

Establishing a breach of Article 4 ECHR



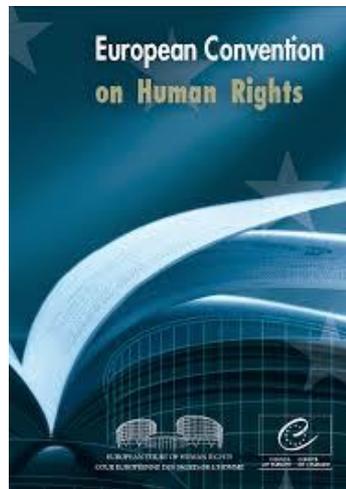
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Article 4

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this Article the term "forced or compulsory labour" shall not include:
 - (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
 - (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
 - (c) any service exacted in case of an emergency or calamity threatening the life or wellbeing of the community;
 - (d) any work or service which forms part of normal civic obligations.

Preliminary matters

- Unqualified right (so no assessment of proportionality)
- Public emergency derogations under Art 15 not permissible
- Art 4(3) is not intended to “limit” *the exercise* of the protected rights in Art 4(2) but to “delimit” *the content* of those rights (Stummer v Austria (2012) 54 EHRR 11)



Trafficking and Article 4

Trafficking falls within conduct prohibited by Art 4:

“There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes “slavery”, “servitude” or “forced and compulsory labour”. Instead, the Court concludes that trafficking itself, within the meaning of art 3(a) of the Palermo Protocol and art 4(a) of the Anti-Trafficking Convention, falls within the scope of art 4 of the Convention.” (Rantsev v Cyprus (2010) 51 EHRR 1 at [282]).

Positive obligations

1. Obligation to put in place an appropriate legislative and administrative framework
2. Obligation to take operational measures to protect from treatment contrary to Art 4
3. Procedural obligation to investigate credible breaches of Art 4
(See MS (Pakistan) v SSHD [2020] UKSC 9 at [29])



Legislative and administrative framework

- An appropriate legislative and administrative framework to:
 - (i) Prevent trafficking
 - (ii) Protect victims
 - (iii) Prohibit and punish trafficking (Rantsev at [285])
- The adopted framework must ensure “practical and effective” protection of victims’ rights
- Includes: measures to regulate businesses used to cover for trafficking, need for immigration rules to address concerns relating to encouragement [284], facilitation or tolerance of trafficking, relevant training for law enforcement and immigration officials [287]

Legislative and administrative framework

- Not examined in detail because framework issue unlikely to arise in HRA damages claim
- Most stringent/specific obligations re framework/system flow from ECAT. Unincorporated but brought into domestic law via guidance (failure to follow such guidance without good reason will be unlawful R (G) v SSHD [2016] 1 WLR 4031; accepted justiciable error of law if NRM guidance did not reflect ECAT – MS (Pakistan) at [20]-[21]). See also also EU Directive (2011/36/EU)
- So breach of Art 4 unlikely to be easiest route of establishing legal flaw in framework (unless manifestly inadequate, eg failure to criminalise domestic servitude – CN v UK (2013) 56 EHRR 24)
- However, scope for developing case law in this area (ECAT and EU Directive as interpretative tool for Art 4...)

Operational measures

- Obligation to take operational measures to protect victims, or potential victims, from treatment in breach of Article 4
- Duty arises where public authority aware (or ought to be aware) of circumstances giving rise to a credible suspicion that an identified individual had been subjected to treatment prohibited by Article 4, or where a real and immediate risk of such treatment occurring
- Duty requires the public authority to take appropriate measures within the scope of their powers to remove the individual from the relevant situation or risk (CN at [67]; MS (Pakistan) at [25])
- The obligation must not be interpreted in a manner which imposes a disproportionate burden on public authorities (CN at [68]; see also OOO v Commissioner of Police for the Metropolis [2011] EWHC 1246 (QB) at [145] – Osman Art 2 principles apply)

Operational measures

Domestic examples:

- OOO v Commissioner of Police at [49]. Description of settled claim against police and local authority – C brought to UK from Nigeria aged 15 to work in domestic servitude for family, physically and emotionally abused. Matter reported to local authority and later C attended police. No action taken
- R (TDT) v SSHD [2018] EWCA Civ 1395 – T a Vietnamese national, discovered in a lorry with 15 other males. Detained at immigration removal centre. Claimed to be 15 but assessed as being over 18. Release sought on basis VoT, but not until safeguarding measures in place. T released with no protection, and disappeared. Breach of Art 4:
 - Protective duty triggered as credible suspicion VoT (high incidence of young Vietnamese males being trafficked to the UK plus T’s account)
 - Therefore, real and imminent risk of re-trafficking on release (by virtue of being a suspected VoT)

Operational measures

Obligation to identify?

- R (SF) v SSHD [2015] EWHC 2705 (Admin) the court considered (*obiter*) that the duty to identify may be part and parcel of the duty to investigate (at [106]-[107])
- BUT in R (H) v SSHD [2016] EWCA Civ 565 the Court of Appeal held that the only procedural obligation imposed by Article 4 is the duty to investigate (with a view to identifying, prosecuting and punishing those responsible)
- Following J v Austria (2017) App No 58216/12 (see [109]-[111]) it seems clear that implicit in Article 4 is a duty to identify VoTs. Therefore, logically a failure to refer to the NRM where there is a credible suspicion will breach Art 4

Operational measures

Obligation to support?

- Chowdury v Greece (2017) (App No 2184/15) at [128] refers to the various positive obligations as those to prevent, protect, investigate and punish. (See also MS (Pakistan) at [30])
- J v Austria also refers to a positive obligation “to support” VoTs. (See [109]-[111]). Extent of this obligation under Art 4 currently unclear. In MS (Pakistan) the SC left open the question of whether the ECAT obligations should be read into Art 4

Duty to investigate

OOO v Commissioner of Police (see also MS (Pakistan))

- There is “a duty to carry out an effective investigation of an allegation of a breach of Article 4 once a credible account of an alleged infringement had been brought to its [the public authority’s] attention. The trigger for the duty would not depend upon an actual complaint from a victim or near relative of a victim. The investigation, once triggered, would have to be undertaken promptly.” (At [154])
- Applying Rantsev: “the scope of the investigative duty arising under Article 3 is identical to the scope of the duty under Article 4” (At [162])
- Therefore, the investigation must be independent and capable of leading to the identification and punishment of the individuals responsible (MS (Pakistan) at [25])

Questions?



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