

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Case No. 16081/08

M.

V

UNITED KINGDOM

WRITTEN COMMENTS BY WOMEN'S LINK WORLDWIDE

Pursuant to Rule 44(2) of the Rules of Court

October 3, 2008

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I. INTRODUCTION

1. These written comments are submitted by Women's Link Worldwide pursuant to leave granted by the President of the Grand Chamber of the European Court of Human Rights (the "Court") in accordance with Rule 44(2) of the Rules of Court.¹

2. Women's Link Worldwide is an international non-governmental organization working to advance women's rights through the implementation of international human rights law and the use of international tribunals and strategic litigation. As a clearinghouse of legal precedent from national and international courts, Women's Link Worldwide is a resource for advocates and organizations committed to furthering women's rights through legal avenues. As an organization dedicated to promoting the respect of human rights of victims of trafficking, Women's Link Worldwide has particular expertise we wish to place before the Court that will be of use in the determination of the legal issues concerning the return of individuals who have been trafficked across international borders to their countries of origin.

3. The return of such individuals engages States' responsibilities under international law, in particular the obligation of *non-refoulement* when there exists the possibility of torture or inhuman or degrading treatment including re-trafficking in the case of return.

4. The jurisprudence of this Court clearly affirms that States have the obligation of *non-refoulement* when there is a real risk of treatment in violation of Article 3 if the person is deported.²

5. These written comments are based on international and comparative law about States' responsibilities regarding victims of trafficking.

6. These written comments deal with the States' responsibilities to victims of trafficking. In particular how the scope of the positive obligation of the States is understood in relation with the principal of *non-refoulement*. The scope of the obligation is also referred to in these comments as the due diligence standard.

¹ Pursuant to letter dated 4 September 2008 by the Registrar, T.L. Early.

² See, for example, *Soering v United Kingdom* (Case No 14038/88) ECHR 7 July 1989 (Soering); *E Chahal v United Kingdom* (App No 22414/93) ECHR 15 November 1996 (Chahal); *Jabari v Turkey* (App No 40035/98) ECHR 11 July 2000 (Jabari); *Saadi v Italy* (App No 37201/06) ECHR 28 February 2008 (Saadi).

II. DISCUSSION³

7. Victims of trafficking suffer a host of human rights violations, both in the country of origin as well as during their migrations and once in the country of destination. At the same time, they may risk serious repercussions if they return home, such as reprisals or retaliation from trafficking mafias, the possibility of being re-trafficked, severe community or family exclusion, and discrimination.

A. State responsibilities for human rights violations by non-state actors

8. International human rights law clearly affirms that States have a responsibility to respect, protect and promote human rights. This responsibility exists not only when the State directly commits a human rights violation, but also when the State fails to protect those under their jurisdiction from such violations.⁴

9. Thus States are obliged to both respect and protect rights. They must not only refrain from committing violations themselves through their agents and apparatus, but also must ensure that rights are not abused by others. This requirement to promote human rights enjoyment in a wider sense clearly includes impeding other individuals (i.e. non-state actors) from violating human rights, though this obligation can be difficult to identify and enforce. This is illustrated by the fact that, “in principle, states are not responsible for the actions of private persons or agencies...States are responsible, however, for their failure to meet their international obligations, even when the substantive breaches originate in the conduct of private persons.”⁵

10. International human rights tribunals have expanded the law of States’ responsibility beyond its classical origins through international human rights conventions. Currently, it is accepted that States are obligated to respond appropriately to potential or actual private conduct, and “to organize the governmental apparatus and, in general all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.”⁶

11. In the case that human rights violations are committed by human traffickers, it must be demonstrated that the “suffering” (the violations suffered as a result of the trafficking) is an internationally recognized wrong that can be brought to the courts,

³ The arguments in this intervention are based on the Dissertation submitted for the Masters of Studies in International Human Rights Law, University of Oxford entitled: *Human Trafficking: State Obligations to Protect Victims’ Rights: The Current Framework and a New Due Diligence Standard* (Viviana Waisman, Kellogg College, Trinity Term 2007). On file with Women’s Link Worldwide.

⁴ R Cook ‘State Responsibility for Violations of Women’s Human Rights’ (1994) 7 Harv Hum Rts J 125, 151.

⁵ *ibid.*

⁶ *Velásquez Rodríguez v Honduras* (Judgment of 29 July 1988) Inter-American Court of Human Rights Series C No 4 (1988), para 176.

and second that the State in question has identifiable duties under international law to protect the trafficking victims and to provide access to redress – that is, to provide adequate remedies for the victims.

12. The due diligence standard or the scope of State responsibility can be utilized to delineate what a State must do when human rights violations take place, so that the State is meeting its obligations to protect human rights. The development of due diligence as a standard to measure State compliance with human rights law is highly significant because it provides a framework for determining the State's minimum obligations in the face of human rights violations by non-state actors. That is, the scope of the obligation of the State.

B. The due diligence standard in International law: jurisprudence from the European Court of Human Rights and the Inter-American Commission and Court of Human Rights

13. The development of the jurisprudence that holds States responsible for human rights violations committed by third parties has tremendous consequences for vindicating violations of women's human rights, as the majority of gender-specific human rights violations are committed by non-state actors. The Inter-American Commission, in particular, set an early precedent in applying the due diligence standard in cases of gender discrimination, specifically in the case of *María da Penha Maia Fernandes v Brazil*,⁷ concerning a woman who was victim of domestic violence at the hands of her husband.

14. General Recommendation Number 19, issued by the Committee on the Elimination of all Forms of Discrimination against Women explains that “discrimination under the Convention is not restricted to action by or on behalf of Governments” and that “under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”⁸

15. The Committee in charge of monitoring the implementation of the Convention on the Elimination of All Forms of Discrimination Against Women also applied the idea of the use of due diligence standard to measure government responsibility in relation to gender violence in *A.T. v Hungary*.⁹ The Committee found that the State party had failed to meet its responsibilities under several articles of the Convention

⁷ *María da Penha Maia Fernandes v Brazil* (Case No 12.051, Report No 54/01, OEA/Ser.L/V/II.111 Doc 20 rev at 704) Inter-American Commission of Human Rights (2001) (*María da Penha*)

⁸ UN Committee for the Elimination of All Forms of Discrimination against Women, ‘CEDAW General Recommendation No 19: Violence against women’ (29 January 1992) UN Doc A/47/38, para 9.

⁹ *A. T. v Hungary* (Case No 2/2003) Committee for the Elimination of All Forms of Discrimination Against Women 26 January 2005 (A. T.)

and examined whether the State had failed in its duty to provide the applicant with effective protection from the serious risk to her physical integrity, physical and mental health, and her life from her former common law husband.

16. The European Court of Human Rights applies a similar standard, named by the Court the “scope of the obligation”. In 1998, the Court used a variation of the standard in the case of *Osman v The United Kingdom*, when examining the positive obligations of the State to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another person. The Court did not question the existence of a positive obligation from the State, but centred its analysis on the scope of the obligation, and affirmed: “where there is an allegation that the authorities have violated their positive obligation to protect the life in the context of their above mentioned duties... it must be established to its satisfaction that the authorities knew or ought to have know at the time of the existence of the real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”¹⁰

17. This standard was reiterated in the case of *Z. and others v The United Kingdom*, where the Court establish “The obligations on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill treatment administered by private individuals.”¹¹

18. In *E. and others v The United Kingdom*,¹² the Court reiterated the holding in *Z. and others*, emphasizing that the State is required to take measures designed to ensure that individuals within their jurisdiction are not subject to torture or inhuman or degrading treatment, including by private individuals, and that “these measures should provide effective protection, in particular, of children and other vulnerable persons, and include reasonable steps to prevent ill-treatment of which authorities had or ought to have had knowledge.”¹³

19. Similarly, the Inter-American Court of Human Rights, in the *Velásquez Rodríguez* case set the standard that if the State’s apparatus acts in a manner that allows for violations to go unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to

¹⁰ *Osman v United Kingdom* (App No 23452/94) 101 ECHR 28 October 1998 ECHR (Osman), para 115.

¹¹ *Z and Others v The United Kingdom* (App No 2939/95) 333 ECHR 10 May 2001 (Z and others), para 73.

¹² *E and others v The United Kingdom* (App No 33218/96) 590 ECHR 26 November 2002 (E and others).

¹³ *ibid*, para 88.

ensure the free and full exercise of those rights to the persons within its jurisdiction.¹⁴ In other words, the State has failed to act with due diligence.

20. The framework developed in the *Velásquez Rodríguez* case was applied by the Inter-American Commission in the *María da Penha Maia Fernandes* case. In this case, the Commission found the Government of Brazil negligent for its lack of adequate protection to a victim of domestic violence. The Commission analyzed the facts taking into account the context in which the violence occurred, and found that the case of *María da Penha* could be viewed as “part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors” and that it involved “not only failure to fulfill the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices.”¹⁵

21. A large number of human rights bodies also advocate for the application of the due diligence standard to set the minimum that States must accomplish to protect human rights. Thus, the Declaration on the Elimination of Violence against Women, adopted by the United Nations General Assembly in 1993 urges States to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”¹⁶

C. Defining the scope of obligation in cases of trafficking: The principle of *non-refoulement*

22. States have the obligation to protect the rights of trafficking victims, including preventing further harm and providing adequate and appropriate remedies.¹⁷

23. Trafficking may sometimes amount to a form of torture and cruel, inhuman, or degrading treatment. In many circumstances, the methods by which women are trafficked – including abduction, incarceration, or the confiscation of passports or other identification – restrict a woman’s freedom of movement. Also, trafficked women may risk serious repercussions after an escape or upon return, such as reprisals or retaliation from trafficking mafias or individuals, the possibility of being re-trafficked, severe community or family exclusion, and discrimination.

24. These threats include the risk of falling back into the hands of traffickers within the receiving State or the possibility of deportation to the country of origin, where

¹⁴ Velásquez Rodríguez (n 6) para 176.

¹⁵ *María da Penha Maia Fernandes* (n7).

¹⁶ Declaration on the Elimination of Violence against Women, UNGA Res 48/104 (20 December 1993) , art 4(c).

¹⁷ The use of the due diligence standard can also be found in the Recommended Principles and Guidelines on Human Rights and Human Trafficking, which states: “States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons.”

women face a host of additional possible human rights violations. It is crucial to recall that often the circumstances in which women are trafficked also amount to inhumane and degrading treatment. On occasion, women are held in slave-like conditions without liberty of movement, they are subject to physical abuse, including rape, and forced to prostitute themselves.

25. According to the jurisprudence of the European Court of Human Rights, a State is required to take measures designed to ensure that individuals within their jurisdiction are not subject to torture or inhuman or degrading treatment, including by private individuals. Special attention should be paid to people in vulnerable situations.

26. Importantly, the prohibition of torture is a *jus cogens* norm, that is, an imperative norm of international law of obligatory nature and binding for all States, independently of the existence or not of any contractual bonds that oblige them.

27. In relation to Article 3, States have the positive obligation of preventing torture or inhuman or degrading treatment. When a person risks deportation, the scope of the obligation in order to prevent a violation of Article 3 requires the application of the principle of *non-refoulement*. This obligation has been clearly outlined and enforced by the Court since *Soering v The United Kingdom*,¹⁸ *Chahal v The United Kingdom*,¹⁹ *Jabari v Turkey*,²⁰ and more recently in *Saadi v Italy*.²¹

28. In *Soering v. The United Kingdom*,²² the Court enlarges the scope of the States' responsibility for breaches of the Convention, and in accordance with this jurisprudence, States must consider the consequences of returning an individual to a third country where he or she may face treatment susceptible of breaching the Convention.²³ This is notwithstanding the fact that the ill-treatment may be beyond its control or even that assurances have been provided that no ill-treatment has taken place.

29. The judgment in the case *Chahal v The United Kingdom*,²⁴ establishes that a person may not be deported to a country where they will face a real risk of torture or inhuman or degrading treatment. The Court affirmed the absolute nature of the prohibition on torture and inhuman and degrading treatment as applying irrespective of public emergency or terrorist threat.²⁵ It held that "The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another

¹⁸*Soering v United Kingdom* (Case No 14038/88) ECHR 7 July 1989 (Soering).

¹⁹*E Chahal v United Kingdom* (App No 22414/93) ECHR 15 November 1996 (Chahal).

²⁰*Jabari v Turkey* (App No 40035/98) ECHR 11 July 2000 (Jabari).

²¹*Saadi v Italy* (App No 37201/06) ECHR 28 February 2008 (Saadi).

²²*Soering* (n 18).

²³*ibid.*

²⁴*Chahal* (n 19).

²⁵*ibid.*, para 79.

State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion.”²⁶

30. Another important precedent was set by the case *Jabari v Turkey*,²⁷ where the Court affirms that where a State's decision to deport an individual raises issues under Article 3, the State is obligated under the Convention not to expel the person. The Court stated, “having regard to the fact that Article 3 enshrines one of the most fundamental values of a democratic society and prohibits in absolute terms torture or inhuman or degrading treatment or punishment, a rigorous scrutiny must necessarily be conducted of an individual's claim that his or her deportation to a third country will expose the individual to treatment prohibited by Article 3.”²⁸

31. In *Saadi v Italy*,²⁹ the Court established “Since protection against the treatment prohibited by Article 3 is absolute, that provision imposes an obligation not to extradite or expel any person who, in the receiving country, would run the real risk of being subjected to such treatment. As the Court has repeatedly held, there can be no derogation from that rule (...). It must therefore reaffirm the principle stated in the *Chahal* judgment (cited above, § 81) that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State.”³⁰ The Court “reaffirms that for a planned forcible expulsion to be in breach of the Convention it is necessary – and sufficient – for substantial grounds to have been shown for believing that there is a real risk that the person concerned will be subjected in the receiving country to treatment prohibited by Article 3”.³¹

32. Victims of trafficking facing deportation may invoke Article 3 in national courts to stop the procedure. Article 3 of the Convention may also be invoked to stop deportation if the person can demonstrate that their right to a dignified existence would likely be violated if they were returned to their country of origin.³²

D. Conclusion

33. In the same way it is evident that victims of trafficking suffer a host of human rights violations, it is equally apparent that States have a legal obligation to protect the rights of women who have been trafficked for exploitation and find themselves within the jurisdiction of the member State.

²⁶ *ibid*, para 80.

²⁷ *Jabari* (n 20).

²⁸ *ibid*, para 39.

²⁹ *Saadi* (n 21).

³⁰ *ibid*, para 138.

³¹ *ibid*, para 140.

³² K Röhl, UNHCR, Evaluation and Policy Analysis Unit, ‘Fleeing violence and poverty: non-refoulement obligations under the European Convention of Human Rights’ (Working Paper No 111) (January 2005) Geneva, 1.

34. As stated above, among the State's positive obligations regarding victims of trafficking is the duty to respect the principle of *non-refoulement* when the deportation of a person may put her at risk of suffering torture. Similarly, the principle must be respected if the person's right to a dignified existence would be violated if returned to her country of origin. In cases of trafficking, there is a very high risk of re-trafficking and of suffering ostracism if the individual is deported to her country of origin. Thus such a deportation would violate the minimum standard that States must comply with in accordance to the European Convention and other international law.

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