
GARDEN COURT
CHAMBERS

Practical Guidance for Practitioners Representing Victims of Modern Slavery - The Case of *VCL v UK*

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VCL and AN v United Kingdom

App 77587/12 and 74603/12

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24 March 2021

Context – prevalence of child trafficking/modern slavery in the UK

- Significant numbers of children are trafficked in the UK – latest NRM statistics show in the last quarter, 49% of referrals were for potential child victims

- As acknowledged by Underhill LJ in *R (TDT) v SSHD* [2018] EWCA Civ 1395 at para 40:

  *"**Trafficking is a process and not a single event**. A victim of trafficking who is encountered in the back of a lorry or found working at a cannabis farm or a nail bar will not only have been trafficked in the preceding period but will also be at real and immediate risk of the trafficking continuing; **even if a victim has escaped, or been removed, from the immediate control of their traffickers, he or she will very commonly still be sufficiently under their influence to be at real and immediate risk of re-trafficking if not afforded proper support and protection.**"*

- See also para 82: *"**being a past victim of trafficking and being at real and immediate risk of being (re-) trafficked are very closely inter-related**."*

VCL – an example of what can go wrong for child victims in the CJS

VCL

- Vietnamese child encountered in 2009 by police during a drugs raid, in locked residential premises converted into a cannabis factory
- In interview described being trafficked and stated he was a child, 15 years old
- The Competent Authority and the Local Authority identified him as a credible victim of trafficking
- CPS disagreed with that assessment, maintained the decision to prosecute
- Nonetheless – guilty plea resulted in a conviction and being sentenced to 20 months' in a young offenders' institution

VCL – an example of what can go wrong for child victims in the CJS

- Appealed to Court of Appeal in 2012 – dismissed
- CCRC reference – fresh evidence and legal submissions as to position of children as victims of trafficking and failures to investigate
- Differently constituted Court of Appeal in 2017 – dismissed again!
- Court of Appeal refused to certify points of law to Supreme Court
- Amended application to ECtHR in 2017:
  - Central plank – failure to investigate/identify him by domestic prosecution authorities resulted in breach of Articles 4 and 6 ECHR

Decision of the ECtHR

- Handed down on 16 February 2021
- Chamber decision – not yet final
- Found there had been violations of Article 4 (prohibition of forced labour) and Article 6(1) (right to a fair trial) in both *VCL* and *AN*
- Decision has for the first time considered the relationship between Article 4 and the prosecution of VOTs/PVOTs
- Interventions from Anti-Slavery International, Liberty and GRETA

Article 4 ECHR – principles

- Confirms "means" element is not necessary for a child victim (para 149)

- Definition of forced labour – will be fact sensitive:

  "Similarly, the question whether an individual offers himself for work voluntarily is a factual question which must be examined in the light of all the relevant circumstances. However, **the Court has made it clear that where an employer abuses his power or takes advantage of the vulnerability of his workers in order to exploit them, they do not offer themselves for work voluntarily. In this regard, the prior consent of the victim is not sufficient to exclude the characterisation of work as forced labour.**"(para 149)

- Re-states that positive obligations must be construed in light of ECAT as interpreted by GRETA, and Art 4 like Arts 2 and 3 will, in some cases, impose operational measures to protect potential or actual victims. Operational measures must be interpreter in a way that does not impose an impossible, disproportionate burden on authorities (para 152-156)

Prosecution of VOTs

- No general prohibition to prosecute – Art 26 ECAT only provides for possibility of non-punishment. Compulsion does not appear to be necessary for a child (para 158)

- In certain cases, prosecution will be contrary to state's duty to take operational measures to protect:

> "The Court considers 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. In the Court's view, the duty to take operational measures under Article 4 of the Convention has two principal aims: 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 future. Not only would they have to go through the ordeal of a criminal prosecution, but a criminal conviction could create an obstacle to their subsequent integration into society.** In addition, incarceration may impede their access to the support and services that were envisaged by the Anti-Trafficking Convention." (para 159)

Early identification is key

"In order for the prosecution of a victim or potential victim of trafficking to demonstrate respect for the freedoms guaranteed by Article 4, **his or her early identification is of paramount importance. It follows that, as soon as the authorities are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual suspected of having committed a criminal offence may have been trafficked or exploited, he or she should be assessed promptly by individuals trained and qualified to deal with victims of trafficking.** That assessment should be based on the criteria identified in the Palermo Protocol and the Anti-Trafficking Convention (namely that the person was subject to the act of recruitment, transportation, transfer, harbouring or receipt, by means of threat of force or other form of coercion, for the purpose of exploitation) having specific regard to the fact that the threat of force and/or coercion is not required where the individual is a child (see paragraphs 94 and 102 above)."
(para 160)

Unique position of children

"Moreover, given that an individual's status as a victim of trafficking may affect whether there is sufficient evidence to prosecute and whether it is in the public interest to do so, any decision on whether or not to prosecute a potential victim of trafficking should – insofar as possible – only be taken once a trafficking assessment has been made by a qualified person**. This is particularly important where children are concerned. The Court has acknowledged that as children are particularly vulnerable, the measures applied by the State to protect them against acts of violence falling within the scope of Articles 3 and 8 should be effective and include both reasonable steps to prevent ill-treatment of which the authorities had, or ought to have had, knowledge, and effective deterrence against such serious breaches of personal integrity** (see, for example, *Söderman v. Sweden* [GC], no. 5786/08, § 81, ECHR 2013; *M.P. and Others v. Bulgaria*, no. 22457/08, § 108, 15 November 2011; and *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V). Such measures must be aimed at ensuring respect for human dignity and protecting the best interests of the child (see *Söderman*, cited above, § 81). Since trafficking threatens the human dignity and fundamental freedoms of its victims (see *Rantsev*, cited above, § 282), the same is also true of measures to protect against acts falling within the scope of Article 4 of the Convention." (para 161)

Application to VCL's facts

Article 4 ECHR

- VCL found in cannabis factory as a child – trafficking suspected – yet he was charged with being in concerned in production of controlled drug – ought to have been referred into NRM. Concerns also flagged by the Local Authority (paras 164-164)

- CPS reviewed decision to prosecute – maintained – not credible that he had been trafficked; no further reasoning shared with ECtHR (para 166)

- CA's review after conviction did not change his status as trafficked victim - (para 168)

- Refers to the evidence of Vietnamese minors being particularly vulnerable at that time – would have been open to the CPS on basis of clear reasons consistent with the definition in Palermo Protocol and ECAT to have disagreed with the positive CG decision. Neither of those things happened." (para 172)

- The Court find violation of Article 4 ECHR (para 173-174)

Application to VCL's facts

Article 6 ECHR

- In determining whether there has been a violation of Art 6 the question for the Court to determine: "...first of all, **did the failure to assess whether the applicants were the victims of trafficking before they were charged and convicted of drugs-related offences raise any issue under Article 6 § 1 of the Convention; secondly, did the applicants waive their rights under that Article by pleading guilty; and finally, were the proceedings as a whole fair**?" (para 194)

- Evidence of a VOT's status is a fundamental aspect of the defence which he or she should be able to secure without restriction (para 196)

- Whilst the defence legal reps could have referred the cases to the NRM, their failures to recognise or act on such indicators cannot by itself absolve the state and its agents of its responsibility to do so (para 198)

- Failure to conduct timely assessment of trafficking is also a violation of Art 6 (para 200)

- Guilty plea did not amount to a waiver of right to fair trial (paras 201-204) - the trial could not therefore be fair (para 205-210)

Practical issues and flashpoints for practitioners

- Arrest, charge and prosecution: early identification – NRM referral; requests reconsideration and judicial review
- Trial – representations to discontinue prosecution in public interest; section 45 MSA defence; abuse of process;
- Sentencing – vulnerability, culpability and positive obligations for recovery under Article 4 ECHR
- Post-conviction? – Out of time appeals, CCRC references
- Compensation and civil claims for unlawful detention, failure to protect, personal injury etc
- Immigration status – revocation of deportation order; discretionary leave as a VOT; asylum and human rights claims

Meanwhile…

Press release

Alarming rise of abuse within modern slavery system

Major increases in child rapists, people who threaten national security and failed asylum seekers clogging up modern slavery system.

https://www.gov.uk/government/news/alarming-rise-of-abuse-within-modern-slavery-system

The Domestic Implications of *VCL v UK*: Can *R v. DS* survive?

Stephen Clark, Garden Court Chambers

24 March 2021

Background - judicial minimalism and the positive obligations

- The three strands of obligation:
  - A ***negative*** duty requiring the State to refrain from inflicting treatment in breach of those provisions.
  - A ***positive*** duty to prevent individuals suffering harm or treatment which breaches those provisions:
    - By taking operational measures to prevent it where the state authorities are aware of a "real and imminent" risk.
    - A "framework obligation" or "systems duty", requiring the State to put in place adequate policies, training, monitoring, oversight and supervision to prevent it taking place.
  - A ***procedural*** duty to conduct an effective, independent investigation where there is a credible suspicion/arguable case that one of the substantive duties has been breached – including by a non-state actor.

The development of the positive obligations

- Positive obligations derive from a combination of the wording of the absolute rights (i.e. "***No one*** *shall be held in slavery or servitude*") and the duty in Article 1 ECHR on states to "*secure to everyone within their jurisdiction*" the rights contained in the Convention and ensure that the rights are "*practical and effective rather than theoretical and illusory*."

- The 'reading across' of obligations originally found in the Article 2 context to Articles 3 and 4 comes from the Strasbourg Court's case law that the Convention "*must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions*" (***Stec v. United Kingdom***; ***Kudla v. Poland***; ***Klass v. Germany***)

- Often mistaken for an application of the '*living instrument*' doctrine and lumped into general judicial concerns about expansionist interpretation of the Convention.

- Mechanism by which *Rantsev v. Cyprus and Russia* creates analogous operational and investigative duties, relying on *Osman, Z* and *Paul and Audrey Edwards*

Domestic judicial minimalism

- Clearest judicial resistance to the *very idea* of positive obligations expressed in *DSD* [2018] UKSC 11:
    - Lord Hughes at [104]: "*If the State inflicts such treatment, it has subjected the citizen to it. Anything beyond that is a judicial gloss on the Convention, well established as that gloss may now be.*"
    - Lord Mance at [142]: "*What has happened in the Strasbourg jurisprudence is, unfortunately, not unprecedented. The European Court of Human Rights starts from a solidly rationalised principle, but then extends it to situations to which the rationale does not apply, without overt recognition of the extension, without formulating any fresh rationale and relying on supposed authority which does not actually support the extension.*"
- Rarely boils over into such outright statements of hostility, but does lead to an approach which seeks to confine the positive obligations to their absolute minimum

Domestic judicial minimalism

- Best expressed in *Minh* [2016] EWCA Civ 565 in the judgment of Burnett LJ (as he then was):
    - The duties developed in *Rantsev* are confined to the duty to '*identify those responsible for crimes committed within the jurisdiction of the State Party in question with a view to prosecution for offences which have occurred within that jurisdiction. It is also concerned with immediate relief for those suffering harm and coercion.*' [29]
    - '*The judge recorded as "uncontroversial" the proposition that if the procedures adopted by the Secretary of State did not match the demands of the Anti-Trafficking Convention "that might be persuasive evidence that there had been a breach" of the investigative obligation. In my view, that proposition is not supported by the decision of the Strasbourg Court in Rantsev. It draws on the Anti-Trafficking Convention for the purpose of establishing the scope of conduct prohibited by article 4 ECHR but the obligations under the former are not read over directly into the procedural obligation under the latter.*' [41]

Background to *DS*

- Background facts:
  - A case of ‘county lines’ trafficking where DS was recruited as a homeless child as a street level dealer
  - Worked on behalf of ‘X’ who simultaneously offered him protection and family support as well as a source of violence and threats

- Referral into the NRM and a positive conclusive grounds decision

- Prosecutorial decision to maintain prosecution because there was ‘no clear evidence of a credible common law defence of duress or of a statutory defence under the 2015 Act’ and it was in the public interest

- Prosecution stayed by HHJ Griffith-Jones QC on application by Defence

Issues in the appeal

- Central issue was the continuing role of the jurisdiction to stay a prosecution as an abuse of the process of the court in trafficking cases

- What role should it have after the creation of a statutory defence in s.45 of the Modern Slavery Act 2015? Was the stay jurisdiction now confined to public law grounds of challenge or a classic 'abuse'?

- Was the s.45 defence sufficient to discharge the United Kingdom's international obligations?

- Answered by Burnett LCJ in short terms at [40]:
  - The previous jurisprudence on the abuse jurisdiction in trafficking cases had been caused by a 'lacuna' which was now filled by the statutory s.45 defence.
  - The stay jurisdiction was now confined to its limits in other areas of criminal law: cases where a fair trial is not possible and state misconduct

DS on the scope of the Article 4 duty

- Burnett LCJ says there are three fundamental observations upon which the Court's decision is founded. The third is that:

> *The state's positive obligation to protect victims of trafficking* ***is not expressed in terms of non-prosecution****, see [287]: it "requires States to endeavour to provide for the physical safety of victims of trafficking while in their territories and to establish comprehensive policies and programmes to prevent and combat trafficking…". **We do not think that there is any basis for deriving a positive obligation not to prosecute victims of "forced or compulsory labour" in Article 4 of the ECHR**. This, the court found, is the lowest level of gravity of oppression against which protection is required, below "slavery" and "servitude". That is the level of oppression for which DS contends in this case. **If any such obligation did exist, it would be heavily qualified and there is no basis for concluding that the qualifications found in the common law of duress, and in section 45 of the 2015 Act, and the CPS Guidance are inadequate so that there is a violation of any such positive obligation under Article 4 ECHR which might exist.***

Incompatibility with VCL

- Easy to take the surface level point that the Court of Appeal was wrong about the principle of non-prosecution

- Real challenge is in explaining *why* a statutory defence is insufficient in Article 4 terms

- Touchstone is [159]:
  '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 future. ***Not only would they have to go through the ordeal of a criminal prosecution****, but a criminal conviction could create an obstacle to their subsequent integration into society. In addition, incarceration may impede their access to the support and services that were envisaged by the Anti-Trafficking Convention.'*

- The ECtHR is not only concerned with the injurious effects of *conviction*, but with the *prosecution process itself*

Incompatibility with VCL

- Furthermore, very clear role for the court supervising the CPS decision making process which goes beyond statutory defence
- Requirements in [160] and [162] for Palermo Protocol and ECAT compliant decisions by CPS
- [162] creates clear hurdles for CPS in departing from positive conclusive grounds decisions
- These are requirements, not of *unincorporated international law instruments*, but directly effective ECHR rights through s.6 of the Human Rights Act 1998
- Even if CPS Guidance was adequate, as an alleged human rights breach, the standard of review is a full merits assessment by the Court
- Difficult to see any jurisprudential basis for judicial deference to the CPS decision maker in that assessment

Investigative failures and Article 6

- Clear articulation of how a failure to follow reasonable lines of enquiry as part of the investigation of criminality can lead not only to an Article 4 ECHR investigative obligation breach, but an Article 6 breach

- Even within the narrow confines of *DS*, a failure to examine D as a potential victim of trafficking and securing evidence to assist the defence case is not *only* a breach of the Article 4 investigative duty, but will give rise to a basis for an exercise of the stay jurisdiction

A health check

- Began with the background deliberately to illustrate existing judicial approach to the positive obligations more generally

- Significant advancement of the positive obligations under Article 4 at the Strasbourg level which go above and beyond comparable duties in Article 2 and 3:
  - Duty to identify victims (*J v. Austria*)
  - Duty to compensate (*Chowdhury v. Greece*)
  - Duty to avoid prosecution (*VCL v. the United Kingdom*)

- Almost inevitable that, whether in civil or criminal context, there will be domestic judicial pushback – along *DSD* lines – that Strasbourg Court has gone too far. Spectres of *Horncastle, Vinter* and *Hirst* loom large.

- Cases building on these advancements need to not only think strategically, but across practice areas. Working in silos is dangerous. Success of VCL attributable to cross-practice team of counsel and solicitors and marriage of criminal, public and human rights law expertise.

Thank you

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