



today's fight for tomorrow's freedom

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Briefing on a proposal for:

European Union Council Directive (COM (2002) 71 final)

On the Short-Term Residence Permit Issued to Victims of Action to Facilitate Illegal Immigration or Trafficking in Human Beings Who Co-operate With the Competent Authorities

Introductory comments

Anti-Slavery International and End Child Prostitution and Trafficking (ECPAT) UK's recommendations are based on our research and experience relating to victims of trafficking. It should be stressed that victims of trafficking are subjected to force, coercion or deceit in order to exploit them through sexual exploitation, forced labour or services and practices similar to slavery or servitude.

In the explanatory memorandum (2.3) it is stated that the purpose of the proposed Directive is to introduce a residency permit and "is not concerned with protection of either witnesses or victims. This is neither its aim nor its legal basis. Victim protection and witness protection are matters of ordinary national or European law".

Victim protection should be a matter for this Directive. Protection mechanisms for victims of trafficking were omitted from the *European Union Proposal for a Council Framework Decision on Combating Trafficking in Human Beings*, despite recommendation for their inclusion by the European Parliament, the United Nations High Commissioner for Human Rights and numerous non-governmental organisations (NGOs). Indeed during the discussion of the Framework Decision it was implied that protection mechanisms would be dealt with in the current Directive.

The position now taken in the Directive that victim and witness protection measures are matters of ordinary national or European law may conform with the European Union's (EU's) legal requirements, but is not acceptable from a human rights view point. EU law, such as the Framework Decision on the standing of victims in criminal proceedings, does not address some problems specific to victims of trafficking, such as risks to family in country of origin or the difficulties in pursuing legal action if removed from the country to which they have been trafficked.

Stating that the problem should be dealt with by ordinary national law is to seek to deny that trafficking is an extraordinary problem which requires EU co-operation in order to tackle it effectively. To abdicate responsibility for harmonised and good quality support and protection for victims of trafficking is morally reprehensible, but will also undermine the fight against trafficking which relies on exactly this support and protection in order to secure convictions of traffickers (see examples under analysis of Article 10 below).

In this context, it is worth quoting the UN High Commissioner for Human Rights, Mary Robinson, who stressed “human rights must be at the core of any credible anti-trafficking strategy and ... we must work from the perspective of those who most need their human rights protected.” This perspective should also be applied to the Council Directive.

Article 8: Reflection period

We strongly supports a reflection period during which victims of trafficking will be referred to a specialised agency which will give them support and advice.

Article 8 suggests a reflection period of 30 days, but we believe that a three months period, as in the Dutch model, would be more appropriate. It is our experience that a 30 day period will often not be a sufficient period to allow victims of trafficking time to recover from traumatic experiences and make an informed decision about whether they wish to co-operate with authorities in prosecuting the traffickers. This is of fundamental importance given the risk to their own lives and those of their families in country of origin.

During this period of reflection, information regarding how victims were recruited and transported will come to light, so that even if the victim decides not to testify against the traffickers, the specialised agency will still have vital information about the traffickers’ *modus operandi* which they can share with the authorities. This information will allow them to profile possible victims and disrupt the traffickers’ networks.

In order to gain access to a reflection period someone will have to assess whether there is a reasonable likelihood of that person having been trafficked. We believe that all relevant agencies (police, immigration officers, local authorities, NGOs, etc.) should be able to apply for reflection periods when they encounter someone they consider is a victim of trafficking. We strongly recommend that the authorities and an independent agency specialising in assisting victims of trafficking should jointly make a decision on whether an individual will be given access to a reflection period.

Article 9: Assistance and care

The UN, in the form of both the High Commissioner for Human Rights and the High Commissioner for Refugees, has noted that the protection and assistance provisions for victims of trafficking should be at least as strong as those adopted in the Article 6 of the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, supplementing the *UN Convention Against Transnational Organized Crime*.

This Protocol indicates that assistance measures for victims of trafficking should include: appropriate housing; counselling and information in a language they can understand (especially regarding their legal rights); medical, psychological and material assistance; education, training and employment opportunities; legal assistance; and take account of the special needs of children.

The EU Directive says Member States should ensure victims of trafficking are provided with accommodation, necessary support, free legal advice and translation and interpreting service. However, Article 9 states that Member States only need ensure that victims have access to “emergency medical and psychological treatment and medical care that cannot be postponed”.

This suggests that only emergency treatment will be provided and, as such, falls far short of what Article 6 (3) of the UN Protocol recommends when it calls on States “to provide for the physical, psychological and social recovery of victims of trafficking in persons”. We would strongly recommend that the language quoted above from the EU Directive be replaced with the above wording from the UN Protocol. The health needs of victims of trafficking should be dealt with as soon as possible regardless of whether it is an emergency or not.

Article 10: Issue and renewal of the residence permit

The Directive states that at the end of the reflection period, the authorities will decide whether to issue a short-term residence permit. The criteria for this will be that the presence of the victim is useful and that they have shown a clear intention to co-operate with the authorities, substantiated by, for example, a declaration or the lodging of a complaint. The permit will be for six months initially, renewable for as long as the above conditions are met.

The risk to the trafficked person does not end with criminal proceedings. On the contrary, co-operation in a prosecution is likely to increase the risks to the individual and their family. Thus, the permit, which offers no guarantee that the victim will be allowed to stay in the country of destination after they are no longer of use to the prosecution, is unlikely to provide the security which most victims will require before putting themselves and their families at risk. Permanent residency for those assisting a prosecution will both ensure the protection of the victim and encourage co-operation in prosecutions.

This viewpoint is shared by officials in the United Kingdom's Metropolitan Police Clubs and Vice Unit which has the most experience in investigating and prosecuting trafficking cases in the UK. An official from the Clubs and Vice Unit said at a conference held in Paris in November 2000 that:

“If law enforcement and the judicial process is to take evidence from the victim of the crime, the primary responsibility is the safety of the victim. Therefore, if they are to testify, they should be offered residency in the country concerned for as long as it takes to create the circumstances where they want to go home and it is safe for them to do so.”

The criteria which requires victims to show a clear and substantiated intention to co-operate is very restrictive in scope. In the United States a ‘U’ visa may be extended to a victim of trafficking who “has been helpful, is being helpful or is likely to be helpful” to officials investigating a crime. This language is less restrictive than that proposed in the Directive and the ‘U’ visa can lead to permanent residency in the United States.

However, the most serious omission in the criteria outlined in Article 10 of the Directive is the absence of an option which will allow the authorities the possibility of granting a temporary permit to victims of trafficking who, if returned to their country of origin, are likely to be subjected to serious human rights violations by traffickers.

Victims of trafficking who are returned home may be subjected to torture, held in slavery or servitude, detained or even killed by traffickers who think they may have co-operated with the authorities, as a warning to others, as punishment for getting caught or for not paying the money they owe. Such human rights abuses are in violation of the *European Convention on Human Rights* (Articles 2, 3, 4, and 5). Furthermore, under Article 3 of the 1984 UN *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* no State Party can expel, return or extradite a person where there are substantial grounds for believing that they would be subjected to torture.

Clearly EU States must not deport trafficked persons if there is a reasonable likelihood that they will fall back into the hands of traffickers and be subjected to these human rights violations. In these circumstances the authorities and a specialist NGO should consider whether the trafficked individual should be granted residency on humanitarian grounds. Making victims of trafficking apply for another type of residency permit or make an asylum application will prolong the period of uncertainty for the victim and may be administratively costly and/or inappropriate.

While the obligation to protect a victims fundamental human rights may be recognised by EU States outside the terms of this Directive, to adopt a Directive which provides for a permit for victims while their presence is

“useful” without mentioning their fundamental obligation to protect them from serious harm seems an untenable position.

The UN High Commission for Human Rights has also stressed, when commenting on the EU Council Framework Decision on Trafficking in Human Beings, that protection for victims should not be contingent upon judicial proceedings being initiated. The High Commissioner states that:

“...victims should be entitled to adequate protection under any circumstances, irrespective of any decision to instigate judicial proceedings.”

In this context, the model used in Italy has much to recommend it. Under Italian law a special permit to stay can be issued when "situations of violence or grave exploitation towards a foreigner have been identified, and concrete dangers for his or her safety emerged as a result of the intent to withdraw from the circle". The permit is valid for six months and is renewable for one year, with the possibility that victims may be allowed to remain permanently. Both the police and NGOs can apply for the permit and the issuing of permits is not made contingent on the victim collaborating in a prosecution.

According to a senior expert for Social Policy in the Italian Ministry of Manpower, this system has helped in ensuring more co-operation with the authorities because victims feel more secure and therefore prosecutors support the use of these special residency permits. According to information supplied by the National Anti-Mafia Directorate there are currently 1,682 investigations or prosecutions under way against traffickers in Italy.

The Italian system has therefore proved effective in terms of protecting and supporting the victims and in ensuring effective prosecutions of the traffickers. We therefore would strongly recommend that the Directive should include among the criteria for issuing a permit, a category which recognises that the individual is likely to be subjected to serious human rights violations if removed.

Temporary permits issued in this way will also allow victims of trafficking to seek legal redress in their own right. The difficulties of trying to pursue a compensation claim or other judicial remedy once removed from the country of destination may effectively deny victims of trafficking the right to legal redress.

Article 14: Victims who are minors

We believe that all children should be allowed to benefit from the provisions in the Directive and that this decision should not be left to Member States to reach individually. Indeed an exclusion of children from the proposal may mean that traffickers may increasingly target children. However, in applying this Directive the best interests of the child should be the primary consideration and all EU States must uphold all their obligations under the UN *Convention on the Rights of the Child*, in particular Articles 3, 12 and 34.

Furthermore, additional measures would be needed to take account of the special needs of child victims of trafficking. One of these measures, as referred to in 14 (a), is that the reflection delay should be extended if it is in the best interests of the child. We would propose that all children should be given six months for a reflection period. This takes account of the fact that it takes a great deal longer to win the trust and confidence of children who are terrified of retribution from the traffickers. They will also need advice from advisers experienced in working with children in order to explain, and ensure they understand, their options and the possible implications of any decisions they make – particularly in relation to testifying against traffickers.

We do not think that assistance, care or temporary permits for children should be made conditional on children ending contact with the trafficking network. Evidence from ECPAT UK's report on trafficking of children into the UK (2001) shows that the coercive influence of the traffickers will often prove compelling and children do seek to renew contact with traffickers because of their fear of the consequences of not doing so. Children in these circumstances need assistance not punishment.

Article 15: Rehabilitation for victims

We consider the proposal to make the issue of a short term permit conditional on the victim's agreeing to an assisted return to the country of origin is unreasonable. Fear of immediate deportation may compel a victim of trafficking to agree to such a condition or they may subsequently not wish to return (e.g. as a consequence of testifying against the trafficker, because of threats received in country of origin, etc.). This is in effect adding additional criteria to Article 10, which do not put the best interests of the victim first.

Article 18: Penalties

Victims of trafficking may enter a Member State on forged papers or be detected while in breach of another law (e.g. they may be involved in prostitution). However, under no circumstances should a victim of trafficking be detained, prosecuted or punished for an illegal act that was committed as a result of their being trafficked. This should be explicitly stated in the Directive.

Article 19: Exchange of information

We welcome the proposal for Member States to communicate up-to-date information to the Commission on the number of short-term permits issued and the effectiveness of rehabilitation programmes. However, we would stress the importance of making sure that statistical information collected and reports made by the Commission distinguish as clearly as possible between victims of trafficking and those who have been smuggled across borders.

Tackling trafficking by addressing the root causes

Tackling trafficking in people at source is the best way of eradicating the problem. This involves addressing the issues which encourage or compel people to leave their homes and family in order to search for employment opportunities elsewhere. Poverty, discrimination, corruption, and growing inequalities both within and between countries increase people's vulnerability to trafficking and must be addressed. Strategies aimed at preventing trafficking also need to address the demand factors.