

6LW043 Nationality, Asylum and Immigration Law

EU Directive 2011/36/EU on Human Trafficking

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Introduction

Trafficking in Human Beings (THB) – the debates around this topic are significantly complex and various strands of debates are followed. These debates cover a broad range of perspectives including labour, migration, human rights and gender-related perspectives. It is also important to note that the assessment of THB is mainly dependent on the geographical location being studied, however, acknowledges the fact that trafficking of human beings is occurring globally, especially in Europe (EU)¹. According to O’Neill² EU is one of such regions in the world having a comprehensive policy and legal framework capabilities and the introduction of the EU Directive on Human Directive³, the position of EU in the fight against trafficking has become much stronger. This Directive replaced the Council Framework Decision 2002/629/JHA and came into force in April 2013. This study deals with the critical analysis of the requirements of this directive (in short: Directive 2011/36/EU) to deal with THB and the second component of this study will evaluate whether the UK is bound to the provisions set within this directive considering the Lisbon Treaty and Schengen *acquis*.

EU Directive 2011/36/EU

Critical analysis of Directive’s requirements

The new EU Directive⁴ when compared with its predecessor⁵, is a much more substantial and comprehensive document and therefore reflects that the Member States are showing significant concerns on the development of human trafficking in the European region⁶. A human rights, integrated and holistic approach is adopted by this directive to handle the issue⁷ and the provisions within are founded on the legal frameworks provided by the EU Charter of

¹ G Wylie & M Redmond, *Human Trafficking in Europe, Character, Causes and Consequences*, in, 1st ed., Palgrave Macmillan, 2010, pp. 1-16.

² M O’Neill, "The EU Legal Framework on Trafficking in Human Beings: Where to from here – the UK Perspective", in *Journal of Contemporary European Research*, vol. 7, 2011, 452-467.

³ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 1001/1

⁴ Directive 2011/36/EU, op. cit.

⁵ Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings OJ L 203/1

⁶ Paragraph 12 of the preamble to Directive 2011/36/EU

⁷ Paragraph 7 of the preamble to Directive 2011/36/EU

Fundamental Rights, the Council of Europe⁸, United Nations (UN)⁹ the International Labour Organisation (ILO)¹⁰. According to O'Neill¹¹, "the directive itself states that it is aiming to amend and expand the provisions of the earlier framework decision, but that in the interests of clarity it should replace the earlier framework decision in its entirety in the relation to the Member States participating in the adoption of this Directive." This directive emphasises more on the obligations of Member States to implement such laws and rules which would force the individuals responsible for human trafficking to reduce their actions or to bring them to justice. This emphasis might have come forward from the limitation of ECHR Article 4 which fell short of addressing the obligations of the state to provide protection to the victims of trafficking¹². This was first observed in the case of *Siliadin v France*¹³ which is a case of a fifteen-year girl held to slavery by two families in France and illegally migrated to the country. However, the judgement in this case only focused on the failure of the legal framework put in place at that time and a more thorough approach to trafficking was taken by the European Court of Human Rights (ECtHR) in the case of *Rantsev v Cyprus and Russia*¹⁴. In this case, the Article 4 of the ECHR was used along with the Article 5 because the court determined that authorities had failed to fulfil their positive obligation of protecting the victim from "arbitrary detention"¹⁵. Ventrella¹⁶ highlighted that the new directive¹⁷ is much more specific than the previous framework¹⁸ and have established various forms of protection entitled to the protection of victims of human trafficking and special

⁸ Council of Europe Convention on Action against Trafficking in Human Beings, 2005, CETS No. 197

⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, adopted by General Assembly resolution 55/25, (in force 25 December 2003) supplementing the United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 (in force 15 November 2000) adopted by General Assembly resolution 55/25 on 12-15 December 2000 and entered into force on 29 September 2003

¹⁰ Inter alia, C 29 Forced Labour Convention, 1930 and C105 Abolition of Forced Labour Convention, 1957

¹¹ O'Neill, op. cit., p. 453

¹² S Chaudary, "Trafficking in Europe: An Analysis of the Effectiveness of European Law", in *Michigan Journal of International Law*, vol. 33, 2017, 77-99.

¹³ *Siliadin v. France*, Application no. 73316/01, 26/7/2015

¹⁴ *Rantsev v. Cyprus and Russia*, Application no. 25965/04, 7/1/2010

¹⁵ S Chaudary, op. cit., p. 86-90

¹⁶ M Ventrella, "Recognising Effective Legal Protection to People Smuggled at Sea, by Reviewing the EU Legal Framework on Human Trafficking and Solidarity between Member States", in *Social Inclusion*, vol. 3, 2015, 76.

¹⁷ Directive 2011/36/EU, op. cit.

¹⁸ Council Framework Decision 2002/629/JHA op. cit.

attention have been given to children, whereas, the previous framework¹⁹ only contained one provision on the protection of victims and was not specifically related to THB.

O'Neill²⁰ highlighted that the new directive has expanded the definition of 'exploitation' and now includes the removal of organs, begging and exploitation of criminal activities²¹. O'Neill²² also believe that the expansion of this definition will lead towards significant changes in the national laws on THB and also in the practice of law enforcement in many areas of crime²³. The minimum penalty provisions for THB are also much clearer and specific in the new directive²⁴ for the standard and aggravated offence. It is also important to note that the provisions regarding jurisdiction have been expanded in the new directive²⁵, however, are still based on the existing provisions of EU on conflicts of jurisdiction²⁶. However, the most important thing is to note that the jurisdiction can only be established when the victim is one of the nationals of EU²⁷ without bearing the condition that offence is to occur in Europe. Forced begging, forced marriage, forced labour and illegal adoption are now included in the new directive provided they fulfil the constitutive elements required for a trafficking offence to be developed²⁸. Severe penalties for trafficking a vulnerable person have been identified in the directive²⁹ and the violence on the victim should be considered before reaching a conclusion³⁰. The issue of prevention is also discussed in the directive and the Member States are now required to adopt various measures to reduce the exploitation of activities related to THB³¹ through internet campaigns, *inter alia*, and raising awareness in collaboration with other stakeholders³². Some new provisions on

¹⁹ Council Framework Decision 2002/629/JHA op. cit.

²⁰ O'Neill, op. cit., p. 453

²¹ Article 2.3 of Directive 2011/36/EU

²² O'Neill, op. cit., p. 453

²³ Article 11.3 of Directive 2011/36/EU

²⁴ Directive 2011/36/EU, op. cit.

²⁵ Directive 2011/36/EU, op. cit.

²⁶ Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflict of jurisdiction in criminal proceedings, OJ L 328, p. 42

²⁷ Article 10.1b. of Directive 2011/36/EU

²⁸ Paragraph 11 of the Preamble to Directive 2011/36/EU

²⁹ Paragraph 12 of Directive 2011/36/EU

³⁰ Paragraph 12 of Directive 2011/36/EU

³¹ Article 18 of Directive 2011/36/EU

³² Article 18.2 of Directive 2011/36/EU

prosecution and investigation³³ have been added along with 6 further and lengthy provisions for the protection of victims, especially child³⁴. The issue regarding unaccompanied children is also covered requiring a legal guardian in such case if necessary³⁵.

EU Directive from the perspective of the UK

Initially, the UK decided not to opt in to the proposed EU Directive on Human Trafficking provided the reasons that the UK already have some stringent measures in place for the protection of THB victims and that the adoption of this directive will bound to the UK such measures that are contrary to their interests³⁶. They further stated that the provisions held in this directive are already related to the practices currently followed in the UK for reducing human trafficking³⁷. However, the UK government also mentioned that they will review their decision of opt-in once the directive is finalised and implemented in the Member States³⁸. Here, it is important to note that the UK was not bound by the provisions held within this directive because the adoption is not applicable to Schengen opt-out states³⁹ (the UK and Republic of Ireland) held within the Lisbon Treaty⁴⁰. However, on 22nd March 2011, the UK Government decided to opt in to the directive stating that we have reviewed the final version and have avoided the risk of being bound to the measures which are against the UK's interest and are only implementing certain provisions of the directive⁴¹. Since, the UK agreed to adopt the directive in accordance with Article 4 of Protocol 21⁴², they are now bound by the directive and in order to ensure that the directive is complied fully, the *Modern Slavery Act 2015* along with two other acts came into force. Since,

³³ Article 9 of Directive 2011/36/EU

³⁴ Articles 13 to 16 of Directive 2011/36/EU

³⁵ Article 16 of Directive 2011/36/EU

³⁶ UK Parliament, "House of Commons - European Scrutiny Committee", in *Publications.parliament.uk*, 2017, <<https://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/428-xxii/42805.htm>> [accessed 3 March 2017].

³⁷ Home Office, "Letter from Damian Green MP to Chairman of the European Scrutiny Committee", in, 2010, <<http://www.statewatch.org/news/2010/sep/eu-uk-trafficking-letter.pdf>> [accessed 1 March 2017].

³⁸ UK Parliament, Home Office, op. cit.

³⁹ M O'Neill, "EU Cross-Border Policing Provisions, the View from One of the Schengen Opt-out States", in *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 18, 2010, 73-89.

⁴⁰ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, Dec. 13, 2007, 2007 O.J. (C 306) 1)

⁴¹ UK Parliament, op. cit.

⁴² Lisbon Treaty, Article 4 of Protocol 21

the UK is now bound to the EU Directive, the government has to ensure that all the requirements of the directive are met.

Conclusion

Conclusively, it can be said that the Directive 2011/36/EU contains specific provisions to fight human trafficking unlike its predecessors and sets out various stringent requirements for the Member States in order to ensure that any activity related to trafficking is reduced or discouraged through the use of various protection forms. Various form, not considered by previous Conventions and Frameworks, have been added in this directive and require the Member States to acknowledge their obligation of protecting the victims of trafficking. Finally, it was also found that the UK is bound by the directive because they accepted the final version in 2011 and according to Article 4 of Protocol 21 in the Lisbon Treaty, they have to ensure that the requirements of the directive are properly met – the *Modern Slavery Act 2015* is also a step forward to ensure the proper implementation of the Directive 2011/36/EU. Talking about Brexit, this cannot change the situation because though the UK has opted out from a number of EU Directives, this directive has to be implemented adequately in order to ensure proper compliance towards the Lisbon Treaty.

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