

**Defending trafficked persons who commit crime,  
terror and war crimes.**

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Carmelite Chambers 11 June 2020

**PHILIPPA SOUTHWELL**

and

**FELICITY GERRY QC**

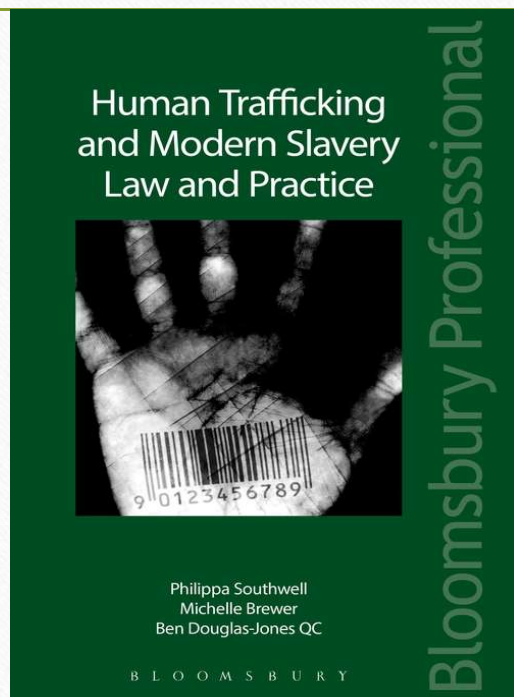


# Event outline

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Felicity Gerry QC spoke with Philippa Southwell, Managing Director of Southwell & Partners and The Human Trafficking & Modern Slavery Expert Directory, about their experience of the UK Modern Slavery Act 2015 and defending human trafficking victims who commit crime. Felicity also discussed defending trafficked persons who face the death penalty, raising the victim's rule in a terrorism trial and child soldiers in international law. Philippa founded the Human Trafficking & Modern Slavery Expert Directory in 2015, after identifying a desperate need for a single resource for professionals working in the counter human trafficking and modern slavery sector. The Directory provides professional training, eLearning and expert reports. Felicity is a listed expert.

# Human Trafficking and Modern Slavery: Law and Practice



Philippa co-edits/authors and Felicity contributes to 3 chapters in this book on UK Law. (2<sup>nd</sup> Ed coming soon).



# Background

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- The UK is a signatory to two important specifically human trafficking conventions: the UN Convention Against Organised Crime (UNCAT) and its Trafficking Protocol (UN Trafficking Protocol) and the Council of Europe Convention on Action against Trafficking in Human Beings (EU Trafficking Convention). The approach of England and Wales to trafficking in persons was largely driven by the EU Trafficking Directive which had direct effect. It has resulted in offences and defences set out in the Modern Slavery Act 2015 and mechanisms for appeals.
- UN General Assembly, *United Nations Convention against Transnational Organized Crime*: resolution adopted by the General Assembly, 8 January 2001
- UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, 15 November 2000
- Council of Europe, *Council of Europe Convention on Action against Trafficking in Human Beings*, 16 May 2005, CETS 197
- European Directive 2011/36/EU on *Preventing and Combating Trafficking in Human Beings and Protecting its Victims* (which replaced Council Framework Decision 2002/629/JHA).



# Definition

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- The MSA 2015 adopts the definition of trafficking in persons in the U.N. Trafficking Protocol and the EU Human Trafficking Convention as

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

# Identifying a trafficked person

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- UNODC on abuse of vulnerability  
[https://www.unodc.org/documents/human-trafficking/2012/UNODC 2012 Issue Paper - Abuse of a Position of Vulnerability.pdf](https://www.unodc.org/documents/human-trafficking/2012/UNODC_2012_Issue_Paper_-_Abuse_of_a_Position_of_Vulnerability.pdf)
- ICAT issue brief on non punishment principle  
<https://www.unodc.org/unodc/en/human-trafficking/Webstories2020/punishing-traffickers--not-victims--icat-launches-an-issue-brief-on-the-non-punishment-principle-for-victims-of-human-trafficking.html>



# Legal framework pre MSA 2015

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- Sexual offences Act 2003
- Sections 59A, 57, 58 and 59 - Human trafficking for sexual exploitation
- Coroners and Justice Act 2009
- Section 71 – Slavery, servitude or forced and compulsory labour
- Asylum and Immigration (Treatment of Claimants) Act 2004
- Section 4 – Human trafficking for all other forms of exploitation (non-sexual)

# *Modern Slavery and Human Trafficking Offences*

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- The offences of human trafficking contrary to section 2 and 4 Modern Slavery Act 2015 (MSA 2015).
- The MSA 2015 also provides for orders which may be imposed after conviction (Slavery and Trafficking Prevention Orders, under MSA 2015, section 14) or on separate application (both Slavery and Trafficking Prevention Orders, under MSA 2015, section 15, and Slavery and Trafficking Risk Orders, under section 23). Requirements for investigations into trafficking offences can be found in the Trafficking People for Exploitation Regulations 2013.



# Non Prosecution legal framework

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- Legal framework – Non prosecution of victims
  - UN Convention on the Rights of the Child 1989
  - UN Palermo Protocol 2000
  - Modern Slavery Act 2015
  - The European Convention for Human Rights, 1953
  - CoE Convention on Action against Trafficking in Human Beings 2009
  - The European Directive on Preventing and Combating Trafficking in Human Beings and Protecting its Victims (2011/36/EU)



# Defences and Appeals

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- It is relatively well known now that [s45 of the Modern Slavery Act 2015](#) provides a defence for trafficked persons who are compelled to commit crime where that compulsion is attributable to slavery or to relevant exploitation. Unfortunately, protection for trafficked persons is limited because schedule 4 to the Act limits the offences to which it applies. This does not prevent representations being made to the CPS that it is not in the public interest to prosecute an individual even if the alleged crime is an offence to which s45 is not applicable. This can be particularly useful for those who play a minor roles in serious offending, such as accessories. CPS Guidance on human trafficking, smuggling and slavery is [here](#)
- It is also relatively well known that those wrongly convicted before the Modern Slavery Act came into force can seek to appeal. The Court of Appeal Criminal Division (CACD) in *R v VSJ* [2017] 1 WLR 3153 declined to extend duress so the CACD largely deploys policy reasoning (under the guise of abuse of process), quashing convictions where had trafficking status been known at the time of the original prosecution the individual would not have been prosecuted.
- The accused trafficked person carries an evidential burden to raise their status but the burden of proof remains on the prosecution. See *MK v R and Gega v R* [2018] EWCA Crim 667.
- The very recent decision in *R v DS* [2020] EWCA Crim 285 made it plain that a stay of an indictment as an abuse of process would be extremely rare at trial level and gave priority to the statutory framework leaving policy decisions by the CPS.



# Procedural Rights

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- The UNODC Anti Human Trafficking Manual for Criminal Justice Practitioners <https://www.unodc.org/unodc/en/human-trafficking/2009/anti-human-trafficking-manual.html>
- The *Slavery and Trafficking Survivor Care Standards* <https://www.antislaverycommissioner.co.uk/media/1235/slavery-and-trafficking-survivor-care-standards.pdf>
- *The Trauma-Informed Code of Conduct for All Professionals Working With Survivors of Trafficking and Slavery*, <http://www.helenbamber.org/wp-content/uploads/2019/01/Trauma-Informed-Code-of-Conduct.pdf>



# Leading forced criminality VOT appeals

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- • R v JXP [2019] EWCA Crim 1280
- • R v N, R v L [2017] EWCA Crim 2129
- • R v VSJ and Others [2017] EWCA Crim 36
- • R v Y [2015] EWCA Crim 123
- • R v N, R v L [2017] EWCA Crim 2129
- • R v D [2018] EWCA Crim 2995
- • R v N & O [2019] EWCA Crim 752
- • R v N [2019] EWCA Crim 984
- • R v O [2019] EWCA Crim 1389
- • R v T(N) EWCA Crim 1569
- • R v V(T) [2019] EWCA Crim 1223



# sentencing

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- Arguably, if convicted, it can still be concluded that a defendant is a trafficked person even if there is a finding they were not compelled in relation to that particular offence.
- Vulnerability and drug mules study here  
[https://www.sentencingcouncil.org.uk/wp-content/uploads/Drug\\_mules\\_bulletin.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/Drug_mules_bulletin.pdf)



## Other Sources

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- UNODC Education for Justice Tertiary Materials. Felicity's **Module 14 on Links between Cybercrime, Trafficking in Persons and Smuggling of Migrants** here <https://www.unodc.org/e4j/en/tip-and-som/module-14/index.html>
- Documentary on Felicity's death penalty case in 2015 here <https://www.youtube.com/watch?v=fOmzpIlQ1ho>
- Game Theory and Human Trafficking paper here <https://www.tandfonline.com/doi/abs/10.1080/23322705.2019.1688086?journalCode=uhmt20>