

ECtHR ? V.C.L. and A.N. v. The United Kingdom, Applications nos. 77587/12 and 74603/12, 16 February 2021

Country of Applicant:

Vietnam

Date of Decision:

16-02-2021

Citation:

European Court of Human Rights, V.C.L. and A.N. v. The United Kingdom, Applications nos. 77587/12 and 74603/12, 16 February 2021

Additional Citation:

ECLI:CE:ECHR:2021:0216JUD007758712

Court Name:

European Court of Human Rights (FourthSection)

Keywords:[Best interest of the child](#) [1][Child Specific Considerations](#) [2][Vulnerable person](#) [3][Trafficking in human beings](#) [4]**Relevant Legislative Provisions:**Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [5] > [Article 4](#) [6]Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [5] > [Article 6](#) [7] > Art 6.1Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [5] > [Article 6](#) [7] > Art 6.3

Headnote:

Article 4 ECHR requires that victims of trafficking are promptly identified as soon as there is credible suspicion of trafficking-related circumstances, regardless of whether the victims were able to identify and mention their experience.

To the extent that is possible, potential victims of trafficking can only be prosecuted following an assessment of whether they have been trafficked. Prosecutorial service should be aware of protocols around trafficking cases.

The lack of an assessment of whether the applicants had been trafficked prevented them from obtaining evidence that were fundamentally related to their defence in violation of their right to a fair trial under Article 6. The domestic judicial procedure was also contrary to Article 6 insofar as the applicants' subsequent claims regarding their trafficking were not adequately assessed.

Facts:

Arrest, criminal prosecution and conviction

V.C.L., the first applicant, was found in a house that had been converted into a cannabis production facility and charged with involvement in drug production. He was confirmed to be a minor while the social services of a legal charity raised concerns regarding his subjection to trafficking and forced labour.

During the prosecution procedure, the UK Border Agency (UKBA) sent a letter to the applicant's representative confirming that there were reasonable grounds to believe that he had been trafficked into the UK. The procedure, however, continued as the Crown Prosecution Service (CPS) considered that the offenses were serious and there was no clear evidence of trafficking. Following legal advice that discouraged him from changing his guilty plea, the applicant was sentenced to 12 months of detention in a young offenders' institution.

A.N., the second applicant, was also discovered in similar circumstances and was charged with the same offense. In his police interview, he stated that following his arrival in the UK he met a man who would provide him with food, money and accommodation. He was then taken to a cannabis factory where he was unable to leave from. He tried to escape when he had an opportunity but he was then threatened and made to return. He was found to be a minor and prosecution continued on this basis. Following advice from his counsel that he could have escaped during that opportunity and a defence duress could not help his defence, the applicant pleaded guilty and was sentenced to 18 months of detention.

The second applicant's referral to anti-trafficking services

Several month following his sentence, a new solicitor referred the second applicant's case to the National Society for the Prevention of Cruelty to Children National Child Trafficking Advice and Information Line (NSPCC NCTAIL). A report was produced concluding that there are reasonable grounds to believe that the applicant had been a victim of child trafficking. Subsequently, the UKBA informed the applicant that he was considered a victim of trafficking but, due to his age and because he was not receiving any counselling, he was not considered a person 'in need'; he was therefore not considered to be a victim of trafficking and was not entitled to a residence permit. The applicant's lawyer instructed a psychologist who prepared a report finding that the applicant was suffering from post-traumatic stress disorder (PTSD). The CPS reviewed the case but did not agree that the applicant is a victim of trafficking.

The applicants' appeals against the convictions

Both applicants appealed against their conviction arguing *inter alia* that, as victims of trafficking,

they should be entitled to protection, rather than prosecution. The Court of Appeal found that the non-punishment provision found in Article 26 of the Anti-trafficking Convention concerns the sentencing of victims and can neither affect the prosecutorial procedure nor extend the duress defence. It also found that there was no clear evidence of trafficking that should have made the CPS act differently and did not allow the appeals against the conviction. Doubts were also expressed regarding the reliability of the expert evidence provided by the applicants. However, the appeals against the sentences were allowed on account of their age and other factual considerations.

The applicants sought permission to appeal to the Supreme Court but their applications were refused. In 2013, the first applicant sought to review his criminal conviction following new medical evidence but the Court of Appeal did not consider that the CPS was bound by the findings of anti-trafficking national authorities and that the applicant's criminality had not been reduced to a point that prosecution should not have continued. Further appeals were dismissed.

Decision & Reasoning:

Article 4 ECHR

The Court started its assessment by reiterating that the positive obligation of states under Article 4 requires prevention, victim protection and investigation through an established legislative and administrative framework. Such a framework should also include operational measures aimed at protecting victims. The obligation to investigate does not depend on a motion filed by a victim or a relative. [150-156]

Turning to cases of prosecution of victims of trafficking, the Court noted that both the Anti-trafficking Convention and the Anti-Trafficking Directive do not generally prohibit the prosecution of victims, including children. However, such a prosecution may contravene the obligation to take operational measures for the protection of suspected victims of trafficking; a criminal prosecution will adversely affect the already vulnerable state of a potential victim. [157-159]

Consequently, Article 4 requires that victims of trafficking are promptly identified as soon as there is credible suspicion of trafficking-related circumstances and in line with the Palermo Protocol and the Anti-Trafficking Convention. As the existence of trafficking circumstances may affect the criminal procedure, a decision on whether to prosecute should only be taken following an assessment made by qualified personnel; even more so in cases concerning children. Any prosecutorial decision will then have to take account this assessment and, although not bound by it, a prosecutor would have to clearly state any reasons to continue with the prosecution. [160-162]

In the present case, the Court noted that [guidance](#) [8] published by the CPS had already identified Vietnamese minors as a specific vulnerable group and included information around the subtle and particular psychological aspects of a trafficked child's experience. Reluctance to disclose exploitation and psychological coercion had been recognised as characteristic of such situations. Consequently, the possession of a mobile phone, the absence of a clearly carceral character of the facility or food provision could not be sufficient reasons to disregard suspicions of trafficking. Despite such suspicious circumstances, there was no referral to the competent anti-trafficking services but a criminal charge and a guilty plea following legal counselling. A subsequent recognition of the applicants' status as a victim of trafficking by the competent authorities was disregarded with no clear reasoning. [170-174]

Moreover, the Court noted that the aforementioned CPS guidance and [domestic jurisprudence](#) [9] clearly underline that prosecutors should be aware of protocols around trafficking and alert to the possibility of encountering such cases. [180-181]

Article 6 ECHR

The Court analysed this part of the complaint by addressing three aspects of the case:

- **Did the failure to investigate trafficking circumstances before prosecution and conviction violate Article 6?**

The investigation and defence of an accused is of paramount importance, including because of the vulnerable position of the person at that stage of the proceedings. Full access to legal assistance services in order to secure their right to defence is required. In the same line, evidence regarding one's status as a victim of trafficking is a fundamental aspect of the defence they should be able to secure. In the applicants' cases, their lawyers failed to act appropriately, despite the social services' findings that there were reasonable grounds to believe the children had been trafficked. [195-197]

Although criminal lawyers may fail to act upon such suspicions, this does not absolve the state from their obligation to intervene following a manifest failure by legal aid counsel to provide effective representation in line with Article 6 (3) c ECHR. Such a high threshold does not have to be reached in cases of Article 4 ECHR, since it is the state that has an obligation to protect and investigate and cannot merely rely on the legal representative's failure or on the applicant's inability to explain their trafficking circumstances, especially when it comes to children. Consequently, the lack of an assessment of whether the applicants had been trafficked prevented them from obtaining evidence that were fundamentally related to their defence. [198-199]

- **Did the applicants waive their rights under Article 6 ECHR by pleading guilty?**

Although Article 6 does not prevent a person from waiving their right to a fair trial, such a waiver must be unequivocal, should not be against the public interest and significant procedural safeguards should accompany it. In criminal trials, one can accept a guilty plea provided they are fully aware of the facts of their case and the content/fairness of the bargain is subject to sufficient judicial review. In the absence of any assessment on whether they were trafficked, the applicants could not have been fully aware of the facts. The serious threat to human dignity that is inherent to the crime of trafficking makes such an assessment all the more indispensable. Even in the case of the first applicant, who was given an opportunity to vacate his plea, the fact that he was a minor, involved in a foreign criminal procedure and simply followed the advice of his legal representative meant that the Court could not consider him to have waived his Article 6 rights. [201-204]

- **Was the fairness of the proceedings prejudiced as a whole?**

The Court noted that the CPS reviewed the decisions to prosecute the applicants even if the applicants had previously pleaded guilty. However, the CPS reasoning in disagreeing with the anti-trafficking authorities' findings was inadequate and did not seem to follow the definition of trafficking found in the Anti-Trafficking Convention. The subsequent judicial review by the Court of Appeal mostly focused on whether there had been an abuse of process on account of misapplication of prosecutorial discretion. Even if Article 4 ECHR had been invoked, the Court did not examine the positive obligations of the state in this respect. The domestic court seemed to apply a very narrow approach in dismissing the appeals considering that only exceptionally could a defendant give fresh instructions about the facts of their case in the context of an appeal against a conviction. Such an approach effectively punishes victims of trafficking for not identifying and

presenting themselves as such from the beginning. Consequently, the appellate proceedings cannot be found to have remedied the errors in the initial criminal proceedings. [205-210]

Outcome:

Violation of Article 4 ECHR.

Violation of Article 6 (1) ECHR.

Case Law Cited:

ECtHR - Söderman v. Sweden [GC], no. 5786/08, ECHR 2013

ECtHR - Deweer v. Belgium, 27 February 1980, §§ 52-54, Series A no. 35

ECtHR - Salduz v. Turkey [GC], Application No. 36391/02

ECtHR - Sejdic v. Italy [GC], Application No. 56581/00

[ECtHR - Rantsev v. Cyprus and Russia, Application no. 25965/04, 10 October 2010](#) [10]

ECtHR - Siliadin v. France (no. 73316/01)

[ECtHR - Chowdury and Others v Greece, Application No. 21884/15, 30 March 2017](#) [11]

ECtHR - Daud v. Portugal, Application no. 11/1997/795/997, 21 April 1998

ECtHR - Dvorski v. Croatia [GC], no. 25703/11, ECHR 2015

ECtHR - S.M. v. Croatia [GC], no. 60561/14, 25 June 2020

Hermi v. Italy [GC], no. 18114/02, ECHR 2006 XII

ECtHR - M.P. and Others v. Bulgaria, no. 22457/08, 15 November 2011

ECtHR - Nagmetov v. Russia [GC], no. 35589/08, 30 March 2017

ECtHR - National Union of Rail, Maritime and Transport Workers v. the United Kingdom, no. 31045/10, ECHR 2014

ECtHR - Natsvlishvili and Togonidze v. Georgia, no. 9043/05, ECHR 2014 (extracts)

ECtHR - Poitrimol v. France, 23 November 1993, Series A no. 277-A

ECtHR - Z v United Kingdom (Application no. 29392/95)

Attachment(s):



[CASE OF V.C.L. AND A.N. v. THE UNITED KINGDOM.pdf](#)[12]

Other sources cited:

Domestic Case Law cited

R v. O [2008] EWCA Crim 2835

R. v. M(L) [2010] EWCA Crim 2327

R. v. L(C) [2013] EWCA Crim 991

International sources cited

United Nations Convention against Transnational Organised Crime (?the Palermo Protocol?)

Council of Europe Convention on Action against Trafficking in Human Beings (?the Anti-Trafficking Convention?)

Directive 2011/36 on preventing and combatting trafficking in human beings (?the Anti-Trafficking Convention?)

International Labour Organisation (?ILO?) Forced Labour Convention, 1930 (No. 29)

Protocol of 2014 of the International Labour Organisation Forced Labour Convention

ILO: Worst Forms of Child Labour Convention, 1999 (No. 182)

Organization for Security and Cooperation in Europe (?OSCE?): Ministerial Declaration on Combating All Forms of Human Trafficking (Vilnius, 6 ? 7 December 2011)

Domestic sources cited

Official Guidance: [Safeguarding children who may have been trafficked](#) [13]

Crown Prosecution Service: Legal Guidance, International and organised crime: Human Trafficking, Smuggling and Slavery

The Child Exploitation and Online Protection Command (?CEOP?):

- First ?scoping report?
- Child Trafficking in the United Kingdom Strategic Threat Assessment (2009 and 2010 reports)
- Strategic Overview 2009-10
- ?Police response to recovering a child or young person from a cannabis farm? (2010)

Authentic Language:

English

State Party:

United Kingdom

National / Other Legislative Provisions:

Modern Slavery Act 2015

Links:

[1] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A17

- [2] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A237
- [3] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A2495
- [4] https://www.asylumlawdatabase.eu/en/case-law-search?f%5B0%5D=field_keywords%3A86
- [5] <http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr>
- [6] https://www.asylumlawdatabase.eu/node/195#toc_14
- [7] https://www.asylumlawdatabase.eu/node/195#toc_34
- [8] <https://www.cps.gov.uk/legal-guidance/human-trafficking-smuggling-and-slavery>
- [9] https://www.refworld.org/cases,GBR_CA_CIV,49467d142.html
- [10] <https://www.asylumlawdatabase.eu/en/content/ecthr-rantsev-v-cyprus-and-russia-application-no-2596504-10-october-2010>
- [11] <https://www.asylumlawdatabase.eu/en/content/ecthr-chowdury-and-others-v-greece-application-no-2188415-30-march-2017>
- [12] <https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/CASE%20OF%20V.C.L.%20AND%20A.N.%>
- [13] <https://www.gov.uk/government/publications/safeguarding-children-who-may-have-been-trafficked-practice-guidance>