



Zero Traffick Circle

The Role of Strategic Litigation in Tackling Issues Affecting Victims of Trafficking

Hosted by Shiva Foundation on 7 October, 2015

1. Introduction

Shiva Foundation is hosting a series of Zero Traffick Circles with key stakeholders within the anti-human trafficking field. The Foundation hopes to harness valuable insights into the gaps that exist in the response to this problem, and to better understand what collective steps may be taken now to address these challenges.

The Circle is a platform where participants can cultivate a shared vision for meaningful change and work towards a systemic response to the global problem of human trafficking.

On 7 October 2015, Shiva Foundation hosted its third circle on the strategic litigation in the sector. The Foundation extends its gratitude to all those who attended, for their openness and willingness to engage in this conversation.

Individuals in attendance were:

- Ainhoa Barrenechea, FLEX
- Anna Dugoni, Taylor Wessing
- Anna Sanders, Shiva Foundation
- Audrey Mogan, Aire Centre
- Catherine Meredith, Doughty Street Chambers
- Connie Sozi, DPG Law
- Elisabeth Andresen, Leigh Day
- Emily-Anna Gibbs, ATLEU
- Emma Lough, Aire Centre
- Jessica Best, Shiva Foundation
- Kamla Adiseshiah, Public Law Project
- Kerry Stares, Trust Law
- Markella Papadouli, Aire Centre
- Marta Bratek, Duncan Lewis
- Maryam Hussein, DPG Law

- Nancy Katambala, Fadiga & Co
- Nishma Jethwa, Shiva Foundation
- Parosha Chandran, 1 Pump Court Chambers
- Paul Yates, Freshfields
- Serena Grant, Trust Law
- Sharmalee Brooks-Gordon, FLEX
- Shanta Martin, Leigh Day

The dialogue was led by Claire Falconer from Focus on Labour Exploitation ('FLEX') and Frances Trevena from Poppy Legal. A summary of the objectives and key takeaways from the discussion follows.

2. Objectives

The focus of this Circle was the the role of strategic litigation in the UK in tackling issues affecting victims of human trafficking. The objectives were to:

- Learn about the varying approaches / strategies to strategic litigation.
- Openly discuss best practice.
- Identify key barriers and obstacles in order to consider practical solutions.
- Allow collaboration and avoid overlap.
- Understand how NGOs might support lawyers in the arena of strategic litigation.
- Identify where energies should be focussed for most effective change to happen.
- Bring together diversity of experience.

3. Key Takeaways

A. Case Law

Some participants first shared their experiences in the context of the past and ongoing cases, which are summarised below for your reference.

DJ Houghton is an ongoing case of six Lithuanian men who allege they were trafficked to the UK and were exploited by a chicken catching company. The claimants allege they experienced severe labour exploitation, wage deductions associated with recruitment fees and squalid living conditions. The participants identified this as an important case not only because the alleged abuse happened in the UK but because it was allegedly carried out by a UK company and UK residents. While being a UK-centred case, it was pointed out that there is also a need to consider the international context to better understand how a UK company might be held accountable for foreign deeds. In addition, alleged failure on the part of the Gangmasters Licensing Authority to act led to them being added as a defendant. Challenges such as access to legal aid and finding appropriate support services for the victims were discussed at length (see below).

A 2008 case, *R vs O* was also discussed. A key case on developing trafficking as a defense for victims who are arrested, it led to the quashing of a criminal conviction for a passport offence committed by a 16-year old Nigerian girl fleeing her trafficker.

A more recent 2013 case, *R vs L and others* involved T, a Vietnamese male who had been trafficked as a child for enforced criminal activity, namely cannabis cultivation, in the UK. His drugs conviction was quashed. Similarly, L was a Ugandan woman who had been trafficked for sexual exploitation and whose use of a false passport subsequent to her trafficking resulted in a criminal conviction, which was also quashed. The Court of Appeal overturned the convictions and issued guidance to courts on how potential trafficking victims should be treated by the criminal justice system

Gudanaviciene was a test case on refusals by the Legal Aid Agency to grant exceptional case funding for victims of trafficking cases prior to a reasonable grounds decision by the competent authority. The particular challenges in this case included a factually weak case and the inherent problems in asking legal aid to re-examine its own decisions. Interestingly, the legal aid issues themselves had resulted in fewer representatives taking on such cases, making it seem as though this was an isolated issue. It was therefore necessary, in this situation, to collect evidence from a range of practitioners to show it was in fact a systemic problem.

Finally the case of *XB* was discussed as an example of one that was slightly less clear cut. It involved an urgent trafficking issue where a woman was deported after a conviction of prostitution. There was a problematic deportation, with potential danger upon return, and difficulties with asylum in the UK. This case was an example of one that was more difficult to present to a judge but important nonetheless.

B. A good strategic litigation case

Participants began by exploring what strategic litigation actually meant. It was suggested that strategic litigation was where a case had a broader impact than simply on the parties themselves, including on policy, public perception and legislative change. It was, however, also made clear that as lawyers, there is a priority to represent clients first and foremost.

Secondly, there was broad agreement among the participants that the number of individuals who are currently seeking help is very low in comparison to the numbers of trafficked victims in the UK and therefore, there is not as much litigation as there should be. So, in some respects, any litigation in this area is strategic.

The following points were identified as some of the factors that contribute to having a good strategic litigation case:

- When the change in policy that is required and what is in the best interests of the client are aligned;

- Where the judgment is reported and therefore precedent-setting;
- Where there is a good balance between a case with strong facts (which are easy to distinguish) versus a case with weaker facts (which are easier to break down); and
- “Clean” cases where judges, who often do not have experience working on such issues and see them as immigration cases, can easily understand the importance of the decision.

Some participants also emphasised the importance of considering the larger international context where exploitation happens across multiple jurisdictions. It was suggested that lawyers should question whether each case has an international element which could be used in addition to the domestic issues.

It was noted that there was often an element of looking back at cases and then realising in hindsight that there could be a greater purpose to it rather than going in at the outset with strategic goals.

Participants touched upon the benefits of taking on strategic litigation, such as giving victims control over their situation and the capacity to obtain redress, being able to obtain support services for victims and raising public awareness on the issue.

C. Law and policy changes required to facilitate access to justice in this area

Some of the key changes required to facilitate genuine access to justice in this area were discussed. It was agreed that one of the most important challenges was access to legal aid, including a refinement of the rules on exceptional case funding. Lack of clear guidance on, and access to, legal aid was seen as the most problematic part of pursuing a case in this area and there was general agreement that massive changes had to be made in order to make strategic litigation and justice accessible to victims.

A second core area identified by participants as requiring major changes were the immigration rules, including the rules for domestic workers which confined them to one employer, the lack of information regarding rights given to domestic workers on arrival, regulations addressing recruitment agencies abroad and follow up support provided to domestic workers.

Finally, participants thought there were also some issues with lawyers not being able to be first responders for trafficking victims despite the fact they are often the ones who first came across these individuals. While it was accepted the new National Referral Mechanism would change this, it was also pointed out that there needed to be a much more robust system in place for referrals to appropriate agencies, including for law firms. This, it was suggested, required training and even further guidance.

D. Barriers to and risks of conducting strategic litigation and how can we overcome them?

A number of barriers and risks to conducting strategic litigation in this area were discussed during the Circle. Key issues identified include:

- Absence of funding, compounded by the inconsistency of the legal aid agency;
- Not having clients whose cases are appropriate for the potential litigation issue;

- Lack of specialist lawyers trained and litigating human trafficking cases;
- Issues with clearly identifying victims of trafficking;
- Pursuing a case that has maximum strategic impact but that is not always being in the best interests of the client - balancing what the client wants with overarching aims;
- Asylum and employment law cases being unreported and so unable to leverage them as precedent or start to develop a body of law;
- Lack of cooperation and collaboration among lawyers, community groups and NGOs, especially on complex cases, so missing taking advantage of possible overlaps and expertise;
- Problems with actually getting compensation from traffickers who are not likely to have real or legal funds available;
- Cases being dragged out, losing potential momentum and clients in the process;
- Potential for revictimisation of clients;
- Urgency in resolving some matters in this area meaning that there is sometimes little time to consider the broader impact of the case or points of law being argued; and
- Proving systemic issues in a court.

E. Focussing efforts going forward

Some of the solutions that were proposed and to be considered further include:

- Providing support to each other on legal aid challenges and working together to prove systemic issues in court;
- Working on the need for more high quality specialised lawyers to represent victims so that good strategic cases are more likely to emerge;
- Being strategic in when we take cases and in what order and how we articulate the claim in order to make systematic progress;
- Encouraging NGOs to be more research led rather than reactionary in their strategic work;
- Encouraging coordination possibly through the creation of a more structured group to enable efficient and trustworthy referrals, i.e. a “funded clearinghouse” (further conversation to happen on this with interested parties - please get in touch if you would like to be involved);
- Cultivating connections between community groups, NGOs and law firms, making sure that they are actually employing their resources effectively;
- Sharing information on organisations that fund strategic litigation; and
- Potentially leading an international discussion for strategic litigation in this area to address gaps that remain in the government's response to human trafficking.

FLEX also shared that they are developing a corporate accountability database outlining laws and regulations that hold organisations accountable and/or encourage further accountability; a tool for litigation which they will share in due course.

Next Steps

You are encouraged to continue sharing knowledge, information, and recommendations on this issue through the Zero Traffick Circle Google Group at zero-traffick@googlegroups.com.

For more information regarding the Zero Traffick Circle or to join future sessions, please contact Jessica Best at Shiva Foundation, at jessica@shivafoundation.org.uk.

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