ILPA IMMIGRATION LAW PRACTITIONERS' ASSOCIATION

ILPA Briefing for the Modern Slavery Bill
House of Commons, Second Reading, 8 July 2014

The Immigration Law Practitioners' Association (ILPA) is a professional membership association. The majority of members are barristers, solicitors and advocates practising in all aspects of immigration, asylum and nationality law. Academics, non-governmental organisations and individuals with an interest in the law are also members. Established over 25 years ago, ILPA exists to promote and improve advice and representation in immigration, asylum and nationality law through an extensive programme of training and disseminating information and by providing evidence-based research and opinion. ILPA is represented on numerous government, including Home Office, and other consultative and advisory groups and has worked with parliamentarians of all parties since its inception.

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Our particular expertise is in representing and supporting non-EEA national trafficked persons before, during and after the process of identification by the UK authorities as well as in any related (or unrelated) immigration matters.

Trafficking is too often seen as an immigration matter, and not as a crime. Many of the problems with the current system of identification and support for trafficked and enslaved persons arise because of a conflation of the specific issues related to the crime of trafficking with immigration control. In our experience, a non-EEA national victim is treated as an immigration problem first, a victim second. This is an inappropriate conflation which must end. This Bill does little to address the structural problems inherent in the system the UK has created for dealing with trafficked persons and victims of slavery. Part 4 of the Bill (an addition to the draft Bill) would provide only minor improvements to the lot of victims. The addition of this new section on victim protection does, however, represent a step in the right direction, towards a recognition that it is only with enhanced victim protections can the prevalence of the crime be reduced.

Part 1: Offences

The drafting of criminal offences is outside our specific expertise and we do not comment on it, save that we consider that in section 1(4), in the definition of the offence of holding a person in slavery or servitude, the list of personal circumstances which should be taken into account should include disability[1]. This appears to be an omission which could be easily rectified.

The offences in sections 1 and 2 are used as the basis for the victim protection measures contained in Part 4 of the Bill (via the interpretation provisions in s.45). We consider that this is

[1] As is done, for example, in the list of the relevant characteristics listed in s. 39(2) of the Bill.

inappropriate. The (uncontroversial) international definitions[2] should be the basis for the definitions used in the victim-focussed parts of the Bill. Criminal offences are designed to operate within the rigours of the criminal law system. Victims should not be defined by way of a refraction of the definition of the offender, or indeed vice versa.

Part 4: Protection of Victims

We address the different sections contained within Part 4 in turn with the exception of s 40 which is outside our expertise.

An issue that cross-cuts Part 4 and the victim protection measures it establishes is the language chosen to define a victim of trafficking or slavery. The phrase used is "*reason to believe a person may be a victim of trafficking*": it is repeated in sections 41, 42, 43 and 44. This meaning of this phrase requires clarification. It should encompass any person who might be a victim of trafficking, akin to the threshold for a 'reasonable grounds' decision in the (albeit highly problematic) National Referral Mechanism which is 'I suspect but I cannot prove'. The threshold in this Bill should be set at the same level as, or below, the threshold used for a reasonable grounds decision so that the Bill's measures can protect victims without, or prior to, any "reasonable grounds" decision under the National Referral Mechanism. This is the only way to ensure that all prospective victims are protected from the earliest possible stage. It is vital to get this language right to avoid local authorities delaying to wait for or deferring to the National Referral Mechanism or otherwise before putting a given victim protection measure in place, by which time it may be too late.

Section 39: Defence for Slavery or Trafficking Victims compelled to commit an offence

Victims of trafficking and slavery who have been compelled to commit crimes in the course of their exploitation should not be prosecuted. This principle is embedded in the Trafficking Directive by Recital 14 and Article 8 and constitutes a binding obligation on the UK. The Crown Prosecution Service has internal guidance which specifies that such victims should not be prosecuted; however in ILPA's experience this guidance is not properly applied in practice, as noted in the Courts[3]. Time and again, victims of trafficking continue to be inappropriately prosecuted for crimes which are part and parcel of their exploitation. A statutory defence cannot be a replacement for proper administrative procedures within the Crown Prosecution Service, police, and other enforcement agencies.

The defence in its current form is unworkable and will not achieve what it purports to. As such, it would not provide sufficient protection for victims who are wrongfully prosecuted.

The defence has three elements, as per s. 39(1). A person must show that they were "compelled" to do the act (s. 39(1)(a)), that the compulsion is attributable to slavery or relevant exploitation (as

[2] As to which see Article 3 of the Palermo Protocol (2000), Article 4 of the Council of Europe Convention on Trafficking (2005), Article 2 of the EU Trafficking Directive (2011), and Article 4 of the European Convention on Human Rights.
[3] See L & Ors v The Children's Commissioner for England & Anor [2013] EWCA Crim 991 (21 June 2013) in which the convictions of four victims of trafficking who had been inappropriately prosecuted were quashed.

defined) (s.39(2)(b)), and that a reasonable person in the same situation as the person with their characteristics would have no realistic alternative but to do the act (s. 39(1)(c).

It is the last of these requirements which gives the most cause for concern. This part of the test is an attempt to import an objective element, that of the "reasonable person", but with a subjective twist – the reasonable person must have the same characteristics as the victim in question. This is an unusual approach, and appears highly problematic – we should be interested to learn whether Ministers can point to other examples in legislation. It would require a member of the jury to attempt to imagine what s/he would have done, if s/he had exactly the same personal circumstances and background as the person in question, and were placed in the same situation. The purported objective test is thus a hybrid: it is so subjective (by importing the need for the 'reasonable person' to be, in effect, the same person as the victim, and in the same situation) that it is unable to achieve the intended objectivity. A judge would have real difficulty in directing any jury as to the correct approach as a result. Moreover it is unnecessary; the jury will already have had to consider the personal circumstances and background of the person when considering the first part of the defence, i.e., whether the person chose to do the act, or whether they were compelled to do so. Personal characteristics and background are highly relevant to this analysis.

There is no similar objective element to be found in the Directive itself, which mandates simply that the UK provide protection from prosecution for victims. It is thus unclear why this objective element has been added to the defence. The subjective elements of the defence – (i) that the person has been compelled to commit the act; and (ii) that the compulsion is a "*direct consequence*" of their exploitation – are already difficult to prove. If the jury concludes that a person has done something because they were compelled to, and compelled as a direct result of their slavery or trafficking, why would they also need to go on to consider 39(1)(c)? Subsection 39(1)(c) adds nothing (but confusion); it should be dropped.

The effectiveness of the defence is further lessened in practice by the exclusion of a very large number of offences from its operation. These are listed in Schedule 3 to the Bill. Further, the provision grants the Secretary of State an open-ended power to add to this list, by s. 39(8). For the defence to apply at all, the person must have been "compelled" to commit the act, as a direct consequence of their slavery or exploitation. Why then is the gravity of the offence relevant at all? The person had no choice.

The explanatory notes state (at para. 146) that the defence will not apply to "*certain serious offences*". This is reiterated (at para. 153), where it is stated "*The defence will not apply to certain serious offences, mainly serious sexual or violence offences*…" However Schedule 3 includes a long list of offences, many of which are not "sexual", do not involve violence, and are not "serious" in the manner described in the explanatory notes. For example, the list of 134 different offences for which the defence is barred includes:

(a) Offences under s.1 and 2 of the Modern Slavery Act are themselves (ironically) excluded from the operation of the offence. If a victim has been exploited and "compelled" to

assist in the exploitation of others by the trafficker, then there is no reason why they should not avail of the defence;

(b) Assault with intent to resist arrest, s. 38 of the Offences Against the Person Act 1861 – even minor struggling in the course of a police raid or similar is sufficient for this offence to be made out. No actual injury is required;

(c) Burglary with intent to do unlawful damage to a building or anything in it.

Lastly, the defence is silent as to the standard of proof required for it to operate. The threshold should be specified in the legislation to avoid judges having to make this determination when interpreting the provision. We should suggest that, given this defence is closely akin to duress, it should have a similar burden of proof. The common law defence of duress operates as follows: the Defendant raises duress to the evidential standard, that is, showing that there is a prima facie basis for it. The burden then shifts to the Prosecution to demonstrate that it does not apply, which must be done to the standard of beyond reasonable doubt. If the Jury thinks that there may have been duress, then the person is entitled to be acquitted. We consider the defence for trafficked and exploited persons should operate in a similar fashion, and that this needs to be made clear on the face of the legislation, to avoid its being interpreted as a burden borne by the victim him or herself (as is likely given the way the provision is currently drafted).

We consider that the special position of children should be reflected in a separate defence. A child does not have to prove "compulsion" in the way that an adult must; any child is in a position of relative weakness and special vulnerability to exploitation, above and beyond that of adult victims. A separate defence is needed to reflect that child victims of trafficking and slavery should not be prosecuted for any crimes that they have committed as a consequence of their exploitation.

Section 41: Child trafficking advocates

The advocates described in this section fall far short of the legal guardians that ILPA and many others have been calling for during the course of the pre-legislative scrutiny on this Bill (and indeed for many years prior to this)[4]. We remain of the view that legal guardians are vital for trafficked children.

The provision for advocates in this Bill would be ineffective in ensuring that trafficked children are properly represented and supported. An advocate or guardian – whichever name is used – must hold legal responsibility in order to provide any real and tangible assistance to the child they represent. Where a separated child (i.e. a child without a guardian or parent in the UK) has an immigration case, there frequently will be no one with the legal competence to make the difficult decisions involved in litigation on behalf of the child. Until the case reaches the higher courts, where is the possibility of the official solicitor getting involved, lawyers can only take instructions

[4] See calls for guardianship in, e.g., Joint Committee on Human rights, Human Rights of unaccompanied migrant children and young people in the UK, First report of session 2013-2014 , HL Paper 9, HC 196. The Children's Society, Press Release, The Children's Society welcomes draft Modern Day Slavery Bill (13 December 2013), available at: www.childrenssociety.org.uk/news-views/press-release/childrens-society-welcomes-draft-modern-day-slavery-bill; ECPAT, Press Release, Protection needs of child victims overlooked in draft Modern Slavery Bill (13 December 2013), available at: www.ecpat.org.uk/media/protection-needs-child-victims- overlooked-draft-modern-slavery-bill-0

from the child client him/herself. This creates myriad problems, not least where the child's instructions may be in conflict with his or her best interests. For example, we have had experience of situations where the child client is convinced that the person responsible for exploiting him / her is in fact acting in their best interests. The only way to ensure that such a child's welfare is safeguarded is by the appointment of legal guardians with full authority who can provide legal representatives with clear instructions upon which to act.

This provision is a mere enabling provision. There is no proper description of the role these advocates would play, their ethical duties, their appointment, their supervision, or their training. The arrangement is thus inadequately outlined to be able to be considered and approved by Parliament. One starting point for exploring a model for such advocates is that of the Children's Guardian. These appointed officers are available to represent the child and his/her interests in family proceedings. The arrangements for such advocates are set down in both the Children Act 1989 sections 41 and 42 and in the Family Procedure Rules 2010 (Chapter 16).

The weakness of the provision is further underscored by the omission of any requirement to ensure that there is an advocate all – the word "may" instead of "must" is used, meaning that there would be no requirement for the Secretary of State to appoint advocates at all.

Advocates with the requisite authority to make legal decisions on behalf of the child are urgently required, to ensure that there is someone capable of instructing lawyers as to the child's best interests, as the debates[5] (and vote) in the House of Lords during the passage of the Immigration Act made clear[6]. We, as legal representatives, are seriously hampered in representing trafficked children in the absence of such a person currently.

Section 42: Guidance about identifying and supporting victims

This provision creates an obligation on the Secretary of State to issue guidance, including to public authorities on indicators of trafficking, support and assistance to possible victims and decision-making on whether persons are trafficked or victims of slavery. It is unclear which Secretary of State it is intended to take on the responsibility for this or whether more than one should do so. We consider that the Home Secretary should not be the Minister responsible for issuing such guidance; trafficking issues cut across the competence of several government departments and input from other departments would be vital. This clause could usefully be amplified during the passage of the Bill to include specific obligations.

[5] See HL Report, 7 Apr 2014: Column 1139 www.publications.parliament.uk/pa/ld201314/ldhansrd/text/140407-0001.htm#14040716000863 and HoL Ping Pong, 12 May 2014: Column 1654ff

[6] At House of Lords' Report on the Immigration Bill the government was defeated and an amendment inserted making provision for guardians for trafficked children. This was removed after parliament was promised an "enabling provision" in the Modern Slavery Bill, under which a scheme of guardians for trafficked children could be set up. HoC, 7 May 2014, Column 219.

Section 43: Presumption about age

This provision introduces a statutory presumption of age, whereby if a public authority (a) has reason to believe that a person may be a victim of trafficking, and (b) is not certain of their age but has reason to believe the person may be under 18, the public authority must assume they are a child until an age assessment is carried out by a local authority. This provision is an attempt to transpose the UK's international obligations, per Article 10(3) of the Trafficking Convention[7] and Recital 22 and Article 13(2) of the Trafficking Directive[8]. We consider that it does not adequately do so, but with changes could be rendered effective:

- the presumption should also be extended to child victims of slavery;
- it should be applied to all functions of all local authorities or public bodies (so as to avoid differences in treatment across different State functions);
- the presumption should remain in place until the final determination of the age dispute (including any litigation on the matter).

Any less than this fails to meet the UK's international obligations, which are imposed on the State as a whole, whereas the provision in its current form would only impact upon certain limited State functions.

Section 41(2), which appears to assume that an age assessment will be carried out by a local authority. There is no obligation to carry out such assessments and one should not be imposed in this legislation. If a child states that they are a certain age and there is no strong evidence to the contrary, this should be accepted instead of putting the child through a formal assessment, which may lead to a dispute, litigation and stress for the child[9].

Section 44: data collection

This section creates a duty for specified public authorities to notify the National Crime Agency if they have reason to believe a person may be a victim of trafficking. We support the provision for this data to be anonymised, to protect the privacy of the individuals concerned. Under-reporting is a feature of the crimes of trafficking and slavery and this provision may result in a better understanding of its prevalence in future.

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[7] Council of Europe Convention on Action against Trafficking in Human Beings (2005)
[8] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA
[9] See further ILPA's report, *When is a Child not a Child?* (2007) http://www.ilpa.org.uk/data/resources/13266/ILPA-Age-Dispute-Report.pdf