



International Organization for Migration (IOM)

The UN Migration Agency

IOM Submission to the Independent Anti-Slavery Commissioner's call for evidence on the use of the Modern Slavery Act's Section 45 statutory defence

Introduction

The International Organization for Migration, Country Office for the United Kingdom of Great Britain and Northern Ireland (IOM UK), is pleased to submit a response to the Independent Anti-Slavery Commissioner's (IASC) call for evidence on the use of the Modern Slavery Act's Section 45 statutory defence.

Established in 1951, IOM is the leading inter-governmental organisation in the field of migration and works closely with governmental, intergovernmental and non-governmental partners. IOM is committed to the principle that humane and orderly migration benefits migrants and society.

According to Article 1 (c) of the IOM Constitution, one of the purposes and functions of the Organization is *"to provide [...] advisory services on migration questions and other assistance as is in accord with the aims of the Organization"*. The IOM Strategy, adopted by the IOM Council in 2007, further provides that the Organization will focus on *inter alia* *"assisting States in the development and delivery of programmes, studies and technical expertise on combating migrant smuggling and trafficking in persons, in particular women and children, in a manner consistent with international law"* (Point 11 of the Strategy).

Since the mid-1990s, IOM and its partners have provided protection and assistance to close to 100,000 men, women and children, who were trafficked for sexual and labour exploitation, slavery or practices similar to slavery, servitude, or for organ removal.

In the UK IOM has been working on human trafficking and modern slavery issues since 2011, in line with the four pillars of: training and capacity building; improving victim support; international collaboration and private sector engagement.

Background

IOM UK's interest in the use of the Section 45 statutory defence in the Modern Slavery Act 2015, or lack thereof, emerged following a research project we carried out with the University of Bedfordshire between 2017 and 2019 which examined vulnerabilities to human trafficking from Albania, Viet Nam and Nigeria.¹ As part of the research study, interviews were carried out with 21 Vietnamese nationals who had been forcibly returned to Viet Nam from UK prisons or Immigration Removal Centres.

The interviewees provided detailed descriptions of the violent and exploitative journeys they had taken from Viet Nam to the UK, as well as in-depth descriptions of their lives here in the UK, which often involved engaging in criminal activities (such as cannabis cultivation), either because they were compelled to do so or lacked any realistic alternatives.

¹ Hynes et al. (2019) 'Between Two Fires': Understanding Vulnerabilities and the Support Needs of People from Albania, Viet Nam and Nigeria who have experienced Human Trafficking into the UK. Available at: https://unitedkingdom.iom.int/sites/default/files/publication/two_fires_footnotes_final2.pdf



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The interviewees also described how they had been detected by the authorities, prosecuted and convicted for the offences they had committed as a result of their exploitation, subsequently spending time in prison and being forcibly returned to Viet Nam. In each case it appeared as though the indicators of trafficking and exploitation had not been detected or acted upon by any of the professionals that the interviewees had come into contact with while in the UK. Instead, they had all been treated as criminals and immigration offenders.

This finding of the study raised IOM's concerns about whether Section 45 of the Modern Slavery Act was being appropriately exercised,² particularly in respect to Vietnamese nationals who are exploited in cannabis cultivation. In response to this finding IOM recommended further awareness raising on Section 45 among key actors in the criminal justice system, including the Crown Prosecution Service, solicitors and Judges to ensure the non-punishment of those who have been identified as victims of trafficking. In addition it was recommended that detection and screening processes in the UK's criminal justice and immigration enforcement systems be strengthened to ensure that potential victims of trafficking that have been engaged in forced criminality and/or have an unresolved immigration status are identified and can be protected, not punished.³

Alongside this research, IOM has been carrying out ad hoc monitoring of UK regional online news reports published between 2017 and 2020 about foreign nationals who received custodial sentences after being found guilty of the production of cannabis.

Through this monitoring, IOM has identified multiple cases in which defendants were explicitly described as a victim of human trafficking and modern slavery during their criminal trial for their involvement in the production of cannabis where Section 45 does not appear to have been applied. IOM has also identified news reports which provide details about the defendant's circumstances which led to their involvement in the production of cannabis that include significant indicators that the defendant was a potential victim of modern slavery. However, in these reports there is no reference to the defendants being recognised as potential victims. This includes cases where there are indicators that the defendant might have been re-trafficked or was previously encountered by police and other statutory agencies while in a potential trafficking situation.

IOM acknowledges the limitations of any analysis of news reports as they do not provide a comprehensive account of all aspects of the particular case. However, we feel they are helpful indications of concerning trends that warrant further exploration.

Evidence Submission

IOM UK's submission focuses specifically on the IASC's call for evidence about cases 'where, with the benefit of hindsight, the statutory defence should or could have been raised.' Through analysis of the online news reports, it provides evidence in response to concerns that victims are not being properly identified and are consequently punished for the crimes they committed as a result of their exploitation. The submission also highlights the need for actors within the criminal justice system to

² It is important to note that some of the criminal proceedings involving the individuals interviewed in the study may have taken place prior to the introduction of Section 45 or in the months thereafter. However, it is unlikely that this would have been the case for all the interviewees.

³ Hynes et al. (2019)

https://unitedkingdom.iom.int/sites/default/files/publication/two_fires_footnotes_final2.pdf p11



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be knowledgeable about appropriate and necessary responses to people who are recognised as having a defence against punishment due to their status as a victim of trafficking. This submission highlights four separate issues that emerged from the analysis of the online news reports:

- a) Convictions of people described as victims of ‘modern slavery’;
- b) Convictions of people with indicators of trafficking that do not appear to have been recognised as a victim of trafficking or modern slavery;
- c) Negative National Referral Mechanism (NRM) decisions as a barrier to a Section 45 defence, despite strong indicators of trafficking;
- d) Responding appropriately to a victim of trafficking following a decision not to convict.

A) Convictions of people described as victims of ‘modern slavery’:

Below are some examples of news reports on criminal trials where a person described as having been in a situation of ‘modern slavery’ was convicted for the offence of the production of cannabis.

In October 2016, a 38-year old Vietnamese man was given a 10-month custodial sentence following a trial at Shrewsbury Crown Court for his involvement in the production of cannabis. In sentencing, the judge described the defendant’s vulnerability:

You were unable to find work and there are in this country a number of gangs operating who recruit vulnerable newcomers from south East Asia, particularly Vietnam, to run their operations of cultivating cannabis.

The Judge continued, "You came here looking for a new life and you found yourself in something approaching modern slavery." The Judge also acknowledged that the defendant had not personally profited from their involvement in the production of cannabis, "I doubt there is much you earned from the exercise at all." The Judge recognised the circumstances that the defendant had been in but appears to have been more influenced by the significance of the crime the defendant had committed and the scale of the production of cannabis. The Judge explained:

...nevertheless this was a big operation and you must have known it was illegal and it is right to describe this, if not as industrial, then as capable of producing cannabis on a significant scale.⁴

In April 2017, two Vietnamese men aged 37 and 27 were each given a 12-month custodial sentence following a trial at Portsmouth Crown Court for their involvement in the production of cannabis. The news report explains that the prosecuting solicitor told the court ‘it was not uncommon for people from South Asia to be trafficked into the UK and put into ‘bonded labour’.’ The Recorder who presided over the trial told the defendants said “I’m satisfied that you were engaged in that by way of pressure, coercion and intimidation and you were clearly in a position whereby you’ve been exploited.” The Recorder concluded that the case was “an example of modern-day slavery.”⁵

In both cases above the explicit references to modern slavery and the descriptions of the circumstances of the defendants would suggest that a defence under Section 45 could have been raised. The media reports do not make reference to any questions about the defendant having a

⁴ <https://www.shropshirestar.com/news/crime/2016/10/12/vietnamese-man-faces-deportation-after-being-jailed-over-telford-cannabis-factory/>

⁵ <http://www.portsmouth.co.uk/news/crime/raid-uncovers-400-000-cannabis-factory-at-havant-home-tended-by-trafficking-victims-1-7903483>



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possible defence against their conviction. In the case below it appears that Section 45 was raised but not applied.

In May 2019, a 28-year old Albanian man was given a 12-month custodial sentence for his involvement in cannabis cultivation despite the defending solicitor explaining that he had “been referred to [the] Home Office department dealing with modern slavery.” The reports in the media of the comments made by the Judge for the case at Taunton Crown Court suggest that Section 45 was raised as an issue but it does not appear to have been applied. The Judge told the defendant:

*You may have a defence under the Modern Slavery Act but [defending solicitor] has made it clear you wish to return to Albania as soon as you can ... I am going to sentence you in a way that does that ... I hope you get back to Albania very quickly and please tell your friends in Albania that it is not very sensible to try and come to this country in the way that you did.*⁶

The case above also highlights another issue which can inhibit the appropriate use of a Section 45 defence: when a defendant is convicted while the competent authority is still making an NRM decision on whether he or she is indeed a victim of modern slavery. In this news report, the defendant’s solicitor explained that his client’s “case is in a long queue of other cases and we understand it could be months before there is any consideration of it.” This sequence of events in which sentencing takes place before an NRM decision is made is highly concerning as it will inevitably limit the proper application of a Section 45 defence.

B) Convictions of people with indicators of trafficking that do not appear to have been recognised as a victim of trafficking or modern slavery:

IOM has also identified news reports about foreign nationals convicted for the offence of the production of cannabis where indicators of trafficking are discussed without any specific reference to enquiries or concerns that the defendant was potentially a victim of trafficking. A small sample of examples are included below to illustrate the types of indicators and situations which appear to have gone unrecognised.

In July 2018, a 22-year old Vietnamese man received an 18-month custodial sentence following a trial at Newcastle Crown Court for their involvement in the production of cannabis. The court heard that the defendant had arrived into the UK in 2010 aged 14. The court was told that he had previously been arrested in 2012, aged 16, for the production of cannabis. It was noted that arrangements had been made for him to be accommodated by the local authority but for whatever reason he did not access the accommodation. The news report also explains that he was later arrested at a property in Newcastle in 2013 where cannabis was found. He was released under investigation but never charged. The prosecuting solicitor said that the defendant had not “availed himself of support” from the immigration authorities.⁷

This defendant’s history, particularly his arrival into the UK at the age of 14, his previous arrests for the production of cannabis in locations across the country and his disappearance from the care of the local authority as a child do not appear to have raised concerns about the possibility that the

⁶ <https://www.somersetlive.co.uk/news/somerset-news/illegal-immigrant-who-came-uk-2829215>

⁷ <https://www.chroniclive.co.uk/news/north-east-news/north-shields-cannabis-farm-court-14896997>



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defendant was a victim of trafficking who had remained under the control of traffickers for many years.

In August 2019, a 37-year old Vietnamese man received a 16-month custodial sentence for the production of cannabis following a trial at Stoke-on-Trent Crown Court.⁸ The news report describes both the 'act' and 'means' elements of trafficking in the circumstances of the defendant. It notes:

The 37-year-old told police he had been driven to the premises, locked inside and told to turn the electricity on and off.

The defendant's solicitor told the court that his client "was brought to Stoke-on-Trent and effectively locked in this industrial unit." The Judge in the case explicitly recognised the defendant's vulnerability and acknowledged that he had experienced exploitation: "When you enter the country illegally with no right to remain you make yourself vulnerable to exploitation."

In February 2020, a 27-year old Albanian man was given a 16-month custodial sentence following a trial at Durham Crown Court for his involvement in the production of cannabis. The defendant told the police that he had agreed to pay £10,000 to come to the UK. Upon arriving in the UK, he was transported to Spennymoor in County Durham via Manchester. He accepted that he had worked in the cannabis factory that had been set up in Spennymoor. However, it was explained that this was in order to pay off his debt of £10,000 because he feared "having holes drilled into his knee caps" by the gang who had arranged his travel and entry into the UK.⁹ Despite the details contained in the news report, there is no reference to any consideration of the possibility that the defendant was a potential victim of human trafficking.

C) Negative NRM decisions as a barrier to a Section 45 defence, despite strong indicators of trafficking:

The outcome of an NRM decision has a very significant impact on an individual's ability to exercise a defence under Section 45. Actors within the criminal justice system will be curtailed from applying the Section 45 defence for victims of trafficking who have incorrectly been given a negative NRM decision. The news reports describe court cases where actors within the criminal justice system have highlighted that the Home Office had decided that the defendant was not a victim of trafficking and therefore the defendant should not be protected from conviction. However, in some of these cases the descriptions of the circumstances of the person contained in the news reports suggest very strong indicators of trafficking.

The strongest example of this comes from the news report of a trial at Teesside Crown Court in January 2019 of a 15-year old Vietnamese boy who was sentenced to 15 months in a Young Offender Institute for his involvement in the production of cannabis in a cannabis factory in Hartlepool. The news report explains: 'Prosecutor Christopher Wood told a jury at Teesside Crown Court that the Home Office had not accepted the trafficking story and he was not the subject of modern-day slavery.' However, the news report also describes the vulnerable circumstances of the defendant. The Vietnamese boy was an orphan who entered the UK when he was 14. His uncle sent him to Russia, and he was then moved

⁸ <https://www.stokesentinel.co.uk/news/stoke-on-trent-news/police-smash-way-abandoned-woolworths-3202317>

⁹ <https://www.thenorthernecho.co.uk/news/18236963.police-interrupted-large-cannabis-grow-spennymoor-house/>



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to France and into the UK. Once in the UK, the news report says the boy was ‘contacted by men who transported him to the [cannabis factory] and threatened [him] with violence if he neglected the crop.’¹⁰ The competent authority guidance on identifying potential child victims of trafficking makes it clear that:

*any child who is recruited, transported, transferred, harboured or received for the purposes of exploitation, or is directed to perform labour is considered to be a potential victim of modern slavery, whether or not they have been forced or deceived. This is because it is not considered possible for children to give informed consent.*¹¹

A lawful negative decision in this case would require that the competent authority concluded that the 14-year old child had not been recruited by those responsible for the cannabis factory or transported to the cannabis factory in Hartlepool, and had looked after 168 cannabis plants with a value of £200,000 without being directed to by others.

D) Responding appropriately to a victim of trafficking following a decision not to convict:

The final case below highlights a unique case that was identified in the monitoring of the media report which suggests either a lack of knowledge about the support and assistance which should be available for victims of trafficking or the inaccessibility of such support for some victims of trafficking.

In December 2018, an 18-year old Vietnamese man who had been recognised as a victim of human trafficking by the Home Office was found not guilty of the production of cannabis at Liverpool Crown Court.¹² However, this did not lead to the man’s immediate release from prison. The Judge adjourned the case until the following day at the request of the defendant’s solicitor. The defendant’s solicitor wanted his client to be able to return to Altcourse Prison on remand for the night. The solicitor explained that his client intended to go to the immigration centre in Liverpool the next day to claim asylum, but he did not have anywhere to stay for the night.¹³ An appropriate response would have been a referral to the NRM and the immediate transfer of the defendant to the care of the Salvation Army or one of their sub-contractors, rather than back to prison. With only the news report as the source of evidence regarding this case, it is not possible to ascertain why such a response was not provided.

IOM UK is available to provide further details on the information provided in this document and for further discussions on this issue, including the roundtable in late April mentioned in the call for evidence.

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¹⁰ <https://www.gazettelive.co.uk/news/teesside-news/exploited-gardener-caught-home-100000-14621909>

¹¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/828756/victims-modern-slavery-competent-auth-v8.0.pdf

¹² The news report does not mention whether this decision was the result of the application of Section 45.

¹³ <https://www.wirralglobe.co.uk/news/17283700.vietnamese-teen-illegally-trafficked-to-cultivate-cannabis-walks-free/>