



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

Information Note on the Court's case-law 241

June 2020

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**S.M. v. Croatia [GC] - 60561/14**

Judgment 25.6.2020 [GC]

**Article 4**

**Positive obligations**

**Effective investigation**

**Article 4-1**

**Trafficking in human beings**

Significant flaws in domestic procedural response to arguable claim of human trafficking and forced prostitution, supported by prima facie evidence: *violation*

*Facts* – The applicant lodged a criminal complaint against T.M., a former policeman, alleging that he had physically and psychologically forced her into prostitution. The policeman was subsequently indicted on charges of forcing somebody to prostitution, as an aggravated offence of organising prostitution. In 2013 the criminal court acquitted him on the grounds that, although it had been established that he had organised a prostitution ring in which he had recruited the applicant, it had not been established that he had forced her into prostitution. He had only been indicted for the aggravated form of the offence in issue and thus he could not be convicted for the basic form of organising prostitution. The State Attorney's Office appeal against the decision was dismissed and the applicant's constitutional complaint was declared inadmissible.

In a judgment of 19 July 2018 (see [Information Note 220](#)), a Chamber of the Court held, by six votes to one, that the relevant State authorities had not fulfilled their procedural obligations under Article 4. In particular, they had neither investigated in depth all the relevant circumstances, nor made any assessment of the possible impact of psychological trauma on the applicant's ability to consistently and clearly relate the circumstances of her exploitation.

On 3 December 2018 the case was referred to the Grand Chamber at the Government's request.

*Law* – Article 4:

The Court clarified certain aspects of its case-law on human trafficking for the purpose of exploitation of prostitution.

*Trafficking in human beings and "exploitation of prostitution" under Article 4*

(i) Human trafficking fell within the scope of Article 4. This, however, did not exclude the possibility that, in the particular circumstances of a case, a particular form of

conduct related to human trafficking might raise an issue under another provision of the Convention;

(ii) It was not possible to characterise conduct or a situation as an issue of human trafficking, which fell within the ambit of Article 4, unless the constituent elements of the international definition of trafficking, under the [Anti-Trafficking Convention](#) and the [Palermo Protocol](#), were present.

The three constituent elements of that crime were: (1) an action (what was done: the recruitment, transportation, transfer, harbouring or receipt of persons); (2) the means (how it was done: by means of threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person); (3) an exploitative purpose (why it was done: this includes, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs). A combination of the three constituent elements was necessary in order for the crime of trafficking to be established as regards adult victims.

In that connection, from the perspective of Article 4, the concept of human trafficking related to both national and transnational trafficking in human beings, irrespective of whether or not connected with organised crime;

(iii) The notion of “forced or compulsory labour” under Article 4 aimed to protect against instances of serious exploitation, such as forced prostitution, irrespective of whether, in the particular circumstances of a case, they were related to the specific human trafficking context. Any such conduct might have elements qualifying it as “slavery” or “servitude” under Article 4, or might raise an issue under another provision of the Convention. In that context, “force” might encompass the subtle forms of coercive conduct identified in the Court’s case-law on Article 4, as well as by the International Labour Organization (ILO) and in other international materials;

(iv) The question whether a particular situation involved all the constituent elements of “human trafficking” and/or gave rise to a separate issue of forced prostitution was a factual question which must be examined in the light of all the relevant circumstances of a case.

#### *The scope of the States’ positive obligations concerning human trafficking and forced prostitution*

The nature and scope of the positive obligations concerning human trafficking and forced prostitution under Article 4 were comprehensively set out in the case of *Rantsev v. Cyprus and Russia*: (1) the duty to put in place a legislative and administrative framework to prohibit and punish trafficking; (2) the duty, in certain circumstances, to take operational measures to protect victims, or potential victims, of trafficking; and (3) a procedural obligation to investigate situations of potential trafficking. In general, the first two aspects of the positive obligations can be denoted as substantive, whereas the third aspect designates the States’ (positive) procedural obligation. Moreover, given the conceptual proximity of human trafficking and forced prostitution under Article 4, the relevant principles relating to human trafficking were accordingly applicable in cases concerning forced prostitution.

#### *States’ procedural obligations concerning human trafficking and forced prostitution*

Traditionally, ever since the *Siliadin v. France* case, the converging principles of the procedural obligation under Articles 2 and 3 of the Convention informed the specific

content of the procedural obligation under Article 4. There were no grounds for revisiting that well-established approach. Moreover, those principles were accordingly applicable to instances of forced prostitution. As the Court had stressed in *Siliadin*, possible defects in the relevant proceedings and the decision-making process had to amount to significant flaws in order to raise an issue under Article 4. In other words, the Court was not concerned with allegations of errors or isolated omissions but only with significant shortcomings, namely those that were capable of undermining the investigation's capability of establishing the circumstances of the case or the person responsible.

*Whether the circumstances of the present case had given rise to an issue under Article 4 of the Convention:*

While the applicant had obtained administrative recognition of the status of a potential victim of human trafficking, that could not be taken as recognition that the elements of the offence of human trafficking had been carried out. That question had to be answered in subsequent criminal proceedings. In that connection, the Court would also stress the necessity of protection of the rights of the suspects or accused, in particular the right to the presumption of innocence and other fair trial guarantees under Article 6 of the Convention.

When an applicant's complaint had been essentially of a procedural nature as in the present case, the Court had to examine whether, in the circumstances of a particular case, the applicant had made an arguable claim or whether there had been prima facie evidence (*commencement de preuve*) of her having been subjected to such prohibited treatment. In that connection, a conclusion as to whether the domestic authorities' procedural obligation arose had to be based on the circumstances prevailing at the time when the relevant allegations had been made or when the prima facie evidence of treatment contrary to Article 4 had been brought to the authorities' attention and not on a subsequent conclusion reached upon the completion of the investigation or the relevant proceedings. This was particularly true when there had been allegations that such conclusions and the relevant domestic proceedings had been marred by significant procedural flaws.

The preliminary police investigation concerning the applicant's allegations of forced prostitution had led to a search of T.M.'s premises and his car, during which the police had found condoms, two automatic rifles and the accompanying ammunition, a hand grenade and a number of mobile phones. In addition, it had been established that T.M., trained as a policeman, had previously been convicted of procuring prostitution using force and of rape.

Regarding the constituent elements of human trafficking, T.M. had allegedly contacted the applicant via Facebook and promised her employment, which was one of the recognised ways used by traffickers to recruit their victims. The applicant's allegations that T.M. had made the necessary arrangements for her to provide sexual services by securing accommodation and other facilities, suggested the elements of harbouring, as one of the possible "actions" of trafficking. Moreover, regarding the means employed, T.M. had admitted to having used force against her on one occasion and lending money to her, which raised an issue of possible debt bondage. The applicant's personal situation undoubtedly suggested that she had belonged to a vulnerable group, while T.M.'s position and background suggested that he had been capable of assuming a dominant position over her and abusing her vulnerability for the purpose of exploitation of prostitution.

In sum, the applicant had made an arguable claim and there had been prima facie evidence that she had been subjected to treatment contrary to Article 4, human trafficking and/or forced prostitution.

#### *Compliance with the procedural obligation under Article 4*

While the prosecuting authorities had reacted promptly to the applicant's allegations, they had failed to follow some obvious lines of inquiry capable of elucidating the circumstances of the case and establishing the true nature of the relationship between both parties. Although the available evidence suggested that T.M. had used Facebook to recruit the applicant and to threaten her after she had left him, the authorities had failed to inspect their respective accounts to determine the real nature of their first contacts and relationship, in particular whether those threats suggested the use of a means of coercion by T.M.. Nor had they given any consideration to obtaining evidence from the applicant's parents, despite the fact that the applicant's mother had had earlier contacts and difficulties with T.M., which the latter had used as one of the means of pressure and threats towards the applicant. The prosecuting authorities had never identified and interviewed any of the neighbours and the owner of the flat where the applicant lived with T.M., who could have provided information on the relationship between the applicant and T.M. and clarified whether she had been under his control at the material time. The owner, moreover, could have shed light on the circumstances in which the flat had been rented and thus clarified who in reality had been in charge of the whole rental process, which was relevant for establishing the potential action of "harbouring" (one of the constituent elements of human trafficking). The persons, who could have provided details on the applicant's alleged escape from T.M., had not been questioned either.

The prosecuting authorities had relied heavily on the applicant's statement and thus, in essence, created a situation in the subsequent court proceedings where her allegations simply had to be pitted against the denial of T.M., without much further evidence being presented. In that connection, as noted by international expert bodies, there might be different reasons why victims of human trafficking and different forms of sexual abuse might be reluctant to cooperate with the authorities and to disclose all the details of the case. Moreover, the possible impact of psychological trauma had to be taken into account. There was thus a risk of overreliance on the victim's testimony alone, which led to the necessity to clarify and, if appropriate, support the victim's statement with other evidence.

The multiple shortcomings in the conduct of the case by the prosecuting authorities had fundamentally undermined the domestic authorities', including the relevant courts', ability to determine the true nature of the applicant's and T.M.'s relationship and whether the applicant had been exploited by him as she had alleged. In sum, there had been significant flaws in the domestic authorities' procedural response to the arguable claim and prima facie evidence that the applicant had been subjected to treatment contrary to Article 4.

*Conclusion:* violation (unanimously).

Article 41: EUR 5,000 for non-pecuniary damage

(Also see concerning Articles 2 and 3: *Makaratzis v. Greece* [GC], 50385/99, 20 December 2004, [Information Note 70](#); *Nachova and Others v. Bulgaria* [GC], 43577/98 and 43579/98, 6 July 2005, [Information Note 77](#); *Beganović v. Croatia*, 46423/06, 25 June 2009, [Information Note 120](#); *Denis Vasilyev v. Russia*, 32704/04, 17 December 2009, [Information Note 125](#); *Hassan v. the United Kingdom* [GC], 29750/09, 16 September 2014, [Information Note 177](#); *Mocanu and Others v. Romania* [GC], 10865/09 and al., 17 September 2014, [Information Note 177](#); *Bouyid v. Belgium* [GC], 23380/09, 28 September 2015, [Information Note 188](#); *Armani da Silva, v. the United Kingdom* [GC], 5878/08, 30 March 2016, [Information Note 194](#); *Hovhannisyan v. Armenia*, 18419/13, 19 July 2011, [Information Note 220](#); concerning Article 4: *Siliadin v. France*, 73316/01, 26 July 2005, [Information Note 77](#); *Rantsev v. Cyprus and Russia*, 25965/04, 7 January 2010, [Information Note 126](#); *M. and Others v. Italy and Bulgaria*, 40020/03,

31 July 2012, [Information Note 154](#); *C.N. v. the United Kingdom*, 4239/08, 13 November 2012, [Information Note 157](#); *L.E. v. Greece*, 71545/12, 21 January 2016, [Information Note 192](#); *J. and Others v. Austria*, 58216/12, 17 January 2017, [Information Note 203](#), *Chowdury and Others v. Greece*, 21884/15, 30 March 2017, [Information Note 205](#); and concerning Article 6: *Schatschaschwili v. Germany* [GC], 9154/10, 15 December 2015, [Information Note 191](#); [ILO Forced Labour Convention, 1930 \(No. 29\)](#).

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