, s/he has to live with a decision to see their story in print for the rest of their lives.

J. Further resources (by chronological order, in sections, key titles in **bold**)

J.1. Where do I start?

www.anti-slavery.org is an excellent starting point: you will find simple, clear explanations but also be able to access (especially through Trafficking News Monthly) specialist documents and texts and updates on work in national and international fora. You can also download from this website the *Annotated Guide to Internet-Based Counter-Trafficking Resources* developed by Regional Clearing Point (RCP) for Belgrade, Serbia and Montenegro established under the Stability Pact Task Force on trafficking in human beings.

www.interpol.int has a section on children and human trafficking, giving details of national legislation and international definitions, while www.osce.org details anti-trafficking work in Europe.

The ECPAT network has excellent material on child trafficking – access national groups through www.ecpat.net

J.2. United Nations and international

Key text: Protocol to Prevent Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime. (Palermo Protocol), 2000

See also

UN General Assembly A Resolution *Trafficking in Women and Girls* 11 October 2002 UN Convention on the Protection of Migrant Workers and their Families (*no UK ratification*)

UN High Commissioner for Human Rights *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, September 2002

UN Commission for Human Rights *Resolution Traffic in Women and Girls* 16 April 2002

ILO (International Labour Organisation) *Trafficking in Children: The problem and Responses worldwide*, P Boonpala & J Kane, 2001

Interpol – has a range of excellent materials on trafficking on its website

www.interpol.int/Public/THB/default.asp

UNICEF *Preliminary Research Findings of an Expert Workshop on Child Trafficking in Europe*. UNICEF Innocenti Research Centre, March 2005. *Covers 50+ countries*. UNICEF has campaigned on child trafficking – access materials from

www.unicef.org/protection/index_exploitation.html and national sites

WHO Ethical and Safety Recommendations for Interviewing Trafficked Women, World Health Organisation, London School of Hygiene and Tropical Medicine, Daphne Programme of the European Commission, 2003. *This publication deals with interviews of adult women, not children, but contains some useful recommendations on safe practice.*

J.3 Council of Europe and OSCE

Resolution CM/Res(2008)7 on rules on the election procedure of the members of the Group of Experts on Action against Trafficking in Human Beings (GRETA)

Council of Europe ***European Convention on Action Against Trafficking in Human Beings***. *opened for signature at the Council of Europe's Third Summit of Heads of State and Government in May 2005* Access via portal at.

http://www.coe.int/t/DG2/TRAFFICKING/campaign/default_en.asp

OSCE A variety of very useful materials on trafficking on their website – see <http://www.osce.org/activities/13029.html> - including *National Referral Mechanisms: joining efforts to protect the rights of trafficked persons: a Practical Handbook*, 2004

See also the important European Court of Human Rights Case *Siliadin v France*. 26 July 2005, ECtHR. Application No. 73316/01 (Case on domestic servitude)

J.4 European Union

Proposal for a Directive of the European Parliament and of the Council providing sanctions against employers of illegally staying third country nationals: Council document 9871/07, Com (2007) 249 final, SEC (2007) 604.

Council Framework Decision of 19 July 2002 on combating trafficking in human beings, 2002/629/JHA

Council Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities 2004/81/EC Into force 29 April 2004

Daphne Programme of the European Commission, with the London School of Hygiene & Tropical Medicine ***The health risks and consequences of Trafficking in Women and Adolescents: Findings from a European Study*** C. Zimmerman, K. Yun, I. Shvab, 2003

J.5 International and overseas, other

Anti-Slavery International *The Migration-Trafficking Nexus: Combatting Trafficking through the protection of migrants' human rights*, 2003

Anti-Slavery International *International Action Against Child Labour: Guide to monitoring and complaints procedures*, 2002

Anti-Slavery International Child Domestic Workers: A handbook for research and action, 1997

Global Alliance Against Traffic in Women GAATW *Human rights and trafficking in persons: a handbook*, 2001

Global Alliance Against Traffic in Women (GAATW) *Human rights in practice: a guide to assist trafficked women and children*, 1999.

GTZ (Deutsche Gesellschaft für Technische Zusammenarbeit) *Study on Trafficking in Women in East Africa* Elaine Pearson, December 2003 Ethiopia, Kenya, Tanzania, Uganda & Nigeria, see www.gtz.de

Guild, E. & S. Carrera, *An EU Framework on Sanctions against Employers of Irregular Immigrants Some Reflections on the Scope, Features & Added Value*, CEAPS Policy Brief, No. 140, 2007 available at www.libertysecurity.org/IMG

Annotated Guide to Internet-Based Counter-Trafficking Resources developed by Regional Clearing Point (RCP) for Belgrade, Serbia and Montenegro established under the Stability Pact Task Force on trafficking in human beings – can be downloaded from www.antislavery.org.uk

US Department of State *Trafficking in persons report*, (periodic) and *The annual Country Reports on Human Rights Practices of the US Department of State* all contain sections on trafficking.

J.4 UK

Acts of the UK parliament can be found on www.opsi.gov.uk or www.statutelaw.gov.uk together with explanatory notes and commencement orders. The site has an excellent search engine.

Parliamentary reports and debates can be searched for on www.parliament.uk. Again, the site has an excellent search engine. If looking for a particular document the Information Office in the Houses of Parliament, contactable through the site, will often be able to help.

An excellent summary of materials is provided in the Joint Committee on Human Rights Twenty-sixth Report of Session 2005-06, Human Trafficking, House of Lords Paper 245-I, and House of Commons Paper 1127-I13 October 2006, published with extensive evidence. The Home Affairs Committee of the UK parliament has conducted a subsequent enquiry.

J.4.i UK Government

Crown Prosecution service guidance on *Prosecution Of Defendants Charged With Immigration Offences Who Might Be Trafficked Victims* updated December 2007

Department for Children Schools and Families Working Together to Safeguard Children guidance ***Safeguarding Children Who May Have Been Trafficked*** December 2007.

UK Action Plan on Tackling Human Trafficking, Home Office and Scottish Executive, March 2007.

Paladin Child: A Partnership Study of Child Migration to the UK via Heathrow, Metropolitan Police et al, 2004.

Trafficking Home Office Toolkit, on www.crimereduction.org.uk *A useful introduction to trafficking, and sets out the responsibilities of various agencies.*

Stopping Traffic: Exploring the extent of, and response to, trafficking in women for sexual exploitation in the UK L Kelly & L Regan Home Office, Police Research Series, Paper 125, 2000

J.4.ii UK Other

COMPAS/TUC *Forced Labour and Migration in the UK*, Bridget Anderson and Ben Rogaly, February 2005. COMPAS is a centre for migration studies, based at Oxford University. Trade Unions in the UK have focused on the rights of migrant workers, including those exploited.

ECPAT UK ***Cause for Concern? London Social Services and Child Trafficking*** Carron Somerset, March 2004

ECPAT UK ***What the professionals know: the trafficking of children into and through the UK for sexual purposes*** C.Somerset,, 2001

ECPAT UK *Mission Report on West Africa* 2001

Kalayaan! works with victims domestic slavery in the UK.

National Missing Persons Helpline *The World of Human Trafficking: An unacceptable violation of human rights* Juliet Singer, 2002

J.5 Interviewing and practice

The following are worthy of special mention:

NSPCC *Grappling with Smoke*, Bernard Gallagher 1998. *Looks at organised crime against children, and responses.*

Achieving best evidence in criminal proceedings: Guidance for Vulnerable or Intimidated Witnesses, including children Home Office, Lord Chancellor's

Department, Crown Prosecution Service, Department of Health and Cynulliad Cenedlaethol Cymru.

Note also that many of those elaborating guidelines on work with trafficked people have found the literature on protection of survivors of domestic violence helpful: with its discussion of ambivalent relationships toward the perpetrator, lack of alternative to remaining in the abusive situation, etc.

ILPA

See also www.ilpa.org.uk , section on submissions, for ILPA submissions on trafficking including

Trafficking and National Referral Mechanisms: ILPA paper following the UK Border Agency workshop on Monday 12th May, May 2008

Home Affairs Committee Enquiry into Trafficking , February 2008

Tackling Human Trafficking - Consultation on Proposals for a UK Action Plan, April 2006

European Commission Communication: Fighting trafficking in human beings - an integrated approach and proposals for an action plan COM(2005) 514 final January 2008

Joint Committee on Human Rights into Human Trafficking, January 2006