
Counsel's Expert Opinion on Clause 8 of Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill

1. I provide this Opinion in relation to Clause 8 of the Human Trafficking and Exploitation (Further Provisions and Support for Victims) Bill (“the Northern Ireland Human Trafficking Bill”).
2. I am a legal expert in the law relating to trafficking in human beings. I am also a practicing barrister at 1 Pump Court Chambers in London. A short CV is attached to this Opinion.
3. Clause 8 of the Northern Ireland Human Trafficking Bill provides:

“Non prosecution of victims of trafficking in human beings

8. Where the victim (A) has committed a criminal act as a direct consequence of the trafficking in human beings, no prosecution or imposition of penalties shall occur if—

(a) A has been compelled to commit the criminal act as a direct consequence of being subjected to—

(i) threats, the use of force or other forms of coercion,

(ii) abduction,

(iii) fraud,

(iv) deception,

(v) the abuse of power or of a position of vulnerability, or

(vi) the giving or receiving of payments or benefits to achieve the consent of a person having control over another person; or

(b) A was a child.”

4. Clause 8 of the Northern Ireland Bill has clearly been drafted with a focus on bringing Northern Ireland into compliance with the UK's obligations in relation to the EU Trafficking Directive Art 8.

5. Art 8 of the Trafficking Directive provides that:

“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.”

6. The use of the term “Member States shall”, when taken with the rest of the wording of Article 8, indicates that Article 8 requires Member States to provide a legally binding form of protection from prosecution, conviction and sentence for those victims of trafficking who satisfy the Art 8 test.

7. The phrase “Member States shall...take the necessary measures to *ensure that competent national authorities are entitled* not to prosecute or impose penalties” [Emphasis added] is to achieve harmonisation across the EU and is addressed to those Member States which have mandatory systems of prosecution (unlike the UK) as such States will need to introduce new processes to entitle their courts to prevent prosecutions from continuing which satisfy the Art 8 test.¹

¹ See OSCE “*Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking*”, April 2013. Para 72, for example, provides this: “In legal systems of mandatory prosecution there is an obligation to prosecute where the facts indicating the commission of an offence are present. It is of paramount importance that in such systems, legal measures are adopted (or amended) in order to prevent prosecution of victims. The failure to do so can have very serious ramifications for trafficked persons, who may on the face of it have committed an offence, although they were not acting with free will.” The OSCE Non-Punishment Recommendations publication provides vital guidance on the non-punishment principle and how it is to be implemented by States in accordance with legal obligations. Note: The OSCE is the world's largest regional security operation and comprises 57 Governments including countries in Europe and the USA. I was consulted by the OSCE to provide expert advice in the drafting of these recommendations. The publication is available here: <http://www.osce.org/cthb/101002>

8. It is critical to note that the Article 8 legal duty on the UK is not satisfied by a prosecutors' discretion as to whether or not to prosecute. The Article 8 duty falls on the Courts of a State as being the ultimate arbiter of justice and it is necessary therefore for there to be a legal framework which recognises this. Where there is not, there is a clear risk a country falling foul of its EU obligations under Art 8.

9. Furthermore, by enshrining the Art 8 duty in legislation, via Clause 8 of the Northern Ireland Human Trafficking Bill for example (which is perfectly put) this will directly impact on the minds of all those involved in the criminal justice system to consider whether a trafficked defendant is in fact culpable of the offences with which s/he is charged including for example the police, prosecutors, defence lawyers, court clerks, probation, social services and, importantly, the judges.

10. Such an approach as that proposed by Clause 8 must therefore be commended.

11. The recent landmark judgment of the Court of Appeal of England and Wales (Criminal Division) in *R v L and others* [2013] EWCA Crim 991 of 21st June 2013² is stark testament to the weaknesses of both prosecutorial discretion and the CPS's Legal Guidance when it comes to protecting trafficked victims' rights to non-punishment in cases involving highly vulnerable victims. The judgment concerned four human trafficking victims, three of whom were at the date of the commission of the relevant offences trafficked Vietnamese youths who had been convicted of cannabis cultivation offences and a fourth case involving a highly vulnerable female adult who had been a victim of extreme sex-trafficking and had been convicted of a false passport offence. In each of the cases there was relevant evidence of trafficking at the time of the prosecutions but the cases had each proceeded and had resulted in convictions and in sentences of imprisonment. On appeal each of the convictions was quashed by the Court of Criminal Appeal which applied the Art 8 duty and found that:

“13. ...when there is evidence that victims of trafficking have been involved in criminal activities...[t]he criminality, or putting it another way, the culpability, of any victim of trafficking may be significantly

² Available at: <http://www.bailii.org/ew/cases/EWCA/Crim/2013/991.html>

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.”

And

“16...The court protects the rights of a victim of trafficking by overseeing the decision of the prosecutor and refusing to countenance any prosecution which fails to acknowledge and address the victim's subservient situation, and the international obligations to which the United Kingdom is a party.”

12. In its judgment in quashing the convictions of the four victims of trafficking who satisfied the Art 8 test the Court found that original prosecutions ought not to have proceeded at all.

13. This judgment demonstrates the reality of where the Art 8 duty is often not satisfied by the existence of prosecutorial discretion. However, where a victim of trafficking commits a criminal offence which he or she *was compelled to commit as a direct consequence of being trafficked*, that person is entitled not to be prosecuted, convicted or otherwise punished for that criminal offence. In the case of trafficked children, their vulnerability on account of their age alone is to be appreciated and this necessitates a test that is absent any reference to compulsion (or any of the means by which an adult is trafficked), as Clause 8 reflects.

14. Only a person who satisfies that test can be protected under Article 8. It follows that Article 8, and indeed Clause 8 does not enable a blanket ban or any form of blanket immunity from prosecution for trafficked victims: those who are trafficked and yet commit crimes which are unconnected with their trafficking will be liable to face criminal charges and prosecution in the ordinary way.

15. The ethos behind the non-punishment provision is not only to protect the human rights of those who have been trafficked from being convicted or punished for crimes which but for their trafficked status they would not

have committed at all. Indeed, the measure is also aimed at enabling the successful prosecution of traffickers.

16. In all cases known to me thus far where the trafficked victim was charged, prosecuted and convicted for the crimes of trafficker (such as the cannabis cultivation cases) or crimes which otherwise arose directly from the trafficking (for example the 'run-away crimes' where a trafficked victim has used a false passport to try to escape the trafficker in the UK) there has been no police investigation whatsoever into their trafficking. Each time it has been the trafficked victim who was wrongly treated as an ordinary criminal offender and exposed to the criminal justice system as a defendant whilst their trafficker, who had committed extremely serious crimes against the trafficked victim and had conducted financial crimes against the State, for example by unlawfully controlling prostitution or via highly lucrative drug manufacture enterprises (having intended or used the trafficked victim for one of those exploitative purposes) got clean away.

17. The deliberate use by traffickers of vulnerable human victims with the aim of exploiting them for their personal profit is, when coupled with the State's prosecution and conviction of trafficked victims for their traffickers' crimes, a perfect escape strategy for human traffickers across the EU.

18. As the OSCE's Special Representative on combatting human trafficking has found:

"[4] The punishment of victims of trafficking for crimes directly related to their trafficking is a violation of their fundamental dignity. It constitutes a serious denial of reality and of justice. Such punishment blames victims for the crimes of their traffickers, for crimes that, but for their status as trafficked persons, they would not have perpetrated. The criminalization of trafficked victims maybe tantamount to persecution of victims by the State: not only does it fail to take into account the serious crimes committed against the victim by the traffickers, which should be investigated, it fails to recognize trafficked persons as victims and witnesses of those serious crimes and exacerbates their victimization and/or trauma by imposing on such persons State-imposed, unjust punishment. Instead of being treated as victims, they are treated as criminals. This practice

furthermore promotes trafficking in human beings by failing to confront the real offenders, by dissuading trafficked victims from giving evidence against their traffickers and by enabling traffickers to exert even further control over their victims by threatening exposure to punishment by the State. Traffickers will favour the punishment of victims as it simply plays into their hands: it ensures that their victims are the ones to bear the criminal penalties while the real offenders can operate with impunity.”

19. I commend Clause 8 for confronting the realities that requires the State to comply with Art 8 of the EU Trafficking Directive. The adoption of Clause 8 would enable not only the protection of victims of trafficking in Northern Ireland from unlawful conviction and punishment in breach of EU obligations where the criminal acts they are prosecuted for arose through compulsion and as a direct consequence of their trafficking. It would also enable a highly critical focus in Northern Ireland on catching the perpetrators of the very serious crimes of human trafficking and would undoubtedly enable an increase in successful trafficking investigations and prosecutions in its territory.

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Annex 1

Parosha Chandran Biography

Parosha Chandran is an award-winning human rights barrister who practices from 1 Pump Court Chambers in London. Called to the Bar of England and Wales in 1997, she is a recognised expert in the law relating to trafficking in human beings and has extensive experience in representing the interests of victims of trafficking. Many of her cases have led to significant legal developments in the protection of trafficked persons in the UK and beyond. Her precedent-setting trafficking cases have included the UK's leading asylum-recognition appeal case of *SB (Moldova)* [2008] UKAIT 00002; the landmark non-punishment criminal appeal in *R v O* [2008] EWCA Crim 2385; *M. v UK*, 16081/08 [2009] ECHR 1229 which was the first successful trafficking-related protection claim to be taken to the European Court of Human Rights against the UK; and *R v L and others* [2013] EWCA Crim 991, the recent successful criminal appeal cases concerning the application of the non-prosecution provision under the EU Trafficking Directive. Parosha contributed expert advice to the OSCE Special Representative on Combatting Human Trafficking's *Policy and Legislative Recommendations in relation to the Non-Punishment Provision*, April 2013, and participated as a member of the UNODC Group of Experts convened in 2012 to assist in determining the application, nature and scope of the legal term 'abuse of a position of vulnerability' ('APOV') in the human trafficking definition (UNODC Issue Paper and Guidance Note on APOV, October 2012). She is the General Editor of the textbook "*Human Trafficking Handbook: Recognising trafficking and modern-day slavery in the UK*" (LexisNexis, 2011). In 2008 she was awarded the Law Society's "Barrister of the Year" award for her pioneering legal work towards the protection of trafficked adults and children in the UK. Earlier this year she provided expert advice in relation to the Human Trafficking (Scotland) Bill 2013. She is currently instructed by Frank Field MP as an independent legal advisor in relation to the UK's proposals for a Modern Slavery Bill.