COMMENT

Defence to modern slavery charge is being misused

Victims of trafficking are prosecuted while willing accomplices are let off

Ben Douglas-Jones

Thursday October 29 2020, 12.01am, The Times

Parliament has been unhelpful in failing to resolve issues around the burden of proof in modern slavery cases.

Section 45 of the Modern Slavery Act 2015, which provides a defence to the charge of slavery or trafficking if the suspect was compelled to commit the act because of their own enslavement or exploitation, should be changed. Prosecutors must prove that someone relying on the defence is not a victim of trafficking, while defendants should have to prove they acted under compulsion because of trafficking and had no realistic alternative to committing the offence.

The independent anti-slavery commissioner's review, published this month, said that the police were not consistently considering whether suspects could be victims and whether the defence might apply. Investigations and prosecutions are discontinued immediately when the defence is raised; criminal courts are placing undue reliance on decisions take by the single competent authority — the Home Office department that identifies and supports victims of modern slavery — and the defences are being raised late.

The commissioner found that the defence is abused, genuine victims are not benefiting and child protection is inadequate.

For context, it is worth looking at the county lines paradigm where children and vulnerable adult victims of modern slavery, compelled by traffickers to supply heroin and crack when they have no alternative, are not being investigated as possible victims and are criminalised instead. They are then likely to be further exploited and may become career criminals.

On the other hand, possible victims of exploitation who choose, without being pressured, to commit crime are not being prosecuted and go on to commit further offences. The failure to prosecute is a pull factor, whereby traffickers recruit children to supply drugs.

If the prosecution's burden was simply to prove that defendants alleging that they were trafficking victims were not, investigators would not avoid identifying victims, and the defence itself, fearing the result. They would focus on the alleged trafficking.

Young victims are vulnerable to further exploitation if they are criminalised
GETTY IMAGES

If defendants had to show on the balance of probabilities that they were compelled to commit a criminal act because it was connected to their trafficking status and they had no realistic alternative, they would only have to adduce evidence uniquely available to them. This would not prejudice defendants.

It would be a bonus if the defence for children were amended to reflect the international law, which parliament misread and misunderstood when enacting it. Whereas compulsion is not necessary for children to be trafficking victims, compulsion should, nonetheless, be a component of the defence. It would be a further bonus if the single competent authority introduced a third tier of decision – one that was fit for purpose in criminal courts.

Single competent authority decisions, designed to ensure victims' safeguarding, should have no status or weight in criminal proceedings. They are being given an elevated status and treated as definitive answers to questions that should only be answered by testing evidence at trial.

The commissioner's review has identified pernicious problems with the defence. They need to be addressed.

Ben Douglas-Jones, QC, practises from 5 Paper Buildings and is a contributing editor of Human Trafficking and Modern Slavery: Law and Practice, Southwell, Brewer and Douglas-Jones, Bloomsbury Professional, 2nd ed (October 2020)

Comments are subject to our community guidelines, which can be viewed here.

Comments (1)

Newest

Benjamin QC

B

Add to the conversation...

J

Jamie Gerry 5 HOURS AGO

Letting all illegal migrants stay in the UK supports the perpetrators of modern slavery. As usual our liberal legal system make things worse, in the name of human rights.

Reply 2 Recommend Report

BACK TO TOP

GET IN TOUCH

About us

Help

The Sunday Times Editorial Complaints

Classified advertising

The Times corrections

Careers

Contact us

The Times Editorial Complai

Place an announcement

Display advertising

The Sunday Times correctio

MORE FROM THE TIMES AND THE SUNDAY TIMES

The Times e-paper

Times Currency Services

Times Print Gallery

Times Crossword Club

Times+

Times Expert Traveller

Schools Guide

Best Places to Live

Sportswomen of the Year Awards

Podcasts