



Forced Migration of Children: Recent Judicial Developments at the European Level

Adam Weiss

Oxford Monitor of Forced Migration Volume 1, Number 2, 26-28.

The online version of this document can be found at: www.oxmofm.com

Copyright for articles published in OxMo rest with the author(s). Materials may be downloaded, reproduced and circulated in entirety provided that the title, author and source (OxMo) is acknowledged.

Forced Migration of Children: The Recent Judgment of the European Court of Human Rights in *Osman v Denmark*

By Adam Weiss

Introduction

The European Court arguably has the most well-developed jurisprudence on the rights of victims of exploitation, including victims of human trafficking, of any international court or human rights body.¹ This brief article looks at the exploitation of child labour by children's family members, in particular it explores the response of the European Court of Human Rights ('ECtHR') to this phenomenon in the recent judgment in *Osman v Denmark*.²

Exploitation of Children by Their Family Members

Sometimes parents or other relatives forcibly move their children to exploit them for economic gain. This is an issue that has only been tangentially considered by the ECtHR. In *Siliadin v France*, the ECtHR dealt with the case of a teenage girl trafficked³ from Togo to France, where she was exploited in domestic servitude. The Court dealt with the failure of the French authorities (and French law) to sufficiently punish those who exploited her. Although the ECtHR did not explore the issue, it is clear from the judgment that members of the applicant's family were involved in trafficking her, notably her uncle, who, when she escaped her 'employers', persuaded her by telephone to return to them.⁴

¹ See, e.g., *Siliadin v France* (application number 73316/01, judgment of 26 July 2005) (domestic servitude); and *Rantsev v Cyprus and Russia* (application number 25965/04, judgment of 7 January 2010) (sexual exploitation). But see *Hadijatou Mani Koroua v Niger*, judgment of Court of Justice of the Economic Community of West African States, judgment of 27 October 2008 (slavery).

² Application number 38058/09, judgment of 14 June 2011.

³ Although the ECtHR did not explicitly conclude that the applicant had been a trafficking victim, the facts of the case fit the trafficking definition, as set out in Article 4 of the Council of Europe Convention on Trafficking Against Human Beings, 16 May 2005, CETS 197:

For the purposes of this Convention :

a) "*Trafficking in human beings*" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

b) The consent of a victim of "trafficking in human beings" to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;

c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in human beings" even if this does not involve any of the means set forth in subparagraph (a) of this article;

d) "Child" shall mean any person under eighteen years of age;

e) "Victim" shall mean any natural person who is subject to trafficking in human beings as defined in this article.

⁴ Paragraph 17 ('Subsequently, in obedience to her paternal uncle, who had been in contact with Mr and Mrs B., she returned to the couple, who had undertaken to put her immigration status in order. However, the situation remained unchanged: the applicant continued to carry out household tasks and look after the couple's children.

The ECtHR was asked to deal more fully with such a situation in *Osman v Denmark*, a case in which the Court delivered judgment on 14 June 2011.⁵ The case involved a Somali national who was residing legally in Denmark with her family from the age of seven. Her parents divorced and she lived with her mother. The applicant had disciplinary problems and was expelled from various schools; by the age of 15, was no longer in school at all. The applicant's father proposed taking her on a short trip to visit her paternal grandmother in Kenya. The applicant was then abandoned by her father with her paternal grandmother who had to take care of her. After two and a half years, the applicant was able to leave the refugee camp and contacted the Danish authorities in Nairobi in order to obtain a new visa to re-enter Denmark. Danish immigration law, and specifically the law on family re-unification, had changed, however, and she was now too old to be eligible for a new visa. She re-entered Denmark clandestinely, rejoining her mother and siblings, and unsuccessfully challenged the refusal to grant her residence status.

The Court found that the refusal to re-instate the applicant's residence status violated Article 8⁶ of the European Convention on Human Rights. In her application to the ECtHR, the applicant alleged that she was a victim of human trafficking; indeed, she alleged not only that her Article 8 rights had been violated but also her Article 4⁷ rights, as the authorities had alleged in an act of human trafficking. As this was the first time the trafficking allegation had been made, the ECtHR found that 'the Danish authorities had... no reason to take this allegation into account', and rejected the complaint under Article 4. However, the Court did take up the applicant's suggestion that the Danish authorities (and, indeed, the Court) should 'look past the exercise of parental authority in order to protect her interest and that it was obvious that her father's decision to send her to Kenya was not in her best interest'.⁸ The Court took particular notice of the applicant's allegations 'that she had been obliged to leave Denmark to take care of her grandmother at the Hagadera refugee camp for more than two years; that her stay there was involuntary; that she had no means to leave the camp'; in short, that she was exploited by her own parent. The Court looked past the principle of the 'exercise of parental rights' and found that in this case, the Danish authorities did not give due consideration to the child's own interests which were, in fact, quite different from her father's and her father's vision of them.

The Court could have accepted the applicant's invitation to see this as a trafficking case. Child trafficking has only two elements: the act (recruiting, transporting, transferring, harbouring or receiving a person) and the purpose (exploitation). It is, however, not necessary to show means.⁹ Child trafficking certainly appears to have happened in this case and, as such, the Danish authorities had an obligation, under Article 10¹⁰ of the Council of Europe Convention on Action

She slept on a mattress on the floor of the children's bedroom, then on a folding bed, and wore second-hand clothes. Her immigration status had still not been regularised, she was not paid and did not attend school.')

⁵ Application Number 38058/09.

⁶ '1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'

⁷ '1. No one shall be held in slavery or servitude. 2. No one shall be required to perform forced or compulsory labour.' The third paragraph of this Article excludes certain forms of work from the definition of 'forced or compulsory labour'.

⁸ Paragraph 63.

⁹ See above, note 3.

¹⁰ '1 Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention.'

Against Trafficking in Human Beings, to identify the applicant as a victim of trafficking. The Court found that the applicant had not exhausted domestic remedies on this point, placing the onus on her to identify herself as a victim of trafficking. It resulted in a more mitigated examination of the nature of the applicant's forced migration from Denmark to Kenya.

The ECtHR's judgment is nonetheless an important step in recognising the insidious ways in which a parent or relative can subject her/his own child to human rights abuses entailing forced migration. The Court concluded that the Danish authorities were not required to take into account the potential human-trafficking element in the case. However, they were required to recognise that her father acted inconsistently with his child's best interests. This may provide the basis for a more child-centred jurisprudence from this Court, which in the past has been reluctant to look past, or require States to interfere with, the exercise of parental responsibility.¹¹

Conclusion

There is a growing appreciation at European level of children's vulnerability to human trafficking and exploitation. The *Osman* case marks a tentative step towards recognising the existence of these phenomena within the family unit. It will take more time, and more cases, before we understand the extent of forced migration of children for the purposes of exploitation within families and, more importantly, the legal consequences this has for States.

Assistant Director of the AIRE Centre (Advice on Individual Rights in Europe), a London-based NGO whose mission is to promote awareness of European law rights and assist marginalised individuals and those in vulnerable circumstances to assert those rights. The author was involved in the representation of the applicant in *Osman v Denmark*, along with Saadiya Chaudary, Hildur Hallgrímsdóttir and Sarah St Vincent.

2 *Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2.*

3 *'When the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age.'*

4 *As soon as an unaccompanied child is identified as a victim, each Party shall:*

a provide for representation of the child by a legal guardian, organisation or authority which shall act in the best interests of that child;

b take the necessary steps to establish his/her identity and nationality;

c make every effort to locate his/her family when this is in the best interests of the child.

¹¹ Compare, e.g., *Nielsen v Denmark* (10929/84), judgment of 24 October 1988, finding no violation of Article 5 in the case of the involuntarily detention of a child in a psychiatric hospital because it was done with his mother's consent. 'The care and upbringing of children normally and necessarily require that the parents or an only parent decide where the child must reside and also impose, or authorize others to impose, various restrictions on the child's liberty' (paragraph 61).