

# CRIMINAL RESPONSIBILITY OF TRAFFICKED PERSONS

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## Introduction

The victims of trafficking often commit crimes. Some of these are committed in the course of being trafficked, for example crossing borders illegally or having false identity papers. Other crimes are committed as a consequence of being trafficked: the activities which a victim is forced to do on arrival at the destination, such as picking pockets, running brothels or cultivating cannabis.

Should the victims of trafficking be criminally responsible for crimes? Should they be prosecuted? Should they be convicted? Should their sentences be reduced? Who needs to be protected: the trafficked person who is the victim of traffickers, or the general public who are the victims of the trafficked person? Should a trafficked person who murders be treated differently from a trafficked person who picks a pocket?

Many legal systems provide that a person who is compelled to commit a crime is not criminally liable. The precise details vary from country to country. For example, in English law the defence of duress is narrowly defined to apply to threats of death and bodily harm and is not available where the accused is charged with murder.<sup>1</sup> In Scottish law the defence of coercion was traditionally understood as applying to acting under immediate danger of death or serious bodily harm.<sup>2</sup> Are victims of trafficking sufficiently protected by existing general laws about crimes committed under compulsion, or should there be special laws specifically to protect trafficking victims?

These are the sorts of questions which have been asked increasingly in recent years as awareness has risen about trafficking and what a serious problem it is both internationally and nationally.<sup>3</sup>

## International Obligations

In 2000, the United Nations adopted the ‘Palermo protocol’, or to give it its full name, the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*.<sup>4</sup>

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<sup>1</sup> Karl Laird, ‘Evaluating the relationship between section 45 of the Modern Slavery Act 2015 and the defence of duress: an opportunity missed?’ (2016) *Criminal Law Review* 395; Susan Edwards ‘Coercion and Compulsion – Re-imagining Crimes and Defences’ (2016) *Criminal Law Review* 876.

<sup>2</sup> David Hume, *Commentaries on the Law of Scotland* (1797) i.53; *Thomson v HMA* 1983 JC 69.

<sup>3</sup> See for example Ryszard Wilson Piotrowicz and Liliana Sorrento, ‘Human Trafficking and the Emergence of the Non-Punishment Principle’ (2016) 16(4) *Human Rights Law Review* 669; Andreas Schloenhardt and Rebekkah Markey-Towler, ‘Non-Criminalisation of Victims of Trafficking in Persons – Principles, Promises and Perspectives’ (2016) 4(1) *Groningen Journal of International Law* 10, 21.

<sup>4</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 25 December 2003) 2237 UNTS 319 (Palermo Protocol).

The purposes of the Protocol were:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
- (c) To promote cooperation among States Parties in order to meet those objectives.<sup>5</sup>

The Palermo Protocol makes provision for various measures to give assistance to and protect the victims of trafficking.<sup>6</sup> But it has nothing specific to say about criminal responsibility of victims. That gap has been filled by the Council of Europe. The *Council of Europe Convention on Action against Trafficking in Human Beings* came into force in 2008.<sup>7</sup> Article 26 states:

#### 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.

The Council of Europe has also established GRETA - Group of Experts on Action against Trafficking in Human Beings – which publishes regular reports on whether and how individual countries are complying with Article 26. The question of criminal responsibility for victims of trafficking has also been addressed nationally by individual countries. In Europe, this has been done through the European Union by the Directive on preventing and combating trafficking in human beings and protecting its victims.<sup>8</sup> Recital 14 of the Directive states:

(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.<sup>9</sup>

Article 8 provides:

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<sup>5</sup> Palermo Protocol (n 4), Article 2

<sup>6</sup> *ibid*, Article 6

<sup>7</sup> Council of Europe Convention on Action against Trafficking in Human Beings (adopted 03 May 2005, entered into force 01 February 2008) CETS 197.

<sup>8</sup> Council Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] L101/1.

<sup>9</sup> *ibid*.

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 [ie being trafficked].<sup>10</sup>

That is almost identical to Article 26 of the Council of Europe convention.<sup>11</sup> Let's just pause and think for a moment about some of the features common to both the Council of Europe Convention and the Directive.

- in accordance with the basic principles of its legal system' (Convention)<sup>12</sup> 'In accordance with the basic principles of their legal systems' (Directive):<sup>13</sup>

That means that each country in can approach the issue differently. But it also means that internally the UK can approach the issue differently. In the UK there are three separate legal jurisdictions: England and Wales, Scotland and Northern Ireland. Each of these legal jurisdictions has different criminal law. Each of these jurisdictions has a different prosecution authority. Each of these legal jurisdictions has a different legislature<sup>14</sup> and each of these jurisdictions has implemented the Directive in a different way.

- 'provide for the possibility of not imposing penalties' (Convention)<sup>15</sup> 'take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties' (Directive):<sup>16</sup>

Neither the Convention nor the Directive is prescriptive about how to do this. Scotland has implemented the Directive differently from England and Wales and Northern Ireland. England and Wales and Northern Ireland have passed legislation altering the criminal law by creating a statutory defence. When a trafficking victim is prosecuted he or she can plead the defence at trial. Scotland has not created a statutory defence. Instead, instructions to prosecutors provide that the victim is not prosecuted in the first place.

- 'To the extent that they have been compelled to do so' (Convention)<sup>17</sup> 'which they have been compelled to commit as a direct consequence' (Directive):<sup>18</sup>

There is no obligation to absolve all trafficking victims from criminal responsibility. The mere fact of being a trafficking victim is not enough: victims are only absolved if they have acted under compulsion, and in

<sup>10</sup> Council Directive 2011/36/EU (n 8).

<sup>11</sup> Council of Europe Convention on Action against Trafficking in Human Beings (n 7).

<sup>12</sup> *ibid.*

<sup>13</sup> Council Directive 2011/36/EU (n 8).

<sup>14</sup> The Northern Ireland Assembly is currently suspended.

<sup>15</sup> Council of Europe Convention on Action against Trafficking in Human Beings (n 7).

<sup>16</sup> Council Directive 2011/36/EU (n 8).

<sup>17</sup> Council of Europe Convention on Action against Trafficking in Human Beings (n 7).

<sup>18</sup> Council Directive 2011/36/EU (n 8).

addition under the Directive the crime must be a direct consequence of having been trafficked. Lord Morrow put it very succinctly in a debate in the Northern Ireland Assembly:

‘there is a key distinction between providing victims of trafficking with immunity from prosecution; and providing victims of trafficking with immunity for crimes committed under the duress of their traffickers’.<sup>19</sup>

- Both the Convention and Directive are silent on the question of whether a trafficking victim who has committed a serious crime is to be treated differently from one whose crime is less serious.

So against that background I turn to look at how each of the UK jurisdictions has implemented the Directive and Convention.

## England and Wales

England and Wales has created a new statutory defence for victims of trafficking.

Section 45 of the *Modern Slavery Act 2015* states:

Defence for slavery or trafficking victims who commit an offence

(1) A person is not guilty of an offence if—

- (a) the person is aged 18 or over when the person does the act which constitutes the offence,
- (b) the person does that act because the person is compelled to do it,
- (c) the compulsion is attributable to slavery or to relevant exploitation, and
- (d) a reasonable person in the same situation as the person and having the person’s relevant characteristics would have no realistic alternative to doing that act.

(2) A person may be compelled to do something by another person or by the person’s circumstances.

(3) Compulsion is attributable to slavery or to relevant exploitation only if—

- (a) it is, or is part of, conduct which constitutes an offence under section 1 or conduct which constitutes relevant exploitation, or
- (b) it is a direct consequence of a person being, or having been, a victim of slavery or a victim of relevant exploitation.

(4) A person is not guilty of an offence if—

- (a) the person is under the age of 18 when the person does the act which constitutes the offence,
- (b) the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation, and

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<sup>19</sup> Northern Ireland Assembly *Official Report* 24 September 2013

(c) a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act.

(5) For the purposes of this section—

“relevant characteristics” means age, sex and any physical or mental illness or disability;

“relevant exploitation” is exploitation (within the meaning of section 3) that is attributable to the exploited person being, or having been, a victim of human trafficking.

(6) In this section references to an act include an omission.

(7) Subsections (1) and (4) do not apply to an offence listed in Schedule 4.

The defence does not apply to every crime committed by a trafficking victim. There is a long list of crimes listed in Schedule 4 to which the defence does not apply: over 120 crimes. These vary considerably in seriousness. At the most serious end of the range they include murder and terrorism. But at the less serious end of the range they include assaulting a person authorised to preserve goods that the sea has washed up on a beach. The victim has to provide sufficient evidence to allow the defence to be considered by the jury, and if he or she does so then the legal burden of proof falls on the prosecution to disprove the defence beyond reasonable doubt.<sup>20</sup>

The Crown Prosecution Service has issued guidelines to prosecutors on section 45. In making a decision as to whether or not to prosecute prosecutors have to follow four stages:

Stage 1: Is there a reason to believe the person is a victim of trafficking/slavery

Stage 2: is there clear evidence of duress [ie the existing common law defence]

Stage 3 is there clear evidence of a section 45 defence

Stage 4: Is it in the public interest to prosecute. At this stage, prosecutors are required to consider all the circumstances of the case, including the seriousness of the offence and any direct or indirect compulsion arising from their trafficking situation. Where the defence does not apply because the offence is too serious, the Crown Prosecution Service will still be able to decide not to prosecute if it would not be in the public interest to do so.<sup>21</sup>

The criminal responsibility of the victims of crime has been considered by the court in various cases, and the current position has been analysed and confirmed by the Court of Appeal in *R v Joseph*.<sup>22</sup> The Court of Appeal held<sup>23</sup> that English law complied with the Directive and Convention because of:

<sup>20</sup> *R v MK* [2018] EWCA Crim 667; [2018] 3 WLR 895.

<sup>21</sup> Crown Prosecution Service, 'Human Trafficking, Smuggling and Slavery' (Crown Prosecution Service, 10 December 2018) <<https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery>> accessed 28 August 2019.

<sup>22</sup> [2017] 1 Cr App R 33, [2017] 1 WLR 3153.



There is a natural tension which exists in any defence, between the potential for misuse and the need to protect victims. We believe a balance needs to be maintained, and the current legislation, case-law and the system of trial by jury achieves the right balance [in respect of the statutory defence for victims of modern slavery]. Protecting vulnerable individuals is the purpose of the Act, and the recent Court of Appeal judgement [ie *R v Joseph*] ensures this protection.<sup>31</sup>

We do not recommend any changes to Schedule 4 [ie offences for which the section 45 defence is not available]. A balance needs to be achieved between preventing the perpetrators of serious criminal acts from evading justice and protecting genuine victims [of modern slavery] from prosecution. An absolute defence for all offences is not appropriate. The current safeguards of CPS discretion and consideration of the public interest test before bringing charges act as an appropriate safety net even if an offence falls within Schedule 4.<sup>32</sup>

The Government is now considering the recommendations and will respond formally in due course. The recommendations are controversial. Some people point out the various psychological methods that traffickers use to control and dominate their victims: eg the fear of what the police will do to the victim, the fear of how a victim will survive in an unknown country with no money and no knowledge of the local culture or language.<sup>33</sup> They think that that the existing law of duress and section 45 give inadequate protection to victims who are controlled and compelled to commit crimes by such subtle methods.

On the other side of the debate, Britain's best-selling quality Sunday Newspaper thinks that victims who commit crimes should be treated as criminals. On 9 June 2019 the Sunday Times published an editorial with the headline:

‘CLOSE THE LOOPHOLE THAT LETS THE SLAVERS OFF SCOT FREE’.

The editorial went on to say:

‘The key loophole is that if those arrested for engaging in cannabis production claim to be under 18, they can escape prosecution, instead entering the local authority care system as victims of child trafficking’.<sup>34</sup>

The Government will in due course have to decide whether that that is indeed a loophole that requires changes to the legislation, or whether it is merely the implementation of the international obligations to protect victims of trafficking.

## Northern Ireland

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<sup>31</sup> Independent Review of the Modern Slavery Act 2015: Final Report (n 30), Recommendation 69.

<sup>32</sup> *ibid*, Recommendation 71.

<sup>33</sup> Sean Mennim ‘The Wrong Side of the Line? Trafficking Victims Compelled to Commit Offences and Prosecutorial Discretion: *R v EK (Kolesnikova)* [2018] EWCA Crim 2961’ (2019) 83(2) *The Journal of Criminal Law* 111; Bethany Simpson, ‘Modern Slavery and Prosecutorial Discretion: When Is It in the Public Interest to Prosecute Victims of Trafficking?: *R v GS* [2018] EWCA Crim 1824’ (2019) 83(1) *The Journal of Criminal Law* 14.

<sup>34</sup> ‘Close the loophole that lets the slavers off scot free’ (The Sunday Times, 09 June 2019)

<<https://www.thetimes.co.uk/article/close-the-loophole-that-lets-the-slavers-off-scot-free-q65dwqckl>> accessed 28 August 2019.

Like England and Wales, Northern Ireland has introduced a statutory defence. The wording of the defence is very similar to that in England. The Northern Irish statute provides that the defence does not apply to serious crimes, but instead of listing serious crimes individually as was done in the English statute, the Northern Irish statute provides that the defence does not apply where the person is over 21 and the crime carries a sentence of over 5 years.

The act is the *Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015* and section 22 provides:

Defence for slavery and trafficking victims in relation to certain offences

- (1) Subject to subsection (9), a person is not guilty of an offence if—
  - (a) the person is over the age of 18 when the act which constitutes the offence was done;
  - (b) the person does that act because the person is compelled to do that act,
  - (c) the compulsion is attributable to slavery or to relevant exploitation, and
  - (d) a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act.
- (2) “Relevant characteristics” means age, sex and any physical or mental illness or disability.
- (3) A person may be compelled to do something by another person or by the person's circumstances.
- (4) Compulsion is attributable to slavery or to relevant exploitation only if—
  - (a) it is, or is part of, conduct which constitutes an offence under section 1 or conduct which constitutes relevant exploitation, or
  - (b) it is a direct consequence of a person being, or having been, a victim of an offence under section 1 or a victim of relevant exploitation.
- (5) For the purposes of subsection (4) “relevant exploitation” is exploitation (within the meaning of section 3) that is attributable to the exploited person being, or having been, a victim of an offence under section 2.
- (6) Subject to subsection (9), a person is not guilty of an offence if—
  - (a) the person is a child at the time the act which constitutes the offence is done; and
  - (b) that act was done as a direct consequence of the person being, or having been, a victim of an offence under section 1 or of relevant exploitation.
- (7) For the purposes of subsection (6) “relevant exploitation” is exploitation which falls within one or more of subsections (2) to (5) of section 3 and is attributable to the exploited person being, or having been, a victim of an offence under section 2.



- (8) In this section references to an act include an omission.
- (9) This section does not apply to an offence which, in the case of a person over the age of 21, is punishable on indictment with imprisonment for life or for a term of at least 5 years, other than—
- (a) an offence under—
    - (i) section 4(2) of the Misuse of Drugs Act 1971 committed in respect of a Class B or Class C drug;
    - (ii) section 5(2) of that Act committed in respect of a Class B drug;
    - (iii) section 6(2) of that Act;
  - (b) an offence under section 26A(3)(a), (b), (d), (e), (f) or (g) of the Immigration Act 1971;
  - (c) an offence under section 1, 2, 3 or 4 of the Forgery and Counterfeiting Act 1981;
  - (d) an offence under section 106 of the Asylum and Immigration Act 1999;
  - (e) an offence under section 4 of the Identity Documents Act 2010.
- (10) The Department may by order amend subsection (9).

## Scotland

Scotland has taken a different approach.<sup>35</sup> There is no statutory defence. Instead it is left to the prosecutors to decide whether to prosecute. The Lord Advocate (the chief prosecutor) is obliged by statute to issue and publish instructions about the prosecution of a person who is or appears to be a victim of trafficking. The instructions were developed in parallel with the passage of the statute through Parliament, and there was extensive consultation on the contents of the Instructions with Members of the Scottish Parliament, anti-slavery NGOs, the police and others working with victims of trafficking.

The statute is the *Human Trafficking and Exploitation Scotland Act 2015*. It provides:

### PROTECTION OF VICTIMS

#### Prosecution of victims

#### 8 Lord Advocate's instructions on prosecution of victims of offences

- (1) The Lord Advocate must issue and publish instructions about the prosecution of a person who is, or appears to be, the victim of an offence—
- (a) of human trafficking,
  - (b) under section 4 [holding someone in slavery].
- (2) The instructions must in particular include factors to be taken into account or steps to be taken by the prosecutor when deciding whether to

<sup>35</sup> Sean Mennim and Nicola Wake, 'Appeal Court, High Court of Justiciary: Does Scotland Require a Defence Equivalent to s. 45 Modern Slavery Act 2015 (England and Wales)?' *Quyen Van Phan v Her Majesty's Advocate* [2018] HCJAC 7 (2018) 82(5) *The Journal of Criminal Law* 373.

prosecute a person in the circumstances mentioned in subsections (3) and (4).

(3) The circumstances are where—

(a) an adult does an act which constitutes an offence because the adult has been compelled to do so, and

(b) the compulsion appears to be directly attributable to the adult being a victim of an offence mentioned in subsection (1).

(4) The circumstances are where—

(a) a child does an act which constitutes an offence, and

(b) the act appears to be done as a consequence of the child being a victim of an offence mentioned in subsection (1).

(5) The Lord Advocate may from time to time revise the instructions.

(6) In this section “prosecutor” means Lord Advocate, Crown Counsel or procurator fiscal (and any person duly authorised to represent or act for them).

There are two main reasons why there is no statutory defence in Scotland.

1. The Scottish Government and the Lord Advocate took the view that a statutory defence would significantly restrict the protection for victims. As in England, a statutory defence would have exceptions. The Lord Advocate would have no discretion to decide not to prosecute where there was an exception. If Parliament expressed a will that there was to be no defence to these crimes, then it would not be appropriate for the prosecutors to defy the will of Parliament by deciding not to prosecute.<sup>36</sup>
2. The aim of the Scottish government was to ensure that victims of prosecution were protected at the earliest possible stage. If there was a statutory defence, then the burden would be on the victim to raise the defence, the defence would need to be lodged before the trial commenced and the defence would require to lead evidence which would satisfy an evidential threshold. Instead, the Scottish Act allows an early intelligence-led assessment to be made of a person’s victim status.<sup>37</sup> As one Independent MSP said: ‘we want to prevent people ending up in the dock in the first place’.<sup>38</sup>

The Lord Advocate has instructed prosecutors that there is a strong presumption not to prosecute victims of trafficking. His Instructions state:

7. If there is sufficient evidence that a child aged 17 or under has committed an

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<sup>36</sup> Scottish Parliamentary Corporate Body, ‘Official Report: Meeting of Parliament Tuesday 16 June 2015’ (The Scottish Parliament) <<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10018&mode=pdf>> accessed 28 August 2019.

<sup>37</sup> *ibid.*

<sup>38</sup> Scottish Parliamentary Corporate Body, ‘Official Report: Meeting of the Parliament Thursday 1 October 2015’ (The Scottish Parliament) <<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10123&mode=pdf>> accessed 28 August 2019.

offence and there is credible and reliable information to support the fact that the child;

(a) is a victim of human trafficking or exploitation and

(b) the offending took place in the course of or as a consequence of being the victim of human trafficking or exploitation,

then there is a strong presumption against prosecution of that child for that offence.

8. If there is sufficient evidence that a person aged 18 or over has committed an

offence and there is credible and reliable information to support the fact that the

person;

(a) is a victim of human trafficking or exploitation

(b) has been compelled to carry out the offence and

(c) the compulsion is directly attributable to being the victim of human trafficking or exploitation,

then there is a strong presumption against prosecution of that person for that offence.<sup>39</sup>

The Instructions recognise that an accused person will not always identify as a victim because for example of cultural differences, fear of authority, threats or trauma or other psychological factors. The prosecutor is required to make his or her own decision as to whether the person is a victim, taking into account the list of Indicators of Human Trafficking which has been produced by the United Nations Office on Drugs and Crime. That is a very detailed list that includes indicators of psychological control and compulsion. The prosecutor must instruct the police to investigate the United Nations indicators, and must obtain information from NGOs working with the accused.<sup>40</sup>

The decision as to whether to prosecute a victim has been centralised. The local prosecutor must make a report to the National Lead Prosecutor who makes the final decision.<sup>41</sup> This leads to consistency and good decision making as all final decisions are made by one person who has expertise in dealing with trafficking victims. This system of centralising the final decision has been welcomed by GRETA<sup>42</sup>

The lack of a statutory defence has been challenged in the Scottish courts in the case of *Phan v Her Majesty's Advocate*.<sup>43</sup> The accused, who was from Vietnam, was found in a flat which had been used for cannabis cultivation. The National Lead Prosecutor reviewed the facts and determined, applying the Instructions, that there was no reasonable basis for concluding that the accused was a trafficking victim and in any event the necessary element of compulsion was not present. The accused was charged with producing cannabis and

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<sup>39</sup> Lord Advocate's Instructions for Prosecutors when considering Prosecution of Victims of Human Trafficking and Exploitation' (Crown Office & Procurator Fiscal Service) <[https://www.copfs.gov.uk/images/Documents/Victims\\_and\\_Witnesses/HumanTrafficking/Lord%20Advocates%20Instructions%20for%20Prosecutors%20when%20considering%20Prosecution%20of%20Victims%20of%20Human%20Trafficking%20and%20Exploitation.pdf](https://www.copfs.gov.uk/images/Documents/Victims_and_Witnesses/HumanTrafficking/Lord%20Advocates%20Instructions%20for%20Prosecutors%20when%20considering%20Prosecution%20of%20Victims%20of%20Human%20Trafficking%20and%20Exploitation.pdf)> accessed 28 August 2019.

<sup>40</sup> Lord Advocate's Instructions (n 39), paras 12-14.

<sup>41</sup> *ibid*, para 25.

<sup>42</sup> Group of Experts on Action Against Trafficking in Human Beings, 'Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the United Kingdom (Greta(2016)21, Council of Europe 2016) <<https://rm.coe.int/16806abdc>> accessed 25 August 2019, para 290.

<sup>43</sup> [2018] HCJAC 7.

being concerned in the supply of cannabis, contrary to sections 4(2) (a) and 4(3)(b) of the Misuse of Drugs Act and theft of electricity.

The sheriff (ie local judge) made a reference to the High Court of Justiciary asking:

(1) Is the Human Trafficking and Exploitation (Scotland) Act 2015 incompatible with Directive 2011/36/EU in the absence of a statutory defence to the effect that the [accused] had been compelled to act as he did as a direct consequence of being subject to human trafficking?

(2) In the absence of a statutory defence ... is the continued prosecution of the [accused] incompatible with Directive 2011/36/EU, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6(1) of the European Convention on Human Rights?

(3) If the ... Act and the ... continuation of the ... proceedings are compatible with Directive 2011/36/EU, and if at trial the evidence broadly follows [certain] lines...would the court require to give additional directions over and beyond the standard directions so as to give effect to the Directive, and, if so, what additional directions should be given?"

To each of these questions the court answered no. The court noted that the Instructions created a strong presumption against the prosecution of persons who appear to be the victims of human trafficking. It found that the existence of the discretion not to prosecute met the requirement of Art 8 of the Directive that national authorities are to be 'entitled not to prosecute'.<sup>44</sup>

The court found that the situation in Scotland was not materially different from English law as set out in *R v Joseph*.<sup>45</sup>

- The Lord Advocate has a general discretion not to prosecute. A decision to prosecute could be reviewed by the court where an accused advanced a plea in bar of trial on the grounds of oppression.<sup>46</sup> There is no blanket immunity from prosecution for trafficking victims. Various factors require to be taken into account including the gravity of the offence.<sup>47</sup>
- The existing law common law defence of coercion would be available if an accused had been coerced into cultivating cannabis under threat of violence.<sup>48</sup>

The court took the opportunity to develop our understanding of the common law of coercion by emphasising that it was not essential for there to be immediate danger of death or serious bodily harm: the traditional case law was about armed robbery which 'was rather different from the more placid, but time consuming crime of cultivating

<sup>44</sup> *ibid*, [39]

<sup>45</sup> *ibid*.

<sup>46</sup> *ibid*, [40]

<sup>47</sup> *ibid*, [41]

<sup>48</sup> *ibid*, [42]

cannabis'.<sup>49</sup> It would be a matter of facts and circumstances whether a person was truly coerced to commit crime by virtue of genuinely anticipated and unavoidable violence.<sup>50</sup> So for example the defence could apply where a farmer is confined to a flat in which cannabis is grown and has reasonable grounds for believing that if he does not tend to the crop he will be seriously injured on the arrival of those controlling the operation.<sup>51</sup> This re-interpretation of the existing law will go a long way towards making the defence available to all trafficking victims.

- Circumstances which fall short of coercion could be taken into account in sentencing and could provide powerful mitigation and result in a significant reduction of sentence, even an absolute discharge.<sup>52</sup>

## Conclusion

The three legal jurisdictions in the United Kingdom have adopted different approaches to implementing the UK's international obligations in respect of criminal responsibility for crimes committed by victims of trafficking. However all three jurisdictions take the matter very seriously, and there is considerable cross-border cooperation between prosecutors and police forces from each jurisdiction.<sup>53</sup> In Scotland there is broad consensus that the system of prosecutorial discretion is working well, and there are no proposals for it to be changed.<sup>54</sup> We all await with interest the outcome of the Government Review in England and Wales.

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<sup>49</sup> *ibid*, [42]

<sup>50</sup> *ibid*.

<sup>51</sup> *ibid*, [44]

<sup>52</sup> *ibid*, [45]

<sup>53</sup> Scottish Government, 'Human Trafficking and Exploitation Strategy: first annual progress report' (Justice Directorate, 14 June 2018), 24.

<sup>54</sup> *ibid*, 38.