

# Section 45 statutory defence (Appendix E)

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**Section 45 of the Modern Slavery Act 2015** provides for a statutory defence where potential victims of modern slavery have been accused of committing criminal offences. The act makes a clear distinction between individuals 18 years and over, who are assumed as having a certain level of resilience, and those less than 18 years, who are considered to be more easily influenced and exploited.

For those 18 years and over at the time of committing the act that constitutes the offence, they are not guilty under section 45 if:

- the person does that act because the person is compelled to do it
- the compulsion is attributable to slavery or to relevant exploitation
- a reasonable person in the same situation as the person and having the person's relevant characteristics would have no realistic alternative to doing that act

A person may be compelled to do something by another person or by the person's circumstances.

For a defence under section 45 to be applicable, the compulsion must be a direct consequence of being a victim of slavery or human trafficking.

For those under 18 years at the time of committing the act that constitutes the offence, they are not guilty under section 45 if:

- the person does that act as a direct consequence of the person being, or having been, a victim of slavery or a victim of relevant exploitation
- a reasonable person in the same situation as the person and having the person's relevant characteristics would do that act

As can be seen, the child under 18 years does not have to be compelled.

The statutory defence in section 45 does not apply to all criminal offences. **Schedule 4 of the Modern Slavery Act 2015** lists the offences to which the defence does not apply. Examples include:

- kidnapping
- false imprisonment
- manslaughter
- murder
- perverting the course of justice
- threats to kill
- wounding
- possession of a firearm with criminal intent
- robbery
- aggravated burglary
- rape
- sexual assault
- sections 1 and 2 of the Modern Slavery Act 2015

The defence does not provide blanket immunity from prosecution.

In relation to how section 45 is considered in practice, the following case law should be noted.

- **MK v R [2018] EWCA Crim 667 [2019] QB 86** – To rely on the defence, the defendant must raise some evidence to show they were a victim of trafficking or slavery. The evidential burden of proof for this rests on the defendant. If the defendant provides sufficient evidence to allow for such a defence to be left to the jury, the burden then shifts to the prosecution to disprove the defence beyond reasonable doubt.
- **R v Brecani [2021] EWCA Crim 731** – The Court of Appeal found that ‘conclusive grounds’ decisions (CGDs) are no longer admissible as ‘expert evidence’. Caseworkers in the SCA cannot properly be considered ‘experts’ to the required standard. The outcome of a CGD is not admissible evidence in a criminal trial, so those who receive a positive CGD are not immune from prosecution.
- **VCL and AN v the United Kingdom** concerned two conjoined cases from 2009 and ruled that the UK had breached Article 4 of the European Convention on Human Rights (ECHR), the prohibition of forced labour – and by extension, Article 6, the right to a fair trial – in respect of the two applicants, following the prosecution of two children who had been the victims of trafficking.

Police officers discovered two young Vietnamese people working on separate cannabis farms. They were arrested and charged with drugs-related offences, to which they pleaded guilty. Following

conviction, they were detained in young offenders' institutions. There were domestic appeals against the convictions, which were dismissed.

The European Court of Human Rights (ECtHR) ruling stated that there had been failures to:

- recognise the two children as potential victims of trafficking
- complete a referral via the national referral mechanism (NRM)
- subsequently fully investigate their exploitation.

It also found that the lack of any assessment of whether the applicants had been victims of trafficking or slavery may have prevented them from securing important evidence capable of helping their defence. The consequences of the ruling are as follows.

## Duty to refer

The ECtHR decision emphasises that it is for national authorities to ensure that a suspected victim of trafficking is referred to the NRM. In particular, state authorities cannot rely on the victim's own lawyers to raise the issue of potential trafficking.

The onus is on the police, prosecutors, defence and court to identify indicators of trafficking, whether or not:

- the suspect makes any disclosure that they are a potential victim of trafficking or slavery
- they make any admissions concerning the offence

The most common circumstances or situations will arise when dealing with county lines drug dealing and cannabis cultivation. Officers should consider whether offenders in other situations – including sex working, shoplifting, begging and benefit fraud – may also be offending due to exploitation or slavery.

## Duty to investigate

The ECtHR made it clear that there is a "positive obligation" on the police to investigate "situations of potential trafficking". Failure to do so will amount to breach of Article 4 of the ECHR (duty to take operational measures to protect victims of trafficking) and by extension Article 6 of the ECHR (right to a fair trial). The breach of Article 6 will be a result of the absence of a thorough police

investigation into the suspect or defendant's trafficked status. In turn, this could deprive them of potential evidence to support the defence case.

When investigating any crime where officers are most likely to encounter a potential victim of criminal exploitation, the investigation should include considerations of the criminal exploitation of suspects. This is especially relevant for the crime type examples given in the previous 'Duty to refer' section. The investigation should consider whether the signs and indicators outlined elsewhere in this APP are relevant for the person being investigated.

If the police have not investigated a situation of potential trafficking in respect of a relevant offender, it is likely that any prosecution will fail.

Where a suspect has been identified as a potential victim, a national referral mechanism (NRM) referral has been made and a positive reasonable grounds decision (RGD) has been made by the SCA, a Modern Slavery Act 2015 crime must be recorded and a thorough investigation must be undertaken.

This crime will be investigated alongside the offence for which the person has been arrested. This means that, in effect, the two recorded crimes are one investigation and, where practicable, should be investigated by the same investigators.

## **Waiting for trafficking assessment before taking decision to prosecute**

The ECtHR confirmed that the decision to prosecute, as far as possible, should not be taken until a complete and thorough assessment of the suspect's trafficked status has been completed – by the SCA in the UK. This is a positive conclusive grounds decision.

The MSOICU report [Criminal exploitation – Is your suspect a victim of trafficking?](#) explains how this investigation should be managed. The guide also includes an annex with a detailed description of the 'VCL and AN v the United Kingdom' ruling and its consequences for policing.

Officers and staff should always consider whether an offender is a potential victim of modern slavery at the earliest opportunity. This is particularly the case if the offender is involved in a crime type that has an established link to modern slavery – for example, cannabis cultivation and supply of controlled drugs.

# Tags

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