

L.E. v. Greece: Human Trafficking and the Scope of States' Positive Obligations under the ECHR

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Abstract

In *L.E. v. Greece*, the European Court of Human Rights found that Greece failed to fulfill its positive obligations under art.4 of the European Convention on Human Rights (ECHR). The judgment can be assessed as a step forward for alleviating the scarcity of judicial engagement with art.4 of the ECHR (the right not to be subjected to slavery, servitude, forced labour and human trafficking). While overall a positive development, in this note I will argue that in some respects the judgment is under inclusive, while in others it is over inclusive. I will demonstrate that the Court faces some challenging questions when it addresses positive obligations under art.4 and these questions have to be more seriously considered. I will also offer an alternative reasoning which is more useful for responding to the structural deficiencies in the protection offered to migrants subjected to severe forms of exploitation in Europe.

Keywords:

human trafficking, Article 4 of the ECHR, positive obligations

1. Introduction

Article 4 of the ECHR enshrines the right not to be subjected to slavery, servitude or forced and compulsory labour. Compared to other provisions from the ECHR, art.4 has produced limited judicial output. The first case in which the European Court of Human Rights (European Court) had the chance to apply this provision in the context of harm inflicted by private actors was *Siliadin v France* decided in 2005.¹ This judgment marked the first time when the European Court had the opportunity to clarify that art.4 imposes positive obligations upon states.² Almost five years later, the Court delivered the widely applauded judgment of *Rantsev v Cyprus and*

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¹ *Siliadin v France* (2006) 43 E.H.R.R. 16.

² H. Cullen, "Siliadin v France: Positive Obligations under Article 4 of the European Convention on Human Rights" (2006) 6(3) *Human Rights Law Review* 585.

Russia,³ which signified two important developments: first, the material scope of art.4 was extended to cover human trafficking;⁴ and second, the positive obligations under art.4 were determined to be much more far reaching than simple criminalisation, since States are also required to take additional protective measures.⁵ In 2012, the European Court rendered two important judgments under art.4. In particular, *C.N. and V. v France* clarified the distinction between forced labour and servitude and reiterated the finding in *Siliadin v France* that States are under the obligation to specifically criminalise the abuses covered by art.4 of the ECHR.⁶ In *C.N. v United Kingdom*, the Court further elaborated on the meaning of servitude and emphasized that this is a specific offence, which “involves a complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance.”⁷ Most importantly, it became clear that for States to comply with the procedural limb of art.4 (the obligation to investigate), an understanding of the subtle ways in which an individual can fall under the control of another is required.⁸ *M. and Others v Italy and Bulgaria* has to be also mentioned since, although the

³ *Rantsev v Cyprus and Russia* (2010) 51 E.H.R.R. 1, para. 282.

⁴ For a critical analysis of this addition see V. Stoyanova, “Dancing on the Borders of Article 4. Human Trafficking and the European Court of Human Rights in the Rantsev case” (2012) 30(2) *Netherlands Quarterly of Human Rights* 163; J. Allain, “Rantsev v Cyprus and Russia: The European Court of Human Rights and Trafficking as Slavery”, (2010) 10(3) *Human Rights Law Review* 546.

⁵ ⁵ On positive obligations under the ECHR more generally see A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, 2004); J. Akandji-Kombe, *Positive Obligations under the European Convention on Human Rights* (Council of Europe Publishing, 2007). On positive obligations under Article 4 of the ECHR more generally see V. Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press, 2016 forthcoming).

⁶ *C.N. and V. v France* (App. No.67724/09), judgment of 11 October 2012, para. 91: ‘In the light of these criteria the Court observes that servitude corresponds to a special type of forced or compulsory labour or, in other words, “aggravated” forced or compulsory labour. As a matter of fact, 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 their condition is permanent and that the situation is unlikely to change. It is sufficient that this feeling be based on the above-mentioned objective criteria or brought about or kept alive by those responsible for the situation.’

⁷ *C.N. v The United Kingdom* (App. No.4239/08) judgment of 13 November 2012, para.80.

⁸ *C.N. v The United Kingdom*, para.80.

complaint by the applicants under art.4 was found inadmissible, the Court reaffirmed the principles emerging from *Rantsev v Cyprus and Russia*.⁹

In light of the above, up until 21 January 2016, when the judgment in *L.E. v Greece* was delivered, the European Court has had only five occasions to consider the applicability of art.4 to exploitation by private actors.¹⁰ *L.E. v. Greece* adds to the above mentioned line of judgments and sheds more light on States' positive obligations under art.4.¹¹ It is an important judgment because it is a helpful step forward for alleviating the dearth of judicial engagement with such structural problems as severe forms of exploitation of migrants in Europe. It also has some wider implications and raises some challenging questions regarding positive human rights obligations. While overall a positive development, in this note I will argue that in some respects the judgment is under inclusive, while in others it is over inclusive.

2. The Factual Circumstances and the Findings of the European Court

The applicant *L.E.*, a Nigerian woman born in 1982, entered Greece in 2004 accompanied by *K.A.*, who had allegedly promised her that in Greece she would work in bars and nightclubs. As a result of these arrangements and once in Greece, she was told that she owed him €40,000. Upon arrival, *K.A.* confiscated her passport and forced her into prostitution for about two years. Throughout this period, she was in contact with the NGO *Nea Zoi*, which provides practical and psychological support to women who have been forced into prostitution. In the period August 2005 – November 2006, *L.E.* was arrested three times for breaching the laws on prostitution and the laws on entry and residence of aliens in Greece. These proceedings resulted in acquittals.

⁹ *M. and Others v Italy* (2013) 57 E.H.R.R. 29, para.146-170.

¹⁰ There is a separate line of case law under Article 4 addressing forced labour demanded by the state. See for example, *Chitos v Greece* (App. No.51637/12), judgment of 4 June 2015. See generally W. Schabas, *The European Convention on Human Rights* (Oxford: OUP, 2015) 210-218.

¹¹ *L.E. v Greece* (App. No.71545/12), judgment of 21 January 2016.

During the above mentioned period she was also issued with a deportation order, however, the deportation was suspended on the ground that it was deemed not feasible. On 29 November 2006, while still in detention pending deportation, L.E. with the support of Nea Zoi, filed a criminal complaint against K.A. and his partner D.J. accusing them of forcing her into prostitution. At this point, L.E. also claimed that she was a victim of human trafficking. The prosecutor at the Athens Criminal Court rejected the claim. The applicant requested a re-examination of her complaint arguing that the investigation into her case was insufficient given that important evidence was disregarded. In particular, the testimony provided by Nea Zoi was not included in the record. Her request was successful in that the prosecutor at the Athens Criminal Court was ordered to bring criminal proceedings against K.A. and D.J. for human trafficking. As much importantly, on 21 August 2007, the prosecutor officially recognised the status of the applicant as a victim of human trafficking and a couple of days later the suspension of the deportation proceedings initially opened against her was approved. In the period 2008 – 2011 criminal proceedings were conducted at national level; however, only D.J. could be arrested and prosecuted. The national court found D.J. not guilty, since it was determined that the latter was not K.A.'s accomplice, but rather another of his victims who had been sexually exploited.

The applicant complained before the European Court that the delay by the police to investigate her case and the deficiencies in the conduct of the investigation had led to the impossibility to prosecute K.A, who was still at large, and to the incorrect acquittal of D.J. The applicant argued that the national court did not assess correctly the facts since, as she claimed, she was forced into prostitution not only by K.A., but also by D.J. She added that the initial rejection of her complaint by the prosecutor had serious consequences because she was not

formally recognized as a victim of human trafficking and was not granted a special residence permit in Greece.

The judgment did not raise any challenging definitional questions and in this sense the applicability of art.4 of the ECHR was not under dispute. Following the tenor of *Rantsev v Cyprus and Russia*, it was simply noted that human trafficking falls within the scope of art.4 of the ECHR and that Greece did not dispute the characterisation of the applicant as a victim of human trafficking. The core of the judgment concerns the scope of the positive obligations under art.4. The European Court reviewed how the respondent government fulfilled the following obligations: (i) to adopt an appropriate legal and administrative framework; (ii) to take protective operational measures; and (iii) to conduct an effective criminal investigation and court proceedings. Although the Court did not agree with all the arguments advanced by the applicant and did not find a violation of (i), it still concluded that Greece had failed to fulfill (ii) and (iii). In what follows, the application of the positive obligations to adopt administrative framework and to take protective operational measures to the case of L.E. will be examined. Although important in the context of the specific case, the obligation to conduct effective criminal investigation and court proceedings is excluded from the ambit of this note because this part of the judgment does not contain innovative aspects.

3. Effective Legal and Administrative Framework

The obligation to penalize and prosecute trafficking is only one aspect of States' positive obligations under art.4.¹² The Court has added that

¹² See V. Stoyanova, "Article 4 of the ECHR and the Obligation of Criminalizing Slavery, Servitude, Forced Labour and Human Trafficking" (2014) 3(2) *Cambridge Journal of International and Comparative Law* 407.

In assessing whether there has been a violation of Article 4, the relevant legal or regulatory framework in place must be taken into account [references omitted]. The Court considers that the spectrum of safeguards set out in the national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking. Accordingly, in addition to criminal law measures to punish traffickers, Article 4 requires member States to put in place adequate measures regulating businesses often used as a cover for human trafficking. Furthermore, a State's immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking [references omitted].¹³

The above quoted paragraph is a reflection of a well-settled aspect of states' positive obligations under the ECHR; namely, states are under the obligation to ensure an adequate and effective regulatory environment so that individuals are protected. As McBride has framed it, "it is hard to imagine compliance with the undertaking in Article 1 to secure the Convention rights and freedoms to everyone without some legal basis for all of the latter being provided."¹⁴ Lavrysen has framed this positive obligation as "protection by the law", an obligation which prescribes States to develop both substantive and procedural guarantees to pro-actively protect the Convention rights.¹⁵ Essentially, this positive obligation extends to the whole web of national laws and regulations. In other words, States might have failed to protect an individual because of

¹³ *Rantsev v Cyprus and Russia*, para.284-285; *L.E. v Greece*, para. 65.

¹⁴ J. McBride, "Protecting Life: A Positive Obligation to Help" (1999) *European Law Review* 43, 43.

¹⁵ L. Lavrysen, "Protection by the Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect the ECHR Rights" in E. Brems and Y. Haeck (eds), *Human Rights and Civil Rights in the 21st Century* (Springer, 2014) 69, 70.

certain deficiencies in the applicable national legislation, and as a consequence be found in violation of the ECHR.

In *L.E. v Greece*, the Court adopted a very superficial approach when considering whether Greece has effective legal and administrative framework.¹⁶ The Court was satisfied that the national legislation criminalises human trafficking and the definition of this criminal offence was in line with the definition in the UN Trafficking Protocol and the CoE Trafficking Convention.¹⁷ The Court was also satisfied that Greece had national legislation envisioning specific protection measures for victims of human trafficking (housing, food, health care and psychological and legal support). It also noted that the Greek legislation provided for the possibility for suspension of deportation proceedings in regard to aliens who are regarded to be victims of human trafficking and who are illegally present. Finally, the Court took into account that Greece had incorporated into its national legislation the Council of Europe Convention on Action against Human Trafficking CETS No. 197 (the CoE Trafficking Convention) and Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (the EU Trafficking Directive).¹⁸ As a consequence, no failure was found in the Greek legal and regulatory framework.

¹⁶ It has to be admitted that the applicant herself did not challenge the effectiveness of the national legislative framework. However, this should not have prevented the Court from examining its effectiveness since the Court has reiterated that 'it is the master of the characterization of the given in law to the facts of a case.' *Söderman v Sweden* [GC] (2014) 58 E.H.R.R. 36, para.57.

¹⁷ Generally, it can be questioned whether copying the international law definition of human trafficking and pasting it into the national criminal law is sufficient for ensuring compliance with Article 4 of the ECHR since this definition can be subject to divergent interpretations. See V. Stoyanova, "The Crisis of a Definition: Human Trafficking in Bulgarian Law" (2013) 5 *Amsterdam Law Forum* 64. For a comparison across different jurisdictions see J. Allain, "No Effective Trafficking Definition Exists: Domestic Implementation of the Palermo Protocol" (2014) 7 *Albany Governmental Law Review* 111, 129.

¹⁸ *L.E. v Greece*, para.71. The Court takes into account external rules in order to assess compliance with the ECHR. See L. Lazarus, C. Costello, N. Ghanea and K. Zeigler, *The Evolution of Fundamental Rights and Case Law. A Comparison of the United Nations, Council of Europe and European Union Systems of Human Rights Protection*, (European Parliament, Director-General for Internal Policies, 2011).

The analysis offered by the Court of the positive obligation to adopt an effective regulatory framework is disappointingly lacking in rigor. The story of L.E. exposes serious deficiencies in the national identification procedure for victims of human trafficking. Prior to discussing these deficiencies and how they relate to the positive obligation of adopting an effective regulatory framework under art.4 of the ECHR, a brief foray into the relevant norms from the CoE Trafficking Convention and the EU Trafficking Directive is necessary. More specifically, art.10 of the above Convention demands that State Parties shall adopt “such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organizations”, shall train its competent authorities in identifying victims and shall suspend deportation upon reasonable grounds to believe that a person has been a victim until the completion of the identification process.¹⁹ The EU Trafficking Directive is framed somehow differently and arguably in a less rigorous way,²⁰ but, still, it also obliges the EU Member States to “establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in cooperation with relevant support organization”.²¹ The Explanatory Report to the CoE Trafficking Convention clarifies that:

¹⁹ Greece signed the CoE Trafficking Convention on 17 November 2005 and ratified in on 11 April 2014. Therefore, although signed, the convention was not in force at the material time. However, this in itself is not an insurmountable problem since the Court has held that ‘[...] in searching for common ground among the norms of international law it [the Court] has never distinguished between sources of law according to whether or not they have been signed or ratified by the respondent State.’ *Demir and Baykara v Turkey* [GC] (2009) 48 E.H.R.R. 54, para.78. In addition, in *Rantsev v Cyprus and Russia*, para.307, the Court used the CoE Trafficking Convention as a relevant source in order to impose a positive obligation upon Russia to investigate possible recruitment as an element of human trafficking. At the material time Russia was not a party to the CoE Trafficking Convention.

²⁰ For a comparison between CoE law and EU law on trafficking see V. Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press, 2016 forthcoming).

²¹ Article 11(4), EU Trafficking Directive.

The identification process provided for in Article 10 is *independent of any criminal proceedings against those responsible for the trafficking*. A criminal conviction is therefore unnecessary for either starting or completing the identification process.

Even though the identification process may be speedier than the criminal proceedings (*if any*), victims will still need assistance even before they have been identified as such [emphasis added].²²

In accordance with the approach outlined in the Explanatory Report, the Group of Experts on Action against Trafficking in Human Beings (GRETA), the body mandated to monitor the implementation of the CoE Trafficking Convention, has taken the position in its reports that the national authorities have to “ensure that the identification of victims of THB is not made conditional on their co-operation in the investigation and criminal proceedings *or the initiation of criminal proceedings* [emphasis added].”²³ What follows from the above is that the granting of the status of ‘victim of human trafficking’ must not be contingent on the initiation or continuation of criminal investigation or criminal proceedings. This requirement was not fulfilled in Greece, where the relevant national legislation incorporated an identification procedure according to which the prosecutor can grant the formal status. Identification was conducted exclusively in relation to the criminal proceedings against the alleged perpetrators. As it

²² Explanatory Report, para. 134 and 135.

²³ *Report Sweden*, 27 May 2014, GRETA(2014)11, para. 142. In its report on Sweden, GRETA expressed its concern that ‘the criminal law-based approach to victim identification leaves victims of THB without formal identification and outside of the scope of the protection measures provided for under the Convention.’ See also *Report Ireland*, 26 Sept 2013, GRETA(2013)15, para.165, where GRETA urged the national authorities to guarantee that ‘in practice identification is dissociated from the suspected victim’s co-operation in the investigation.’

happened in the particular circumstances of L.E., it was on the very day that the prosecutor at the Athens Criminal Court instituted criminal proceedings against the alleged offenders for the crime of human trafficking that the applicant was formally recognised as a victim of human trafficking. Three days after this official recognition, the public prosecutor at the Athens Court of Appeal approved the suspension of her deportation. The identification was thus intimately linked with the criminal investigation. As a consequence of this, her initial complaint that she was forced into prostitution did not lead to formal identification; criminal proceedings had to be initiated for this purpose.

In the European Court of Human Rights judgment, this deficiency in the identification procedure was not scrutinised through the lens of the positive obligation of adopting an effective regulatory framework. As a consequence, the Court succumbed to the assumption that victim identification is a facet of the criminal proceedings. Certainly, the CoE Trafficking Convention gives a lot of leeway to States how to organise their identification procedures and to this effect the Explanatory Report clarifies that by competent authority it is meant “the public authorities which may have contact with trafficking victims, such as the police, the labour inspectorate, customers, the immigration authorities and embassies and consulates”.²⁴ As a result, the different State Parties have mandated different bodies, including prosecutors,²⁵ with the task to identify victims. However, in the logic of the CoE Trafficking Convention, victim identification is primarily a tool for ensuring that victims, including presumed victims,²⁶ access assistance and protection. If the national identification procedure does not achieve this, due to its exclusive or

²⁴ Explanatory Report, para. 129.

²⁵ See *Report Belgium*, GRETA (2013)14, 25 September 2013, 35; *Report Bulgaria*, GRETA (2011)19, 14 Dec 2011, 35.

²⁶ See Article 10(2) and Article 13 of the CoE Trafficking Convention which refer to ‘reasonable grounds to believe that the person concerned is a victim’.

dominant focus on prosecution and conviction of traffickers, then it is doubtful whether it lives up to the requirements of the latter convention.²⁷

One can object to my critique of the judgment by observing that the Court did find a failure in the national identification procedure. In particular, Greece was found in violation of its positive obligations under art. 4, since there was a nine month lapse between the point in time when the applicant filed a criminal complaint against the alleged traffickers and her formal recognition as a victim of human trafficking by the prosecutor.²⁸ This failure was, however, scrutinised in the context of the positive obligation of taking protective operational measures. The specific conditions under which this obligation is triggered and the requirements raised once activated, will be analysed in the next section. At this juncture, it is relevant to clarify the distinction between the two positive obligations, namely to take protective operational measures, on the one hand, and to adopt an effective regulatory framework, on the other. The first one concerns the requirement of personal protection of one or more identifiable individuals, who are at risk of ill-treatment. The second one concerns the requirement of affording general protection and the particular applicant before the European Court might be a representative victim of the respondent State's failure to afford such protection.²⁹ Following this distinction, in *Rantsev v Cyprus and Russia*, the European Court found that Cyprus had failed to fulfill its obligation to put in place an appropriate legislative and administrative framework since, generally, the artiste

²⁷ Here we should take note of the three objectives of the CoE Trafficking Convention as stated in Article 1(1): to prevent and combat trafficking in human beings; to design a comprehensive framework for the protection and assistance of victims; and to promote international cooperation. Despite the strong focus on effective application of criminal law, the preamble of the convention suggests that protection of victims is the paramount objective.

²⁸ *L.E. v Greece*, para.77 and 78.

²⁹ See, for example, *Mastromatteo v Italy* [GC] (App. No.37703), judgment of 24 October 2002, para.69; *Eremia v The Republic of Moldova* (2014) 58 E.H.R.R. 2, para.56: 'As recalled earlier (see paragraphs 48-52 above), the States' positive obligations under Article 3 include, on the one hand, setting up a legislative framework aimed at preventing and punishing ill-treatment by private individuals and, on the other hand, when aware of an imminent risk of ill-treatment of an identified individual or when ill-treatment has already occurred, to apply the relevant laws in practice, thus affording protection to the victims and punishing those responsible for ill-treatment.'

visa regime was not only inadequate, but in fact structured the relation between employers and migrant women in a way that made the latter very vulnerable.³⁰ Cyprus also failed to fulfill its positive obligation to take protective operational measures, since “there were sufficient indicators available to the police authorities, against the general backdrop of trafficking issues in Cyprus, for them to have been aware of circumstances giving rise to a credible suspicion that Ms Rantseva was, or was at real and immediate risk of being, a victim of trafficking, or exploitation.”³¹ At the relevant time, the national authorities had concrete indicators that specifically Miss Rantseva might have been trafficked or exploited and yet they failed to take preventive measures.

In *L.E. v. Greece*, the nine month delay in recognising the applicant as a victim of human trafficking is represented as a failure to protect the specific individual and *not as a general structural failure* of the victim identification procedure in Greece. The Court’s determination that the relevant legislation in force at the material time in Greece offered the applicant practical and effective protection³² is hard to accept – in fact, it was *precisely* the relevant national legislation which envisioned the particular identification procedure to which L.E. was subjected and this procedure was contingent of the exigencies of the criminal law. As a result of this very contingency, there was a delay. In conclusion, in *L.E. v. Greece*, the Court missed an important opportunity to review more generally the victim of human trafficking identification procedure in a way that could potentially distance it from the criminal law rationale so that it can better serve the purpose of protecting and assisting victims.

³⁰ *Rantsev v Cyprus and Russia*, para. 290-293.

³¹ *Rantsev v Cyprus and Russia*, para. 296.

³² *L.E. v Greece*, para.72.

4. Protective Operational Measures

Article 4 of the ECHR requires that states take protective operational measures to protect victims of trafficking. The European Court has clarified that

In order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be demonstrated that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being, trafficked or exploited within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention. In the case of an answer in the affirmative, there will be a violation of Article 4 of the Convention where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk.³³

It is important first to place the positive obligation of adopting protective operational measures in the context of the wider jurisprudence of the Court and the principles established therein. In *Osman v United Kingdom* and in subsequent judgments,³⁴ the Court has developed this obligation, in relation to which it is important to distinguish two analytical stages: (i) when the positive obligation of taking protective operational measures is triggered; and (ii) once it is triggered, what is required from the national authorities.

³³ *Rantsev v Cyprus and Russia*, para.286; *L.E v Greece*, para.66.

³⁴ *Osman v the United Kingdom* [GC] (1998) 29 E.H.R.R. 245, para. 116. See also *Branko Tomasic and Others v Croatia* (App. No.46598/06), judgment of 15 January 2009, para.50; *Choreftakis and Choreftaki v Greece* (App. No.46846/08), judgment of 17 January 2012, para.45.

4.1. Triggering of the Obligation

As the *Osman* test suggests, the obligation is triggered once the state authorities are aware or ought to have been aware of circumstances giving rise to a credible suspicion that a particular individual is at real and immediate risk. In *L.E. v Greece*, the Court posited that the obligation of taking protective operational measures was triggered on 29 November 2006 only when the applicant *explicitly* stated to the authorities that she was a victim of human trafficking.³⁵ Pursuant to the reasoning of the Court, prior to this date, the obligation was not set into motion because the applicant did not *herself* alert the authorities about her situation. There were various contacts between her and the authorities; however, on no occasion did she make an explicit statement that she was a victim of human trafficking. While it might be correct that the factual substratum of the case did not expose circumstances prior to 29 November 2006 giving rise to a credible suspicion that L.E. might have been a victim of trafficking, the assertion by the Court that the victim should explicitly articulate that she had been trafficked is worrying. As the facts reveal, it is unlikely that L.E. would have formulated a claim that she had been trafficked without the support of Nea Zoi. The wording of the judgment can be thus criticised for not demonstrating sufficient sensitivity to the particular situation of migrants who might be victims of trafficking and who might not readily come forward with revelations that they are victims of trafficking. Most importantly, it can be argued that when the scope of the positive obligation of taking protective operational measures under art.4 of the ECHR is *informed* by the CoE Trafficking Convention, the national authorities cannot passively wait for victims to identify themselves; they should rather take more proactive measures.³⁶

³⁵ *L.E. v Greece*, para.73.

³⁶ See Article 10(1), CoE Trafficking Convention, which requires competent national authorities who are trained and qualified in identifying victims of trafficking.

Sure enough, the Court did enquire whether prior to 29 November 2006, the national authorities ought to have been aware that L.E. might have been a victim of trafficking.³⁷ However, the analysis is limited to whether the authorities were alerted and does not contain an indication that authorities should take any proactive measures. The reasoning of the judgment on this point can be also criticised on another ground. More specifically, the Court commends the national authorities that even without knowledge of her specific situation they offered her a place in a reception center. This assertion shows insufficient sensitivity to States' obligations to migrants who have applied for international protection, an issue on which I will elaborate in the following section.

4.2. Victims of Human Trafficking as Applicants for International Protection

In order to substantiate its conclusion that prior to 29 November 2006, the national authorities did not know about the specific predicament of the applicant and therefore no preventive operational measures could be triggered, the Court observed that the applicant herself did not alert the authorities about her situation. The Court also added that

Such was the case, for example, when the applicant submitted asylum applicants to the competent authorities. The Court takes also note in this regard, the even without knowledge of her specific situation, the authorities offered the applicant a place in a reception centre, but she did not appear to take this place.³⁸

The above quotation begs two comments. First, it is difficult to understand how the fact that she was offered a place in a reception centre is of any relevance to the establishment of the absence

³⁷ *L.E. v Greece*, para.75.

³⁸ *L.E. v Greece*, para.75 (translation by the author).

of knowledge on behalf of the authorities. More specifically, this offer is used in the reasoning to bulwark the conclusion that the authorities did not know about her situation; this line of argumentation seems to be fundamentally flawed. Second, as an applicant for international protection L.E. was very likely entitled to some specific reception conditions, including a place in a reception centre. Therefore it is difficult to see how the offer of accommodation has any bearing on the presence or absence of knowledge of risk.

If the Court is to adopt a more sensitive approach to victims of human trafficking who are also applicants for international protection, it will have to take into consideration the important intersections between the positive obligations under art.4 of the ECHR and EU Member States' obligations under the EU Reception Conditions Directive (recast).³⁹ Although not immediately relevant to *L.E. v Greece*, it is important to keep in mind for future cases that the above mentioned EU law instrument obliges Member States to *automatically* screen whether asylum seekers belong to the category of vulnerable persons, including victims of human trafficking.⁴⁰ A brief outline of the relevant provisions is necessary at this point. Article 21 of the directive stipulates that Member States shall take into account the specific situation of vulnerable persons, including victims of human trafficking. Article 2(k) provides that when vulnerable persons are “in need of special guarantees in order to benefit from the rights and comply with the obligations provided in this Directive”, they belong to the category of “applicants with special reception needs.” Essentially, art.22 of the directive obliges the Member States to “assess whether the applicant is an applicant with special reception needs.” It also adds that “[t]hat assessment shall

³⁹ Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), OJ L 180/96, 29 June 2013 (Recast Reception Directive).

⁴⁰ For a comprehensive examination of the intersection between the law on human trafficking and the EU asylum legislation see V. Stoyanova, “Victims of Human Trafficking, A Legal Analysis of the Guarantees for “Vulnerable Persons” under the Second Phase of the EU Asylum Legislation” in C. Bauloz, M. Ineli-Ciger, S. Singer and V. Stoyanova (eds), *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (Martinus Nijhoff Publishers, 2015) pp.58-108.

be initiated within a reasonable period of time after an application for international protection is made and may be integrated into existing national procedures.” What follows from the above is that Member States have to proactively assess whether applicants for international protection are victims of human trafficking with special reception needs. Notably, this obligation which originates from EU law can certainly have an impact on the determination whether the national authorities knew or ought to have known that an individual is in need of protection so that the positive obligation of taking protective operation measures can be set into motion.⁴¹

4.3. The Content of the Protective Operational Measures

In this section I will discuss the respondent State's duty after the point in time, namely 29 November 2006, when the positive obligation of taking protective operational measures was triggered. The central question here is the following: once this obligation was set into motion, what was Greece required to do? What was the required content of the protective operational measures? The Court acknowledged that the national authorities had not remained indifferent to L.E.'s statement. However, it also held that it was a grave failure that Greece delayed the conferral of the status of a victim of human trafficking. This conclusion provided the basis for the Court to find Greece in breach of its obligations under art.4. The reasoning thus in *L.E. v Greece* leads to the general conclusion that States' obligations under the CoE Trafficking Convention to identify victims and to confer them a specific status, including residence permits, is *absorbed* by the positive obligation to take protective operation measures under art.4 of the ECHR. This is a development to be celebrated; however, as I am going to demonstrate below there are some puzzling aspects of how the Court applied the positive obligation in the particular case.

⁴¹ See, for example, *MSS v Belgium and Greece* [GC] (2011) 53 E.H.R.R. 2, para. 250, where the Court took into account EU law in order to determine the scope of the respondent state's positive obligations.

In order to reveal the perplexities imbuing the judgment, it is useful to clarify initially the rationale behind the positive obligation of taking protective operational measures and the related content of these measures. Its rationale is to extract an individual from a harmful situation which has already materialised and which meets the level of severity necessary for triggering some of the ECHR provisions. Alternatively, its rationale is to prevent the occurrence of a situation which might be so harmful as to reach the severity threshold of some of the ECHR provision.⁴² As the Court has framed it in *Rantsev v Cyprus and Russia*, “there will be a violation of Article 4 of the Convention where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from *that situation or risk* [emphasis added].”⁴³ The phrase ‘that situation or risk’ refers to a situation of trafficking or a risk of trafficking and in this way it *links* a failure by the authorities to act with a harm falling within the scope of Article 4. This linkage is of significance because it ensures proximity between harm inflicted upon the victim (and here it is important to remind ourselves that this harm originates from a non-state actor, i.e. the trafficker) and state conduct which takes the form of an omission to act.⁴⁴

Considerations of proximity are absent in the *L.E. v Greece* reasoning in relation to harm falling within the definitional scope of Article 4. In *L.E. v Greece*, the Court noted that nine months elapsed from the point in time when she articulated her claim to be a victim of human

⁴² For example, in relation to Article 3, the ECtHR has established that ‘[t]hese measures should provide effective protection, in particular, of children and other vulnerable persons, and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge [references omitted]. Thus a failure, over four and a half years, to protect children from serious neglect and abuse of which the local authorities were aware disclosed a breach of Article 3 of the Convention in the case of *Z. and Others v. The United Kingdom* ([GC] no. 29392/95, ECHR 2001-V, para.74-75).’ *E. and Others v The United Kingdom* (2003) 36 E.H.R.R. 31, para.88; see also *E.S. and Others v Slovakia* (App. No.8227/04), judgment of 15 September 2009, para. 39-44; *Opuz v Turkey* (2010) 50 E.H.R.R. 28, para.176.

⁴³ *Rantsev v Cyprus and Russia*, para.286.

⁴⁴ For a general analysis of the relevance and applicability of human rights law to the problem of human trafficking, including the requirement for proximity, see R. Piotrowicz, “The Legal Nature of Trafficking in Human Beings” (2009) 4 *Intercultural Human Rights Law Review* 175; V. Stoyanova, *Human Trafficking and Slavery Reconsidered. Conceptual Limits and States' Positive Obligations in European Law* (Cambridge University Press, 2016 forthcoming).

trafficking to her formal recognition as a victim. Measured against the positive obligation of taking protective operational measures under art.4, the Court concluded that this time period was unreasonable. However, one wonders whether there is any proximity between this delay, on the one hand, and exposure to harm or risk of exposure to harm falling within the scope of art.4, on the other. If she had been formally identified immediately after articulating the trafficking claim, would this have prevented harm within the scope of art.4? What could have been the significance from the perspective of art.4 if she was granted in a timely fashion the formal status of a victim of trafficking? On this point, the Court observed:

[...] the period of about nine months that had elapsed before the recognition of the applicant as a victim of human trafficking, cannot be considered as reasonable. This is all the more true in view of the fact that the omission of the competent authorities had negative consequence on the personal situation of the applicant. Indeed, her release from detention was delayed, given that she was detained until 20 February 2007. It must be born in mind that under Article 12(2) of Law 3064/2002, the domestic authorities could have ended earlier her detention pending deportation.⁴⁵

The Court thus noted that the delay attributable to the national authorities did have a negative consequence: her release from detention was delayed. This can certainly be a pertinent consideration in the context of art.5(1)(f) of the ECHR, a provision permitting detention pending deportation provided that certain safeguards are in place, including safeguards for vulnerable

⁴⁵ *L.E. v Greece*, para.77 (translation by the author).

persons.⁴⁶ However, we remain puzzled as to how proximity between the delay (the omission by the State authorities) and harm under art.4 was established. In what way did this omission cause harm intended to be protected by art.4. I do not suggest that failures to identify victims of trafficking do not cause harm in respect of which states have to be held responsible under human rights law. All that I am suggesting is that the Court's reasoning in *L.E.* is unconvincing in this respect. The Court seems to be moving away from the proximity requirement. It merits emphasis that there are avenues for establishing proximity between states' failures to identify victims and continuation of abuses or exposure to potential abuses falling within the scope of art.4. For example, failure to identify might lead to re-trafficking or it might leave migrants exposed to the mercy of their employers in this way exacerbating their situation.

Is it possible to envisage an alternative argument than the one proposed by the Court? Is it possible to structure the reasoning in *L.E. v Greece* so that it is more persuasive from the perspective of the precepts for establishment of state responsibility under human rights law?⁴⁷ If the failure to formally recognize L.E. was reviewed through the lens of the positive obligation of adopting an effective regulatory framework as I proposed in Section 3 above, then it would be easier to make an argument that more generally failures to recognise victims of trafficking and the ensuing absence of protection and assistance, leave victims exposed to future abuses falling within the scope of Article 4. L.E. can be framed as a representative victim of this danger.

⁴⁶ If the issue is reviewed under Article 5(1)(f) of the ECHR, then what would be at stake is not state's positive obligations. Deprivation of liberty is a direct and one of the most severe forms in which states harm human beings; therefore, framing release from detention as a positive obligation is objectionable. On the safeguards to vulnerable persons see C. Costello, *The Human Rights of Migrants and Refugees in European Law* (Oxford: OPU, 2016) 292-293.

⁴⁷ Although there is no requirement for causality, there needs to be proximity between the harm and the state's omission: '[a] failure to take reasonably available measures which could have had a *real prospect* of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State [emphasis added].' *O'Keefe v Ireland* [GC] (2014) 59 E.H.R.R. 15, para.149; see generally B. Conforti, "Exploring the Strasbourg Case-Law: Reflections on State Responsibility for the Breach of Positive Obligations" in M. Fitzmaurice and D. Sarooshi (eds), *Issues of States Responsibility before International Judicial Institutions* (Hart Publishing, 2004) 129.

5. Conclusion

Exploitation of migrants, including those in the sex industry, is a structural problem in relation to which there is overwhelming empirical evidence.⁴⁸ In this light, it is worrying that the case law under Article 4 of the ECHR is scarce. *L.E. v Greece* is a step forward since the European Court reaffirmed the demanding positive obligations imposed by art.4 and, hopefully, this will instigate future complaints. As I have demonstrated in this note, in the forthcoming cases, the Court will have to more seriously consider at least the following four issues so that the protection under art.4 can be enhanced. First, how the positive obligation under art.4 of adopting effective regulatory framework can affect States' obligations to identify victims of human trafficking so that the identification procedure is actually geared towards protection and assistance, and not exclusively towards the exigencies of the criminal law? As I argued above (Section 3), there is an unexplored potential to use art.4 in this respect so that victims can be better protected. Second, the triggering of the positive obligation of taking protective operational measures does require official awareness of the predicament of the specific individual (the authorities knew or should have known); however, the requirement for explicit statement by migrants that they are victims of human trafficking is unjustifiably demanding. In light of the CoE Trafficking Convention, states are actually under the obligation to proactively assess whether a migrant who has come to their attention is a victim (Section 4.1). Third, the obligation upon States under Reception Conditions Directive (recast) to assess whether applicants for international protection are vulnerable persons will have to inform the Court's assessment under Article 4 whether the

⁴⁸ See, for example, *Fundamental Rights of Migrants in an Irregular Situation in the European Union* (European Agency for Fundamental Rights, 2011); *Severe Labour Exploitation: Workers Moving within and into the European Union. States' Obligations and Victims' Rights* (European Agency for Fundamental Rights, 2015).

national authorities knew or should have known that a migrant might be a victim (Section 4.2). This is of significance against the backdrop of empirical evidence that many victims of human trafficking are also asylum-seekers.⁴⁹ Finally, the requirement for proximity between abuses falling within the material scope of Article 4 and failures by the state raises challenging questions, which is not advisable for the Court to eschew. In this note, I suggested possible ways for addressing this requirement (Section 4.3).

⁴⁹ See J. Gauci, "Why Trafficking Persons need Asylum" in J. Gauci, M. Giuffré and E. Tsourdi (eds), *Exploring the Boundaries of Refugee Law* (Brill, 2015) 172.