

## Trafficking: ECHR and international law issues



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# SUMMARY OF TALK



- (1) Relevance of the European Convention on Human Rights: positive duties under Art.4
  
- (2) International law issues: diplomatic immunity and the Supreme Court's decision in ***Al-Malki v Reyes*** [2017] UKSC 61

## Art.4



### ***Prohibition of slavery and forced labour***

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 well-being of the community;
  - (d) any work or service which forms part of normal civic obligations.

## Art.4 – includes trafficking

- Unqualified
- No derogation possible under Art.15 in times of war/national emergency
- In common with other articles, Art.4 imposes a positive obligation on the state in certain situations.
- In ***Rantsev v. Cyprus and Russia*** (2010) 51 EHRR 1, the ECtHR clarified that the prohibition in Art. 4 applied also to human trafficking. There was no need to fit human trafficking into one of the pre-existing categories. Para.282:

## Recent ECtHR case law

- ***Rantsev*** was a case concerning sexual exploitation. In ***Chowdury v. Greece (30 March 2017)***, ECtHR applied the same approach to a situation involving the exploitation of persons without status.
- ***SM v. Croatia*** (no. 60561/14) 19 July 2018 related to a Croatian woman's complaint that she had been forced into prostitution. The ECtHR gave further guidance on the positive duties under Art.4 and clarified that there need be no cross-border element to the exploitation (all occurred within Croatia).

# Chowdury v. Greece



- Court examined three types of positive obligations:
  - (1) putting in place an appropriate legal and regulatory framework;
  - (2) adopting protective operational measures. ECtHR emphasised that positive obligations generated by Article 4 of the ECHR must in principle be interpreted in light of the Council of Europe Trafficking Convention
  - (3) effectiveness of national investigation. Two procedural violations:
    - (i) failure to examine complaints of one group of applications; and
    - (ii) acquittals resulted from national court's very narrow interpretation of human trafficking. Bar for qualifying abuses as human trafficking required migrants be absolutely powerless to defend themselves and be deprived of freedom of movement. Restrictions upon freedom of movement cannot be a necessary element.

# Chowdury v. Greece



Distinguished forced labour from servitude – para.99:

*“The Court takes the view that, admittedly, the applicants’ situation cannot be characterised as servitude. In that connection, it reiterates that the fundamental distinguishing feature between servitude and forced or compulsory labour within the meaning of Article 4 of the Convention lies in the victim’s feeling that his or her condition is permanent and that the situation is unlikely to change (see C.N. and V. v. France, cited above, § 91). Whilst that was the case for the first applicant in C.N. and V. v. France (ibid., § 92), in the present case the applicants could not have had such a feeling since they were all seasonal workers recruited to pick strawberries.”*

# S.M. v. Croatia



- Court also found a violation of Art.4 in **SM**:
  - (1) although there was an adequate legal framework in Croatia for criminalising trafficking in human beings, forced prostitution and exploitation of prostitution;
  - (2) there had been shortcomings in the authorities' investigation into SM's case: (i) Investigating authorities had not interviewed all the possible witnesses (ii) the national Court had refused to accept certain aspects of SM's testimony on the basis of her presentation in court without making any assessment of the possible impact of psychological trauma and (iii) in finding that she had voluntarily given sexual services to acquit the accused, had taken no account of international laws on human trafficking according to which the consent of the victim was irrelevant.

# Applying Art.4 in domestic context



- In ***R (TDT) v SSHD*** [2018] EWCA Civ 1395, Court of Appeal held that there had been a breach of the positive duty under Art.4 where the Home Office had released a Vietnamese national who was a potential victim of trafficking without having put in place adequate measures to protect him from being re-trafficked:
  - C's solicitor had made a reference to UK Human Trafficking Centre stating T was a victim of trafficking;
  - LA offered to provide secure accommodation;
  - C's solicitors made it clear C should not be released without notice;
  - Home Office released C day JR proceedings issued and subsequently disappeared.
- CA noted evidence of high incidence of young Vietnamese males being trafficked; C's account was consistent with wider evidence

# Applying Art.4 in domestic context

- Challenges to investigations: note robust approach taken in **SM**, where ECtHR criticised fact investigators did not interview all the available witnesses;
- Interpretation of provisions of Immigration Rules in light of Art.4?

# Applying Art.4 in domestic context

- Seems no reason why SC decision in ***Commissioner of Police of the Metropolis v DSD*** [2018] UKSC 11, where Court clarified positive obligation under Art.3 (including lack of need for a systemic problem to make out liability) should not apply to Art.4 cases; nb Lord Hughes at [129]:

*“It might also be noted that the application of the judicial glosses to the other rights protected by the Convention has not, as yet, received detailed consideration. But it is difficult to see why, if they are sound, they may not in principle be applied equally to other rights. In ***Siliadin v France*** (2005) 43 EHRR 16 the court held that the second gloss applied to article 4 at least as far as the obligation to put in place legal prohibition of forced labour was concerned, but an obligation in relation to investigation was not in issue. Some third party behaviour in relation to modern slavery might indeed be considerably more serious than actual bodily harm in a fight outside a club.”*

# ECHR: Summary



- Human trafficking standalone prohibition in Art.4 but forced labour and servitude may also be relevant
- Positive duties apply to courts/adjudicating authorities as well as investigating authorities

# Al-Malki v Reyes [2017] UKSC 61



- Claimants employed as domestic workers by KSA diplomat and his wife. Cs brought claims against employers alleging inter alia race discrimination and failure to pay minimum wage, alleging mistreatment and being a victim of trafficking.
- Courts considered the question of whether D's diplomatic immunity under the Vienna Convention on Diplomatic Relations ("**the VCDR**") defeated the claim. By the time case had reached the Court of Appeal, D was no longer a diplomat.

# Al-Malki v Reyes [2017] UKSC 61



- Supreme Court concluded that D did not have diplomatic immunity under Art.39(2), which governed the position of former diplomats ('residual immunity') and provided for a more restricted form of immunity insofar as activities performed in the course of official functions. D's activities in employing Cs were not in the course of his official functions, therefore he did not have the benefit of residual immunity.
- Most of Court's judgment concerned with obiter question of whether (had D remained a diplomat) he would have been entitled to rely on exception from diplomatic immunity at Art.31(1)(c).

# Al-Malki v Reyes [2017] UKSC 61



Art. 31 of the VCDR provides, so far as relevant:

*“A diplomatic agent... shall...enjoy immunity from [the receiving state’s] civil and administrative jurisdiction, except in the case of– (...) (c) an action relating to any **professional or commercial activity exercised by the diplomatic agent in the receiving state** outside his official functions.”*

Obiter question: Did D’s employment of Cs fall within the red text?

# Al-Malki v Reyes [2017] UKSC 61



- Lord Sumption (with whom Lord Neuberger agreed) considered that the situation would not fall within the Art.31(1)(c) exception.
- In Lord Sumption's view, Art.31(1)(c) referred to carrying on a course of business. Considered that otherwise, the provision would apply to *“every purchase a diplomat might make”*.

# Al-Malki v Reyes [2017] UKSC 61



Lord Wilson expressed doubt about Lord Sumption's conclusion; and Lady Hale and Lord Clarke agreed with Lord Wilson's doubts.

Lord Wilson:

- (1) highlighted extent of problem of exploitation of foreign workers by diplomats in particular;
- (2) noted broad international agreement in condemning trafficking;
- (3) Questioned why employment contracts made in the UK were excepted from state immunity but not from employment immunity NB *Propend Finance Pty Ltd v Sing* 111 ILR 611.
- (4) Considered that Art.31(3)(c) of the Vienna Convention on the Law of Treaties permitted the Court to take into account subsequent developments in the law to interpret "commercial activity" in light of the Palermo Protocol.

# Al-Malki v Reyes [2017] UKSC 61

Sumption v Wilson



# Al-Malki v Reyes [2017] UKSC 61



## ISSUES

- (1) What is a commercial activity?
- (2) What is the effect of Art.31(3)(c)?

# Al-Malki v Reyes: commercial activity



*“It is inherent in the concept of jurisdictional immunity that it will shelter a serving diplomat (and in some circumstances a former diplomat) against legal proceedings in the receiving state. It is not inherent in that concept that the immunity will enable him to exercise a distinct business activity in competition with others while sheltering him from the modes of enforcing the corresponding liabilities which are an ordinary incident of such an activity.” [21(5)]*

## **“Article 42**

*A diplomatic agent shall not in the receiving state practise for personal profit any professional or commercial activity.”*

- No need for profit?
- Compete in what sense?
- Where is the line drawn?

## Al-Malki v Reyes: Art.31(3)(c)

Art.31(3)(c) of the (other) Vienna Convention (on the Law of Treaties, VCLT) codifies a rule of interpretation that "*any relevant rules of international law applicable in the relations between the parties*" are to be taken into account in the interpretation of a treaty.

The original intention behind the inclusion of art.31(3)(c) in the Vienna Convention was an attempt to encapsulate the so-called intertemporal principle that a treaty is to be interpreted in light of the law contemporary with it: *Island of Palmas* (Netherlands v USA) (1928) (PCA) 2 R.I.A.A. 829 at 845.

Regularly applied by the ECtHR in context of interpretation of ECHR - e.g. *Hassan v UK*.

# Al-Malki v Reyes: Art.31(3)(c)

**Hassan v UK:** re-interpreting Art.5(1).

Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty **save in the following cases** and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (.....)
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

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**(g) where detention is authorised under by the Geneva Conventions;**

# Al-Malki v Reyes: Art.31(3)(c)

*Serdar Mohammed Hassan v UK*: re-interpreting Art.5(1).

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(g) where detention is authorised under by the Geneva Conventions; and

(h) where detention is pursuant to a power under a UN Security Council Resolution passed under Chapter VII of the UN Charter.

## Al-Malki v Reyes: Art.31(3)(c)

In *Al-Malki*, claimants argued that “commercial activity” should be read to include trafficking, in view of internationally agreed definition.

Lord Sumption rejected this argument :

- (1) Art.31(3)(c) only applied where there is an “intention that the principal treaty should accommodate future change” [42];
- (2) Exclusion of jurisdiction is not incompatible with substance of a prohibition, because it is a procedural rule; immunity, “*does not contradict a prohibition... merely diverts any breach of it to a different method of settlement*”
- (3) Even if trafficking was necessarily a commercial activity, did not consider that employing someone as a domestic worker was a commercial activity – analogy with a person who purchases a stolen good vs. a person who sells it.

# Al-Malki v Reyes: Art.31(3)(c)

## ISSUES:

- What does treaty envisaging change over time mean? Cf. ECHR (e.g. *Hassan*) and *Namibia* case cited by Lord Sumption.
- Is this really the way Art.31(3)(c) is meant to work? *Namibia*.

# Al-Malki v Reyes: summary



- Supreme Court decided issue of diplomatic immunity in context of trafficking on narrow point i.e. that defendant was no longer a diplomat and therefore had a narrower immunity;
- Broader issue of to what extent a diplomat still in their posting can rely on immunity left open, with court divided;
- Central question is whether employing a trafficked person can be said to fall within commercial activity exception; Art.31(3)(c) of VCLT likely to play a key part.

Landmark  
CHAMBERS