Human trafficking, victims' rights and fair trials

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HUMAN TRAFFICKING, VICTIMS' RIGHTS AND FAIR TRIALS

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Introduction

Cases of human trafficking are frequently difficult to prosecute and raise a number of issues in the law of evidence. Human trafficking, now defined by the Modern Slavery Act 2015, s 2, involves arranging or facilitating the travel (to, from or within any country) of another person with a view to their being exploited; the exploitation may involve a sexual offence, servitude or forced labour, or otherwise coercing or deceiving the person into providing some service or benefit.[1] According to a recent report by the National Audit Office (NAO), only 6% of the offences under the Modern Slavery Act 2015 recorded in the year to the end of March 2017 resulted in a charge or summons. More than a quarter (27%) were recorded by the CPS 'as having evidential difficulties'. The CPS and the police are reported to be investigating the reasons why cases are not meeting the evidential threshold for prosecution.[2] Prosecutors interviewed by the NAO pointed to variable levels of investigation and case-building by the police and to difficulties in identifying perpetrators, gathering sufficient evidence, and 'victims agreeing to act as witnesses and then being available for the trial'.[3]

It is unclear how far the law of evidence, as opposed to the practical difficulties of evidence gathering, contributes to the difficulties of prosecuting human trafficking cases. In this article we identify several aspects of the law relating to character evidence, sexual history evidence, witness anonymity and hearsay which appear to raise potential difficulties in trafficking cases, or which have in fact done so in cases that have reached the Court of Appeal. Our starting point is a recognition of victims' rights as an important factor in evidential decisions, coupled with an insistence that victims' rights cannot trump the defendant's right to a fair trial. We refer to *victims'* rights not because we equate complainants with victims, but because it is actual victims, those whose human rights (particularly to freedom from servitude) have in fact been violated, who are the intended beneficiaries of these rights.[4] Complainants who are not in fact victims also have some rights – for example that their lives should not be endangered – but they are primarily the unintended beneficiaries of the duties of the state towards victims.

The body of this article is in two parts. The first discusses the position of the victim in relation to the investigation, prevention and prosecution of human trafficking, with particular

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[1] Modern Slavery Act 2015 ss 2, 3.

[2] National Audit Office, *Reducing Modern Slavery* (HC 630, 2017) para 4.9.

[3] Ibid, 4.10.

[4] Our use of the concept of a right accords with David Lyons' 'qualified beneficiary theory': *Rights, Welfare and Mill's Moral Theory* (OUP 1994), 29-30.

emphasis on the rights of trafficking victims, and victims in general, under human rights law and EU law. The second part considers the tensions that arise within the domestic law of evidence between the protection of (alleged) victims and the defendant's right to a fair trial. We argue that protection of victims does not justify curtailing the rights of defendants to introduce evidence, or ask questions in cross-examination, of potentially substantial probative value, however distressing they may be. The protection of victims and witnesses *does*, however, justify a relatively flexible approach to the admission of hearsay evidence. There is a dearth of research on how the rules on hearsay – or most of the other rules we discuss – are applied in practice, either in trafficking cases or generally; but whether there is scope for more extensive use of hearsay in trafficking cases is perhaps the most important practical question raised by the discussion that follows.

Part I: Victims and the Investigative Process

An effective investigation by the police, and/or another agency such as the Gangmasters and Labour Abuse Authority,[5] is needed to bring an offender to justice. Central to the success of human trafficking prosecutions is the involvement and cooperation of human trafficking victims as witnesses. Human trafficking is a covert crime which presents complex evidential issues. Victims of modern slavery and human trafficking, whether for sexual exploitation or labour, can be among the most vulnerable of witnesses, often belonging to socially excluded groups and requiring significant support. However, they are most often treated as the primary source of evidence, so that securing their cooperation plays an important role in a successful prosecution. Studies of law enforcement responses to human trafficking suggest that victim cooperation is central to the success of human trafficking prosecutions[6] and is one of the most common challenges faced by law enforcement in the identification and investigation of human trafficking cases.[7] The percentage of successful prosecutions for human trafficking offences shows that there was a rise in unsuccessful outcomes due to victim issues, from 31.1% in 2015–16 to 43.9% in 2016–17. Subsequently, the number of human trafficking convictions fell from 192 in 2015–16 to 181 in 2016–17.[8] The UK's Anti-Slavery Commissioner, Kevin Hyland, in his first annual report stated his concern that 'From the limited data that is gathered on victims' circumstances via the current NRM system through to compromised crime recording, a lack of

[5] See e.g. 'Trafficking Duo get Six Years Each After Joint Investigation', http://www.gla.gov.uk/whats-new/press-release-archive/180516-trafficking-brothers-get-six-years-each-after-joint-investigation/, 20 May 2016 (accessed 4 Jan 2018)

[6] Frank Laczko and Marco A Gramegna, 'Developing Better Indicators of Human Trafficking' (2003) 10 Brown J World Affairs 179.

[7] Heather J Clawson, Mary Layne and Kevonne Small, *Estimating Human Trafficking into the United States: Development of a Methodology* (Caliber: Fairfax, VA, 2006).

[8] HM Crown Prosecution Service Inspectorate (HMCPSI) *Review of the CPS Response to the Modern Slavery Act 2015* (Dec 2017), para 2.8.

intelligence reporting and evidence-based operational action, victims both present and future are being failed.'[9] This was reflected in HM Inspectorate of Constabulary's report which stressed the urgent need to consider 'victimless' or 'evidence-based' prosecutions for modern slavery and human trafficking investigations for various reasons: most importantly that victims may be too vulnerable to support a prosecution.[10] Building cases through evidence-based prosecutions without the cooperation of an alleged victim has been encouraged in the recent CPS Response to Modern Slavery Act[11] although the report also acknowledges that '[t]here is no specific CPS legal or policy guidance on "victimless" prosecution for human trafficking, slavery and forced labour offences.'[12] The Inspectorate's report also highlighted the effective use of a wide range of investigative tools and techniques, particularly covert surveillance, through organised crime structures in order to dismantle the criminal networks but also to ensure victims are safeguarded.[13]

Prosecution should be seen as part of a wider strategy against trafficking and exploitation, in which measures to reduce the demand for exploited labour (including the exploitation of sex workers) is a central element. The most promising approaches adopt a form of 'responsibilisation strategy', in which corporations, NGOs and individual citizens are, in Garland's words, 'persuaded to exert their informal powers of social control, and if necessary, to modify their usual practices, in order to help reduce criminal opportunities and enhance crime control'.[14] In the criminological and sociological literature the concept of 'responsibilisation' often has negative connotations, being viewed as part of a neo-liberal trend towards privatising functions that were formerly seen as belonging to the state.[15] In the context of human trafficking, however, we would argue that such an approach represents a realistic

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[9] Independent Anti-Slavery Commissioner, *Annual Report 2015-16*, 42.

[10] HM Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS), *Stolen Freedom: The Policing Response to Modern Slavery and Human Trafficking* (2017), 60.

[11] HMCPSI, n 8 above, para 1.4.

[12] Ibid, para 5.14.

[13] HMICFRS, n 10 above, paras 5.13-5.17.

[14] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society*. (Oxford University Press, 2002), 126. See also, Shahrzad Fouladvand, 'Decentering The Prosecution-Oriented Approach: Tackling Both Supply and Demand in the Struggle against Human Trafficking' (2018) 52 *International Journal of Law, Crime and Justice* 129.

[15] See for example Jamie Bennett, 'They Hug Hoodies, Don't They? Responsibility, Irresponsibility and Responsibilisation in Conservative Crime Policy' (2008) 47 Howard Jnl of Crim J 351; Antje Bednarek, 'Responsibility and the Big Society' (2011) 16 (2) *Sociological Research Online* 17; Jo Mockeridge, 'Responsibilisation in the Youth Justice System: Repositioning Marginalised Knowledge' in K Atkinson, A R Huber and K Tucker (eds) *Voices of Resistance: Subjugated Knowledge and the Challenge to the Criminal Justice System* (Liverpool John Moores University/EG Press, 2017).

understanding of the market-driven nature of the crime, as well as the important role of the voluntary sector in working with victims.[16]

In this context, the main aim of 'responsibilisation' is to make the potential *consumers* of trafficked and exploited labour – from large corporations[17] to individual buyers of sexual services[18] – accept responsibility for their potential use of exploited labour. There is, however, a concern about the extent to which the state also holds victims themselves responsible for playing their part in the crime control process. For example Jo Goodey argues that, under some of the international legal instruments discussed below, 'trafficking victims have a right to access criminal justice and social services, but only when they take on responsibilities to the State as witnesses.'[19] It is a significant aspect of the 'responsibilisation strategy' that the police foster good relations with voluntary sector organisations working with victims with a view to those organisations encouraging their clients to provide intelligence to the police, and perhaps to become prosecution witnesses.[20] The idea that victims and witnesses in general have responsibilities to the state is endorsed in one of the most important recent judgments on criminal evidence, *R v Riat: '*a degree of (properly supported) fortitude can legitimately be expected [of a fearful witness] in the fight against crime.'[21]

For any such 'responsibilisation of the victim' to be acceptable it has to be coupled with a recognition of the victim as a bearer of rights which the state has a responsibility to uphold (whether or not the victim is a citizen of that state). In designating human trafficking as a form of 'modern slavery', Parliament has recognised it as an offence which violates individual rights in a fundamental way, indeed which denies the victim the status of a rights-bearing subject.[22] The idea that such a violation of the victim's rights gives victims (or those credibly claiming to be so) certain rights in the legal process is, as we shall see, recognised in international and domestic law. The uncomfortable fact remains, however, that those victims who seek to vindicate their rights through the criminal justice process take on what may an extremely onerous role, and there are limits to the extent to which the state can reduce the burden on

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[16] Fouladvand, n 14 above.

[17] I.e. those with an annual turnover exceeding £36m, which are required to publish statements under the Modern Slavery Act 2015, s 54.

[18] See e.g. Sexual Offences Act 2003 s 53A.

[19] Jo Goodey, 'Sex Trafficking in Women from Central and East European countries: Promoting a 'victim-centred' and 'women-centred' approach to Criminal Justice intervention' (2004) 76 *Feminist Review* 26.

[20] HMICFRS, n 10 above, 72.

[21] *R v Riat* [2012] EWCA Crim 1509, [16].

[22] The claim that *every* offence of trafficking under the Modern Slavery Act 2015 (which may involve only a short journey with some form exploitation in view) amounts to anything akin to chattel slavery is, however, problematic. See Julia O'Connell Davidson, *Modern Slavery: The Margins of Freedom* (Palgrave, 2015); Vladlislava Stoyanova 'Dancing on the Borders of Article 4: Human Trafficking and the European Court of Human Rights in the Rantsev Case' (2012) 30 NQHR 163.

witnesses while still respecting the rights of defendants. In the case of (alleged) human trafficking victims, the likelihood that they will suffer damaging attacks on their credibility is heightened by the fact that claiming to be a victim may have certain advantages, which can be portrayed as an incentive to false claims particularly to extend the support from National Referral Mechanism (NRM) beyond the 45 days recovery period[23] and also to secure their right to remain in the UK. Moreover, victims may fail to conform to an ideal of pure, passive victimhood, but may, for example, have agreed to enter the country to work in the sex industry.[24]

The UK has opted out of the EU Residence Permit Directive[25] which purports to offer third-country nationals the opportunity to 'cooperate freely and hence more effectively if their legal position in the country was assured'.[26] As Roth puts it, the Directive in fact was an incentive for the victims to expose themselves to further risk from their traffickers and to other consequences, such as potential stigmatisation.[27] Such an incentive can, in fact, treat traumatised victims of human trafficking as instruments of law enforcement to cooperate with the authorities in the investigations and criminal proceedings. [28]

Victims' Rights and Due Process

Following Doak, we can distinguish two types of victims' rights: rights to protection and to participation.[29] In a procedural or evidential context, the most important right of protection is a right to protection against secondary victimisation. Rights to participation are enshrined, at least pending Brexit, in Directive 2012/29/EU (the 'Victims Directive')[30], as the 'right to be

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[23] Caroline Haughey, *The Modern Slavery Act Review*, (2016), https://www.gov.uk/government/publications/modern-slavery-act-2015-review-one-year-on (accessed 15 Jan 2018), 25.

[24] Goodey, n 19 above.

[25] Council Directive 2004/81/EC of 29 April 2004, OJ L 261/19 (6.8.2004).

[26] Council Directive 2004/81/EC of 29 April 2004, OJ L 261/19 (6.8.2004). Preamble, para 11.

[27] Venla Roth, *Defining Human Trafficking and Identifying its Victims***:** *A Study on the Impact and Future Challenges of International, European and Finnish Legal Responses to Prostitution-Related Trafficking in Human Beings*, (Martinus Nijhoff, 2012), 187.

[28] Ibid, 187.

[29] Jonathan Doak, Victims' *Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart, 2008), Chs. 2-3.

[30] The Victims' Directive sets out the basic rights afforded to victims of crime across the European Union and came into force on 16th November 2015. The revised Victims Code implements some provisions of the Directive: Ministry of Justice, *Code of Practice for Victims of Crime* (October 2015).

heard'. The Directive does not provide this right with much substantive content, but does recognise that it can be fulfilled by allowing the victim to make a written statement. [31]

In European human rights law, the key case on the rights of victims of trafficking is *Rantsev v Cyprus and Russia*. [32] The Strasbourg Court expounds the duties of states to afford protection against human trafficking as a form of slavery, servitude or forced labour within the scope of ECHR Art. 4. It also, albeit briefly, addresses victims' rights to participation:

> Like arts 2 and 3, art.4 also entails a procedural obligation to investigate situations of potential trafficking. …. For an investigation to be effective, it must … be capable of leading to the identification and punishment of individuals responsible, an obligation not of result but of means. …. The victim or the next-of-kin must be involved in the procedure to the extent necessary to safeguard their legitimate interests.[33]

In *Rantsev* the victim of trafficking was dead, and this may have encouraged the court to formulate the right by analogy with the rights of next of kin under Art. 2. As the 'investigation' includes the whole process leading to punishment, it appears that the trial is an aspect of the process in which the victim has a right to be involved, to the extent necessary to safeguard her legitimate interest in establishing that her right has been violated.[34] The obligations of states under *Rantsev* extend to any case where there is 'a credible suspicion' of human trafficking.[35]

The UN Protocol on Trafficking in Persons[36] provides, in Art. 6(2):

> Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases…
>
> (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

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[31] Dir 2012/29 EU, preamble, para 41.

[32] (2010) 51 EHRR 1.

[33] Ibid, [288]. See also *CN v UK* (2013) 56 EHRR 54, [59].

[34] See also *Perez v France* (2005) 40 EHRR 39, [72]; *Gäfgen v Germany* (2011) 52 EHRR 1, [116-9]; Vladislava Stoyanova, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligations in European Law* (Cambridge, CUP 2017) 368-9.

[35] *Rantsev*, (2010) 51 EHRR 1, [286]; *CN* (2013) 56 EHRR 54 [69-71].

[36] Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (2000), http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx

While this wording is similar to the more general Declaration of Basic Principles of Justice for Victims of Crime,[37] it goes further by requiring *assistance*, rather than merely *allowing* victims to express their views. The reference to 'views' is not exactly apt: what is important is that victims should able to communicate their *experiences* to the court and have them taken into respectful consideration. Special measures for vulnerable witnesses, admission of hearsay in certain circumstances, restrictions on impugning victims' character or sexual offence complainants' sexual history, can all be seen as protecting the 'right to be heard'.[38]

EU Directive 2011/36 'on preventing and combating trafficking in human beings and protecting its victims' focuses on the right to protection against secondary victimisation:

> Victims of trafficking who have already suffered the abuse and degrading treatment which trafficking commonly entails… should be protected from secondary victimisation and further trauma during the criminal proceedings. Unnecessary repetition of interviews during investigation, prosecution and trial should be avoided, for instance, where appropriate, through the production, as soon as possible in the proceedings, of video recordings of those interviews.[39]

The EU Victims Directive is somewhat less specific, requiring only that interviews be kept to the minimum necessary.[40] The latter Directive does, however, amount to a recognition that victims in general – defined as natural persons who have been harmed by crimes[41] – have broadly similar rights to participation and protection. We can sum this up by saying that victims have a right to a *fair opportunity to participate in a fair trial* of anyone whom they and/or the state accuse of violating their rights. They also have a right that such a trial be conducted, so far as is consistent with fairness to the accused, in a way that minimises the risk of 'secondary victimisation or further trauma'.[42] These principles of effective participation and minimising former trauma also underlie Ellison and Munro's recent view of criminal procedure through a 'trauma-informed lens'.[43] The integration and recall of painful traumatic experiences and events is extremely complex, involving 'chaotic, fragmented images, somatic affects, and bodily enactments'.[44] Ellison and Munro focus on special measures for vulnerable witnesses

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[37] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly Resolution 40/34, Annex (1985), https://www.unodc.org/pdf/compendium/compendium_2006_part_03_02.pdf, Art. 6(b).

[38] Directive 2012/29/EU, art 10.

[39] Directive 2011/36, art. 20.

[40] Directive 2012/29/EU, art 20.

[41] Ibid art 2(1)(a)(i); subpara (ii) extends to family members of homicide victims.

[42] See above, n 41.

[43] Louise Ellison and Vanessa E Munro 'Taking Trauma Seriously' (2017) 21 E&P 183.

[44] Yoram Yovell, 'From hysteria to post traumatic stress disorder: Psychoanalysis and the neurobiology of traumatic memories' (2000) 2 Neuro-Psychoanalysis, 171.

and the judicial control of cross-examination, but the goal of enabling victims to be involved in proceedings without secondary victimisation or further trauma raises a wider range of evidential issues.

As we shall illustrate with respect to human trafficking proceedings, the measures that help to secure the victim's right to participate in the legal process include not only special measures but the use of written or recorded statements as hearsay evidence. They also include restrictions on non-defendants' bad character and sexual history evidence to the extent that these protect complainants against being unfairly discredited, rendering their participation in proceedings ineffective. The protection of victims against secondary victimisation and further trauma is a further justification for these rules, as well as more general control of cross-examination. Any move towards a more victim-centred, trauma-sensitive approach therefore has implications not just for courtroom procedure but also for the core rules of evidence law.

Identifying and interviewing victims

Before any question of a victim giving evidence arises, the first hurdle is to identify the individual as a victim of human trafficking and to remove them from harm. Victims who come into contact with the police are not always recognised as such and therefore remain in the hands of those who are exploiting them. Others are arrested as offenders or illegal immigrants. [45]

Identifying victims is particularly difficult because many victims are reluctant to work with state authorities in order to obtain service and assistance out of fear and lack of trust, preferring to work with NGOs, some of which do not have full capabilities to meet victims' due to funding. Victims often choose not to identify themselves as victims, which thus disenfranchises them from access to state services and protection.[46] Reasons for this reluctance, amongst others, may include: threats made to the victim or to his or her family; concerns about immigration status; wariness of authorities based on the victims' previous experiences in their home countries.[47] Korzinski describes how traffickers 'force the victim into a position of isolated helplessness….completely reliant on the trafficker for her survival'.[48] As a result of psychological manipulation, victims may remain with their exploiters for long periods without

[45] See HMICRFRS, n 10 above, 60.

[46] Ella Cockbain and Helen Brayley-Morris, 'Human Trafficking and Labour Exploitation in the Casual Construction Industry: An Analysis of Three Major Investigations in the UK Involving Irish Traveller Offending Groups' (2017) *Policing* (advance articles) https://doi.org/10.1093/police/pax032, 14; Andrea Sölkner, *Needs Assessment of the National Referral Mechanism for Victims of Trafficking in Human Beings in Ukraine: Assessment Report*.' https://kidsempowerment.org/needs-assessment-of-the-national-referral-mechanism-for-victims-of-trafficking-in-human-beings-in-ukraine-assessment-report. (accessed 6 Feb 2018)

[47] See HMICFRS, n 10 above, 16.

[48] Michael Korzinski, 'Identifying and Responding to Trauma in Victims of Trafficking and Exploitation' in Parosha Chandran (ed) *Human Trafficking Handbook* (LexisNexis, 2011), 71.

attempting to escape or alert the authorities, and the defence may present such behaviour as evidence that no exploitation has occurred.[49]

Following an effective identification system, victims' human rights should be protected[50] and they should be entitled to support and protectives measure(s) provided by the state. Supporting victims is a challenging task particularly during the recovery and reflection period.[51]

One of the main challenges law enforcement faces in investigating human trafficking cases is that the victim's or witness's distrust of law enforcement may lead to ineffective interviews where the interviewer does not fully understand the problem.[52] A covert investigation might be conducted to utilise cooperating witnesses or informants. However, law enforcement authorities should ensure proper procedures and investigative technique in order to obtain credible information and evidence and protect victims.[53]

A comprehensive criminal justice response to human trafficking should include measures for the protection and support of trafficked victims alongside measures to prosecute human traffickers. Victim protection and support policy measures should not be conditional on a trafficked victims' willingness to cooperate with law enforcement officers in their criminal investigations, which to a greater or lesser extent it appears to be in some instances. Victims of human trafficking are often reluctant to cooperate in a criminal investigation due to their fear of the traffickers and lack of alternatives to the trafficking situation, distrust of law enforcement and feelings of shame.[54] It is in this context where unreliable evidence given by the victim makes it hard for the prosecution to prove the elements of the trafficking crime and to secure the right punishment in relation to the severity of the crime that offenders have committed.[55] Testai's study in Italy suggests that there should be alternatives to victim protection policies or to get testimony from them based on a genuine human rights approach which would not link

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[49] Cockbain and Brayley-Morris, n 49 above, 14.

[50] OSCE/ODIHR, (2004) Guiding Principles on Human Rights in the Return of Trafficked Persons, Published by the OSCE Office for Democratic Institutions and Human Rights (ODIHR), available at www.osce.org/odihr/124268?download=true

[51] See for example Margaret Malloch and Paul Rigby (eds) *Human Trafficking: The Complexities of Exploitation* (Edinburgh University Press, 2016).

[52] Bradley W. Orsini, 'Law Enforcement Considerations for Human Trafficking' in Mary C. Burke (ed) *Human Trafficking: Interdisciplinary Perspectives*, (Routledge 2013), 197.

[53] Ibid, 200.

[54] Amy Farrell et al., *Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases* (NIJ: Washington DC, 2012) 107.

[55] United Nations Global Initiative to Fight Human Trafficking (UN.GIFT), 2008. *From Protection to Prosecution- A Strategic Approach*. www.un.org/ga/president/62/ThematicDebates/humantrafficking/ebook.pdf (accessed 15 Jan 2018).

protection to witness' testimony but would effectively give them access to a range of services to recover and reintegrate into the society.[56]

The obligation to identify victims of human trafficking is contained in the Principles and Guidelines on Human Rights and Human Trafficking adopted by the UN Economic and Social Council in 2002. Principle 8 requires States to 'ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care [which] shall not be made conditional on the capacity or willingness of trafficked persons to cooperate in legal proceedings'.[57] Under Articles 24 and 25 of the UN Convention Against Organised Crime (UNCTOC),[58] state parties are obligated to provide 'effective protection' as well as 'assistance' to victims and witnesses of organised crime offences covered by the Convention. The measures should protect witnesses from threats, intimidation or bodily injury, with a full witness protection programme to be put in place as a last resort.[59] The UN Human Trafficking Protocol and Council of Europe Convention on Action against Trafficking in Human Beings also highlight the importance of assisting victims of trafficking and also, as we have seen, afford some recognition of their procedural rights. Article 27 (1) of the Council of Europe Convention on Action against Trafficking in Human Beings provides that States shall ensure that investigation into and prosecution of offences under the Anti-Trafficking Convention are 'not dependent upon the report or accusation made by a victim, at least when the offence was committed in whole or in part on its territory'. The more prosecutions can be 'evidence led,'[60] that is, based on evidence other than the victims' testimony, including undercover operations[61] or covert surveillance, the better the prospect of securing convictions without causing further trauma to victims. In practice, however, the

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[56] Patrizia Testai, 'Victim Protection Policy in a Local Context: A Case Study' in Mary C. Burke (ed) *Human Trafficking: Interdisciplinary Perspectives*, (Routledge 2013), 207. It is worth mentioning here (from the same source) that the principle of 'victim protection' was established in Italy through Article 18 of the Italian immigration law (Law Decree n. 286/1998), which grants a residence permit for 'reasons of social protection' to foreign individuals who are administratively defined as victims of trafficking.

[57] Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report of the High Commissioner for Human Rights to the Economic and Social Council, UN Doc. E/2002/68/Add.1.

[58] United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000 and entered into force on 29 September 2003.

[59] United Nations Office on Drugs and Crime (UNODC), 2012. *Victim Assistance and Witness Protection.* www.unodc.org/unodc/en/organized-crime/witness-protection.html (accessed 15 Jan 2018).

[60] HM Inspectorate of Constabulary, *Increasingly Everyone's Business: A Progress Report on the Police Response to Domestic Abuse* (2015), 94-8.

[61] Bradley W. Orsini, 'Law Enforcement Considerations for Human Trafficking' in Mary C. Burke (ed) *Human Trafficking: Interdisciplinary Perspectives*, (Routledge 2013), 201.

difficulty of mounting such operations may make heavy reliance on victim testimony unavoidable.[62]

Article 10 of the CoE Convention on Action against Trafficking in Human Beings, obliges each state party to identify and support victims through a National Referral Mechanism (NRM) which is in fact a process of 'locating and identifying potential victims of trafficking'.[63] In the UK, potential victims of human trafficking will be assessed by a competent authority to decide whether there are reasonable grounds to believe they are victims of modern slavery or human trafficking.[64] If a positive decision is reached the individual will be able to benefit from protection and support services for a 45 day 'Recovery and Reflection' period during which the CA will investigate the individual's case and come to a conclusive decision as to whether the individual is a victim of trafficking. The purpose of this reflection period is to help individuals to recover from their ordeal and they should be given the information about their future options, which can include choosing to return home or assisting the UK police in their enquiries to prosecute their traffickers. Reflection periods, therefore, have the potential to create an environment that encourages victim cooperation in the prosecution of traffickers.

If a CA decides an individual is not a victim of trafficking then the prosecution would be unlikely to use them as a witness as their credibility would be questioned by the defence. The absence of a formal right of appeal for trafficking victims who receive a negative conclusive grounds decision has been criticised as being inconsistent with the right to an effective remedy guaranteed by ECHR art. 13.[65] The most recent US State Department Trafficking in Persons Report stated that

> Although the [UK] government meets the minimum standards, the victim identification and referral system, did not consistently assist all those requiring help, and the quality of care varied between jurisdictions in the UK. The government did not always ensure victim care following a 45-day

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[62] Cockbain and Brayley-Morris, n 49 above, 15.

[63] The UK National Referral Mechanism for victims of human trafficking is under review and changes to the NRM have been piloted in West Yorkshire police force area and the South West from 3rd August 2015. The outcome of these have not been published yet.

[64] These can be referred by 'first responders' (such as the UK police, UK Borders Agency (UKBA), and certain Non-Government Organisations (NGOs); for instance the Salvation Army or Barnardo's, to one of two Competent Authorities (CA): the National Crime Agency's (NCA) Modern Slavery Human Trafficking Unit (MSHTU) or the Home Office Visas and Immigration (UKVI). The CA will then determine whether there are 'reasonable grounds' to suspect that the individual is a victim of trafficking. See http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/specialist-capabilities/uk-human-trafficking-centre/national-referral-mechanism (accessed 15 Jan 2018).

[65] Anti-Trafficking Monitoring Group, *Wrong Kind of Victim* (2010) www.ecpat.org.uk/Handlers/Download.ashx?IDMF=9b1a0aa4-8645-4d61-ade8-e5e7257ddc98 (accessed 12 Jan 2018).

> reflection period, after which authorities in many cases deported foreign victims who were not assisting in an investigation and prosecution.[66]

In cases of trafficking in persons, statements by victims are often inconsistent or even include outright falsehoods.[67] While in general the consistency of a witness statement will be an important element for courts to consider in their assessment of credibility, in cases of trafficking, inconsistencies may arise from a range of reasons other than lack of credibility including lapses in memory, confusion about the chain of events or traumatic reactions.[68] It is well-documented that trafficking victims will often recount inconsistent stories as a result of the trauma they have experienced, a fear of the authorities and/or the repercussions of speaking out which present some unique barriers to the investigation of human traffickers.[69] The fear a victim may have in assisting the law enforcement officers could be enormous. For instance, the fear from the traffickers that might harm victims' family members in their home country; shame, particularly, for the victims of sexual exploitation who were forced into prostitution; self-blame and guilt that prevent them from leaving the trafficking situation which contribute to their inability to recall the exact details of their victimisation.[70]

As mentioned above, the reflection period plays an important role in the recovery of victims; however, this has been also a contentious issue for some CoE member states which view it as a potential 'pull factor' for illegal immigration. It is feared that some illegal immigrants may make false claims of being trafficked in order to receive the benefits of protection and support offered to 'genuine' victims of trafficking.[71] For example, in the UK under the NRM, as a result of obligations under the Trafficking Convention (Article 14 (1) (b)), a victim of trafficking may be granted 'discretionary leave to remain' (DLR) for a period of up to one year if they are assisting the authorities in their criminal investigations. Although potential victims are under no obligation to cooperate with the police in their investigations[72] however, by remaining in the UK the police and legal professionals involved in the criminal

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[66] US Department of State, *Trafficking in Persons Report, June 2017*, 411-2 https://www.state.gov/j/tip/rls/tiprpt/2017/ (accessed 12 Jan 2018).

[67] United Nations Office on Drugs and Crime (UNODC), 'Evidential issues in Trafficking in Persons Cases' 2017 www.unodc.org/documents/human-trafficking/2017/Case_Digest_Evidential_Issues_in_Trafficking.pdf (accessed 15 Jan 2018).

[68] Johanna Lindholm, Ann-Christen Cederborg and Charlotte Alm, 'Adolescent girls exploited in the sex trade: informativeness and evasiveness in investigative interviews' (2014) 16 *Police Practice and Research: An International Journal* 197.

[69] e.g. Cockbain and Brayley-Morris, n 49 above

[70] Elizabeth Hopper, 'Underidentification of Human Trafficking Victims in the United States' (2004) 5 *Journal of Social Work Research and Evaluation, 125-136.*

[71] UN.GIFT, n 58 above.

[72] Home Office, United Kingdom Borders Agency, 2010. *Victims of Trafficking: Guidance for Competent Authorities.* 106. www.gov.uk/government/publications/victims-of-trafficking-guidance-for-competent-bodies (accessed 15 Jan 2018).

investigation will have easier access to the victims to obtain evidence while the victims can benefit from the provided support necessary for their recovery. This is an area which the defence can attempt to weaken the prosecution's case by claiming that the victim was incentivised to assist the police by the promise of DLR.

An important question here is: how can the 'genuine' and 'deserving' victim be distinguished from the 'fraudulent' or 'undeserving'? According to O'Connell Davidson this binary is particularly salient in the depiction of the 'trafficking victim', mainly victims of sexual exploitation. [73] Both the 'genuine' victim of evil sex traffickers and the 'bogus' victim playing the system can serve as part of the rhetoric justifying state coercion against migrants and sex workers. [74] As an example of the latter, it has been reported that a growing number of pregnant Albanian women who pay criminal gangs to smuggle them into Britain are falsely claiming to be sex trafficking victims to gain asylum. Anthony Steen, the UK's former special envoy on human trafficking, claimed that 'while the number of claims from Albanian women who claim to have been sex trafficked had reached a record high, government investigations found most cases were fabricated'.[75] Whatever the ideological uses of the genuine/fabricated binary, it is one that courts cannot avoid when the evidence of alleged victims is challenged. The courts are seemingly willing to challenge expert evidence which simply recounts the testimony of alleged trafficking victims, and NRM decisions regarding such status are not binding on the court.[76]

Notwithstanding such anxieties, courts in various jurisdictions have been ready to accept the evidence of complainants despite, or even because of, inconsistencies in their evidence which can be attributed to intimidation.[77] The recent UNODC report on *Evidential Issues in Trafficking in Persons Cases*[78] gives examples from a range of jurisdictions.

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[73] Julia O'Connell Davidson, 'New Slavery, Old Binaries: Human Trafficking and the Borders of "Freedom"' (2010) 10 *Global Networks* 244.

[74] Margaret Malloch and Paul Rigby, (eds.) *Human Trafficking: The Complexities of Exploitation*, (Edinburgh, Edinburgh University Press), p. 183.

[75] http://news.trust.org//item/20141110172225-y5yir/

[76] See *R v Joseph* [2017] EWCA Crim 36.

[77] The US State Department urges prosecutors to see 'a reluctant or untruthful witness as … evidence of the trafficker's success in controlling the victim': *Trafficking in Persons Report 2017*, n 69 above, 7.

[78] United Nations Office on Drugs and Crime (UNODC), *Evidential issues in Trafficking in Persons Cases*' (2017) available at

www.unodc.org/documents/human-trafficking/2017/Case_Digest_Evidential_Issues_in_Trafficking.pdf (accessed 12 Jan 2018).

In many cases the argument that inconsistencies in a complainant's testimony can best be explained as effects of their victimisation is a perfectly reasonable one.[79] Before it is accepted as a basis for conviction, however, fairness demands that the defence have ample opportunity to advance the alternative explanation that the complainant is inconsistent because she or he is lying. This raises difficult questions about just how far the defence need to be allowed to go. Do they have to be able to question a witness about every single untruth or inconsistency, or does that pose too great a risk of secondary victimisation or of unfairly discrediting the complainant, particularly where the factfinder is a lay jury inexperienced in the effects of trauma? In cases such as *Rehman*[80] and *Jonas*,[81] discussed below, trial judges have protected complainants against what they saw as unduly repetitive or detailed questioning, and these restrictions have been upheld on appeal.

Further difficulties arise from the process of interviewing complainants, particularly when these interviews, conducted in accordance with ABE (Achieving Best Evidence) guidelines, are used as witness's evidence in chief.[82] Specialist-trained interviewers in line with ABE guidance will interview victims wishing to support prosecution in order to obtain statements and intelligence regarding offender methods before relocation occurs through the NRM.[83]

According to Kaur,[84] due to the trauma they have experienced and feelings of shame and fear, their testimony is often disjointed and a full account of their experiences may only come to light over a course of follow up interviews.[85] This can be difficult to present to a jury. The CPS Inspectorate 'were told of lengthy incoherent accounts, with or without interpreters, provided by way of ABE that could not be used [as evidence in chief], being too long and too unwieldy to edit.'[86] Multiple interviews are often necessary to build trust and rapport between law enforcement and traumatized victims. However, multiple interviews can have the reverse effect of re-traumatizing victims rather than creating trust and ultimately cooperation in a case against the perpetrator.[87] In a US study, Warpinski acknowledges that trafficking victims can

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[79] On the acceptance of testimony as a form of inference to the best explanation, see Axel Gelfert, *A Critical Introduction to Testimony* (Bloomsbury, 2014), 136-42.

[80] *R v Rehman, Rasheed and Ali* [2017] EWCA Crim 106.

[81] *R v Jonas* [2015] EWCA Crim 562.

[82] Youth Justice and Criminal Evidence Act 1999, s 27.

[83] HMICFRS, n 10 above, 71.

[84] Kalvir Kaur, 'Obtaining Evidence from Traumatised Trafficked Persons', in Parosha Chandran (ed) *Human Trafficking Handbook: Recognising Trafficking and Modern-Day Slavery in the UK* (London, LexisNexis Butterworth, 2011), 103.

[85] ibid.,

[86] HMCPSI, n 8 above, para 6.9.

[87] Farrell, n 57 above, 124.

be challenging for prosecutors to work with, by depriving them of voice, choice, and validation, but she found that judges were concerned about secondary victimisation by prosecutors.[88]

The Court of Appeal has grappled with some of these issues in *Rehman,*[89] a case of rape, trafficking and sexual activity with a child. The complainant was a 13-year old girl and the ABE interviews with her lasted, depending on which of two passages in the Court of Appeal judgment is correct, either 10½ hours or at least 13 hours.[90] The prosecution acknowledged 'that in the first interviews she told many lies and concocted detailed but false stories. They relied on the last interviews, in which she described offences committed by the appellants'.[91] The judge agreed that only the interviews – 8 hours in length – on which the prosecution relied should be played to the jury as the complainant's evidence in chief. The jury was also provided with a 20-minute excerpt from the earlier interviews, and a summary of the lies and inconsistencies in these interviews. In upholding these decisions, the Court of Appeal remarked that it was not necessary for every previous inconsistent statement to be put to such a vulnerable witness, either by questioning or by playing the interview. The combination of admissions by the prosecution, the excerpt from the earlier interviews, and questions put to the complainant in cross-examination had given the jury 'sufficient detail of the lies told and sufficient material to show C's demeanour'.[92]

As far as we can tell from the limited detail in the judgment, this seems a fair approach in that it avoids making the evidence needlessly confusing while communicating clearly to the jury the decision they have to make between two competing explanations of the complainant's lies. There was, however, one particular lie by the complainant which was kept from the jury for reasons that exemplify the difficult legal issues discussed below.

Part II: Trafficking Victims and the Law of Evidence

Decisions to exclude certain defence evidence or lines of questioning, or to allow alleged victims' testimony to be given anonymously or by way of hearsay statements, raise difficult issues about how to reconcile the rights of victims with those of defendants. We shall explore four of these issues: evidence of the complainant's bad character; sexual history evidence; anonymous evidence; and hearsay evidence from complainants ostensibly in fear.

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[88] Sarah Warpinski, *Know Your Victim: A Key to Prosecuting Human Trafficking Offenses* (2013), https://digitalcommons.law.msu.edu/king/222/ (accessed 15 Jan 2018) 22.

[89] *R v Rehman, Rasheed and Ali* [2017] EWCA Crim 106.

[90] Ibid [5], [25].

[91] Ibid, [5].

[92] Ibid, [53]

Bad Character

Senior Investigating Officers interviewed by Cockbain and Brayley-Morris expressed concern about the volume of 'bad character' evidence that had to be disclosed on victims and its potential to undermine witness credibility.[93] Cross-examination can be a painful and traumatic experience for vulnerable witnesses, including victims of offences such as human trafficking. It can undermine the right to be heard, if it prejudices a jury to such an extent that they do not fairly hear what the witness has to say. Cross-examination is often combined with attacks on a witness's character. The Criminal Justice Act 2003, s 100, restricts the circumstances in which evidence of bad character can be used to discredit a victim, but it allows such evidence where it is of 'substantial probative value'. So although trial judges can shield complainants from the distress, and unfair undermining of their credibility, that could result from gratuitous 'mud-slinging', the need to allow the defence to air any legitimate ground for reasonable doubt sets an important limit to such protection.

In the *Rehman* case discussed above,[94] it is strongly arguable that the trial judge overstepped this limit when he excluded evidence that the teenage complainant had previously made what she admitted was a false allegation of abduction against a young man she regarded as her 'boyfriend'. It seems hard to deny that the probative value of this evidence was substantial. The defence case was that once again the complainant was falsely alleging serious crime by 'boyfriends' with whom she had fallen out. The evidence of the previous case would have shown that this was not just a crude appeal to a 'rape myth', but a claim that the complainant had followed an unusual pattern of behaviour that she had adopted in the past.

Once it is accepted that bad character evidence has substantial probative value, there is no discretion to exclude it.[95] From a victim-centred perspective this is unfortunate but, we submit, unavoidable. There cannot be a fair trial where the defendant is barred from adducing evidence of substantial probative value. The Court of Appeal in *Rehman* nevertheless held that the exclusion of this evidence was 'within the bounds of legitimate discretion'.[96] If the court was using discretion in the strong sense this cannot be right, but it is more likely that what they meant by discretion is that whether the probative value of the evidence is substantial is a fact-sensitive judgment with which the Court of Appeal is reluctant to interfere. While the concern of both the trial judge and the Court of Appeal to minimise the distress of a vulnerable young witness are commendable, their decisions stretch the legitimate boundaries of fact-sensitive judgment.

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[93] n 49 above, 14.

[94] [2017] EWCA Crim 186. For more on the aspects discussed here see Tony Ward, 'Vulnerable Witnesses, ABE Interviews and Bad Character' (2017) 82 J Crim L 244.

[95] *R v Dizaei* [2013] EWCA Crim 88; [2013] 1 Cr App R 31, [35].

[96] [2017] EWCA Crim 186, [55].

Sexual history

Whatever the imperfections of its drafting,[97] the overall aims of the Youth Justice and Criminal Evidence Act 1999, s 41, align with the view of victims' rights outlined above. It protects 'the right of complainants not to be subjected to unnecessary humiliation and distress when giving evidence'.[98] By protecting complainants against marginally relevant but potentially prejudicial[99] attacks on their credibility, it helps to protect their 'right to be heard'. At the same time, s 41(2)(b) allows evidence of the complainant's sexual history to be admitted where its exclusion 'might have the effect of rendering unsafe a conclusion of the jury … on any relevant issue in the case.' What is problematic about s 41 is that, but for its creative interpretation (or rewriting) by the House of Lords,[100] it would exclude evidence that might render a conclusion unsafe but did not fall within any of the narrowly defined categories of admissible evidence it sets out. A neglected aspect of s 41 is its application to human trafficking for the purposes of sexual exploitation,[101] and a number of other offences related to sex work, such as controlling prostitution. Here too, the rigid wording of the section is a potential source of difficulty.

One issue, which arose in the *Rehman* case discussed above, is that while evidence that a witness has previously made a false allegation of sexual behaviour does not in itself constitute evidence of sexual behaviour, it may be impossible to introduce or challenge the evidence without raising issues of sexual behaviour. In *Rehman* the complainant had admitted making a false allegation of abduction against her 'boyfriend', a term that could denote a merely romantic relationship (especially given the youth of both parties) but had sexual connotations. The prosecution would have wished to point out that the 'boyfriend' had admitted to sexually touching the under-age complainant, and they would have been free to do so as s. 41 does not apply to prosecution evidence, although there is a strong argument that it should be extended to curb unnecessarily intrusive prosecution questioning.[102]

For the reasons given above, we submit that this evidence ought to have been admitted, but in a way that kept its distressing and intrusive nature to a necessary minimum. All that was

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[97] See for example Mike Redmayne, 'Myths, relationships and Coincidences: The New Problems of Sexual History' (2003) 7 E&P 75; Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd ed, OUP 2010), 458-52; Brian Brewis, *Sexual Behaviour Evidence: A Critical Examination of Section 41 of the Youth Justice and Criminal Evidence Act 1999* (unpublished PhD thesis, Northumbria University, 2017).

[98] *R v A (No 2)* [2002] 1 AC 45, [51] per Lord Hope.

[99] For reasons given by Redmayne, n 100 above, 'marginally relevant' will often be a more accurate term than 'irrelevant'; but cf Clare McGlynn, 'Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence (2017) 81(5) J Crim L 367.

[100] *R v A (No 2)* [2002] 1 AC 45

[101] YJCEA 1999 s 62(1)(b)

[102] Liz Kelly, Jennifer Temkin and Sue Giffiths, *Section 41: an Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (Home Office Research Report 20/06, 2006), 13, 76.

relevant to the issue in *Rehman* was the intense emotional relationship implied by the word 'boyfriend,' in the context of which the complainant had supposedly concocted her allegations, and there was no good reason for either the defence *or the prosecution* to invade the complainant's privacy by asking about any sexual contact between her the man concerned. In this respect s 41 is arguably not restrictive enough. The Court of Appeal should not, however, have used the fact that s 41 could raise difficult issues as a reason for excluding the potentially significant evidence of the false allegation.

Another issue about sexual history that can arise in trafficking cases is illustrated by *Jonas.*[103] The two complainants in this case gave evidence that they had been forced to work as prostitutes in Hungary before being trafficked to England where further enforced prostitution awaited them. The defence challenged the portrayal of the women as passive victims, claiming that they had freely chosen to become prostitutes and to move to England; the defendants had merely helped them to ply their chosen trade in a new location. The trial judge imposed restrictions on the cross-examination of the women about their lives in Hungary; these were upheld on appeal as legitimate measures to protect vulnerable witnesses.

For reasons that are not entirely clear, no issue under s 41 appears to have been raised, although any defence questioning about the complainants' careers as sex workers was undoubtedly within the scope of the section. It was probably assumed that as they had given evidence in chief about the nature of their past experience as prostitutes, the defence were entitled to seek to rebut it under s 41(5). The difficulty with this view is that it overlooks the requirement under s 41(6) that any questioning or evidence must relate to a 'specific instance' of past sexual behaviour. According to the Court of Appeal in *White,* the mere fact that a woman has a history of paid sex work, or even that she has convictions for prostitution offences at specific times and places is not a sufficiently specific allegation of sexual behaviour to be admitted under s. 41.[104] Rather, 'there must be something about the circumstances of a specific episode of alleged sexual conduct by a complainant which has potential probative force'.[105] The issue in *White* was whether the mere fact of having worked as prostitute had probative force under s 41(3). It is a different question whether such evidence can, in certain cases, have probative force under s 41(5). Evidence that the complainants' sex work in Hungary had been freely chosen would have probative force in rebutting their accounts of being trafficked to England against their will and compelled to work under the control of the defendants. Nevertheless, it is difficult to see how such questions could be confined to *specific instances* of sexual behaviour, unless the defence were in a position to ask about individual clients.

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[103] [2016] EWCA Crim 37.

[104] *R v White* [2004] EWCA Crim 946.

[105] Ibid. [16]. Arguably this adds 'a gloss that Parliament had not intended' to s 41(6): Brewis, n 100 above, 135. See also Peter FG Rook and Robert Ward, *Sexual Offences: Law and Practice* (6th edn, Sweet & Maxwell 2016)1464 n 175.

Rook and Ward describe s 41(6) as a rock 'lurking beneath the surface' of s 41 and threatening the fairness of trials,[106] and this is one instance where the metaphor seems right. Section 41(6) is intended to exclude general allegations of promiscuity in rape trials. In some human trafficking cases it may need to be very broadly construed in order to comply with the Human Rights Act by admitting evidence essential to a fair trial, as the House of Lords did in *R v A*[107] in respect of s. 41(3).

This does not render s 41 nugatory as a protection for human trafficking victims. Even under a broad interpretation of s 41(6), leave should be given to question alleged victims about their sexual history only to the extent that 'a refusal of leave might have the result of rendering unsafe a conclusion of the jury ... on any relevant issue in the case' (s 41(2)(b)). This might have been invoked in *Jonas* as a further basis for some of the restrictions on questioning that the judge imposed (although much of the questioning was only obliquely related to their sex lives). The defence must, however, be given reasonable scope to challenge the portrayal of the complainant as a passive victim of exploitation.

In both the areas we have considered, s 41(2)(b) emerges as the key to a fair interpretation of the law. This is no accident: s 41(2)(b) encapsulates the law's attempt to combine the defendant's right to a fair trial with the complainant's rights to privacy, to effective participation in the trial (which can be fatally undermined by unfair attacks on her credibility) and to protection against secondary victimisation. To allow as much questioning as is necessary to ensure a safe verdict, and no more, is the most reasonable way to combine these goals. If Parliament had trusted judges to apply this principle fairly, the rest of s 41 would have been unnecessary. On the assumption that judges are now more sensitive to the needs of victims and the dangers of 'rape myths' than they were in the 1990s,[108] a broad test of 'substantial probative value' may be preferable to the intricacies of s 41.[109]

Anonymity and risk

One of the most important and familiar cases on the rights of victims in criminal proceedings is *Doorson v Netherlands*, where the ECtHR pointed out that although ECHR art 6 does not specifically protect victims and witnesses, their rights to life, liberty, security of the person and privacy are protected by other articles of the Convention and 'principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or

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[106] Ibid, 26.178.

[107] [2001] UKHL 25; [2002] 1 AC 45.

[108] Brewis, n 100 above.

[109] Cf. McGlynn, n 102 above, 388, arguing for a test, modelled on Canadian and Scots law, of significant probative value not substantially outweighed by the danger of prejudice to the administration of justice.

victims called upon to testify'.[110] There was no suggestion that the applicants had personally threatened any of the witnesses but the Court accepted that, 'Regard must be had to the fact, as established by the domestic courts and not contested by the applicant, that drug dealers frequently resorted to threats or actual violence against persons who gave evidence against them.'[111]

Thus it appears that to justify the use of anonymous witnesses under art. 6, or other measures that limit the accused's right of confrontation, it can be sufficient to show that the *type* of crime with which the defendants are charged is such that *if* they are involved in it, there may be a real danger to the witness. This approach sensibly avoids any suggestion that the court is prejudging whether the defendants are, in fact, involved in that type of crime.

In considering a witness anonymity order under the Coroners and Justice Act 2009, s 88(3), it appears legitimate to take a similar approach. It is well established that human traffickers often resort to threats or violence, not only against witnesses themselves but against family members in their countries of origin.[112] The Court of Appeal stressed in *Mayers* that the word 'necessary' imports a high standard of proof – it is debateable whether this is equivalent to the criminal standard[113] – but evidence that the witness or his/her family *would* be in grave danger if their evidence were true could well meet this standard. Unfortunately in many cases the identity of the witness is likely to be known to the defendants. In other cases, the fact that the defendants may have a very strong suspicion of who the witness is does not preclude its being 'necessary' to avoid confirming their suspicions.[114]

Hearsay and fear

The position is not so simple where the prosecution seeks to adduce hearsay evidence on the ground that a witness is 'in fear'. Unlike the anonymous witness provisions, CJA 2003 s. 116(1)(e) requires two findings of fact about the mental state of the witness: that she is in fear, and that the fear is the cause of her failure to give oral evidence (at all or in response to particular questions). It does *not* require that the fear have any objective basis, but some evidence of such

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[110] (1996) 22 EHRR 330, [70].

[111] Ibid, [71]

[112] M. Hossain Zimmerman and Cathy Watts, 'Human Trafficking and Health: A Conceptual Model to Inform Policy, Intervention and Research', (2011) 73(2) *Social Science & Medicine* 327. See also Hussein Sadruddin, Natalia Walter and Jose Hidalgo, 'Human Trafficking in the United States: Expanding Victim Protection Beyond the Prosecution Witness', (2005)16 Stan. L. & Pol'y Rev. 379- 383.

[113] 'Case Comment: Anonymous Witnesses' (2009) 13 E&P 150. What is 'necessary' may be a question to which neither the criminal nor the civil standard applies: see *Misick v R* [2015] UKPC 31, [2015] 1 WLR 3215.

[114] *R v Powar* [2009] EWCA Crim 254; [2009] 2 Cr App R 8.

a basis is needed to justify resorting to hearsay under ECHR art, 6.[115] According to the Court of Appeal in *Shabir,* when it is the prosecution that seeks to rely on hearsay evidence they must prove both these matters to the criminal standard.[116] Where it is the defence that adduces the hearsay evidence the standard is presumably the civil one, as it was under CJA 1988.[117]

The dilemma that this high standard of proof creates in human trafficking cases is obvious. Genuine victims of trafficking, as we have seen, are often in great and well-founded fear, and the law should enable their evidence to be admitted in cases where they cannot be persuaded to attend court (or submit to video recorded cross-examination under YJCEA s. 28, which as yet, except in three Crown Courts,[118] is available only for children and witnesses with mental or physical disabilities).[119] But how is the court to be satisfied to the criminal standard that a complainant has fallen into the hands of a criminal gang with the power to intimidate her, when that is the very issue in dispute in the trial? A decision to deny the defence the right to cross examine a witness should not presuppose the truth of the very evidence the defence is denied the right to challenge. Consequently, as *Shabir* acknowledges, it may be difficult to establish fear without bringing the witness to court to face cross-examination about the genuineness of their fear – although the court also acknowledges that in some types of case, (which may well be thought to include human trafficking) this is undesirable.[120] It would be hard to devise a less satisfactory way of upholding the rights of both witnesses and defendants.

In *R v Ali*,[121] the defendants were alleged to have transported young teenage girls, after a period of grooming, relatively short distances to out-of-the way places where, having been plied with alcohol, they were sexually assaulted or raped. One important point established by the Court of Appeal's judgment is that such brief 'transport' can constitute trafficking, and the judgment is also important for what it says about the meaning of 'consent' under the Sexual Offences Act 2003. The evidential issue in this case was that the ABE interview of a teenage girl, 'GB', was admitted as hearsay evidence on the ground that she was in fear. The evidence of fear was a social worker's statement that GB 'had said she was scared about going to court and the thought of coming to court gave her more pain and stress than the actual incident and [the social worker's] opinion was that [GB] had been emotionally traumatised by the whole

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[115] *Al-Khawaja v UK* (2012) 54 EHRR 23

[116] [2012] EWCA Crim 2564, [64].

[117] *R v Mattey* [1995] 2 Cr App R 409; see also *R v Nkemayang* [2005] EWCA Crim 1937.

[118] Namely Leeds, Kingston and Liverpool, where its extension to sexual offence and human trafficking complaints is being piloted: Penny Cooper and Michelle Mattison, '"Section 28" and the Pre-recording of Cross-Examination' (2018, 6 Jan) 182 CL & J 7, 8.

[119] Criminal Practice Direction 2015 (Amendment no. 5) [2017] EWCA Crim 1076, para 18E.1.

[120] [2012] EWCA Crim 2564, [64].

[121] [2015] EWCA Crim 1279; [2015] 2 Cr App R 33.

event and added to her childhood experiences when she was aged three.'[122] This is a classic case of a witness at risk of secondary victimisation and given the express statutory requirement that 'fear' be widely construed,[123] the judge and the Court of Appeal were clearly right to treat the social worker's statement as evidence that GB was in fear. It is difficult, however, to see how it could constitute sufficient evidence to prove fear to the criminal standard. Opinion evidence based on hearsay evidence from the very witness the defence sought to portray as highly unreliable cannot be sufficient to prove beyond reasonable doubt the traumatic nature of the incident about which GB would have had to testify.[124] The Court of Appeal in fact made no reference to the standard of proof but simply held that fear was 'established'.[125] The Court could and should have done better than to fudge the issue in this way.

One option open to the Court of Appeal would have been to state clearly that what was said in *Shabir* about the standard of proof was *obiter* and should not be followed. The point does not appear to have been argued in *Shabir* and the court expressly states that the part of the judgment dealing with the proof of fear is not among the grounds for its decision.[126] Although some commentators assert that there is a general principle that *all* preliminary matters which the prosecution seeks to prove must be proved to the criminal standard,[127] this principle is not firmly established in case law. The strongest authority for it is Lord Hughes JSC's judgment in *Misick v R*,[128] but not only is the Privy Council's acceptance of the principle clearly *obiter*, but Lord Hughes is at pains to point out that the earlier authorities for it were either confined to specific situations,[129] or were *dicta* on points that had not apparently been argued. [130] Australian, Canadian and New Zealand courts which have considered the general issue of

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[122] Quoted ibid, [50].

[123] CJA 2003 s 116(3)

[124] Contrast the Court of Appeal's scepticism about the expert evidence in *R v Joseph,* n 79 above.

[125] [2015] EWCA Crim 1279 [71].

[126] [2012] EWCA Crim 2564, [68].

[127] JR Spencer, *Hearsay Evidence in Criminal Proceedings* (2nd edn 2014) para 6.40; Hodge Malek (ed) *Phipson on Evidence* (18th edn, 2013) para 30-95; Ian Dennis, *The Law of Evidence* (6th edn 2017) para 11-047. Rosemary Pattenden, 'The Proof Rules of Pre-verdict Judicial Fact-finding in Criminal Trials with Jury' (2009) 109 LQR 79, 98-102, accepts the existence of the rule but denies it has any principled basis.

[128] [2015] UKPC 31; [2015] 1 WLR 3215.

[129] Ibid, [37], referring to confession evidence (where the criminal standard is now enshrined in the Police and Criminal Evidence Act 1984, s 76) and the authenticity of exemplars of handwriting: *R v Ewing* [1983] QB 1039.

[130] E.g. *R v Minors* [1989] 1 WLR 441 (drawing an unwarranted generalisation from the *Ewing* case above).

principle have all concluded that in general the appropriate standard of proof is the civil one,[131] although Canada and New Zealand, unlike Australia, make an exception for the voluntariness of confessions.[132]

There is much to be said for adopting the civil standard of proof for most preliminary issues, including that of whether a witness is in fear, but this raises wide issues beyond the scope of this article.[133] What we want to suggest here is that it would be in keeping with a victim-centred due process approach to admit the hearsay evidence in *Ali* even on the assumption that fear must be proved to the criminal standard.

What the court should have done, we suggest, was to hold that even if the evidence was not admissible through the 'fear' gateway, it was admissible in the interests of justice under s 114(1)(d). The Court of Appeal has stressed on a number of occasions that s 114(1)(d) should not be used to circumvent the requirements of the specific gateways,[134] and has also urged caution in using the discretion to protect witnesses on grounds that assume what the prosecution needs to prove.[135] If the fear gateway cannot be passed unless fear is proved to the criminal standard, it would be wrong to hold that a lesser degree of proof was sufficient *in itself* to establish that the interests of justice required the hearsay to be admitted. The issue in *Ali* was not, however, simply whether the witness was in fear. Rather, the court should have focussed on the risk that the complainant would actually be traumatised by having to relive her experience. No prejudgment of guilt is involved in finding that there is a *risk* that the events the witness would have to describe *may* have been so traumatic that she would suffer secondary victimisation by having to relive them. Such a risk may exist whether or not the complainant is in a subjective state of fear. It is more serious than a mere reluctance to relive distressing past experiences, which has been held insufficient to justify admission under s 114(1)(d).[136] It is incumbent on courts to protect witnesses against secondary victimisation, while giving them a fair opportunity for their stories to be heard, provided that this is consistent with the defendant's right to a fair trial. In a case such as *Ali*, it is in the interests of justice to admit the hearsay evidence provided there are sufficient opportunities for the defendant to challenge it.

Similarly, s 114(1)(d) could be used in the situation where complainants claim that they or their families have been threatened by the defendants and their associates, but it would be

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[131] David M Paciocco and Lee Stuesser, *The Law of Evidence* (5th edn, Irwin Law, 2008), 20-21; *R v U(FJ)* (1995) 42 CR (4th) 133 (SCC); for New Zealand see JD Heydon, *Cross on Evidence* (9th Australian edn, LexisNexis 2004), 360 n 113; *Police v Anderson* [1972] NZLR 233, 249-50.

[132] Paciocco and Steusser, n 134 above; *R v McCuin* [1982] 1 NZLR 13, 22; Andrew Ligertwood, *Australian Evidence* (4th ed. LexisNexis 2004), 100-1; *Wendo v R* (1963) 109 CLR 559.

[133] These are discussed in a forthcoming article by the first author and Natalie Wortley.

[134] *R v Z* [2009] 1 Cr App R 34; *R v C* [2010] EWCA Crim 2401, [2010] Crim LR 858; *R v CT*[2011] EWCA Crim 2341, [2012] Crim LR 217.

[135] *R v Burton* [2011] EWCA Crim 1990, [16].

[136] *R v Z* [2009] 1 Cr App R 34.

premature to find this proved to the criminal standard at the admissibility stage. The reason for admitting the evidence in the interests of justice would not be the witnesses' subjective state of fear, but the risks that they or their families would face should it turn out that the defendants really were members of a violent criminal organisation. As in *Doorson*, this could be justified on the basis of what is known about the common methods of this type or organised crime, without any prejudgement of the guilt of the particular defendants.

Conclusion

We have examined a number of situations where, in theory, the rules of evidence appear to pose serious problems for the prosecution of human trafficking cases. The qualification '*in theory'* is important, because what we have also seen (particularly in *Rehman* and *Ali*) is that the Court of Appeal is quite capable of fudging the issue so as to avoid decisions that would seem harsh from the perspective of the alleged victim. What we do not know is how often similar fudges are applied at first instance. Nor do we know how far the 'law in the books' influences prosecutorial decisions. This ignorance as to how the technicalities of evidence law are reflected in practice is a problem not just for the study of human trafficking prosecutions but for evidence scholarship in general, and it can be remedied only be empirical research.

In a human rights perspective, criminal trials for serious offences should be seen not simply as crime control measures – though they do have a part to play within a wider strategy to reduce crime – but as the forum in which the state seeks to fulfil its duty towards those whose human rights have been violated by crime, by proving the guilt of an offender in a fair trial in which the victim is afforded a fair opportunity to participate.[137] It is essential to a fair trial that the defendant must be able to adduce evidence that is of substantial probative value, and raise questions that potentially afford grounds for reasonable doubt, even if that evidence or those questions may be distressing to the alleged victim. However, the right of victims to be protected against secondary victimisation may afford compelling grounds for limiting the defendant's 'right to confrontation' provided there are what the ECtHR calls 'sufficient counterbalancing factors'[138] to ensure a fair trial. The weaknesses that commonly exist in the evidence of alleged trafficking victims, such as inconsistent or false previous statements and motives to present themselves as victims, will very often be ones that can be amply demonstrated to the court without needing to cross-examine the complainant. The recent report from the CPS Inspectorate highlights the use of the hearsay provisions, alongside other ways of bringing prosecutions without victim-witnesses, as form of good practice that needs to be used more effectively.[139] There is scope for some flexibility in the courts' response to such applications.

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[137] Tony Ward and Clare Leon, 'Excluding Evidence (or Staying Proceedings) to Vindicate Rights in Irish and English Law' (2015) 35 LS 571.

[138] *Al-Khawaja v UK* (2012) 53 EHRR 23, [147].

[139] HMICFRS, n 10 above, para 6.11.