ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION
PRESIDENT: IAN MACDONALD QC

ILPA BRIEFING
21st January 2009

BORDERS, CITIZENSHIP AND IMMIGRATION BILL
POLICING AND CRIME BILL

TRAFFICKING OF BABIES – AN URGENT NEED TO AMEND THE LEGISLATION

In 2004 it was argued that the definition of trafficking in what became section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act was inadequate to capture the trafficking of babies and very small children, e.g. for benefit fraud.

On 16 May Peace Sandberg was jailed for 26 months at Isleworth Crown Court after being found guilty of facilitating illegal entry into the UK. The illegal entry in question was that of a little baby believed to have been purchased in Nigeria. It appeared that the reason for the purchase of the baby was so that the purchaser qualified for priority housing in the UK.

Ms Sandberg was not prosecuted for trafficking because…it was concluded that the section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act was inadequate to capture the trafficking of babies and very small children, e.g. for benefit fraud. The police and Crown Prosecution Service achieved a conviction, but they had to do so with one hand tied behind their backs.

ILPA brought the matter to the attention of the Bill team working on the Draft (partial) Immigration and Citizenship Bill in July 2008, following a conference presentation on 16 July 2008 by Detective Inspector Gordon Valentine, who headed up the Paladin Child work on trafficking, making reference to the case. ILPA urged that the lacuna be addressed in that Bill. That Bill has now been superseded by the Borders, Immigration and Citizenship Bill. We are aware from our attendance at Home Office stakeholder meetings and other conferences that we are far from alone in emphasising the importance and urgency of this matter. There are now two bills: the Policing and Crime Bill and the Borders, Immigration and Citizenship Bill in which the matter could be addressed. There does seem to be ample opportunity to correct this mistake in this parliamentary session.

To do so would be to give effect to the government's averred intention. At Report stage in the House of Lords on the Asylum and Immigration (Treatment of Claimants, etc.) Act the Baroness Anelay of St Johns, the Conservative Party's front bench spokeswoman, raised the risk of a lacuna and was supported by many other peers. She said:

'I have tabled this probing amendment in response to a concern raised by the Refugee Children's Consortium in its Second Reading briefing … The Government's new paragraph 4(4)(d), which has not yet been debated, improves the clause, which still appears to allow some people who traffic children and families to escape prosecution. I am sure that no one would wish that. It is contrary to the consortium's wishes, certainly to my wishes, and—the consortium believes—the wishes of the Government…. The references to "request or inducement" in subsection (4)(d), and the attempt to produce an exhaustive list of positions of vulnerability, still appear to the consortium not to cover all forms of exploitation that involve an abuse of power or of a position of vulnerability. That is the wording adopted in the United Nations Palermo Protocol on trafficking.'[1]

The Baroness Scotland of Asthal, responding for the government, stated

'…I say to the noble Baroness, I hope by way of reassurance, that we think that mischief is caught by subsection (4)(d). In saying that, let me make it clear that the Government are absolutely committed to tackling human trafficking in all its forms. The noble Baroness is absolutely right to say that we are at one in that purpose… This is the sort of scenario at which the amendment is aimed, and we agree that the offences should cover this situation. However, we do not consider that an amendment is necessary to achieve this. …. Let me make it clear that a child will not have to know that they are being requested or induced to do something for an offence to be committed….We think that that there is not, therefore, a lacuna, which needs to be addressed or filled by this amendment…. . We believe that these activities would and should be caught. I am very conscious of the Pepper v Hart basis on which I say that…If we thought there was a lacuna, we would want it plugged. The draftsmen and others believe that the mischief which noble Lords have highlighted is covered. '[2]

Parliamentarians will be aware that the doctrine in *Pepper v Hart* [1993] AC 593 is that reference can be made to ministerial statements in *Hansard* if, and only if, legislation is ambiguous. If it is not ambiguous, *Pepper v Hart* avails one nothing.

Fulsome as the reassurance was, it did not satisfy those concerned, and the Baroness Anelay, with the same chorus of support, returned to the matter at Third Reading in the Lords. She said

'The concern can be simply stated. Is Clause 4 sufficiently broad to cover all cases involving children? … Does it cover situations where the child may not be conscious of what is happening to them?

I have always accepted that the Government do not intend that there should be any lacuna. We have been working as one on this matter. However, it appeared that the gap was as follows. Children may not be subject to treatment amounting to slavery or forced labour. They could therefore not satisfy the definition of exploitation in Clause 4(4)(a). Children may not be trafficked for their organs; thus they may not satisfy the definition in subsection 4(b). As for subsection 4(c), the threat of violence may not be made *to the child: the parent may be told that the*

---

[1] *Hansard* HL Report 6 April 2004, col 1642ff
[2] *Hansard* HL Report 6 April 2004 col 1645ff

child will be harmed. The parent may be asked to agree that the child become involved in an activity, and no one may ask the child anything at all. Thus it would appear that those who traffick in children may escape prosecution under this clause.

Following our debates on Report on 18 May, I understand that the Government have had further discussions behind the scenes with the Refugee Children's Consortium. I understand that the Minister may now be in a position to put on record the Government's further statement on their understanding of the term "inducement" in the context of this clause.

If the Minister is able to do so and can demonstrate that the clause makes it clear that children do not need to be conscious of what is happening to them, then I anticipate that I shall most certainly, and with great pleasure, be able to withdraw this amendment.[3]

The Lord Rooker responded for the government:

> *'We are satisfied that the ordinary meaning of the word "inducement" is such that a person may be induced to do something notwithstanding his not being fully aware of what he is being induced to do. We therefore consider that subsection (4)(d) as drafted can apply in cases involving very young children, who may not be fully aware of the situation, of their actions, and of what it is they are being encouraged to do. … We are satisfied that the ordinary meaning of the word "inducement" is such that a person may be induced to do something, notwithstanding the fact that that person is not fully aware of what it is he is being induced to do."*[4]

As the Peace Sandberg case demonstrates, the Baroness Scotland and the Lord Rooker were wrong and the Refugee Children's Consortium was right. The government's intention is clear, but amendment to the primary legislation is required to address it.

The text of the suggested amendment in 2004 was to insert into section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act

> "(e) he is subjected to an abuse of power, or
> (f) he is in a position of vulnerability"

For further information please get in touch with Alison Harvey, General Secretary, ILPA on 0207 251 8383, Alison.Harvey@ilpa.org.uk

[3] *Hansard*, HL Report 6 July 2004 cols 669-670
[4] *Hansard* HL Report 6 July 2004 cols 671ff