

LEGAL CASE ANALYSIS:

THAILAND' KANTANG' CASE PROTECTION & JUSTICE IN HUMAN TRAFFICKING OF MIGRANT FISHERS



SYNOPSIS

In 2015, Burmese fishers were rescued from fishing vessels in Trang province, Thailand. The fishers had been subjected to forced labour conditions, including confinement, debt bondage and physical abuse. The case was heard in the Trang Provincial Court before being appealed to the Court of Appeal Region IX and ultimately to the Supreme Court of Thailand. Of the 11 defendants charged with human trafficking and related offences, eight were found guilty. The remaining four defendants - the vessel captains - were found not guilty due to a lack of evidence. Widely referred to as the Kantang case, the case set a legal precedent in recognising debt bondage as a form of human trafficking in Thailand.

Whilst the support provided was critical in protecting the victims during the legal proceedings in Thailand, the victims did not receive skills/training to recover their livelihoods in the longer term. They also requested to leave the shelter due to financial problems (the inability to earn money), discomfort (a large number of residents at the shelter), and relational difficulties with other residents (of different nationalities and ethnicities, which lead to cross-cultural misunderstandings). The Human Rights and Development Foundation (HRDF), the plaintiffs' lawyer, petitioned for the victims to be allowed to return to Myanmar and provide testimony remotely. The defence lawyer objected to this request, arguing the need for victims to appear in person in court in Thailand. The Court denied the request.

I. Victim Assistance

(Socio-Economic Support):

1. Capacity to Deliver Support:

Between March and October 2015, 18 Burmese were rescued from fishing vessels in Trang province. They were each screened as victims of human trafficking, with some subsequently rescreened after the inclusion of debt bondage as an indicator. In total, 15 victims were referred by a Multi-Disciplinary Team (MDT) representative to a government shelter-based accommodation in Songkhla for protection. They had to remain at the shelter for the duration of the trial, which was upwards of 2 years. An assessment was undertaken for each victim to ascertain their specific material and psychological needs.

2. Repatriation to Myanmar:

The victims were repatriated to Myanmar after the legal proceedings had concluded. Although this was organised through government to government (G2G) liaison, there was a lack of coordination and communication concerning ongoing victim needs and support post-repatriation, including those relevant to their safe reintegration. In this sense, repatriation was limited to removal from Thailand and initial reception in Myanmar. There was a lack of follow up information provided to supporting NGOs in Thailand, including their ability to connect with counterpart organisations in Myanmar to maximise the delivery of appropriate post-return support as the NGOs did not have the legal standing to follow up (ACTIP, Chapter 4, Article 14.5, 14.10.a).

KEY RECOMMENDATIONS:

1) A review of shelter-based accommodation for victims of trafficking should be undertaken with a view to developing alternative assistance/shelter models such as NGO/community shelters.

2) Memorandums of Understanding between countries should include provisions and protocols for supporting victims' post-repatriation, including mechanisms for ongoing monitoring of victims during the reintegration process. Such efforts could be significantly enhanced by facilitating opportunities for NGO cooperation in providing relevant reintegration support. Myanmar to strengthen its national capacity to execute reintegration support and enhance monitoring to assess and report on reintegration measures.

II. Victim Protection (Justice Processes):

1. Pro-bono legal Assistance:

The fifteen (15) victims received legal assistance from the HRDF, a co-plaintiff in the case. We interpret this as a strength of the case.

2. Safety in Providing Testimony:

The plaintiffs had to give testimony in-person in the court and in front of the defendant, with no barriers to provide protection from intimidation. They were not permitted to return to Myanmar to give testimony remotely (ACTIP Chapter 5, Article 16.7). The courtroom was open to the public.

3. Confronting Traffickers:

No victim impact statements were given, and while victims gave evidence, they were not able to confront the defendants directly about their experiences and the ongoing impact of these experiences on their wellbeing. Any communication had to occur through the lawyers.

4. Protection from Traffickers:

HRDF requested that the case be heard at the Criminal Court's Trafficking in Persons Division in Bangkok due to potential influence by the defendants locally; however, the Supreme Court denied the request as the court did not see any risk for the victims. This refusal is against ACTIP, Chapter 5, Articles 16.3, 16.4 and 16.7, which are concerned with victim protection and the side-effects of court procedures which do not guarantee protection from traffickers for victims.

KEY RECOMMENDATIONS:

1) Enhance implementation of existing mechanisms for a rights-based approach to victims in the justice process, particularly in key areas of victim safety in court proceedings, legal aid to ensure victims may be able to participate fully in justice processes and apply principles of restorative justice.

2) Mobilise existing legal provisions for video testimony to be instituted when there are risks to victim-witnesses and where repatriation is essential to meet their psycho-social needs.

3) Establish and implement judicial standard operating procedures to address irregular adoption of court safety measures, including communications technology such as video links, closed court proceedings or screened victim-witness arrangements. To ensure full participation in the justice process, video testimony should extend to circumstances where repatriation is essential to meet the psycho-social needs of victim-witnesses.

III. Right to Remedy:

Non-payment of Compensation: HRDF and supporting organisations are still seeking to enforce the payment of compensation from the dedicated government fund to ensure that the fifteen (15) victims receive their compensation as awarded by the Court (ACTIP, Chapter 4, Article 14.13).

The amount of compensation awarded to each plaintiff was based on their evidence and testimony. While the awarding of compensation was a key success of the case, payment was made through government officials in Myanmar. However, government officials had difficulty in locating some of the victims.

KEY RECOMMENDATIONS:

- 1) The state's role in the enforcement of remedy needs to be clarified to ensure victims receive remedy made in the judgement. This includes the payment of remedy after victims have left the jurisdiction.
- 2) The Thai Government's victim fund compensation should be made available through regular payments during the trial period with no conditions attached, rather than being paid at the conclusion of the legal proceedings. At a minimum, compensation should be paid before victims are repatriated.
- 3) Steps to be taken by states concerned to develop regional cooperation mechanisms to protect victims' interest in obtaining adequate compensation or restitution on return to their own country of residence or nationality. At a minimum, return of a victim to their home country should not prevent payment of compensation. This includes establishing linkages between law enforcement and agencies repatriating and receiving victims.

IV. International Cooperation:

Lack of Cooperation during Investigation & Prosecution:

There was a lack of co-operation between the Thai and Myanmar law enforcement during the investigation and prosecution stages. There was inadequate state-to-state mutual legal assistance to meet victims' needs. While the Thai and Myanmar governments have an MOU of cooperation, the MOU was not adequately utilised in the post-trial repatriation phase to optimise support to victims during the reintegration process (ACTIP, Chapter 6, Article 18).

KEY RECOMMENDATIONS:

As in 1, 2).

V. Interpretive Problems:

Unclear Definition of Forced Labour:

In 2008, the definition of forced labour in Thai law was unclear. Through the legal proceedings of the Kantang case, and provision of background material to support the case brief, HDRF helped develop a better understanding of forced labour. The eventual verdict from this case demonstrated that the definition of forced labour does not have to be confined to forced labour by physical abuse. After the Kantang case, a key success factor was that the Thai government amended the Anti-Trafficking in Persons Act (2008) to include debt bondage as a form of forced labour (The Anti-Trafficking in Persons Act (No. 3) B.E. 2560 (2017)).

KEY RECOMMENDATIONS:

The meaning of "debt bondage" should be specific in Thai law and amongst justice stakeholders. At the very least, the state party should have the same standard regarding what circumstances can be considered debt bondage in forced labour. Case studies of actual (e.g. Kantang case) and hypothetical cases of trafficking in persons involving debt bondage should be provided to justice stakeholders to understand better the diversity of experiences and core practices associated with debt bondage.

The International Labour Organization Forced Labour Convention 1930 is clear that several elements individually or in conjunction can indicate a forced labour situation, including the element of debt bondage. Regional alignment with the ILO's broad definition must form part of domestic legal and policy frameworks.

VI. Evidentiary issues:

High evidentiary bar:

The four-vessel captains were found not guilty because their actions did not satisfy the three (3) elements of human trafficking. Even though the victims testified how they were forced to work more than 17 hours every day, there was a lack of material evidence to support their claims. This demonstrates that trafficking in persons offences are hard to prove (particularly in the absence of corroborating witnesses) (ACTIP, Chapter 2, Article 6).

KEY RECOMMENDATIONS:

To enhance capability of investigating officers in human trafficking cases, State parties to develop checklists that:

- 1) document all relevant evidence necessary to sustain a prosecution;
- 2) detail the types of questions that are most likely to reveal evidence of human trafficking; and
- 3) introduce additional and alternative charges to human trafficking to optimise evidence gathering.

This fact sheet is one of a series co-produced through a joint research project by La Trobe University and ASEAN-ACT.

The research project aims to critically evaluate the gaps in justice and protection in the human trafficking and forced labour of migrant fishers from Southeast Asia.

The research involved a desk review of legal documents pertaining to the case, supplemented by semi-structured interviews with key stakeholders in justice, law enforcement and civil society and, where feasible, semi-structured interviews with trafficking survivors involved in the cases.