

Trafficking in human beings and exploitation in
Germany – taking stock two years after
implementation of the EU Directive

*Symposium organized by KOK *

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***“Experiences from anti-trafficking proceedings,
especially with regards to the application of the non-
punishment provision”***

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General Introduction

- Often the first time a trafficked person may come to the attention of the authorities is as a result of having been arrested or detected in circumstances involving the commission of an unlawful activities such as a crime or administrative or other offence.
- The ordinary response of law enforcement might be to arrest, detain and charge such a person, for the prosecutor to prosecute, the defence lawyer to advise the person to plead guilty of the offence charged and for the judge to convict and sentence them, often to a term of imprisonment.
- Where a trafficking victim commits an offence that occurred as a direct result of their trafficking, and which they had no choice but to perform, EU Member States that have implemented the Directive 2011/36/EU are obliged to protect that person from prosecution and penalty.
- This is known as *“the non-punishment clause or provision”*.

The Criminalisation of a Victim of Trafficking -An early case example-

Ten years ago...

R v O [2008]

England and Wales Court of Criminal Appeal Case

A Nigerian girl, trafficked into the UK for sexual exploitation, was convicted by an English Court of the criminal offence of using a false identity document. She had used a fake ID card to board a coach in Dover, headed for France, in order to flee her trafficker in the UK. She explained what had happened to her but the police charged her & her lawyer advised her to plead guilty. The Judge accepted her account as mitigation and sentenced her to 8 months' imprisonment in an adult prison. No one cared or noticed that she was a trafficked child.

- Her conviction was overturned when new lawyers brought an appeal which relied on her right to a fair trial and on her right to protection and identification as a trafficking victim under the Council of Europe Convention on Action against Trafficking in Human Beings 2005, Art 25, which provided the first legally binding non-punishment provision.**

Expanding the list of the prohibited forms of Exploitation

EU Trafficking Directive, Article 2(3):

“Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.”

[Emphasis underlined]

The Recital to the EU Trafficking Directive provides that:

“...this broader concept of exploitation’ is to tackle recent developments in the phenomenon of human trafficking”.

Recital to Trafficking Directive:

“[11]...The expression ‘exploitation of criminal activities’ should be understood as the exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain...” [Emphasis underlined]

Comparing outcomes:
Trafficking for the purpose of criminal activities

- Vietnamese children trafficked into or within the UK for cannabis cultivation

- Before the UK's implementation of the EU Directive 2011/36/EU

• ***R v N***

[2012] EWCA Crim 189

(now pending before the ECtHR, as
A.N. v United Kingdom, App. No. 74603/12)

R v N [2012] EWCA Crim 189 : **Child trafficking for labour exploitation in cannabis production**

- In 2012 the Court of Appeal (Criminal Division) of England and Wales examined the case of N, a Vietnamese child who had entered the UK illegally. Shortly after his arrival he accepted a job and was taken to a disused commercial factory that had been converted in a cannabis farm, where he was told he must cook and clean. He was 16 and was told the plants were herbs. He slept on the floor on a sheet. He was not paid. The house was guarded, the door was bolted from the outside and the windows were bricked up. N was locked in with others. He later discovered the plants were cannabis and became frightened. On the only day he was allowed to leave the factory he telephoned his trafficker to say that he did not want to go back but was told him that ‘an investment’ had been made in him and they would find him and kill him if he ran away. He therefore agreed to be taken back to the cannabis farm.
- N was arrested on the day he turned 17, when the police were called to the premises by neighbours after burglars smashed down one of the factory’s walls to steal the cannabis crop that was valued at between £250,000-£500,000.
- No police investigation of those who had been responsible for the sophisticated set-up in the factory that was found by the police was undertaken.
- N was charged, prosecuted and convicted by a criminal court of cannabis production offences along with three other youths who were found there. He was sentenced to a youth detention and training order (DTO) for 18 months.
- In the meantime his case was submitted to the UK’s National Referral Mechanism (NRM) for formal trafficking identification.
- After he had completed his criminal sentence new lawyers brought an appeal against N’s convictions and sentence, relying on the non-punishment provision under Article 26 of the Council of Europe Trafficking Convention. The UK wasn’t a State Party to the EU Directive 2011/36/EU
- During this time N was conclusively recognised under the NRM by the Government’s Home Secretary as being a child victim of trafficking for the purposes of enforced criminal activity at the time of his arrest.
- However the Government’s Director of Public Prosecutions fought against N’s criminal appeal and the Court of Criminal Appeal also rejected N’s appeal against his conviction, refusing to give weight to the NRM decision and the expert evidence adduced in his case.
- In the Court’s view an important question was whether the circumstances in which N was working in the cannabis farm at the time of his arrest “represented a level of coercion and compulsion which should have led to the decision that he should not be prosecuted” (judgment, para. 90) and found it did not. This test was applied despite the fact that under the Art 4(c) Trafficking Convention definition no ‘means’ are required to establish a child is a victim, that the test of compulsion does not apply to a child and that a child cannot consent in law to being trafficked or exploited.
- The Court also decided that “[t]he language of Article 26 is directed at the sentencing decision rather than the decision to prosecute”.
- The Court decided to reduce N’s sentence from 18 months to 4 months but refused to quash his conviction.
- In November 2012 N lodged his application before the European Court of Human Rights, where it remains pending. N argues that the UK breached Art 4 ECHR by failing to offer him protection from being convicted and punished for a crime that as a child he was forced to commit by his traffickers and that Art 26 applies to decisions to prosecute as well as sentencing decisions. He also complains the UK failed to investigate his trafficking because no police investigation into his trafficking ever took place despite all the hallmarks of human trafficking were present.

[England and Wales Court of Appeals, **Case of R v N, R v LE**, EWCA Crim 189 (2012); <http://www.bailii.org/ew/cases/EWCA/Crim/2012/189.html>
Reported in the OSCE Recommendations on the Non-Punishment Provision 2013 at p 27]

Non Criminalisation Legal Clauses

- **Article 26** of the Trafficking Convention provides:
“Article 26 – Non-punishment provision
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** of the Trafficking Directive provides:
“Article 8 Non-prosecution or non-application of penalties to the victim
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 [i.e. human trafficking]” [Emphasis underlined]

- *Children trafficked for Cannabis cultivation, continued:*
- After the UK had implemented the Directive 2011/36/EU:
 - The landmark judgment in:
 - ***R v L and Others***
 - [2013] EWCA Crim 991

Why and when should the non-punishment principle apply?

Court of Appeal (Criminal Division) judgment in the landmark criminal appeal cases of *R v L and others* [2013] EWCA Crim 991

In the four linked cases in *L and others* the Court of Appeal of England and Wales quashed/overturned the criminal convictions of the Appellants [three of whom were Vietnamese former child victims of trafficking for the purposes of criminal activities (cannabis cultivation) and L, a Ugandan woman who had been a victim of sex trafficking and had been convicted of using a false passport given to her by her trafficker with the aim of causing L to commit a criminal offence] on the basis their crimes arose as a “manifestation of their exploitation or trafficking”

The Lord Justice of England and Wales held:

“13...The reasoning [for the non-prosecution of victims of trafficking] is not always spelled out, and perhaps we should do so now. The criminality, or putting it another way, the culpability, of any victim of trafficking may be significantly diminished, and in some cases effectively extinguished, not merely because of age (always a relevant factor in the case of a child defendant) but because no realistic alternative was available to the exploited victim but to comply with the dominant force of another individual, or group of individuals.” [Emphasis underlined]

Challenges to the Application of the Non-Punishment Provision & Barriers to Trafficked Persons enforcing their Rights

- No Identification of victims of THB – indicators of trafficking must be applied, potential victims must be identified and referred for identification & support
- Distinguishing (1) the *Perpetrator of TBH* from (2) *the victim of THB*, in crime scenes
- Investigating the human trafficking offence: the positive obligation on States under Art 4 ECHR (*Rantsev v Cyprus & Russia* App. No. 25965/04, judgment of 2010)
- State authorities incorrectly applying the legal definition of THB
- State authorities not distinguishing children victims of THB from adult victims
- Lack of clear policy or defined practices for State authorities on the application of the NPP

Special Features of the THB Definition that are of crucial importance in relation to the application of the NPP

The Irrelevance of consent in adult cases:

Trafficking Directive Convention, Article 2(4) provides:

“The consent of a victim of trafficking in human beings to the exploitation, whether intended or actual, shall be irrelevant where any of the means set forth in paragraph 1 have been used”.

Special cases: Child Trafficking – no means are ever required:

Article 2(5) provides:

“When the conduct referred to in paragraph 1 involves a child, it shall be a punishable offence of trafficking in human beings even if none of the means set forth in paragraph 1 has been used.”

Who is a child?

Article 2(6) provides:

” ‘Child’ shall mean any person below 18 years of age”.

Understanding what is ‘Abuse of a Position of Vulnerability’ (‘APOV’):

EU Directive 2011/36/EU (“The Trafficking Directive”) , Art 2 (2):

“2. A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved”

See also: ***United Nations Office on Drugs and Crime (UNODC) “Guidance Note on APOV”, October 2012:***

“2.3. The existence of vulnerability is best assessed on a case-by-case basis, taking into consideration the personal, situational or circumstantial situation of the alleged victim. Personal vulnerability for instance, may relate to a person’s physical or mental disability. Situational vulnerability may relate to a person being irregularly in a foreign country in which he or she is socially or linguistically isolated. Circumstantial vulnerability may relate to a person’s unemployment or economic destitution. Such vulnerabilities can be pre-existing and can also be created by the trafficker. Pre-existing vulnerability may relate (but not be limited) to poverty; mental or physical disability; youth or old age; gender; pregnancy; culture; language; belief; family situation or irregular status. Created vulnerability may relate (but not be limited) to social, cultural or linguistic isolation; irregular status; or dependency cultivated through drug addiction or a romantic or emotional attachment or through the use of cultural or religious rituals or practices. “ [Emphasis added]

EU Directive, Recital, para 14

- “Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities such as the use of false documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subject to trafficking.”
- “The aim of such protection is to safeguard the human rights of victims, to avoid further victimisation and to encourage them to act as witnesses in criminal proceedings against the perpetrators. This safeguard should not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in.”

What does “compelled” mean?

See:

- OSCE Paper: *“Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking”* April 2013:
- “[12]... [T]he non-punishment provision should be interpreted in light of the definition of trafficking in human beings, especially with regard to compulsion. A comprehensive understanding of compulsion includes all the means of trafficking: threat/ use of force, other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability. Being “compelled” to commit a crime thus includes the full array of factual circumstances in which victims of trafficking lose the possibility to act with free will; not only under the threat of physical violence or emotional abuse, but also... in the devastatingly prevalent scenarios wherein traffickers exploit victims by abuse of a position of vulnerability.”

Compelled continued:
Children's Cases

OSCE Recommendations, April 2013:

- “[42] ...in cases involving children, the need for a broad application of compulsion needs to be understood in light of the child’s vulnerability on account of their age alone, and of the irrelevance of consent in the legal definition of child trafficking...where a child is exploited and/or trafficked, and is used by a trafficker for an illegal purpose, or the child commits a criminal act related to their trafficked status, the application of the non-punishment provision is crucial, not only from a child safeguarding perspective but also to prevent the risk of secondary traumatization to the child at the hands of the State.”

Will mitigation of sentence suffice?

- “[76] It is not appropriate that the fact of having been trafficked should be treated only as a factor mitigating a punishment or penalty. Mere allowance for mitigation of the penalty would not amount to compliance with the obligation of non-punishment because it fails to take account of the victim’s true condition. The autonomy and free will of the victim is actually taken away and they cannot be held responsible for unlawful acts which they have committed, where it can be shown that these acts were actually committed without any choice owing to the control exerted by the traffickers. Where it is concluded that a person has been trafficked, their criminal file should be cleared so that that person has no criminal record with regard to offences committed in the course, or as a result, of having been trafficked.”

OSCE Policy and Legislative Recommendations 2013

Conclusion: Traffickers' Strategies

OSCE Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking”, April 2013.

“[1] ...It is often a deliberate strategy of the traffickers to expose victims to the risk of criminalization and to manipulate and exploit them for criminal activities. It is therefore not uncommon that victims of trafficking commit criminal offences or other violations of the law directly connected with, or arising out of, their trafficking situation. In these situations they often come to the attention of the authorities primarily as offenders and they may not be easily recognized as actual victims of a serious crime. Therefore, States should be fully aware of these developments in order to enable accurate victim identification and effective investigation of the trafficking crime, as well as to ensure effective protection of victims' rights, including non-punishment of victims for offences caused or directly linked with their being trafficked.”

Good practice case example: the County Lines case

- *Prosecution under the Modern Slavery Act 2015 of county line offending*
- This case concerns the operation of a drugs supply network known as a “County Line”.
- The structure of the conspiracy involves a drugs gang located in the London area moving their operation into a provincial area; in this case, Swansea in Wales. The defendants, both members of the “Dem Africans” gang, were involved in advertising the sale of Class A drugs (heroin and cocaine) to potential buyers in the Swansea area via mass mobile phone messaging from a dedicated phone line.
- The gang then set up a group of suppliers in the Swansea area in order to meet the demand. The victims had agreed to meet up for a job in London and agreed willingly to travel to Swansea before being forced into drugs smuggling and supply, having to conceal the drugs dangerously inside their bodies, and once they had arrived in Wales, they were under the daily control of one of the defendants. A female victim was imprisoned and kept like property, in terrible living conditions without heat or electricity. She was threatened if she left the house.
- County Lines are organised gangs who extend their drug dealing network from big cities to other areas
- They often target young people or vulnerable adults to deliver their drugs - often "grooming" them using gifts as well as using intimidation and violence
- The vulnerable adults targeted are mainly Class A drug addicts but also include the elderly, those with mental or physical health impairments, women sex workers and single mothers
- Gangs are also increasingly exploiting children - often boys aged 15-17 years old - to act as runners and conduct the day-to-day dealing
- Mobile phone downloads and cell site analysis was used by the police to track the whereabouts of the defendants and victims. The defendants were charged with, and pleaded guilty to, drug trafficking offences and offences of trafficking for exploitation for the purposes of using the victims to supply drugs and were sentenced to a total of 19 years imprisonment.
- Both were made the subject of Trafficking Prevention Orders for a period of 20 years each.
- <https://www.bbc.co.uk/news/uk-wales-south-west-wales-43751754>

Compensation arising from criminal convictions for Modern Slavery Offences

- Article 8 Modern Slavery Act 2015:
- A judge must give reasons why not to grant compensation to a victim following a criminal conviction of a trafficker (or other modern slavery offence) and the order of confiscation of the proceeds of crime.

Conclusion

It is critical for the Non-Punishment Provision to be applied lawfully and uniformly, in all cases of exploitation.

If it is not, the use of victims by traffickers for their criminal activities will continue to flourish... victims of trafficking will remain unprotected, as victims of continuing human rights abuses and at additional high risks of being persecuted by the State...

& the..

Traffickers

Go

Free

Thank you

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