

WELCOME TO ONE PUMP COURT

**TRAFFICKING LAW AND PRACTICE
FOR FAMILY PRACTITIONERS**

WILL BE STARTING SHORTLY

Thursday 11 March 2020

Chair: Parosha Chandran

Speakers: Harriet Short and Rachel Francis



THIS WEBINAR WILL PROVIDE A FOUNDATION IN THE PRINCIPLES OF TRAFFICKING AND MODERN SLAVERY LAW, WITH A FOCUS ON PRACTICAL APPLICATION FOR FAMILY PRACTITIONERS.

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TRAFFICKING LAW AND PRACTICE FOR FAMILY PRACTITIONERS

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CONTENT OF THE TRAINING

- Sources of law on trafficking (HS)
- Key definitions (HS)
- The National Referral Mechanism (RF)
- Entitlement to status, support and services (RF)
- Key indicators to look for in your cases (RF)
- Relevance to Family practitioners (RF)
- Information sharing (RF)
- Legal aid (RF)



KEY INSTRUMENTS

- European Convention on Human Rights (hereafter, '**the ECHR**')
- Council of Europe Convention on Action Against Trafficking in Human Beings 2005 (hereafter, '**ECAT**'). ECAT was signed on 3.3.08 and ratified on 17.12.08 by the United Kingdom (UK).
- Directive 2011/36/EU of the European Parliament and of the Council (hereafter, '**the Directive**') of 5.4.11 on preventing and combating trafficking in human beings and protecting its victims. The UK opted in to the Directive in July 2011; this opt in was accepted by the European Commission in October 2011. The Directive replaces the Council Framework Decision 2002/629/JHA (hereafter, '**the European Directive**').



Modern Slavery Act 2015

- It is designed to combat modern slavery in the UK and consolidates previous offences relating to trafficking and slavery.

Art.4 ECHR

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

Rantsev v Cyprus and Russia (2010) 51 EHRR 1

- Content and scope of Art.4:
 - System duty: implement measures to combat trafficking
 - Protection duty: take steps to protect (including support) victims
 - Investigation duty: investigate situations of potential trafficking

ECAT: summary of key provisions

- Art.4: Definition
- Art.10: Identification
- Art.12: Assistance to victims
- Art.15: Compensation and legal redress
- Art.16: Repatriation and return
- Art.26: Non-punishment

RELATION BETWEEN ECAT & ECHR

- *Rantsev v Cyprus and Russia* (Application no. 25965/04), the ECtHR held that where there had been a breach of the procedural obligations under ECAT, there had been a breach of Article 4 ECHR.

EM, R (on the application of) v The Secretary of State for the Home Department [2018] EWCA Civ 1070 (15 May 2018)

- *The Anti-Trafficking Convention*
- [18] The Anti-Trafficking Convention is the principal international measure designed to combat trafficking in human beings. It is concerned with the immediate treatment of those in respect of whom there are reasonable grounds to believe that they are victims of trafficking. It is also concerned with their medium-term treatment for immigration purposes if it is accepted administratively that they have been trafficked. It is also concerned with the criminalisation of behaviour associated with trafficking and the need to investigate and prosecute offences. See *Secretary of State for the Home Department v H* [2016] EWCA Civ 565 at [30].
- [19] The United Kingdom signed the Convention in March 2007 and ratified it on 17 December 2008. The Convention has not been incorporated into UK law, and consequently individuals cannot enforce its provisions directly against the Government, but insofar as the SSHD has adopted parts of the Convention as her own policy in guidance, she must follow that guidance unless there is good reason not to do so: *R (Lumba) v SSHD* [2012] 1 AC 245, Lord Dyson at [26-39]; *R (Galdikas) v SSHD* [2016] 1 WLR 4031, Sir Stephen Silber at [66]. [my emphasis]

EOG v Secretary of State for the Home Department (Rev 1) [2020] EWHC 3310 (Admin) (03 December 2020)

- Although ECAT has not been formally incorporated into our domestic law it has been held that a failure by the government to apply its principles will be justiciable (see, for example, *R (PK (Ghana)) v Home Secretary* [\[2018\] 1 WLR 3955](#) and *MS (Pakistan) v Secretary of State for the Home Department* [\[2020\] UKSC 9](#) at [20]). Further, the Modern Slavery Act 2015 states in its explanatory notes that the Act was passed against the backdrop of ECAT and other international instruments and that the guidance that the Secretary of State is obliged to issue under section 49 must take into account the international requirements set out in the Convention. The latest version of that guidance (version 1.02) was re-issued in August 2020 ("the Main Guidance").

EOG v Secretary of State for the Home Department (Rev 1) [2020] EWHC 3310 (Admin) (03 December 2020)

- Therefore, ECAT is as close to being incorporated in our domestic law, without actually being so, as it is possible to be.

KEY POLICIES

- Modern Slavery: statutory guidance for England and Wales (under s49 of the Modern Slavery Act 2015) and non-statutory guidance for Scotland and Northern Ireland.
- Last updated 4 January 2021
 - This guidance is for:
 - First Responder Organisations
 - organisations with a duty to notify the Home Office when encountering a potential victim of modern slavery
 - other organisations involved in the identification of potential victims of modern slavery
 - decision makers at the Single Competent Authority
 - organisations offering support to potential victims and victims of modern slavery



Modern Slavery Guidance

- Definitions and examples
- Identification and indicators
- Roles and responsibilities of the organisations
- Referral to the NRM
- Support

KEY POLICIES

- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/941844/di-for-victims-of-modern-slavery-v4.0ext.pdf
- This version was published on 8 December 2020
- HOWEVER: the previous (2018) policy was found unlawful in *EOG* (3 Dec 20) and the parts which were found to be unlawful are unchanged.

STATUS OF POLICIES

- In *CP (Vietnam), R (on the application of) v Secretary of State for the Home Department* [2018] EWHC 2122 (Admin), Karen Monaghan QC, sitting as a Deputy High Court Judge, held:
 - 39. *It is trite law that absent a special consideration, which must be explained, the Defendant will err as a matter of public law if she does not exercise her powers in accordance with her own policies (see, for example, R (Kambadzi v Secretary of State for the Home Department* [2011] 1 WLR 1299).



From the Modern Slavery Guidance

Key points:

- **Modern slavery encompasses human trafficking and slavery, servitude and forced or compulsory labour.**
- **Some people may not be victims of human trafficking but still victims of modern slavery if they have been subject to slavery, servitude and forced or compulsory labour.**
- **Human trafficking is not the same as human smuggling. There are common myths about modern slavery, such as misconceptions that UK nationals cannot be victims and that a person cannot be a victim if they reject offers of help.**

TRAFFICKING: DEFINITION

- Trafficking is defined at Article 4 of ECAT as follows:
- *a. "Trafficking in human beings" shall 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 payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. 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.*
- *b. The consent of a victim of "trafficking in human beings" to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where 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 human beings" even if this does not involve any of the means set forth in subparagraph (a) of this article;*
- *d. "Child" shall mean any person under eighteen years of age;*
- *.e "Victim" shall mean any natural person who is subject to trafficking in human beings as defined in this article.*
- (Emphasis added)



TRAFFICKING: DEFINITION

- The definition of trafficking has 3 constitutive elements:
 - Action
 - Means
 - Exploitation



The definition:

- An adult must establish all three constituent elements of the definition.
- For a child it is sufficient to establish that an act was undertaken for the purposes of exploitation, in order to meet the definition of trafficking (see Art 4(c) of ECAT above).
- Furthermore, a child can never consent to his / her own exploitation (see Art (b) and (c) of ECAT above).



1: Action

- Recruitment, transportation, transfer, harbouring or receipt of persons
- *Which includes an element of movement whether national or cross-border*
- It is not necessary for the victim to crossed any borders in order to make out 'transportation'. See Article 2 of ECAT, which provides as follows:
- *This Convention shall apply to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime.*



2: Means

- Which is achieved by a:
 - Threat of force, coercion, abduction, fraud, deception, abuse of power or vulnerability



2: Means

- Article 4(b) of ECAT specifically provides that the use of means as defined negates any presumed consent by the victim.
- The abuse of a position of vulnerability is a wide and far-reaching form of means. The 'Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings' sets out as follows:
 - *83. By abuse of a position of vulnerability is meant abuse of any **situation in which the person involved has no real and acceptable alternative to submitting to the abuse.** The vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim's administrative status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited. Persons abusing such a situation flagrantly infringe human rights and violate human dignity and integrity, which no one can validly renounce.*
 - (Emphasis added)

2: Means

- At §84 the Explanatory Note sets out the wide range of means contemplated:
 - *abduction of women for sexual exploitation, enticement of children for use in paedophile or prostitution rings, violence by pimps to keep prostitutes under their thumb, taking advantage of an adolescent's or adult's vulnerability, whether or not resulting from sexual assault, or abusing the economic insecurity or poverty of an adult hoping to better their own and their family's lot.*

Exploitation

- For the purposes of
- E.g. sexual exploitation, forced labour or domestic servitude, slavery, financial exploitation, removal of organs.
- There is no requirement for **the purpose** to have been achieved. Accordingly, if a person escapes or is rescued before exploitation has taken place, they may still be a victim of trafficking.
- For exploitation of children reference should be made to the UN Convention on the Rights of the Child and the optional protocol that provides a comprehensive framework for the protection of the rights of children.



THE NATIONAL REFERRAL MECHANISM (NRM)

- The identification mechanism utilised in the UK for potential victims of trafficking is the National Referral Mechanism (hereafter, '**the NRM**'). This was introduced as part of the government's implementation of ECAT:
 - ***Article 10 – Identification of the victims***
- The obligation to identify and investigate where there is a credible suspicion that a person is a victim of trafficking and / or modern slavery arises both under ECAT (see above) and under the ECHR (see Art 4 above).



SUMMARY OF THE NRM PROCESS

- In summary, the NRM provides the following process for potential victims of trafficking:
 - **REFERRAL**
 - A 'First Responder' to refer the potential victim to the 'Single Competent Authority' ('SCA').
 - 'First Responder': law enforcement (police, NCA, Gangmasters and Labour Abuse Authority) Border Force, UKVI and Immigration Enforcement, and, Local Authorities. Modern Slavery Guidance p.38-39:
 - *Local Authorities have a statutory duty to safeguard child victims under section 47 of the Children Act 1989, and Adults at Risk under section 42 of the Care Act 2015. Local Authorities have responsibility for identifying potential victims and making referrals into the NRM. The Ministry for Housing Communities and Local Government has also published guidance on providing homelessness services to victims of modern slavery.*
 - Non-public bodies: Barnardo's, BAWSO, Kalayaan, Medaille Trust, Migrant Help, New Pathways, NSPCC, Poppy Project, Refugee Council, The Salvation Army, Unseen UK.



SUMMARY OF THE NRM PROCESS (cont.)

REASONABLE GROUNDS DECISION

- The SCA to make an initial reasonable grounds decision within 5 working days of the NRM referral being received or ‘*as soon as possible*’ if the person is in detention.
 - *Very low threshold, “I suspect but I cannot prove.”*
- If the decision is positive than a ‘recovery and reflection’ period of at least 45 days is granted (see Article 13 of ECAT).
 - It can be extended if necessary. Article 12 of ECAT sets out the objectives to be achieved within this period. Importantly, Article 13(1) of ECAT makes clear that the period granted must be sufficient to enable the objectives to be achieved.
- If the decision is negative it can only be challenge by way of judicial review.



SUMMARY OF THE NRM (cont.)

CONCLUSIVE GROUNDS DECISION

- Following a reasonable grounds decision the SCA is required to investigate the claim and make a 'conclusive grounds' decision'. *Threshold, "balance of probabilities"*.
- If the conclusive grounds decision is positive the victim may require (and is entitled) to further support and assistance to aid recovery, advice on compensation or a residence permit.
- If the decision is negative, again, it can only be challenge by way of judicial review.



KEY RIGHTS AND ENTITLEMENTS

- ECAT sets out the rights to which a victim of trafficking is entitled. Key section: **Article 12 – Assistance to victims.**
- In summary, victims are entitled to:
 - *Appropriate and secure accommodation;*
 - *Psychological assistance;*
 - *Material assistance;*
 - *Access to emergency medical treatment;*
 - *Translation and interpretation services, when appropriate;*
 - *Counselling and legal information (in a language that they can understand);*
 - *Access to education for children.*
- The UK must take due account of the victim's safety and protection needs.
- All of these rights continue until the victim has left the UK and must be offered in all settings (prison, detention, care proceedings, or otherwise)



INDICATORS OF TRAFFICKING

- **Modern Slavery Guidance - Annex A** (pp.70-76):
 - Sexual Exploitation (sexual health indicators, maternity indicators)
 - Forced Labour
 - Domestic Servitude
 - Criminal Exploitation (relevant to County Lines cases)
 - Child-specific
 - Specific indicators of County Lines cases
 - Child sexual exploitation



RELEVANCE TO FAMILY PRACTITIONERS

- **Access to support, services, and status** for vulnerable clients, and their children
 - Information-sharing needed
- Facts that go to **threshold**
- **Risk** assessments
 - Trafficking
 - Signs of Safety (NAI cases)
- **Local Authority duties**
- International **duties**
- **Credibility**
- **Collaborative** working



INFORMATION-SHARING

- **Key legislation:**
 - Section 12 of the Administration of Justice Act 1960
 - Section 97 of the Children Act 1989
- **Key case law:**
 - *Kent County Council, Re B (A Child) v the Mother & Ors* [\[2004\] EWHC 411](#)
 - **§§82** which documents can and cannot be published.
- Also see: Family Procedure Rules Parts 12 and 14.
- **Why does this matter?**
 - Family documents needed to progress immigration or trafficking case.
 - NB: Home Office policy - order for disclosure needed.



LEGAL AID

- **Victims can receive legal aid:**
 - For advice on an application for leave to enter or remain (if positive Reasonable Grounds or Conclusive Grounds decision).
 - As defendants in criminal proceedings.
 - For an asylum claim (can apply at any point).
 - For advice for claims under employment law arising in connection with their exploitation.
 - For advice on a claim for damages arising as a result of their being a victim of modern slavery.

NOTE

- Exceptional Case Funding.



THANK YOU FOR
ATTENDING!

