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IN THE COURT OF APPEAL
CRIMINAL DIVISION

IN THE MATTER OF AN APPLICATION TO INTERVENE
BY THE EQUALITY AND HUMAN RIGHTS COMMISSION

BETWEEN

R v L
R vHVN
R vHYN
R v THN
R v T

and

Children's Commissioner

Intervener

SUBMISSIONS FOR INTERVENTION
BY EQUALITY AND HUMAN RIGHTS COMMISSION

A: introduction and basis of proposed intervention

1. The Equality and Human Rights Commission ("the Commission") seeks the permission of the Court to intervene in five appeals against conviction brought by appellants who are victims of trafficking, who are (or were at the time of the prosecution) children.
2. The Commission was established by the Equality Act 2006 to create a single independent body with the primary duty of promoting and monitoring equality and human rights in society. In particular it has duties to monitor the effectiveness of the equality and human rights enactments (s11(1), Equality Act 2006), to encourage good practice in relation to human rights and to encourage public authorities to comply with s6, Human Rights Act 1998 (s9, Equality Act 2006). The Commission also has a duty to oversee the operation of the public sector duty pursuant to s31, Equality Act 2006¹. It is accredited by the United Nations as a National Human Rights Institution and is required to report to the United Nations on the UK's progress in complying with human rights treaty obligations. The Commission is required

¹ The public sector duties include sections 149, 153 and 154 of the Equality Act 2010.

under the Equality Act 2006 to report to Parliament every 3 years on how well our laws, institutions and institutional processes support and protect human rights and to highlight areas in which human rights problems could be better tackled and protections ensured. More information about the Commission's role can be found in the witness statement of Ms Wendy Hewitt, Deputy Director Legal at the Equality and Human Rights Commission.

3. Pursuant to s30(1), Equality Act 2006, the Commission has "capacity to intervene in legal proceedings ... if it appears to the Commission that the proceedings are relevant to a matter in connection with which the Commission has a function".
4. Pursuant to its duty to report to Parliament every three years, the Commission has been focusing on the issue of forced labour, slavery and trafficking. In 2011, the Commission completed an Inquiry into Human Trafficking in Scotland pursuant to its statutory powers under the Equality Act 2006, which examined the nature, extent and causes of human trafficking in Scotland²; a follow-on report was published in March 2013³. This has led to the police authority in Scotland announcing in early April 2013 that it will no longer seek to prosecute those who are trafficked to Scotland to work as sex slaves or "gardeners" in cannabis factories⁴.
5. In view of its statutory duty and status as a key stakeholder in matters concerning the implementation of the state's human rights obligations, the Commission has an interest in intervening in these joint appeals and considers that its expertise, particularly arising from its 3-year-long inquiry into human trafficking in Scotland may bring to bear an informed perspective that may assist the Court in determining the appeals.
6. The Commission considers that these appeals raise questions of law within the scope of the Commission's statutory remit about:
 - (i) the state's duty to investigate trafficking, exploitation and abuse,
 - (ii) the state's duty to protect possible victims of such treatment,

² Inquiry into Human Trafficking Scotland: http://www.equalityhumanrights.com/uploaded_files/Scotland/Human_Trafficking_in_Scotland_inquiry_into_human_trafficking_in_scotland-full-report_pdf.pdf.

³ Inquiry into Human trafficking Scotland: Follow-on Report (2013) http://www.equalityhumanrights.com/uploaded_files/Scotland/Human_Trafficking_in_Scotland_ht_follow_on_final_web.pdf.

⁴ <http://www.scotsman.com/the-scotsman/scotland/police-trafficking-victims-will-not-be-prosecuted-1-2871323>.

- (iii) the approach of the trial court to possible victims and to decisions by the CPS about prosecution,
 - (iv) the role of the appellate courts.
7. The Commission's submissions on these issues are set out below in sections E to H, the critical paragraphs being paragraphs 36, 38, 51, 63 and 64. These "critical paragraphs" can be read as a speedy introduction to the Commission's case. Sections B, C and D set out the Commission's position on the trafficking and human rights framework so far as is relevant to these appeals, the critical paragraphs being paragraphs 23, 30, 34 and 35. At this juncture, it appears that the main difference, between the Commission and the parties, is that whilst all the parties appear to accept that the trial court exercises a function of secondary review only, the Commission submits that the trial court is under a duty to ensure there has been an adequate investigation of potential trafficking and that a prosecution does not proceed unless that would be compatible with the duties owed by the state to the potential victim.
 8. The Commission seeks permission to intervene by way of written submissions and short oral submissions (not exceeding 45 minutes).
 9. This application is made at this relatively late stage for the reasons set out in Ms Hewitt's witness statement: essentially, the Commission only recently found out about these appeals and needed to bring together the required information, obtain agreement to go ahead with the intervention and seek consent from the parties within an extremely tight timescale.
 10. The Commission sought the consent of the parties by letter dated the 15 April 2013. Consent has been given verbally by all appellants and the Children's Commissioner.
 11. The Commission would invite the court to grant its intervention on terms that it will not be liable for the costs of any other party. The Commission undertakes, as an intervener, to bear its own costs and to not seek costs against another party.

B: the trafficking framework

12. The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* (known as "the Trafficking Protocol", "the Palermo Protocol" or "the UN TIP Protocol") is a protocol to the *Convention against Transnational Organised Crime* and is one of the two Palermo protocols, the other one being the *Protocol against the*

Smuggling of Migrants by Land, Sea and Air adopted by the United Nations in Palermo, Italy.

13. The *Trafficking Protocol* entered into force on 25 December 2003. As of March 2013 it has been ratified by 117 countries (including the United Kingdom on 9 February 2006) and has 154 parties.
14. Article 3 of the Trafficking Protocol defines trafficking in human beings in such a way as to make it clear that “in relation [to children] the “means” requirement is waived. Accordingly, trafficking will exist in situations where the child has been subject to an act such as recruitment, transportation or receipt – the purpose of which is the exploitation of the child”⁵. Thus, in the case of children who have been recruited etc., the only question is whether the use to which they were put amounted to “exploitation”. Article 3 of the Palermo Protocol makes it clear that any consent given by the child is invalid and irrelevant to whether the child was trafficked.
15. Articles 6 and 9 provide for a range of protective measures for victims of trafficking.
16. As far as concerns regional action, in Warsaw on the 16 May 2005, the *Council of Europe Convention on Action against Trafficking in Human Beings* (“the Anti-Trafficking Convention”) was opened for accession and has since been signed by 43 member states of the Council of Europe. It was signed on the 23 March 2008 and ratified on the 17 December 2008 by the UK.
17. The explanatory report⁶ accompanying the Anti-Trafficking Convention emphasises that trafficking in human beings is a major problem in Europe today, which threatens the human rights and fundamental values of democratic societies. The report states at paragraphs 3 and 4:

3. Trafficking in human beings, with the entrapment of its victims, is the modern form of the old worldwide slave trade. It treats human beings as a commodity to be bought and sold, and to be put to forced labour, usually in the sex industry but also, for example, in the agricultural sector, declared or undeclared sweatshops, for a pittance or nothing at all. Most identified victims of trafficking are women but men also are sometimes victims of trafficking in human beings. Furthermore, many of the victims are young, sometimes children. All are desperate to make a meagre living, only to have their lives ruined by exploitation and rapacity.

⁵ *The International Law of Human Trafficking* (Anne T. Gallagher, Cambridge, 2010).

⁶ <http://www.conventions.coe.int/Treaty/EN/Reports/Html/197.htm>

4. To be effective, a strategy for combating trafficking in human beings must adopt a multi-disciplinary approach incorporating prevention, protection of human rights of victims and prosecution of traffickers, while at the same time seeking to harmonise relevant national laws and ensure that these laws are applied uniformly and effectively.”

18. Article 1 provides that the purposes of the Anti-Trafficking Convention are to prevent and combat trafficking in human beings, to protect the human rights of victims of trafficking, to design a comprehensive framework for the protection and assistance of victims and witnesses and to ensure the effective investigation and prosecution of trafficking.

19. Article 4 adopts the Palermo Protocol definition of trafficking. Article 12 provides for extensive protection to be afforded to trafficking victims. Article 26 contains the “Non-punishment provision”:

26. Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.

20. Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (“the anti-trafficking directive”) requires member states to introduce the laws necessary to comply with the anti-trafficking directive by the 6 April 2013 (article 22).

21. Like the Palermo Convention and the Anti-Trafficking Convention, the anti-trafficking directive defines trafficking, at article 2, so as to make it clear that a child is trafficked if he or she has been recruited, transported, transferred, harboured or received for the purpose of exploitation, irrespective of whether some form of compulsion has been used, or the child consented.

22. Article 2 goes on to provide that “exploitation” includes “as a minimum” “forced labour or services” and “the exploitation of criminal activities”. Paragraph 11 of the preamble makes it clear that “the expression “exploitation” of criminal activities” should be understood as the exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain”.

23. Thus, beyond doubt, the recruitment of a child to be a gardener in a cannabis factory is trafficking and the child is a child victim of trafficking, irrespective of whether any form of compulsion was used or the child consented.

24. Article 8 contains a non-prosecution/non-application of penalties clause, in similar terms to article 26 of the Anti-Trafficking Convention.

C: article 4 ECHR

25. Article 4 ECHR provides insofar as is relevant that:

Article 4 . Prohibition of slavery and forced labour

1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

26. Article 4, like articles 2 and 3 ECHR, is an absolute and unqualified right which makes no provision for exceptions or derogations. These articles are said to enshrine the basic values of the democratic societies making up the Council of Europe: paragraph 283 of Rantsev v Cyprus and Russia (Application no 25965/05, 10 May 2010); paragraph 65 of C.N. v United Kingdom (Application no 4239/08, 13 February 2013).
27. Although article 4 does not use the term, it does prohibit “trafficking”: Siliadin v France (Application no 73316/01, 26 October 2005) at paragraph 121; Rantsev at paragraph 282.
28. In Siliadin, the European Court of Human Rights stated the following about article 4 ECHR :
- (i) “slavery” refers to the classic definition of slavery contained in the 1926 Slavery Convention, which required exercise of a genuine right of ownership and reduction of status of an individual to an “object”: paragraph 122,
 - (ii) “servitude” prohibits a “particularly serious form of denial of freedom” which entails an obligation under coercion to provide one’s services, and is linked with the concept of “slavery”: paragraph 124,
 - (iii) “forced or compulsory labour” means “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”. For this to arise, there must be some physical or mental constraint as well as some overriding of the person’s will: paragraph 117,
 - (iv) prior consent, without more, does not negate a finding of compulsory labour (referring to Van der Musselle v. Belgium, Application no 8919/80, 23 November 1983) at paragraph 36.
29. In Rantsev, the European Court considered that:

281. ... trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere (see paragraphs 101 and 161 above). It implies close surveillance of the activities of victims, whose movements are often circumscribed (see paragraphs 85 and 101 above). It involves the use of violence and threats against victims, who live and work under poor conditions (see paragraphs 85, 87 to 88 and 101 above). It is described by Interights and in the explanatory report accompanying the Anti-Trafficking Convention as the modern form of the old worldwide slave trade (see paragraphs 161 and 266 above).

282. There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery", "servitude" or "forced and compulsory labour". Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention.

30. The following principles can be distilled from Strasbourg case law as to the content of the positive obligations imposed on member states⁷:
- (i) like articles 2 and 3, article 4 ECHR requires that the spectrum of safeguards set out in national law and administrative practice is adequate to ensure the practical and effective protection of victims or potential victims of trafficking: paragraph 284 of *Rantsev*,
 - (ii) article 4 imposes a duty to investigate where there is a credible suspicion that a person is or was at real risk of being a victim of treatment in breach of article 4: paragraph 296 of *Rantsev*; paragraph 69 of *C.N. v UK*,
 - (iii) once the matter has come to the attention of the authorities they must act of their own motion: see *Paul and Audrey Edwards v. the United Kingdom*, Application no. 46477/99, paragraph 69; *C.N. v UK* paragraph 69,
 - (iv) for an investigation to be effective, "it must be independent from those implicated in the events. It must also be capable of

⁷ See *Siliadin*; *Rantsev*; *CN v UK*.

leading to the identification and punishment of individuals responsible, an obligation not of result but of means. A requirement of promptness and reasonable expedition is implicit in all cases but where the possibility of removing the individual from the harmful situation is available, the investigation must be undertaken as a matter of urgency. The victim ... must be involved in the process to the extent necessary to safeguard their legitimate interests.”: paragraph 288 of *Rantsev*,

- (v) article 4 requires a state to take operational measures to protect victims or potential victims of trafficking: paragraph 286 of *Rantsev*. This can require a state to refrain from prosecuting victims of trafficking who have committed a crime associated with their trafficking: R v O [2008] EWCA Crim 2835,
- (vi) in order for a duty to take protective measures to arise the state must know, or ought to know, that an identified individual had been treated in contravention of article 4, or was at real and immediate risk of being so treated: paragraph 286 of *Rantsev*,
- (vii) where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk, there will be a violation of Article 4: paragraph 286 of *Rantsev*; Osman v United Kingdom (Application no 00023452/94, 28 October 1998) at paragraphs 116 to 117,
- (viii) article 4 imposes a duty on member states to penalise and prosecute effectively any act aimed at maintaining a person in a situation of slavery, servitude or forced or compulsory labour: paragraph 89 and 112 of *Siliadin*; paragraph 105 of *C.N. and V. v. France* and paragraph 285 of *Rantsev*.

D: articles 3, 5 and 8 ECHR, read with the CRC

- 31. These appeals understandably focus on the magnetic concept of trafficking, but it may be important not to lose sight of the fact that article 3 ECHR imposes duties on states, that are for all practical purposes identical to those imposed by article 4, to pro-actively investigate, protect and penalise, in cases of suspected abuse and exploitation where it is suspected that the level of inhuman or degrading treatment prohibited by article 3 may have been reached, in particular where children or vulnerable adults are concerned.
- 32. As it was put by Baroness Hale in E v Chief Constable of Ulster Constabulary [2008] UKHL 66, [2009] 1 AC 536:

8 These and later cases show that the special vulnerability of children is relevant in two ways. First, it is a factor in assessing whether the treatment to which they have been subjected reaches the “minimum level of severity” that is, the high level of severity needed to attract the protection of article 3.....

9 The special vulnerability of children is also relevant to the scope of the obligations of the state to protect them from such treatment.....

33. A case could arise where, on the facts, a child had not been trafficked or otherwise treated in breach of article 4 ECHR, but might have been, subjected to abuse or exploitation amounting to inhuman or degrading treatment. The state authorities would still be under the same type of duty: to investigate, protect and penalize: *E v Chief Constable*, at paragraph 7.
34. In addition, all children, including of course child victims of trafficking, exploitation or abuse, are entitled to have their best interests treated as a primary consideration pursuant to article 3, UN Convention on the Rights of the Child (“CRC”)⁸ and not to be detained otherwise than as a last resort and, even then, only for the shortest appropriate period of time (article 37 CRC). In addition, the CRC contains a range of articles that require the state to protect children from trafficking, exploitation and abuse, at articles 19, 32, 33, 36.
35. These rights exist in national law, inter alia because it is established that article 8 ECHR must be read in the light of article 3 CRC, so as to impose a duty on public authorities to treat the best interests of children as a primary consideration, in all actions that could affect them: *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4 [2011] 2 WLR 148, at paragraphs 21 to 25. The same must apply in the context of articles 3, 4 and 5 ECHR: the best interests of children must remain a primary consideration in every context.

E: the investigative duty

36. The Commission makes the following submission:

The state is under a duty to investigate, of its own motion, all situations of potential breaches of articles 3 and 4 ECHR (including potential trafficking) in order to take proportionate measures to protect victims and punish perpetrators. The duty arises where there is a credible suspicion that a person is or was trafficked, or otherwise treated in breach of articles 3 and 4 ECHR. The duty to investigate must not be construed so as to impose an impossible or disproportionate burden on the

⁸ See Siliadin at §§51(d) and 87.

authorities but it is an important duty, in particular when the potential victim is a vulnerable adult or child. In any event, as a minimum, an investigation must be:

- independent (from those implicated),
- adequate (capable of leading to the identification and punishment of traffickers),
- reasonably prompt and, in cases of possible ongoing breaches of articles 3 and 4 ECHR, completed urgently,
- fair (with the victim involved to the extent necessary to safeguard their legitimate interests).

37. The authority for these propositions is found at paragraphs 285 to 289 of *Rantsev*; paragraphs 65 to 69 of *C.N. v UK*; and OOO v Commissioner of Police for the Metropolis [2011] EWHC 1246 QB, at paragraphs 152 to 166.

F: whether prosecutions of victims should proceed

38. The Commission makes the following submission:

State authorities must consider whether it is appropriate to prosecute and punish victims of trafficking (or other breaches of articles 3 and 4 ECHR). State authorities must not prosecute a child victim of such treatment unless that is in his best interests or unless the damage to his best interests is justified by countervailing considerations of sufficient gravity, bearing in mind that the state must not impose any form of detention on a child unless there is no alternative and, even then, only for the shortest appropriate period, and that state authorities must support, assist and protect child victims of trafficking and not further victimise them, by prosecuting them, unless the circumstances are very exceptional.

39. The case-law in this jurisdiction focuses on article 26 of the Anti-Trafficking Convention, set out above at paragraph 19.

40. As Hughes LJ noted on behalf of the Court of Appeal, in *R v LM* [2010] EWCA Crim 2327, article 26 requires only a “process” – it is simply a duty of “active consideration” (paragraph 18).

41. The Court in *LM* treated article 26 as having been implemented in national law by (i) affording the common law defence of duress of circumstances, (ii) CPS guidance, to “consider the public interest in proceeding” where “there is evidence that a suspect is a credible

trafficked victim”, (iii) the power of the court to stay a prosecution which is an abuse of process.

42. The Commission does not make any submissions about (i) the defence of duress of circumstances and will address (iii) the role of the Court separately, in the next section of these written submissions. In this section, the Commission addresses the idea (ii) that, unless duress of circumstances applies, the role of the authorities (the CPS) is simply to exercise a policy judgment as to whether there is a public interest in maintaining the prosecution of a credible victim of trafficking. In the Commission’s respectful submission, that is not correct.
43. First, as noted above, at paragraphs 31 to 35 and 37, the duty on the state to investigate, penalise and protect, applies where there is a suspected breach of either article 3 or 4 ECHR.
44. Second, articles 3, 4 and 8 ECHR impose a range of duties in relation to children, on both the CPS and the Court, as noted above at paragraphs 34 and 35, principally:
 - to treat children’s best interests as a primary consideration (as formulated at article 3 CRC),
 - to refrain from detaining children otherwise than as a last resort and even then only for the shortest appropriate period of time (as formulated at article 37 CRC).
45. Whilst these 2 duties are formulated in the CRC, it has been established in the European Court of Human Rights, and in the Supreme Court, that they form part and parcel of the ECHR and, consequently, are binding on public authorities in national law, as a result of s6, Human Rights Act 1998: *ZH (Tanzania)*, at paragraphs 21 to 25.
46. In any event, as paragraph 8 of the preamble to the anti-trafficking directive notes, as secondary legislation, the directive must be read subject to, inter alia, the treaty provision of article 24 of the *Charter of Fundamental Rights of the European Union* (“CFR”), which imposes materially identical duties on member states, to those imposed by article 3 CRC.
47. The duty at article 3 CRC has been extensively considered by the Supreme Court recently, in *ZH (Tanzania)* at paragraphs 25 to 29, 44 and 46; in *HH v Deputy Prosecutor of the Italian Republic, Genoa* [2012] UKSC 25, [2012] 3 WLR 390 at paragraphs 15, 25, 29 to 30, 33, 120 to 125, 143 to 146, 153 to 155 and in *H v Lord Advocate* [2012] UKSC 24, [2012] 3 WLR 151, at paragraph 51. Essentially, for present

purposes, it amounts to a duty to:

- ascertain how the best interests and welfare of a child will be affected, depending on what action the state takes,
- treat the best interests and welfare of the child as *prima facie* the most important consideration,
- take such a course of action as best safeguards and promotes the child's best interests and welfare unless one or more countervailing considerations accumulates such weight in the decision-maker's mind as to justify a derogation from that course of action. Derogation is then lawful, providing the derogation is proportionate having continued regard to the prime importance or safeguarding and promoting the best interests and welfare of the child, and having regard to the considerations that a custodial sentence can only be, in the case of a child, the last resort and for the shortest appropriate period.

48. Leaving aside the possibility that in an extreme case it might conceivably be in the best interests of a child to be prosecuted and punished for a crime he committed as a result of trafficking or other breaches of articles 3 and 4 ECHR, in practical terms, when it has been ascertained that a child has committed an offence, as a result of trafficking, or some other breach of his rights under articles 3 and 4 ECHR:

- the first question is, what treatment would best safeguard and promote the child's welfare. The answer to that question will almost certainly lie in the range of support and assistance measures outlined in articles 11 to 16 of the anti-trafficking directive,
- the next question is, to what extent taking the different course of prosecuting and punishing this particular child will adversely affect his best interests and welfare, compared with how it could be safeguarded and promoted by the provision of support, assistance and protection,
- the next question is whether, in the particular circumstances, the public interest in punishing criminals, deterring crime and so forth, justifies prosecuting and punishing this particular child, bearing in mind the duty to treat the child's best interests and welfare as *prima facie* the most important consideration and, at all times and in any event, a prime consideration and

bearing in mind that a custodial sentence cannot be imposed save as a last resort and for the shortest appropriate period:

(without intending to suggest any rigid order in which these questions require consideration).

49. On any view, paragraphs 8, 11, 14, 21 to 23 of the preamble, and articles 8 and 11 to 16 of the anti-trafficking directive, strongly underline the approach described above. In the Commission's submission, they add an additional element – that the state's duty is to support, assist and protect child victims of trafficking and not to further victimise them by prosecuting them, unless the circumstances are truly exceptional:

- as noted above, at paragraphs 22 and 23, the definition of trafficking in article 2 of the directive entails that a child is a trafficking victim when he is recruited etc. for the purpose of exploitation, which includes taking part in criminal activities, irrespective of whether any compulsion was used or the child consented,
- at first blush, article 8 of the directive appears to go no further than article 26 of the Anti-Trafficking Convention, and to merely require that authorities "are entitled not to prosecute or impose penalties". But that would be too narrow a view, for the reasons below,
- paragraph 14 of the preamble states in terms that there should be no prosecution for offences committed by trafficking victims under compulsion: "Victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities that they have been compelled to commit as a direct consequence of being subject to trafficking",
- articles 11 to 12 cast the victim of trafficking very firmly in the role of victim and witness, as far as concerns any ensuing criminal proceedings, not as defendant,
- articles 15 to 16 require assistance, support and protection to be provided to a child victim of trafficking, including special measures for protection, in the event of criminal proceedings, where the child victim is a witness. None of this is consistent with prosecuting a child victim for a trafficking crime,

- article 8 does not envisage there being any prosecutions of child victims because it talks of there being an entitlement not to prosecute victims of trafficking for involvement in crimes they have been *compelled* to commit as a direct consequence of being subjected to the means of compulsion outlined in article 2. All those means of compulsion are, however, irrelevant to the status of child victims of trafficking. Article 8 cannot be construed sensibly, let alone compatibly with article 24 CFR, as requiring there to be an entitlement not to prosecute child victims who were compelled to commit crimes, but as not requiring there to be an entitlement not to prosecute child victims who commit crimes as a result of exploitation. It must have been drafted on the assumption that, as a result of the duty to support, assist and protect child victims, they would not be prosecuted for crimes directly resulting from their being trafficked,
- as paragraph 11 of the preamble explains, the effect of the definition of trafficking in article 2, is that “when a child is concerned, no possible consent should ever be considered valid”. That requires the state to proceed on the basis that a child recruited to take part in criminal activities never consented to carry out such activities, which cannot therefore be regarded as being voluntary acts committed by him,
- as secondary legislation, the directive must be read subject to article 24 CFR, as the preamble to the directive notes, at paragraph (8). That requires the child’s best interests to be treated as a primary consideration and, also that the child’s right to such protection and care as is necessary for their well-being is respected.

50. In short, whilst the anti-trafficking directive refrains from explicitly prohibiting the prosecution of child victims of trafficking, for crimes they committed (by definition) involuntarily and as a result of exploitation, the combination of the duties imposed on the state towards children, and the other provisions found in the anti-trafficking directive, compel the conclusion that such prosecutions will only be lawful, compatibly with the directive, where there is a truly exceptional justification. It is understood that the Children’s Commissioner will refer to policy material supportive of that position.

G: the approach of trial court to possible victims and to decisions by the CPS about prosecution

51. The Commission makes the following submission:

The trial court is under a legal duty to decide for itself

- **whether there has been an independent, adequate, sufficiently prompt and fair investigation into whether a defendant has been the victim of conduct incompatible with articles 3 and 4 ECHR, in particular where the defendant is a vulnerable adult or child, and to stay a prosecution until such an investigation has been completed,**
 - **as far as possible, what the true facts are, relevant to whether a prosecution should continue (for example, where there is a dispute),**
 - **whether, in the light of the above, the continued prosecution of a child victim of such conduct is compatible with the duty, binding on the court, to treat the child's best interests as a primary consideration and not to detain him otherwise than as a last resort and even then only for the shortest appropriate period of time, and with the duty generally to support, assist and protect child victims of trafficking and not further victimize them, by prosecuting them unless the circumstances are very exceptional.**
52. In *LM*, the Court of Appeal regarded the role of the Court as being limited to reviewing the "public policy" decision of the CPS to continue a prosecution, to see whether the decision was one "at which no reasonable prosecutor could arrive" (paragraph 19). This approach was endorsed and followed in *NR* (paragraph 21).
53. But all of this rested on the premise that the only legal duty, binding on the state, was the duty to give "active consideration" not to prosecute or punish, found in, or derived from, article 26 of the Anti-Trafficking Convention.
54. That premise is incorrect, for the reasons given by the Commission in the previous section of these written submissions:
- the state is under a duty to investigate possible cases of trafficking, exploitation or abuse, in particular of children and vulnerable adults,
 - the state is also under a duty not to prosecute a child victim of trafficking except in cases where prosecution is a proportionate derogation from the primary duty to safeguard and promote the child's best interests and welfare (and so on).

55. These duties are imposed on the court, just as much as on the CPS. The role of the court cannot be limited to a *Wednesbury* review of the CPS decision.
56. Authority for the proposition that “the state”, for the purposes of the ECHR, includes the Court, is found at s6(3)(a), Human Rights Act 1998, as construed by the House of Lords at paragraphs 7 to 16 of Huang v SSHD [2007] UKHL 11, [2007] 2 AC 167 and at paragraphs 8 to 146 of R(Nasser) v SSHD [2009] UKHL 23, [2010] 1 AC 1. As part of the state, for these purposes, all the duties identified in the previous section, summarised above at paragraph 52, are owed by the court towards children, just as much as by other state bodies.
57. As noted at paragraphs 285 and 287 of *Rantsev*, what is required is a comprehensive framework of protection. That is reflected in the comprehensive framework required by article 3 CRC, which expressly imposes the best interests duty on courts. In consequence, as it was put in the Committee on the Rights of the Child’s General Comment No. 5 (2003)(emphasis added):

Article 3 (1): the best interests of the child as a primary consideration in all actions concerning children.

The article refers to actions undertaken by "public or private social welfare institutions, courts of law, administrative authorities or legislative bodies". The principle requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children’s rights and interests are or will be affected by their decisions and actions - by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.

58. The European Court of Human Rights has held, on countless occasions, that the test of *Wednesbury* reasonableness is not an adequate test for ascertaining whether there has been a breach of the European Convention on Human Rights⁹.
59. It is now well established in this jurisdiction that it is for the court itself to decide whether, on the facts, a public authority has acted in breach

⁹ See inter alia Smith and O’Grady v UK (Application nos 33985/96 and 33986/96, 27 December 1999) at §§136-139 – rejecting the “heightened scrutiny” test adopted by the domestic courts.

of the ECHR with the result that even “an impeccable decision-making process by the Secretary of State will be of no avail if she actually gets the answer wrong”¹⁰.

60. If the ECHR did not afford protection from the state to a person who in truth was within its protective scope, simply because the state itself formed a *Wednesbury* rational view that the person was outside its scope, then the protection afforded by the ECHR would not be “practical and effective”¹¹ – indeed in some cases it would be wholly ineffectual.
61. The approach proposed by the Commission is entirely workable in the context of the approach to the Court’s power to stay proceedings as an abuse of process described in cases such as R v Horseferry Road Magistrates Court *ex parte Bennett* [1994] 1 AC 42, at 104F, 74G; R v Latif and Shahzad [1996] 1 WLR 104, 112F; R v Maxwell [2010] UKSC 48; Warren v Attorney General of the Bailiwick of Jersey [2011] UKPC 10; R v Grant [2005] EWCA Crim 1089 [2006] QB 60.
62. In practical terms, the Commission submits, the Court is required to actively manage prosecutions so as to ensure that possible trafficking, and other breaches of articles 3 and 4 ECHR, that could be relevant to the prosecution, in particular, as to whether it should proceed, are independently, adequately, promptly and fairly investigated. That duty is particularly strong in cases involving vulnerable adults or children. The court is then under a primary duty to consider (as far as possible) what the true facts are and whether a prosecution ought to proceed bearing in mind the matters referred to above. The court therefore exercises a primary role, just as it does when considering extradition requests and whether to make a confiscation order. As it was put in R v Waya [2012] UKSC 51, [2013] 1 AC 294:

19 That guidance should be issued to prosecutors is perfectly proper. The Crown’s power, under section 6(3)(a) of POCA, to ask the court to make a confiscation order is one with far-reaching consequences and care should be taken to exercise it on sound principles. Section 6 of HRA imposes on prosecutors the duty not to act in a manner incompatible with Convention rights, so that the Crown has an important preliminary function in ensuring that a disproportionate order is not sought. But the safeguard of the defendant’s Convention right under A1P1 not to be the object of a disproportionate order does not, and must not, depend on prosecutorial discretion, nor on the very limited jurisdiction of the High Court to review the exercise of such discretion by way of judicial review. The latter would moreover lead to undesirable satellite litigation. Mr Perry and Lord Pannick were

¹⁰ See R (Nasseri) v SSHD [2009] UKHL 23 [2010] 1 AC 1, at §§12-14.

¹¹ Artico v Italy (Application No. 6694/74, 13 May 1980) at §13.

correct to identify the repository of the control in the person of the Crown Court judge, subject to the reviewing jurisdiction of the Court of Appeal, Criminal Division, on appeal by either party. There is no occasion for any challenge to a confiscation order to involve an application for judicial review, which would founder on the objection that there is an adequate remedy in the hands of those two courts...

H: role of the appellate court

63. In criminal appeals, the court has an exceptionally wide role, as described in ss 2, 23 and 23A, Criminal Appeals Act 1968 and cases such as R v Pendleton [2001] UKHL 66, [2002] 2 WLR 72; R v Roberts [2006] EWCA Crim 2915 [2007], 1 WLR 1109; R v Hughes [2009] EWCA Crim 841 and [2010] EWCA Crim 1026; R v Beesley and anor [2011] EWCA Crim 1021.
64. In addition, axiomatically, where the Crown Court has failed to discharge its duties, as a public authority, compliantly with s6, Human Rights Act 1998, and articles 3, 4, 5 and 8 ECHR, read with the CRC, there will have been an error of law: *ZH (Tanzania)*, paragraphs 39 to 42.

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