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CASE LAW COMMENTARY

European Court of Human Rights, Judgment of 16 February 2021, *V.C.L and A.N. v. the United Kingdom*, Application Nos. 77587/12 and 74603/12

More than a “credible suspicion”: the prosecution of trafficking victims challenges States’ operational duty to protect under art. 4 ECHR

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Abstract

In its judgment on the case of V.C.L and A.N. v. U.K., the European Court of Human Rights examined for the first time the content and scope of the principle of non-punishment of victims of trafficking (VoTs) for criminal acts directly connected to their situation of grave exploitation (art. 26 CoE Anti-Trafficking Convention 2005). The judicial review of the prosecutorial conduct of UK authorities set the stage for a broad discussion of the impact of State positive obligations of protection of VoTs under European law on the adoption of institutional arrangements concerning the multi-agent response to trafficking and on their dynamic interaction with criminal procedural rules, especially in cases, like the one at hand, where child victims are concerned.

A. Facts of the case and judgment

1. Facts

The case regards the prosecutorial and judicial vicissitudes of two Vietnamese nationals, who were charged with drug-related offences by UK authorities. The applicants, who were both minors at the time of the facts, were arrested in 2009 during two police operations in London and Cambridge targeting indoor cannabis factories, where the two youths were involved in the growing of cannabis plants.

The two applicants were advised by their legal counsels to plead guilty to the contested offences; they were subsequently convicted to 18 and 20 months of detention.

After their arrests, the applicants were identified at different times as potential VoTs during individual assessments of their situations, conducted by two “Competent Authorities”, officially mandated to ensure an expert identification of VoTs within the newly introduced National Referral Mechanism. In both cases, the Competent Authorities concluded that there were reasonable grounds for believing that the two minors had been trafficked in the criminal activities they were convicted for.

After these findings, both cases were reviewed in different times by Crown Prosecution Service (CPS) lawyers, who refused to discontinue the prosecutions, excluding the possibility that the two accused youths had been trafficked. While in the review of the first applicant’s prosecution no explicit motivation was provided for in the CPS decision, in the case of the second applicant some circumstantial elements were indicated as grounds of the lawyer’s adverse assessment concerning the potential victim status of the youth. These referred to the alleged relevant level of autonomy held by the applicant, the absence of traces of physical violence, his “mature” age (17 years), and the availability of means (a mobile phone, cash) and opportunities (episodic periods of “leave” from the cannabis factory) which could have allowed him to escape from his illegal situation.

The applicants subsequently filed a joint appeal with the UK Court of Appeal, asking for a quash of their convictions in light of an alleged abuse of process of the Crown Prosecution Service, which did not adequately evaluate the evidence of victimization provided by the Competent Authorities and consequently violated the prohibition of punishment of trafficking victims for criminal offences connected to their trafficking, (art. 26 [CoE 2005 Anti-Trafficking Convention](#)). The Court of Appeal dismissed the

applicants' claims. In particular, the Court affirmed the non-binding nature of Competent Authorities' trafficking assessments on prosecutorial decisions, and the presence of several elements suitable to justify the CPS decision to continue the prosecution as legitimate, given the alleged lack of a clear nexus between the trafficking of the two youths and the crimes they were charged with.

The applicants subsequently lodged an application with the ECtHR, complaining about the violation of their right as trafficking victims to be protected and assisted by State authorities (art. 4 ECHR) and of their fair trial rights (art. 6 ECHR).

2. Judgment

2.1. Relevant principles of the ECtHR art. 4 jurisprudence in trafficking cases

Examining the applicants' complaints, the Court clarified its lack of competence in interpreting the provisions of the CoE Anti-Trafficking Convention and affirmed the necessary limitation of its judicial overview to the interpretation of the Conventional prohibition of slavery and forced labour under art. 4 ECHR. The scope of this provision has been progressively defined in the ECtHR's jurisprudence as comprising not only a "negative" obligation on States to abstain from the practice of slavery and from other forms of human objectification (see ECtHR, [Siliadin v. France](#)). On the contrary, Member States are required to act proactively to contrast trafficking in human beings, by fulfilling a series of *positive* obligations. These include the duty to put in place an adequate legislative and administrative framework to criminalize slavery and forced labour, an operational duty to identify, protect and assist victims, as well as a procedural duty to investigate cases where credible indicators of slavery or serious exploitation are present.

In its judgment on V.C.L. and A.N., the Court reiterated that trafficking as a libetricide phenomenon falls under the protective scope of art. 4 ECHR (see lastly ECtHR, [SM v. Croatia, commented in this blog](#)). Consequently, States' Conventional obligations arise when *all* the constituent elements of its international definition of trafficking are integrated. In accordance with art. 4, CoE Anti trafficking Convention, trafficking involves "[t]he recruitment, transportation, transfer, harbouring or reception of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation" In cases where a child victim is involved, the coercive nature of the

trafficking conduct is presumed, as the minor's consent to his/her exploitation is considered irrelevant under the Convention. (art. 4b CoE Anti-Trafficking Convention).

The standard of proof required for the activation of State operational response to trafficking under art. 4 ECHR is identified in the «*credible suspicion that an individual had been, or was at real and immediate risk of being, trafficked or exploited within the meaning of art. 3(a) Palermo Protocol and art. 4(a) Anti-Trafficking Convention*» (ECtHR, [Rantsev v. Cyprus and Russia](#), §286).

2.2. On the violation UK's operational duty to protect trafficking victims in the case at hand

Coming to the core matter of the case, the Court specified that the non-punishment provision of art. 26 CoE Anti-trafficking Convention cannot be said to ground a general prohibition of prosecution of VoTs. On the substantive side, the application of these clauses is in fact limited by the proof of a compulsion of the victim to commit the crime; on the procedural side, the application of the provision is not mandatory for national authorities: on the contrary, States are only required to provide for a legal *possibility* of non-prosecution of VoTs in their internal criminal justice frameworks.

This notwithstanding, the Court recognized that «*the prosecution of victims, or potential victims, of trafficking may, in certain circumstances, be at odds with the State's duty to take operational measures to protect them where they are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual has been trafficked*». This potential interference derives from the two principal aims of the operational measures required under the Convention, i.e., «*to protect the victim of trafficking from further harm; and to facilitate his or her recovery. It is axiomatic that the prosecution of victims of trafficking would be injurious to their physical, psychological and social recovery and could potentially leave them vulnerable to being re-trafficked in the future*» (§159).

To avoid these adverse effects of criminal prosecution, the Court affirmed the «*paramount importance*» of an early identification of VoTs, to be conducted by qualified actors with the provision of a high standard of diligence in the detection of circumstantial elements, suitable to ground a «*credible suspicion*» of victimhood or exposure to trafficking. These institutional arrangements are deemed essential, especially in the case of particularly vulnerable victims like minors, for the evaluation

of the adequateness of the evidence for a conviction and for the assessment of the public interest to prosecute. Consequently, the Court expressed the view that «*any decision on whether or not to prosecute a potential VoT should – insofar as possible – only be taken once a trafficking assessment has been made by a qualified person*» (§161).

Concerning the relationship between the trafficking assessment of qualified authorities and the prosecutorial decisions, the Court reiterated the non-binding nature of the findings of such assessment on the prosecutor, but at the same time it stressed that prosecutors must in any case take those findings into account, providing their eventual decision to prosecute with «*clear reasons which are consistent with the definition of trafficking*» (§162).

The Court subsequently applied the abovementioned principles to the facts of the case. First, the judges examined the treatment of the two youths during and after their arrest, noting that, when the police operations were conducted, the high vulnerability to trafficking of Vietnamese minors was largely known and that even internal documents and guidelines of police officers warned against the prosecution of minors found in cannabis farms. This, together with the lacking activation of the National Referral Mechanism, led the Court to recognize a violation of State obligations of protection towards VoTs, given the underestimation by police authorities of elements which should have raised a “credible suspicion of trafficking” from the moment of the arrests of the two youths.

As for the subsequent prosecutorial choices, the Court examined the review decisions of CPS lawyers, delivered after the identification of the applicants as VoTs by a Competent Authority. The Strasbourg judges expressed the view that, without prejudice to prosecutorial discretion, the discussed decisions could not be considered compliant with the Conventional obligations of protection of VoTs, as their affirmation of absence of any credible suspicion of trafficking wasn't duly justified. In the first applicant's case, no official motivation was in fact provided for in the CPS review decision; in the case of the second applicant, the CPS had drawn its evaluation on «*peripheral issues*» (§170), relating to the alleged absence of force in the applicant's involvement in the criminal activity. The Court reaffirmed that, where child victims are involved, the proof of coercion is not necessary to integrate the crime of trafficking, as the consent of the minor to his/her exploitation is always deemed invalid. The CPS lawyer's reasoning, consequently, didn't amount to an adequate motivation based on the trafficking definition. Furthermore, the same “*peripheral issues*” had already been considered in the trafficking assessment of the Competent Authority, whose findings

were not explicitly discussed in the CPS decision. The same motivational lacuna was identified, in turn, in the subsequent review decision of the Court of Appeal, which once again relied exclusively on the examination of potential indicators of coercion in the exploitative experiences of the two minors. These considerations led the Court to find a violation of UK's operational obligations of protection of VoTs under art. 4 ECHR.

2.3. On the violation of victims' fair trial rights under art. 6(1) ECHR

In the last part of the judgment, the Strasbourg judges identified a nexus between the violation of positive obligations under art. 4 ECHR by criminal justice authorities and the fairness of the criminal proceedings where VoTs are involved as accused and/or defendants. In this regard, the Court found that the absence of prompt attribution of the status of potential VoTs to the two applicants during the criminal proceedings deprived them of a «*fundamental aspect of the[ir] defence*» (§200), thus unduly compromising their processual position. On the other hand, this same lacuna in the identification phase was recognized by the Court as a legal obstacle for the “voluntary” waiving of the applicants' fair trial rights by means of their guilty pleas, given their evident deprivation of the «*full awareness of all facts of the case*» (i.e., the recognition of their victim status) «*and [of] the legal consequences*» (i.e., their subsequent availability of defences against incrimination; §201). Furthermore, the Court critically analysed the decision of the UK Court of Appeal, noting that this internal judicial review was exclusively focused on examining the issue of the potential abuse of process of the CPS in its prosecutorial decision. On the contrary, the Court of Appeal didn't analyse the broader issues concerning the potential violation of State's obligations under art. 4 ECHR, which had been explicitly raised by the applicants in their appeal. These elements led the Court to affirm the unfairness of the *whole* criminal proceedings under art. 6(1) ECHR.

B. COMMENT

1. A historic decision

The Court's judgment on the case at hand was long awaited, given its temporal distance from the facts and the influence of the contested episode and other similar ones on the developments of UK anti-trafficking policy after 2009. The evidence of a frequent conviction of exploited child cannabis farmers in UK criminal Courts, in facts, [played a strong political role](#) in the drafting and subsequent approval of the UK Modern Slavery Act 2016, which introduced a new defence against incrimination for VoTs compelled to commit some targeted criminal offences (including drug-related-offences). The proceedings before the ECHR notably involved the third-party interventions of several Anti-trafficking authorities and NGOs (GRETA, Anti-Slavery International, Liberty).

Consequently, if the case at hand can now be considered part of the history of UK anti-trafficking policy, its effects on other CoE Member States are likely to be disruptive, given the current [low level](#) of responsiveness of many national systems for what concerns VoTs identification practices and referral mechanisms.

2. The institutional implications of State Conventional obligations to identify and protect VoTs

In its articulated reasoning, the Strasbourg Court delivered its most insightful interpretation to date of State positive obligations of protection under art. 4 ECHR. The most innovative aspects of the ECtHR decision can be found in the Court's concretization of the general duty to protect VoTs in clear procedural rules and in their active interposition between the victims and their criminal proceedings in the case at hand.

2.1 Operationalizing art. 4 ECHR

With regard to the first aspect, the decision clarified the influence of State obligations of effective protection of VoTs on the content of national administrative and institutional arrangements aimed at the recognition and assistance of victims. On the side of national response capacity, the emersion of victims is recognized as an intrinsically multi-agent process, which requires an adequate cooperation frame involving multiple governmental and non-governmental actors. The regulation and effective application of a national referral mechanism, consequently, is recognized by

the Court as an intrinsic element of the operational duty to protect. Coming to the “who” of identification, the decision clarified the necessity of the integration in all referral procedures of *qualified subjects*, who must be charged of the official assessment of victim status. Furthermore, the judgment touched upon the question of the “how” of trafficking assessment, clarifying the standards of evaluation of trafficking victimhood/vulnerability to be adopted by competent authorities. These standards blend different legal frameworks and “levels of legality”: the legal basis of the assessment is identified in the international definition of the *crime* of trafficking (art. 3 Palermo Protocol/art. 5 CoE Anti-Trafficking Convention), whose elements must nonetheless be ascertained following a *presumptive* rationale (*credible suspicion*), which, in turn, finds its epistemic basis in the detection of *indicators* of trafficking, often listed in *soft law* instruments and guidelines of non-governmental actors.

2.2. On the protection of trafficking victims in - and from - criminal proceedings

Coming to the application of the abovementioned operational obligations of protection in criminal justice matters, we can notice an impressive gap-filling work of the Strasbourg Court in the connection of the facultative non-punishment clauses of art. 26 CoE Anti-Trafficking Convention with its art. 4 jurisprudence. What was often [addressed](#) as a weak prohibition in European criminal law was, on the contrary, declined in the case at hand as a human-rights-based limit to prosecution, as long as its violation coincides with a compromission of VoTs conventional guarantees of protection.

Under this perspective, the judgment clarified how criminal procedural rules are part and parcel of State response toward VoTs and are likely to undergo changes in order to gain compliance with Conventional obligations of protection. This can be inferred from the Court’s statement that the identification of VoTs must be conducted (where possible) *before* the beginning of the prosecution: this reasonably seems to indicate the necessary *institutionalization* of a “victim-screening-phase”, preliminary to the opening of criminal proceedings, to be activated where credible indicators of trafficking are present. Secondly, the judgment clarified the substantial and procedural conditions for an acceptable waiving of VoTs fair trial rights in the criminal sphere, excluding *a priori* the possibility of a full and free consent of victims to plea bargaining in cases where the preliminary identification has not been conducted. Third, the decision intervened on the breadth and scope of prosecutorial functions, reaffirming the autonomy of

prosecutors in their evaluation of the evidence of victimhood and in their decisions to prosecute even where the accused is identified as a VoT. Nonetheless, any prosecutorial decision where indicators of trafficking are present is conditioned to an express motivation, based on the trafficking definition, aimed at examining the grounds that could indicate a foreseeable interference of the criminal proceedings with the individual's protection needs and to evaluate the public interest to prosecute.

Finally, the vulnerability of VoTs in criminal proceedings, and the absence of any obligation of self-identification upon them, are qualified by the Court as central elements of the victim's general interest of access to justice, thus excluding the fair nature of those trials where a VoT is prosecuted and/or convicted without a previous diligent assessment of his/her status.

C. SUGGESTED READING

To read the text of the judgment:

[ECtHR \(Fourth Section\), 16 February 2021, Case of V.C.L and A.N. v. U.K.](#), Appl. nos. 77587/12 and 74603/12

Case law:

[ECtHR, \(Grand Chamber\), 25 June 2020, Case of SM v. Croatia](#), Appl. n. 60561/14

[ECtHR \(First Section\), 10 May 2010, Case of Rantsev v. Cyprus and Russia](#), Appl. n. 25965/04

Literature:

J. TRAJER, [Prosecutors Behaving Badly. Revisiting the Operational Duty to Protect Trafficked Persons in V.C.L. and A.N. v. U.K.](#), in Strasbourg Observers, March 15, 2021.

M. JOVANOVIĆ, [The Principle of Non-Punishment of Victims of Trafficking in Human Beings: A Quest for Rationale and Practical Guidance](#), in Journal of Human Trafficking and Human Exploitation, 1:1, 2017, 41-76

V. STOYANOVA, *Human Trafficking and Slavery Reconsidered: Conceptual Limits and States' Positive Obligation to Identify Victims of Human Trafficking*, Cambridge, 2017

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