

Age disputes, trafficking and the criminal justice system

This fact sheet provides an overview of the contexts in which young migrants, including victims of trafficking, who do not have documentation to prove their age may find themselves in the criminal justice system, and what should be done to ensure they receive appropriate support.

Child victims of trafficking

Child trafficking is the practice of transporting children into, within, and out of the UK for the purposes of exploitation. In determining whether a person is a victim of trafficking, their consent to being trafficked is irrelevant if they are a child, but relevant if they are an adult.

For further information on trafficking, including definitions, indicators, processes, support and the impact of the immigration system, please see our other fact sheets at:

http://www.childrenslegalcentre.com/?sfid=132&_sft_resource_topic=trafficking.

If a child is identified by police during operations, the local authority should be notified immediately so that a child protection plan can be put into place and a strategy discussion co-ordinated. The child should also be referred into the National Referral Mechanism. [1]

Many children trafficked into and out of the UK have no identity documents or are using false documents. This means determining the child's exact age can be very difficult. It is important to remember that many of these children, who may have been sexually, physically or emotionally abused, could be suffering from a range of mental health issues, such as post-traumatic stress disorder (PTSD), and are highly vulnerable.

In the case of children where there are reasonable grounds to believe that they are a victim of trafficking, they should be presumed to be under the age of 18. [2] The children's services department of

the local authority will then be responsible for assessing their age.

Age disputes

The importance of a young person's age should not be underestimated. Age will not only affect the way a young person is supported, educated and cared for by the local authority. It will also affect the way a young person is treated if they come into contact with the criminal justice system. Age is an inexact science and a comprehensive assessment will usually need to be undertaken by social workers if a separated child's age is in dispute. For more information on assessing the age of a young person, see our fact sheet on the age assessment process, at:

<http://www.childrenslegalcentre.com/resources/age-assessment/>.

Age and the criminal justice system

In the criminal justice system, a child who is 'deemed' to be an adult: will not be entitled to the support of an appropriate adult in criminal proceedings, will be unable to apply for special measures in court proceedings, will be detained and sentenced as an adult, and will have no access to age appropriate services. This can be particularly damaging in the cases of victims of trafficking.

A number of young refugees and migrants find themselves in the criminal justice system. Typically, a trafficked child may be forced to commit a crime by their trafficker, or may be otherwise compelled to commit a criminal offence as a direct consequence of having been trafficked. Many children are not identified as potential victims of trafficking and are subsequently charged with criminal offences. In other circumstances, children and young people may be accused of committing immigration offences, such as using a false passport, or will enter the criminal justice system in some other way and risk deportation as a result. Age is a key issue in these cases.

No standardised practice for undertaking age assessments where age disputes arise has been established in criminal law.

The Crown Prosecution Service (CPS) guidance states that if the victim states they are a child, they should be viewed as such until their age can be verified by identification, a court determination, or an independent age assessment carried out by the local authority. [3]

The courts also have a duty to make due inquiry about the age of a defendant and take note of any evidence provided, under section 99(1) of the Children and Young Persons Act 1933.

Often children whose ages are in dispute will first come to the attention of the police, or the youth offending team. It is important that all professionals operating within the criminal justice system are alert to issues facing migrant children, including age and trafficking, and are aware of the appropriate steps to take upon identifying such a case.

Victims of trafficking and the criminal justice system

The CPS makes clear that child trafficking is first and foremost a child protection issue and that the use of a child in a criminal enterprise is a form of child abuse. The Code for Crown Prosecutors requires that they consider the best interests of children and young people when assessing whether it is in the public interest to prosecute. [4]

Where there is a credible suspicion that the child or young person might have been trafficked and exploited through criminal activity, then that would generally provide a defence of duress. Clear evidence of trafficking should result in the young person not being prosecuted, and less clear evidence should at least prompt further enquiries. Prosecutors must work with law enforcement and organisations that support child victims of trafficking to ensure that all relevant information is available and that all appropriate assessments are undertaken. [5]

Prosecutors should be alert to the circumstances of the child's arrest and be pro-active in causing

enquiries to be made. [6] If new information or evidence supports the fact that the child or youth has been trafficked and has committed the offence whilst in a coerced situation, then there is a strong public interest to stop the prosecution. [7]

Assessing age in criminal proceedings

The Association of Chief Police Officers guidance states that 'no decision to progress charges against such individuals should be made until all relevant assessments have been undertaken', and that 'where official records, or other reliable evidence, are not available to confirm age, a Merton compliant age assessment should be carried out by the local authority'. [8]

However, some children whose age is in dispute may still end up in court without having had a lawful assessment undertaken. Where anyone is brought before any court and it appears that they are a child or young person, the court must 'make due inquiry' about the defendant's age and 'take such evidence as may be forthcoming at the hearing of the case' [9] - it should consider 'any available evidence'. [10] The age presumed or declared by the court is deemed to be their true age. Where there is a dispute as to age it is better for the court to adjourn for more detailed inquiries if there is any doubt. [11]

Compliance with provisions regarding determination of age 'requires much more than superficial observation of the defendant in court or in the dock to enable the judge to make an appropriate age assessment'. Therefore when an age issue arises, the court 'must be provided with all the relevant evidence which bears on it'. The court may postpone proceedings for further investigations to be carried out (i.e. an age assessment by a local authority). [12]

If, at the end of a 'due enquiry' into age, the age of the defendant is still in doubt, they must be viewed as a child until their age can be verified by identification or an independent age assessment carried out by the local authority or a court determination. [13]

The age of a young person is also important for the purposes of conviction and sentencing – if the young

person's age has been determined by the court, this is the age that will be used. [14] The sentence or order will not be invalid if it is subsequently established that the defendant is in fact a different age that makes him or her ineligible for such a sentence. [15]

Prosecutors should assist the court by:

- Providing relevant documents that indicate a date of birth such as a Police National Computer (PNC) printout, custody record, copies of passports, identity cards.
- inviting the court to hear oral evidence from the defendant and any accompanying adult(s) as to the age of the defendant and cross examining where such evidence is inconclusive or inconsistent with other evidence, including the defendant's appearance and demeanour.

CPS guidance on Youth Offenders states that 'where the defendant appears to have entered the UK without satisfactory evidence of identity and age, additional evidence should be available from [the Home Office] or the local authority'. [16] However, evidence from the Home Office should be treated with caution, as Home Office 'assessments' are often made at the border and are based solely on appearance and demeanour. As such, they are far less reliable than those conducted by children's services.

That said, there is also varying practice with social work assessments and it is good practice for information to be sought from a range of sources, including other individuals who have interacted with that young person, such as advocates, foster carers, teachers or health professionals. [17]

Challenging a decision regarding age

Where a child or young person who is a victim of trafficking is being prosecuted for illegal activities or an immigration offence, their trafficking should be raised by the criminal defence solicitor representing them. However, not all criminal solicitors are aware of trafficking and the immigration law implications, and many advise clients to plead guilty. Where this has occurred and a child or young person has been convicted, their trafficking may only be noticed much

later, possibly in a young offenders' institution or prison.

If any practitioner has trafficking concerns at this point, they should always say something: legal advice from a criminal solicitor and an immigration solicitor should be sought as soon as possible. It may be possible to pursue an out-of-time appeal against the conviction. A further avenue is the Criminal Cases Review Commission, which can look into a criminal case when someone thinks they have been wrongly convicted.

If a young person has had their age assessed by a local authority this may also be open to challenge. For more information on local authority age assessments, see our fact sheet at:

<http://www.childrenslegalcentre.com/resources/age-assessment/>.

NOTES

[1] Coram Children's Legal Centre, fact sheet: the National Referral Mechanism, available at:

<http://www.childrenslegalcentre.com/resources/national-referral-mechanism/>

[2] Section 51, Modern Slavery Act 2015

[3] Crown Prosecution Service publications, available at:

http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a24

[4] Code for Crown Prosecutors, 4.12 at

http://www.cps.gov.uk/publications/code_for_crown_prosecutors/codetest.html

[5] CPS Policy for Prosecuting cases of human trafficking,

http://www.cps.gov.uk/publications/docs/policy_for_prosecuting_cases_of_human_trafficking.pdf

[6] *R v O* [2008] EWCA Crim 2835

[7] CPS Legal Guidance on Human Trafficking, Smuggling and Slavery at

www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling and CPS Policy for Prosecuting cases of human

trafficking at

www.cps.gov.uk/publications/docs/policy_for_prosecuting_cases_of_human_trafficking.pdf

[8] Association of Chief Police Officers of England, Wales and Northern Ireland, 'Position from ACPO Lead's on Child Protection and Cannabis Cultivation on Children and Young People Recovered in Cannabis Farms', 2010

[9] Section 99(1), Children and Young Persons' Act 1933

[10] Section 150, Magistrates Court Act 1980; Section 1(6), Criminal Justice Act 1982; and Section 305(2), Criminal Justice Act 2003

[11] *R v Steed* [1990] Crim LR 816. Where any issue as to the age of a defendant arises, it must be addressed at the first court appearance. If age becomes or remains an issue at the Plea and Case Management Hearing in court, prosecutors should ensure that the appropriate age-assessment enquiries are carried out. This may require a request for an adjournment to the court.

[12] *L, HVN, THN and T* [2013] EWCA Crim 991, para 22

[13] Para 25 of *L, HVN, THN and T* [2013] EWCA Crim 991, referred to in Crown Prosecution Service guidance, Human Trafficking, Smuggling and Slavery, at http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a32

[14] Section 164(1), Powers of the Criminal Courts Act 2000

[15] *R v Brown* [1989] CLR 750.

[16] http://www.cps.gov.uk/legal/v_to_z/youth_offenders/

[17] Coram Children's Legal Centre, 'Happy Birthday? Disputing the age of children in the immigration system', 2013

This fact sheet should not be used to give legal advice and is for information and guidance only. For advice on individual cases, assistance should be sought from an independent regulated legal adviser.

For further assistance contact our advice line either by email: mcpadvice@coramclc.org.uk or by telephone (0207 656 8505 – Tuesday to Thursday 10am-2pm).