

Prosecuting Human Trafficking Offences

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1. Introduction

“Up to relatively recently, many observers would, if asked, have probably stated that slavery in the western world ended with the efforts of the reformer William Wilberforce, Lincoln's Emancipation Proclamation, and the subsequent defeat of the Confederate Forces at the close of the American Civil War in April, 1865.

But if these events marked finis to the institution of slavery in western society, other developments — such as the growth of air travel and immigration — over the last 30 years or so have contributed to the emergence of new forms of slavery and servitude, including the enormous social problem of human trafficking. This problem is largely hidden from view as the traffickers operate within the parameters of a criminal underworld whose methodology and ruthlessness is simply alien to the vast bulk of society”

Mr. Justice Gerard Hogan in *Win Lin v. Governor of Cloverhill* [2014] 1 I.R. 134.

Globalisation and the ease of movement of people has contributed enormously to human society. These developments coupled with the emergence and evolution of the internet and the current digital age means that as society we are more advanced and mobile than ever before. However, these developments have also been exploited by some, particularly in the context of the trafficking and movement of humans for criminal and unlawful purposes. Slavery in this regard, has not been consigned to the past. This paper will discuss the crime of human trafficking through an examination of the legal landscape in Ireland including different examples of human trafficking and an examination of the US Department of State's Trafficking in Persons Report 2021.

2. The Irish legal landscape:

2.1 Offences: -

The Criminal Law (Human Trafficking) Act 2008 (“the 2008 Act”) and the Criminal Law (Human Trafficking)(Amendment) Act 2013 govern the area of human trafficking in this jurisdiction.

The various forms of the offences of trafficking persons is set out in section 4 of the act, the offence of trafficking of children is set out in section 2. The offence of trafficking children for the purposes of sexual exploitation is amended by section 3 (amends the Child Trafficking and Pornography Act, 1998).

Section 4(1)

“A person (in this section referred to as the “trafficker”) who trafficks another person (in this section referred to as the “trafficked person”), other than a child or a person to whom subsection (3) applies, for the purposes of the exploitation of the trafficked person shall be guilty of an offence if, in or for the purpose of trafficking the trafficked person, the trafficker—

- (a) coerced, threatened, abducted or otherwise used force against the trafficked person,*
- (b) deceived or committed a fraud against the trafficked person,*
- (c) abused his or her authority or took advantage of the vulnerability of the trafficked person to such extent as to cause the trafficked person to have had no real and acceptable alternative but to submit to being trafficked,*
- (d) coerced, threatened or otherwise used force against any person in whose care or charge, or under whose control, the trafficked person was for the time being, in order to compel that person to permit the trafficker to traffick the trafficked person, or*
- (e) made any payment to, or conferred any right, interest or other benefit on, any person in whose care or charge, or under whose control, the trafficked person was for the time being, in exchange for that person permitting the trafficker to traffick the trafficked person.”*

Under Section 4(3) the trafficking of a mentally impaired person for the purposes of exploitation is an offence simpliciter:-

- (3) A person who trafficks a person who is mentally impaired for the purposes of the exploitation of the person shall be guilty of an offence*

The sale or purchase of a person is made an offence also:-

- (4) A person who—*
 - (a) sells another person, offers or exposes another person for sale or invites the making of an offer to purchase another person, or*
 - (b) purchases or makes an offer to purchase another person,*

Significantly the section provides that consent of the trafficked person shall not be a defence:-

(2) In proceedings for an offence under this section it shall not be a defence for the defendant to show that the person in respect of whom the offence was committed consented to the commission of any of the acts of which the offence consists

It is noteworthy that an attempt is made to deter the engagement of third parties with trafficked persons who are being sexually exploited by virtue of section 5 of the Criminal Law (Sexual Offences) Act 2017 amended the 2008 Act and section 5 provides:-

“A person who pays, gives, offers or promises to pay or give a person (including the trafficked person) money or any other form of remuneration or consideration for the purposes of the prostitution of a trafficked person shall be guilty of an offence.”

What is apparent from each offence is that the trafficking must be linked to exploitation of some form. The legislation sets out clear interpretation for the wording used in the creation of the offences:-

“trafficks” means, in relation to a person (including a child)—

(a) procures, recruits, transports or harbours the person, or

(i) transfers the person to,

(ii) places the person in the custody, care or charge, or under the control, of, or

(iii) otherwise delivers the person to,

another person,

(b) causes a person to enter or leave the State or to travel within the State,

(c) takes custody of a person or takes a person—

(i) into one’s care or charge, or

(ii) under one’s control,

or

(d) provides the person with accommodation or employment.

The Act sets out four categories of exploitation for the purpose of the legislation:

“ exploitation means –

(a) Labour exploitation

(b) Sexual exploitation

(c) Exploitation consisting of the removal of one or more of the organs of a person, or

(d) Exploitation consisting of forcing a person to engage in –

(i) An activity that constitutes an offence and that is engaged in for financial gain or that by implication is engaged in for financial gain, or

(ii) An activity in a place other than the State that –

- (I) *Constitutes an offence under the law of that place and would, if done in the State,, constitute an offence, and*
- (II) *Is engaged in for financial gain or that by implication is engaged in for financial gain”¹*

Labour exploitation:

Section 1 of the 2008 Act defines labour exploitation:-

‘labour exploitation’ means, in relation to a person (including a child)—

- (a) subjecting the person to forced labour (including forcing him or her to beg),*
- (b) forcing the person to render services to another person, or*
- (c) enslavement of the person or subjecting him or her to servitude or a similar condition or state;*

The definition of ‘beg’ is as per the Criminal Justice (Public Order) Act 2011.

Forced labour is defined in the 2008 Act as “*work or service which is exacted from a person under the menace of any penalty and for which the person has not offered himself or herself voluntarily*”² but excludes compulsory military service, normal civic obligations, work exacted as a consequence of a conviction, work exacted in the case of an emergency or a minor communal service.³

Chowdury & others v. Greece (judgment of ECtHR 30th March 2017) concerned labour exploitation. 42 Bangaldeshi nationals were recruited around Greece, without a Greek work permit, to work a strawberry farm in Manolada. Their employers failed to pay them and forced them to work in poor physical conditions supervised by armed guards. The ECtHR found a violation of Article 4§2 of the Convention (the prohibition of forced labour), with the Court finding the situation to be one of human trafficking and forced labour. The Court held the State had failed in its obligations to prevent the situation, to protect the victims and to effectively investigate the offences, and punish those responsible.

More recently in the UK, three men were convicted in Coventry Crown Court of various trafficking offences in respect of the transportation and trafficking of Polish victims to the UK on the promise of employment, but who became enslaved.⁴

¹ Section 1 Criminal Law (Human Trafficking) Act 2008 as substituted by the Criminal Law (Human Trafficking) (Amendment) Act 2013, s.1(a)

² Section 1 Criminal Law (Human Trafficking) Act 2008 as inserted by s.1(c) Criminal Law (Human Trafficking) (Amendment) Act 2013

³ *Ibid.*

⁴ News Report available at: <https://metro.co.uk/2021/06/26/uks-biggest-human-trafficking-gang-forced-hundreds-to-work-for-next-to-nothing-14832966/>

Sexual exploitation

Section 1 of the 2008 Act defines sexual exploitation:-

“sexual exploitation” means, in relation to a person—

- (a) the production of pornography depicting the person either alone or with others,*
- (b) causing the person to engage in sexual activity for the purpose of the production of pornography,*
- (c) the prostitution of the person,*
- (d) the commission of an offence specified in the Schedule to the Act of 2001 against the person; causing another person to commit such an offence against the person; or causing the person to commit such an offence against another person, or*
- (e) otherwise causing the person to engage or participate in any sexual, indecent or obscene act;*

L.E. v. Greece (Application no. 71545/12) 21 January 2016, a judgment of the European Court of Human Rights concerned a Nigerian national forced into prostitution in Greece. The applicant was officially recognised as a victim of human trafficking for the purpose of sexual exploitation, but had to wait over nine months before being granted such status. The ECtHR found a violation of Article 5 (prohibition on forced labour) in respect of the effectiveness of the inquiry and investigation, noting delays and failings in respect of Greece’s procedural obligations. The Court also found violations of Article 6§1 and 13.

R v Iyamu [2018] EWCA Crim 2166 a London-based nurse was convicted of five offences of arranging or facilitating travel of another person with a view to exploitation under the Modern Slavery Act 2015. The offences had occurred between May 2016 and August 2017. The 5 victims travelled from Benin City in Nigeria having been in contact with the accused about travelling to Europe to work there. With the exception of one victim on their arrival in Europe they were made aware they were to work as prostitutes; none had worked as prostitutes before. Prior to commencing their travels the accused made the victims attend the address of a priest who practised juju and they were forced to take an oath and engage in various forms of ceremonies and rituals. On arrival in Europe they were forced to work as prostitutes to pay their debt for being brought to Europe with the threat of the juju curse held over them. She was sentenced to 14 years in prison. During the 10-week trial, prosecutors set out that she is the "ringleader of a network trafficking vulnerable women." The Solicitor General sought leave to appeal on the grounds of undue leniency. The sentence was increased to 18 years.

Organ Exploitation

This type of exploitation consists of the removal of one or more of a person's organs. This type of exploitation is not elaborated on in the 2008 Act. Traffickers seek to profit from human organs and the transplantation of same.

Children

As noted above section 2 of the 2008 Act creates separate offences in respect of the trafficking of children: trafficking a child for the purpose of exploitation⁵, selling, offering or exposing a child for sale, or inviting the making of an offer to purchase a child.⁶ Causing these offences to be committed⁷ as well as attempts to commit an offence are also criminalised by the legislation.⁸ The maximum sentence for an offence under section 2 of the 2008 is one of life imprisonment.

2.2 Detection of Offences/Prosecution of Offences:-

Significant structures have been put in place by An Garda Siochana in an effort to assist in the detection of human trafficking offences. These include:-

- Linking in with persons advertising sexual services online
- Making efforts to engage with travellers at point of entry
- Increased efforts to detect at ports.

In dealing with the prosecution of the offences there are a number of factors that require particular attention:-

- Victim account – accounts are outlined by victims, important that they are in a position to give every possible detail in relation to the offending behaviour and what led them to the circumstances they found themselves in.
- There is a view that human trafficking involved smuggling persons across borders, and that can be feature however the offence covers significantly more. It is apparent that persons can be victims of human trafficking offences in circumstances where they are moved around their own country of birth or induced into exploitation by persons in authority who have a duty of care to them.
- Crucially victims tend to be vulnerable persons for various different reasons:- poverty, no connections, isolated in an area they are not familiar with, language barriers, cognitive issues and may have particular physical vulnerabilities. In truth persons who find themselves in these

⁵ Section 2(1) Criminal Law (Human Trafficking) Act 2008

⁶ Section 2(2) Criminal Law (Human Trafficking) Act 2008

⁷ Section 2(3) Criminal Law (Human Trafficking) Act 2008

⁸ Section 2(4) Criminal Law (Human Trafficking) Act 2008

situations are not persons who will feel empowered to make complaints to the authorities. As a result the proactive steps being taken by the Gardai in this area are very significant.

- This being so engaging with victims is a careful exercise in building up a form of trust. In this regard the importance of taking a full and detailed statement in the first instance will significantly assist the investigating process. On foot of that detailed statement efforts can be made to determine the independent matters that will assist in corroborating the account of victims. This can lead to numerous areas of investigation including obtaining bank statements, IP addresses, linking with website providers, searches for particular addresses, accounts of matters that might have led to the person travelling across jurisdiction.
- UNODOC studies have found that there is a feature of double exploitation and victimization of the women and girls in the cases where traffickers not only earned a profit by sexually exploiting the victims, but then made them commit crimes so they could escape liability and prosecution. A modus operandi of deliberately using them in low-level roles that were more exposed to law enforcement authorities – meaning they were more likely to get caught. This in turn leads of an issue of credibility when engaging with authorities and can lessen the possibility of making a complaint in the first instance and it being viewed in any credible light if it is made.
- Empirical studies evaluating the manner in which control is exerted over victims of human trafficking is dependent on the manner of recruitment and transportation.
- Studies show four different control methods in practical ways¹²:
 - o the confiscation of travel documents,
 - o the use of violence,
 - o the threat to harm family members and
 - o a financial dependency upon the human trafficker.
- This can be ¹³ expanded in a number different ways.
 - o the isolation method into constant surveillance or confinement,
 - o the recognition, reinforced by traffickers, of their illegal status,
 - o an addition of two control methods: shame and humiliation and a cultural-related psychological coercion.
- In circumstances where the method of control is linked to cultural beliefs that might be unfamiliar to a jury it will be appropriate that an expert witness be called in to give an independent account of the cultural aspects that are prevalent.
- There are a number of charges that globally are frequently charges as additional charges to human trafficking charges. Money Laundering will almost always be a feature of these cases and frequently criminal organisation charges.
- The United Nations Office on Drugs and Crime Anti Human Trafficking Manual for Criminal Justice Practitioners (2008) has the purpose to further facilitate the prevention of human trafficking, protection of its victims, prosecution of its culprits and develop international

cooperation to achieve these targets. The manual addresses each phase of the criminal justice response to trafficking in persons, from identification of victims through investigations and prosecutions of trafficking, to the protection of victims.

2.3 Protections:-

The State has obligations under European Law to take special measures in respect of victims of human trafficking. Directive 2011/36/EU on preventing and combatting trafficking in human beings and protecting its victims (“the Directive”) acknowledges human trafficking as “*a gross violation of fundamental rights.*”⁹ Under EU Law, member states have certain obligations in respect of the investigation and punishment of crimes involving human trafficking.¹⁰ EU law also provides for the non-prosecution of victims of human trafficking. In particular Article 8 of the Directive requires member states to “*take the necessary measures to ensure that national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings*”¹¹ in respect of their involvement in criminal activities which they have been compelled to commit as a result of them being trafficked.¹² In *Win Lin v. Governor of Cloverhill* [2014] 1 I.R. 134 the applicant unsuccessfully claimed that as he was a victim of human trafficking and the offences contrary to the Misuse of Drugs Act 1977 arose out of his forced servitude. Pursuant to Article 40.4.2° of the Constitution he sought his release, arguing that as a victim of trafficking, he should not be prosecuted in light of Directive 2011/36/EU. The prosecution evidence was that the applicant had voluntarily taken up employment with the alleged captors and he was at liberty to travel extensively within the State during the relevant period. Mr. Justice Hogan accepted evidence from An Garda Síochana that the applicant had not been trafficked into the State. He stated at paragraph 57:-

“What is critical, however, is that the accused must be a victim of trafficking and that there must be a real and substantial connection between the applicant's status as a person who has been trafficked and the crimes which were actually committed. Had, for example, it been established that Mr. Lin had been trafficked into the State and that he had been coerced to work in the growhouse, then it is clear that serious consideration would have to have been given by the Director of Public Prosecutions as to whether there should have been a prosecution in the first place.”

⁹ Directive 2011/36/EU

¹⁰ Article 2, Article 4 Directive 2011/36/EU

¹¹ Article 8 Directive 2011/36/EU

¹² Article 8 refers to human beings being involved in criminal activities, which they have been compelled to commit as a direct consequence of any of the Acts referred to in Article 2 Directive 2011/36/EU

Recently the European Court of Human Rights in *VCL and AN v. the United Kingdom (Application No. 77587/12, 74603/12, judgment of 16th February 2021)* held that the UK had violated Articles 4 and 6§1 of the European Convention on Human Rights in proceeding with prosecutions in respect of youths working on cannabis farms, in spite of the fact that they were victims of child trafficking.

3. Monitoring

2021 Trafficking in Persons Report – US Department of State

The US State Department publish their Report on Trafficking in Persons on an annual basis. The 2021 Report¹³ describes the COVID-19 pandemic as having unprecedented repercussions for human rights and economic development globally, including in human trafficking.¹⁴ In particular it notes that reports from several countries demonstrated drastic increases in online commercial sexual exploitation and sex trafficking, including online sexual exploitation of children, including content that involved victims of human trafficking.¹⁵ The effect of the pandemic in the delaying and suspending prosecution efforts was also noted in the report.¹⁶

The Report is prepared using various sources of information, including from US embassies, government officials, nongovernmental and international organizations, published reports, news articles, academic studies, consultations with authorities and organizations globally.¹⁷ The Report relates to government efforts undertaken from 1st April 2020 – 31st March 2021.¹⁸

Pursuant to the US Trafficking Victims Protection Act of 2000 (“the TVPA”), the US Department of State places each country in the Report into one of four Tiers; Tier 1, Tier 2, Tier 2 Watchlist and Tier 3. The allocation to a specific tier is based on the extent of government efforts to meet the TVPA’s minimum standards for the elimination of human trafficking.¹⁹ The criteria assessed in respect of a determination of placement in a tier include the following:

- enactment of laws prohibiting severe forms of trafficking in persons, and provision of criminal punishments;
- criminal penalties prescribed for human trafficking crimes with a minimum of four years’ deprivation of liberty;

¹³ Available at <https://www.state.gov/reports/2021-trafficking-in-persons-report/>

¹⁴ Note 13 at page 2

¹⁵ Note 13 at page 7

¹⁶ Note 13 at page 10

¹⁷ Note 13 at page 51

¹⁸ *Ibid.*

¹⁹ *Ibid*; see pages 56-56 of the Report for the TVPA’s minimum standards for the elimination of trafficking in persons

- implementation of human trafficking laws through vigorous prosecution of the prevalent forms of trafficking in the country and the sentencing of traffickers;
- proactive victim identification measures with systematic procedures to guide in the process of victim identification;
- government funding and partnerships with NGOs to provide victims with access to primary health care, counselling, and shelter, etc;
- victim protection efforts that include access to services and shelter without detention and with legal alternatives to removal to countries in which victims would face retribution or hardship;
- the extent to which a government ensures victims are provided with legal and other assistance and that, proceedings are not prejudicial to victims' rights, dignity, or psychological well-being;
- the extent to which a government ensures the safe, humane, and to the extent possible, voluntary repatriation and reintegration of victims;
- governmental measures to prevent human trafficking, including efforts to curb practices identified as contributing factors to human trafficking; and
- governmental efforts to reduce the demand for commercial sex acts and international sex tourism.²⁰

Matters not taken into account in the ranking system include: efforts of NGO's in the relevant country; general public awareness events lacking concrete ties to the prosecution of traffickers, protection of victims or the prevention of trafficking; and enforcement or developmental initiatives.²¹ The following is a summary of the tiers.

Tier 1: The placement of a country in Tier 1 means that its government fully meet the TVPA's minimum standards for the elimination of trafficking.²² The placement of a country in Tier 1 does not mean that a country has no human trafficking problem, or that it is doing enough to tackle human trafficking.²³ Governments should demonstrate 'appreciable progress' each year in combatting trafficking in order to maintain a place in Tier 1.²⁴

Tier 1 countries include: Australia, Belgium, Canada, Colombia, Finland, France, Philippines, Slovenia, United Kingdom, United States.

²⁰ Note 13 at page 52

²¹ *Ibid.*

²² *Ibid.*

²³ Note 13 at page 51

²⁴ *Ibid.*

Tier 2: The placement in this tier is for countries whose governments do not fully meet the TVPA's minimum standards but who are making significant efforts to bring themselves into compliance with those standards.²⁵

Tier 2 countries include: Albania, Bangladesh, Fiji, Ghana, Italy, Kenya, Mexico, Morocco, New Zealand, Nepal, Poland, Turkey, UAE.

Tier 2 Watch List Countries: The placement in this tier reflects the criteria in Tier 2 namely, countries whose governments do not fully meet the TVPA's minimum standards but who are making significant efforts to bring themselves into compliance with those standards. However, in addition this tier relates to countries where:

- (i) the estimated number of victims of severe forms of trafficking is very significant, or
- (ii) the estimated number of victims is significantly increasing and the country is not taking proportional concrete actions; or
- (iii) there is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year, e.g. increased investigations, prosecutions, convictions and assistance to victims, and decreasing evidence of complicity in severe forms of trafficking by government officials.²⁶

Tier 2 Watch List countries include: Azerbaijan, Belarus, Congo, Haiti, Hong Kong, Ireland, Pakistan, Papua New Guinea, Romania, Sri Lanka, Thailand, Trinidad and Tobago, Zambia.

Ireland was placed on the Tier 2 Watchlist in 2020. While there was one trafficking conviction under false imprisonment charges, there have been no convictions under the 2008 Act, since its amended in 2013. Training for law enforcement, prosecutors and judges was recommended, as well as the adoption into legislation of a provision to exempt victims from penalisation for the unlawful acts traffickers compelled them to commit.²⁷ There have since been convictions for human trafficking offences against two accused in Mullingar in June 2021. It is hoped that this in conjunction with efforts to combat and detect this form of offending will result in a higher placement in the 2022 report.

Tier 3: Countries falling within tier 3 are those in which governments do not fully meet the TVPA's minimum standards and who are not making significant efforts to do so. The following factors determine whether a country should fall within Tier 2/Tier 2 watchlist or Tier 3: the extent to which the

²⁵ *Ibid.*

²⁶ Note 13 at page 52

²⁷ Note 13 at page 302; while there is no legislative provision in this regard, there is an administrative notice entitled *Administrative Immigration Arrangements for the Protection of Victims of Human Trafficking (2008)*.

country is a country of origin, transit, or destination for severe forms of trafficking; the extent to which government officials have been complicit in severe forms of trafficking; reasonable measures that the government would need to undertake in light of the government's resources and capabilities to address and eliminate severe forms of trafficking; the allocation of budgetary resources by governments to investigate, prosecute convict and sentence traffickers; and obtain restitution for victims; the allocation of budgetary resources to protect victims and prevent trafficking.²⁸ Also falling for consideration are policies or patterns of trafficking, forced labour, sexual slavery in government camps, or employing or recruiting child soldiers.²⁹ Should a country be ranked as Tier 2 Watch List for two consecutive years and would continue to be ranked in Tier 2 Watch List for a third consecutive year, it will instead be downgraded to Tier 3.³⁰ Governments of countries on Tier 3 may be subject to certain restrictions on foreign non-humanitarian and non-trade related assistance.³¹

Tier 3 countries include: Afghanistan, Algeria, Burma, China, Cuba, Iran, Korea, Russia, Syria.

4. Conclusion

The legislative provisions in Ireland for the prosecution of human trafficking offences are comprehensive and wide ranging. Significant work is carried out to ensure engagement with victims and to meet their needs and ensure that matters proceed to trial where offences are detected. While in 2021 the US Department of State Report places Ireland in the Tier 2 watchlist category, there is every expectation that this will be reviewed in the 2022 Report on foot of various advancements that have been made over the past 18 months or so including convictions for the offence of human trafficking, sentencing of those convicted and significant safeguards implemented by the Gardai with a view to detecting these crimes. In 2013 Ireland was on Tier 1 and it is hoped that the measures being implemented at present will facilitate inclusion on that list again in the near future.

²⁸ Note 13 at page 53

²⁹ Note 13 at page 54

³⁰ The Secretary of State can waive this downgrading to Tier 3 if satisfied the government has a written plan, which implemented could constitute making significant efforts to meet the TVPA's minimum standards.

³¹ Note 13 at page 54