KRACHUNOVA V. BULGARIA: NEW POSITIVE OBLIGATION UNDER ARTICLE 4 ECHR TO COMPENSATE VICTIMS OF HUMAN TRAFFICKING FOR PECUNIARY DAMAGES

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By Vladislava Stoyanova

Krachunova v. Bulgaria is the first judgment where the ECtHR addressed the question of compensation for victims of human trafficking as a positive obligation held by States under Article 4 of the Convention. As the Court noted at para 161, in this case, the Court is 'for the first time confronted with the question of whether there is a positive obligation under Article 4 of the Convention to enable trafficking victims to claim compensation from their traffickers in respect of lost earnings.' In this post, after summarising the facts, I will first note some definitional challenges brought to light by the case. Second, I will point out the linkage between the question of compensation and the definitional question of whether the applicant is a victim of human trafficking. Finally, I will explain the new positive obligation found by the Court to arise under Article 4 ECHR.

Summary of the facts

The applicant came from a poor background, having been raised in a small village in Bulgaria and completing only secondary school. In 2012, at the age of twenty-six, she met X whose main occupation was to drive prostitutes to and from places to work. The applicant agreed to work with X since she needed the money. In 2012 and 2013 she worked as a prostitute on Sofia's ring road. She was arrested on various occasions. On 15 February 2013, she was again approached by police officers, at which point she told them that X had been keeping her against her will and holding her identity card. She also stated that she did not want to engage in sex work anymore. On the same day, she was taken to a police station, interviewed and then taken to a crisis shelter in Sofia. On the same day, X also came to the police station to return her identity card.

On 15 February 2013, the police opened a criminal investigation against X. He was charged with the crime of human trafficking contrary to Article 159a §1 of the Bulgarian Criminal Code. After appeal and retrial, he was finally convicted for this crime. This was relatively easy since according to the definition of human trafficking in the Bulgarian Criminal Code, it is not relevant whether any of the means (e.g. coercion, abuse of power, or position of vulnerability) in the international law definition of human trafficking has been used. The

Bulgarian definition is thus much wider and convictions for this crime are easy (for a detailed analysis see here). The usage of some of the means can only be an aggravating factor according to the Bulgarian Criminal Code, possibly leading to a more severe sentence.

The key issue in the case was not, however, the interpretation of the crime, the conviction or the severity of the sentence, as have been the key issues for most other judgments under Article 4 (see e.g. Chowdary and Others v. Greece). The key issue concerned the compensation. In particular, despite the conviction and despite the applicant's compensation for non-pecuniary damages (4 090 EUR), she did not receive compensation for pecuniary damages. As the Sofia City Court explained in its judgment from 5 December 2017, the sums earned by the applicant as a prostitute that X took from her, 'are not to be returned to [her], since they were obtained in *an immoral manner* that is prohibited by the law, as laid down in Article 329 §1 of the Criminal Code (emphasis added).' Article 329 §1 of the Criminal Code criminalised obtaining income in an immoral manner.

It is here relevant to note that on 27 September 2022, i.e. after the above-mentioned judgment by the Sofia City Court regarding Krachunova, Article 329 §1 of the Bulgarian Criminal Code was declared unconstitutional by the Bulgarian Constitutional Court. The latter reasoned inter alia that prostitution was not criminalised as such in Bulgaria and that Article 329 §1 was adopted under different social and political conditions (i.e. during communism) when the perception was that all of us have a duty to work.

Did the factual circumstances fall within the definitional scope of Article 4 ECHR?

Although the definitional question as to whether the applicant was a victim of human trafficking and whether, accordingly, her case can be examined under Article 4 ECHR, was not a key question, it is still interesting to note how the Court approached it. The reason is the mismatch between the definition of the crime of human trafficking in the Bulgarian criminal code and the international law definition that the Court has fully endorsed as the valid definition for the purposes of Article 4 ECHR. According to the definition in the Palermo Protocol, in the CoE Anti-Trafficking Convention, and for the purposes of Article 4 ECHR (see S.M. v. Croatia), three elements need to be fulfilled for human trafficking to be constituted: 'action', 'purpose' and 'means'. The first two were found by the Court in Krachunova v. Bulgaria to be fulfilled since X 'had recruited the applicant twice and had continuously harboured and transported her with a view of exploiting her for sexual services' (para 147). The meaning of 'exploitation' was not clarified in the reasoning. It is possible, however, to infer from the facts and the reasoning of the Court that the retention of the income from the prostitution was accepted as amounting to 'exploitation.'

As to the 'means' element (that as mentioned above was not required under the Bulgarian Criminal Code for the purposes of convicting X for human trafficking), the Court found it fulfilled with reference to various factors (e.g. the applicant was 'poor and emotionally

unstable young woman'; her reputation in the village would be harmed, had X disclosed that she had worked as a prostitute; her identity card was retained).

The definitional approach to Article 4 therefore suggests a relatively low severity threshold applied to this provision for triggering its application. The Court at para 156 of Krachunova v. Bulgariareminded that a positive finding that human trafficking is constituted for the purposes of triggering the protection of Article 4 under the ECHR, does not mean that the crime of human trafficking is necessary consisted for the purposes of convicting a perpetrator under the domestic criminal law. Yet, this suggestion is not entirely unproblematic. The reason is that it has been established that States are under a positive obligation to criminalise harms that fall within the definitional scope of Article 4 (see Stoyanova). A low severity threshold under the Convention therefore has implications for the national criminal law, including the expansion of the scope of the criminalisation by lowering the severity threshold (on this very topic more generally see Mavronicola and Lavrysen).

The compensation question

However, one can ask the following question: should the classification of a woman prostitute as a victim of human trafficking (irrespective of how narrowly or widely the definition of human trafficking is construed) at all matter for the purposes of compensation for pecuniary damages? If she has not received her income from her work (be it sex work also) since this income has been retained by her pimp, shouldn't she have access to legal procedural means to seek return of her income (in the form of compensation) and shouldn't it actually be legally possible to obtain it? Krachunova v. Bulgariaoffers a negative response to this key question. This is explained in para 191 that is worthy of being cited in full:

It should not be overlooked in this connection that the applicant was not seeking to enforce, directly or indirectly, or obtain restitution under, a contract for sex work, or to profit from conduct in which she had engaged freely, without any coercion. She was claiming the proceeds retained by her trafficker, which proceeds derived from her unlawful exploitation for coerced prostitution, and with which her trafficker had unjustly enriched himself. Indeed, the applicant was at pains to emphasize that her complaint did not relate to voluntary sex work, but to exploitation for the purposes of coerced prostitution (see paragraph 138 above) – which is, as recognized by the Court, incompatible with human dignity.

In this way the Court distanced itself from the general admittedly controversial question of prostitution. The Court narrowed its examination to the question of whether it was permissible under the Convention to not allow victims of human trafficking to claim compensation for pecuniary damages 'on the grounds that the earnings at issue had been obtained immorally.' (para 192) In light of the above quoted para 191, the answer offered is that it is not permissible because the earnings are not immoral since the woman was coerced into prostitution (i.e. she was a victim of human trafficking). In this sense, the

qualification of the circumstances of the applicant as a victim of human trafficking, permits the imposition of a positive obligation upon States 'to enable victims of trafficking to claim compensation from their traffickers in respect of lost earnings.'

Justifications for the positive obligation

It needs to be further explained how the Court justified the above formulated positive obligation upon States. First, the Court referred to the general means for interpreting the Convention. These include the following: the rights in the Convention have to be interpreted in a way that is practical and effective; the rights in the Convention have to be interpreted in harmony with other rules of international law, including the CoE Anti-Trafficking Convention ; the rights have to be interpreted with regards to 'developments in domestic legal systems that indicate a uniform or common approach or a developing consensus between the Contacting States in a given area.'

The second step taken in the reasoning to justify the new positive obligation is invoking the standards developed under the procedural limb of Article 2. In particular, at para 166 in Krachunova v. Bulgariathe Court observed that it 'has already had occasion to hold that the fact that it is not possible (under the relevant domestic rules) to lodge claims for certain types of damages is in breach of Article 2'. There are three cases cited to support this assertion (Movsesyan v. Armenia, §§ 72-74; Sarishvili-Bolkvadze v. Georgia, §§ 94-97; and Vanyo Todorov v. Bulgaria, §§ 56-67). It is relevant to note that these cited judgments are about non-pecuniary damages, as part of the assessment of the procedure limb of Article 2, where life has been lost. In contrast, Krachunova v. Bulgaria was about pecuniary damages as part of the assessment of the substantive positive obligations under Article 4.

The procedural limb of Articles 2, 3 and 4 that demands effective investigation, aims to address harm that has already materialised, including by ensuring compensation. The substantive limb (i.e. the substantive positive obligations) under these provisions has been generally construed as having a preventing function (see Stoyanova and Lavrysen). The relevant question that arises here then is the following: What is the link between the question of compensation for pecuniary damages and prevention of harm that falls within the definitional scope of Article 4? This can be understood as a causation question and reframed in the following way: Does the compensation for pecuniary damages in any way prevent the harm (i.e. human trafficking) and if yes, how?

According to the reasoning in para 169-173, there is such a causation for four reasons. The first one is that the compensation for pecuniary damages assists victims' recovery, in this way among other things '*reducing the risks* of their falling victims again to traffickers (emphasis added).' This can be understood as a risk-reduction reason. The second reason underpinning the causation in the judgment is that awarding compensation deters trafficking. More specifically, '[m]aking it possible for victims to recoup lost earnings from their traffickers would *go some way* towards ensuring that those traffickers are not able to enjoy the fruits

of their offences, thus *reducing the economic incentives* to commit trafficking offences (emphasis added).' This can be framed as deterrence via reducing the economic incentives reason.

The Court briefly mentioned two other reasons to justify the causation between the possibility for victims to receive compensation for pecuniary damages and the prevention of human trafficking: '[Ensuring that victims are compensated by the offenders] can also reduce the burden on the public resources sometimes used to support the recovery of trafficking victims. Moreover, it can give victims an additional incentive to come forward and expose trafficking, thereby increasing the odds of holding human traffickers accountable and thus *preventing* future instances (emphasis added).' (para 172)

Empirically these lines of causation are difficult to substantiate. Normatively, however, the proposition that victims should be allowed under the national law to claim compensation for pecuniary damages from the perpetrators is completely defensible.

Conclusion

Article 15(3) of the CoE Anti-Trafficking Convention ('Each Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators') reflects the above-mentioned proposition. As I have argued here, the reference to internal law in this provision leaves States wide discretion. Krachunova v. Bulgaria is very useful in limiting this discretion. The discretion has indeed been limited since States are not allowed to deny a victim of human trafficking compensation for pecuniary damages on the ground that the earnings have been immorally obtained.

Yet, as it is generally the case with positive obligations (Stoyanova), States have discretion how to comply with them. This also implies that in many other respects, including in the context of compensation of victims, discretion continues to exist and remains to be litigated before the Court.