

Trafficking and National Referral Mechanisms: ILPA paper following the UK Border Agency workshop on Monday 12th May**I. Introduction**

Legal advice and representation are dealt with under Article 15 of the Council of Europe Convention on Action against Trafficking in Human Beings ('the Convention'), which 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.

...'

This is ILPA's primary interest in any National Referral Mechanism. It is inevitable that, as legal representatives, we are likely to be dealing with those cases where there is a challenge to decisions made by the competent authorities.

We see nothing in the drafts circulated for the meeting on 12 May on rights of representation before the decision-making body proposed, including whether legal aid for representation will be available, nor on how it would be possible to appeal against the decision of the body proposed. Nor, although this is perhaps outside the ambit of the powerpoint presentation that we were shown, do we see any information on how to ensure that people have access as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language they can understand.

If the decision of the proposed body is that a person has not been trafficked, one possible (and in many cases, for example those of a person who has entered in a clandestine manner and is detected in a raid on premises, likely) result of this will be that a person has no leave to enter or remain in the UK. The person may face removal from the UK and will have rights to challenge this, for example on asylum or human rights grounds.

How will records of the decision made by the body proposed be made available within the immigration jurisdiction, including to the appellant and representatives?

Whatever the composition of the decision-making body, it will not get every decision right. There will be challenges, whether to that decision (on appeal if provision is made for this or by judicial review if not) and then to any proposed removal in the immigration decision.

Evidence given before the body may also be relevant to criminal proceedings, whether a prosecution of the alleged trafficker, or of the alleged victim (e.g. document offences).

Procedural safeguards and records will be required.

Given that there will be challenges to the decision it is necessary that the impact assessments, including legal aid impact assessments, and assessments of effect on the courts, be conducted. ILPA met on 22 May 2008 with representatives of the Department for Business, Enterprise and Regulatory Reform, the Ministry of Justice, the Legal Services Commission, the UK Border Agency and the Home Office Better Regulation team to discuss the importance of the UK Border Agency carrying out impact assessments in an accurate and timely manner on all its proposals. These discussions will continue.

2. Competent authorities

To reiterate the points made at the meeting: Article 10 imposes obligations on States. ILPA reads 'competent authorities' in Article 10, as in a number of other 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 are simply those authorities who may come into contact with those who have been trafficked. For an example of this in the case of children see the Department for Children Schools and Families Working Together to Safeguard Children guidance *Safeguarding Children Who May Have Been Trafficked* December 2007.

Thus ILPA reads the reference to 'a competent authority' in Article 14 of the Convention as a reference to 'the competent authority in question'.

3. Reasonable grounds

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. 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.

Whether there are reasonable grounds for thinking that a person has been trafficked is not a hurdle set at a fixed height throughout the process – the person in the relevant competent authority is doing their best with the information they have been able to amass. At the initial stage, it is enough that trafficking cannot be ruled out. At a later stage, more will be required. During that period the State is under an obligation as per Article 10 of the Convention to protect the person. In many cases, firm identification will only be as a result of disclosure. Thus the obligation must be to create the conditions that best facilitate disclosure.

4. Initial identification

An official body comes into contact with, or has brought to their attention, a person who has, or appears to have, come from overseas. That person may or may not have a lawful immigration status in the UK – there is no incompatibility between being trafficked and

having lawful leave and it is far from the case that all trafficked persons will be persons whose own status here is unlawful.

At that point trafficking is one possible explanation for the person's situation. In some cases there will be disclosure. In others there may be no disclosure, there may be little to go on, but the person's situation cannot be fully explained and one hypothesis is that they have been trafficked.

At this point the authority must take steps to protect the position. The obligations under Article 15(1) kick in. And, e.g. if there is a breach of health and safety laws, or overcrowding rules, or an illegal entry, then the Crown Prosecution Service must be alerted to the need to take into account the possibility of trafficking, in accordance with its guidance (last updated December 2007), before deciding whether to prosecute. If there is a question about the lawfulness of the person's presence in the UK, the UK Border Agency must be alerted to the prohibition on removal, as per Article 13(1) of the Convention. Support agencies such as local authorities need to be aware of a risk of trafficking and provide support in a manner that facilitates disclosure. Helpful reference was made in the meeting to the Multi Agency Risk Assessment Conference (MARAC) model used in domestic violence cases.

5. Referral to and decision by the proposed body

Reference was made at the meeting to the proposal that matters be referred to the proposed body in five days. That does not provide the time to amass sufficient evidence where the question of whether a person has been trafficked is not clear cut: to obtain a disclosure from a person in fear or in the early days of recovery, or, where there has been disclosure, to obtain corroborative medical or other evidence, such as intelligence on trafficking routes.

If a case comes before the proposed body at a time when relevant evidence has not been obtained/collated, then what provision is there to give the person the benefit of the doubt? What provision is there for the proposed body to take time to collate the relevant evidence?

The rules of a fair procedure require not only that evidence is obtained, but that the other party is given a chance to challenge it. Thus, for example, if a person claims to have been trafficked by a particular route, and this is disputed, there must be time to collate evidence of this route, including expert opinion.

As set out above, the decision may have consequences for proposed criminal prosecutions and for the person's continued stay in the UK, including for any subsequent legal proceedings. It is vital that the decision is of the highest possible standard and properly evidenced. The body does not appear to be conceived of as any kind of court or tribunal. We do not understand why not, but in any event its proceedings will come under scrutiny in subsequent legal proceedings.

One possibility mooted is that not only competent authorities but the support authorities to which reference is made in Article 10 of the Convention be able to make referrals directly to the proposed body. Both competent authorities and support agencies may be reluctant to make a reference if there has been no time for evidence gathering and no time will be given at a subsequent stage in the procedure. Nowhere in the proposal has it been set out what, if

anything, will be the sanction for failure to refer to the proposed body or for delay in so referring.

As ILPA understands it, it is not proposed that the body to be set up hold case conferences but that it decide who is and who is not a person who has been trafficked and that a consequence of the decision on whether or not a person has been trafficked will be that the person does or does not benefit from a reflection period. It is not clear whether consideration has been given to providing a reflection period while the proposed body deliberates or collects further evidence.

The question of what decision the body is making needs more careful consideration. It appears that under the proposal there would be an interim period before a decision is made on whether a person has been trafficked, a period while the proposed body deliberates and a reflection period afterwards. The obligations on the competent authorities, as set out above, cover all three periods as do obligations to facilitate disclosure. Will a person have the same rights prior to being granted a reflection period as during that period? Anything else would appear to fail to give effect to the obligations set out in Article 10 of the Convention.

There is a significant task to be undertaken in determining what will be the consequences of any decision that a person has been trafficked, or that more evidence is needed to determine this. We mentioned at the meeting the example of the Detained Fast Track used for asylum cases. As per published guidance¹, in cases of people who may be survivors of torture, acceptance of a referral by the Medical Foundation for the Care of Victims of Torture is sufficient to lift a person out of the Detained Fast Track Procedure. By contrast, in cases of people who may have been trafficked, a referral to the UK Human Trafficking Centre or to the Poppy Project does not 'stop the clock', only their opinion subsequent to their intervention does not². The Detained Fast Track procedure is very fast: however quickly the UK Human Trafficking Centre or Poppy react, it is almost certain that the case will be done and dusted by the time their opinion is available.

6. Existing procedures

It is important to emphasise that the body must sit alongside, and cannot displace, existing procedures. Three important instances where this will be important are set out below.

Children

A particularly striking example is the child protection framework: there is no provision in law for child protection responsibilities or child protection law to be displaced just because a body is examining whether a person has been trafficked³. Let us suppose that it is concluded

¹ *Suitability for Detained Fast Track (DFT) and Oakington processes*, Home Office, Border and Immigration Agency Asylum Process Instruction 28 July 2007

² Letter of Asylum Aid and the Anti-Trafficking Legal Project to Border and Immigration Agency (now UK Border Agency), 3 August 2007, and response of Matthew Coats, then Strategic Director, Asylum, Border and Immigration Agency, 3 October 2007 stating 'In relation to your recommendation that upon receipt of a letter from the Poppy Project stating that they wish to assess a woman in the detained fast track, the case should be taken out of the fast track. I understand your concerns but I am afraid that it is not possible to release these individuals from the detained fast track until they have been interviewed assessed.'

³ See the Department for Children Schools and Families Working Together to Safeguard Children guidance *Safeguarding Children Who May Have Been Trafficked* December 2007 DCSF-00959-2007 with its detailed references to existing frameworks and obligations, including those under section 47 of the Children Act 1989

that a child has not been trafficked, but instead came to the UK and subsequently became involved in prostitution. The child is at risk and a child protection response is required, albeit that trafficking is not part of the picture.

Given that the child protection framework will operate in respect of such a child then it is necessary to consider what will happen in question of age disputes, if this might dictate which court or body examines the question of a risk of trafficking. ILPA has done considerable work on age disputes, see our 2007 publication *When is a child not a child? Asylum, age disputes and the process of age assessment*, age disputes are frequent, too frequent, in immigration cases, and this is a matter needing work.

Determination of asylum and humanitarian protection claims

Similarly, ILPA sees no provision in law for the proposed body to displace the jurisdiction of the Asylum and Immigration Tribunal: it is open to the tribunal to conclude that a person has been trafficked, and, where appropriate, accord them protection on that basis (for example recognising them as a refugee, or by granting them humanitarian protection) even where the proposed body found that they were not. Or indeed *vice versa* although, depending on its quality, the decision of the proposed body might be highly persuasive.

Criminal cases

Similarly in the criminal courts – it would be open to the criminal courts to convict a trafficker on the evidence of a person whom the proposed body had found not to be trafficked, although again, the decision of the proposed body, depending on its quality, might be highly persuasive.

These are examples only and similar points can be made for a whole host of rights and entitlements.

In summary, it is necessary to consider:

- How obligations under Article 15 of the Convention will be discharged;
- Impact assessments, including legal aid impact assessments and assessments on courts and tribunals, in accordance with better regulation procedures;
- How obligations under Article 10 of the Convention will be discharged, in particular steps to be taken to protect a person and to facilitate disclosure of any claim of having been trafficked from the moment that a person comes into contact with the competent authorities of the UK, both prior to a referral being made and during the period when the proposed body is deliberating: how the will UK discharge its obligations under the Convention;
- How legal representation will be provided to those appearing before the proposed body, including whether legal aid will be available for proceedings before the proposed body. If it is not, this is likely to vitiate rights under Article 15 because few people will be in a position to pay for legal representation;
- Other procedural protections for those referred to and appearing before the proposed body;
- Whether a five day period for referring to the proposed body is adequate;
- What will be done in cases where five days is insufficient to gather relevant evidence (in ILPA's view this will be most cases);
- What sanctions, if any, there will be for a delay in referring or a failure to refer;
- Who can make a referral to the proposed body and in what circumstances;

- How the proposed body will function, or indeed whether it has a role, in cases where a person who has been trafficked has lawful leave to be in the UK;
- The character of the decision to be taken by the proposed body and the protection of the individual concerned prior to a decision being taken;
- Record keeping of decisions taken by the proposed body, given that records will need to be made available in other proceedings;
- Evidence gathering and cases where the body has insufficient evidence to make a decision;
- Rights of appeal and challenge to decisions of the proposed body, including how effect will be given to rights under Article 15 in the event of a challenge;
- Consequences of a decision by the proposed body that a person has been trafficked, or that more evidence is required;
- How records of the decision made by the proposed body will be made available within the immigration jurisdiction, including to the appellant and representatives;
- The interaction of the proposed body with existing procedures including child protection procedures, the criminal courts and proceedings before the Asylum and Immigration Tribunal.

ILPA 29 May 2008