Commentary

A Focus on Human Trafficking Blinds Courts to Forced Labor

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Introduction

Although this case reaffirms earlier European Court of Human Rights (ECtHR) jurisprudence, it also exposes certain practical difficulties in prosecuting employers of domestic workers for forced labor and human trafficking violations.1 The applicants—three workers from the Philippines who escaped from their UAE employers while on a trip to Austria—complained to the ECtHR, relying on the first two of four elements in Article 4 of the European Convention on Human Rights, the first prohibiting “slavery or servitude” and the second “forced or compulsory labour.” They alleged that their employers had confiscated their passports, made them work extremely long hours, failed to pay agreed wages, and subjected them to verbal and sometimes physical abuse. Earlier jurisprudence had established that Article 4 encompasses trafficking (Saladin v France Application No. 25965/04, 7 January 2010, Application No. 73316/01, 26 July 2005; Rantsev v Cyprus and Russia, and L.E. v Greece, Application No. 71545/12, 21 January 2016; see paras. 103–7 of the new decision).2

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1 European Court of Human Rights, J. and Others v Austria, Application No. 58216/12, 17 January 2017.
Under Austrian law, the workers had filed a criminal complaint for trafficking only (Article 104a of the Criminal Code). The authorities discontinued criminal proceedings, based on absence of personal jurisdiction over the accused and other reasons. One of these was that Austrian interests were not engaged, given the lack of connection to Austria or any obligation under international law (para. 40). The workers lost their appeals of the decision not to prosecute.

In reaching its decision, the ECtHR also relied on the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (the Palermo Protocol), the Council of Europe Anti-Trafficking Convention along with the report on Austria by the Group of Experts under that Convention, the European Union Charter of Fundamental Rights and the EU Anti-Trafficking Directive (see paras. 47–61 and 65–67 of the decision). The Court also mentioned, without analysis or reference to reports of the International Labour Organization (ILO) Committee of Experts on the Application of Conventions and Recommendations, Articles 2(1) and 25 of the ILO Forced Labour Convention, 1930 (No. 29)(see paras. 62–64). All of these instruments are in force for Austria. The ILO Convention requires States to punish forced or compulsory labor as a penal offense, with adequate and strictly enforced penalties when such action occurs in its territory.

Analysis

In *J. and Others v Austria*, the ECtHR has reiterated the positive obligations of States under Article 4 of the Convention. These obligations involve adopting an effective legal and regulatory framework to protect individuals, taking positive operational measures, conducting effective investigations and legal proceedings, and cooperating with authorities of the States of origin, transit, and destination in the investigation of acts that took place in their territories. The Court’s finding that Austria met its positive obligation to identify and support the applicants as victims of human trafficking was justified. Its conclusion concerning the adequacy of the investigation was not. This lack is linked to the Court’s characterizing the alleged offense as human trafficking and thus

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